



Appeal number: FTC/63/2012

Procedure – costs – whether, in a case where the taxpayer has opted out of the Complex costs regime, the First-tier Tribunal has the power to order that the parties share the costs of the appellant complying with a direction for preparation of hearing bundles – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules – rule 2 (overriding objective) – rule 5 (case management powers) – rule 10 (orders for costs)

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Appellant

- and -

ECLIPSE FILM PARTNERS NO. 35 LLP

Respondent

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 13 March 2013

Rajesh Pillai, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

Jolyon Maugham, instructed by Freshfields Bruckhaus Deringer LLP, for the Respondent

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DECISION

1. On 1 June 2011, in the course of a case management hearing, the First-tier
5 Tribunal (Tax Chamber) (“the FTT”), comprising Judge Edward Sadler and Judge
John Walters QC, made a direction (“the Direction”) that the costs of preparing the
hearing bundles for the substantive appeal by Eclipse 35 should be shared equally by
the parties to that appeal, Eclipse 35 and HMRC. That Direction had been opposed
by HMRC at the June hearing.

10 2. No appeal was made by HMRC against that case management decision. The
hearing bundles were prepared by the solicitors for Eclipse 35, Freshfields Bruckhaus
Deringer LLP (“Freshfields”), with the assistance of Eclipse 35’s litigation consultant,
Future Capital Partners Limited (“FCP”). There were in total 736 lever-arch files. It
15 is common ground that this was a considerable exercise. The FTT commented at the
hearing of the substantive appeal on the impressive organisation and categorisation of
the bundles.

3. Following the hearing of the substantive appeal, on 17 October 2011, FCP sent
HMRC an invoice prepared by Freshfields for half of Freshfields’ costs of preparing
the bundles. Following correspondence in which those charges were disputed by
20 HMRC, on 16 January 2012 FCP sent HMRC a schedule of its own costs in preparing
the bundles. The combined amount of the share of costs claimed is £108,395.48
(inclusive of VAT).

4. On 7 February 2012, HMRC applied to the FTT to set aside the Direction or to
limit its effect to copying costs only. On 24 February 2012 FCP responded to that
25 application, and made an application on behalf of Eclipse 35 for a wasted costs order
or for an order for costs against HMRC on the grounds that HMRC had acted
unreasonably in conducting the proceedings.

5. The decision of the FTT in this respect was issued on 31 May 2012. The FTT
30 held, contrary to submissions made on behalf of HMRC, that it had jurisdiction to
make the Direction, and that the costs to be shared extended to the professional and
other costs of compiling and organising the bundles as well as to the copying costs. It
did not, in the circumstances, deal with the alternative application of Eclipse 35.

6. With permission of the FTT, HMRC now appeal to this Tribunal. The essential
35 question before me is whether the FTT had power to make the Direction. Depending
on my decision on that question, other issues may arise; I will consider those after
dealing with the principal issue of the power of the FTT.

7. What HMRC say is that the Direction was a costs order. The FTT can only
40 make a costs order in the three circumstances listed in Rule 10(1) of the Tribunal
Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the FTT Rules”), namely
(a) a wasted costs order; (b) an order where a party or his representative has acted
unreasonably; or (c) where the case has been allocated as a Complex case under Rule
23 and the taxpayer has not opted out of the cost-shifting regime by making a written

request under Rule 10(1)(c)(ii) that the proceedings be excluded from potential liability for costs and expenses under sub-para (c). In this case, the taxpayer had opted-out (on 23 September 2009); accordingly, circumstance (c) did not apply. Therefore, say HMRC, the FTT acted without jurisdiction and wrongly ordered that
5 HMRC pay half the costs of preparing the hearing bundles.

8. The substantive appeal before the FTT was heard in July 2011, and was dismissed by the FTT. HMRC submit that the incongruous consequence of the Direction is that, despite the fact that Eclipse 35 opted out of the costs-shifting regime and lost, HMRC must now contribute to the losing taxpayer's costs of an unsuccessful
10 challenge to HMRC's decision in issue in the substantive appeal.

9. Eclipse 35, on the other hand, supports the FTT's decision that it had power to make the Direction, and that it was right to dismiss HMRC's application to set that Direction aside. Eclipse 35 says that the FTT was correct in deciding that it had power under its general case management powers in Rule 5 in relation to the conduct
15 or disposal of proceedings, and the specific power in rule 5(3)(i) empowering the FTT to make a direction requiring a party to produce a bundle for a hearing.

The Tribunal Rules

10. The FTT is a creature of statute, and it is to the statute that I turn first. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") makes provision for
20 the power of the FTT in respect of costs. It relevantly provides:

"Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal ...

shall be in the discretion of the Tribunal in which the proceedings take
25 place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

30 11. The Tribunal Procedure Rules, governing the practice and procedure to be followed in the FTT, are made under s 22 of the TCEA, Sch 5 of which makes further provision about the content of the Rules. Paragraph 12 of Sch 5 provides that the Rules may make provision for regulating matters relating to costs of proceedings before the FTT. This includes provision for enabling costs to undergo detailed
35 assessment.

12. Rule 10 of the FTT Rules is headed "Orders for costs" and provides as follows:

"10.—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs);

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

(c) if—

5 (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had
10 been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or

...

15 (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

20 (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

25 (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

30 (b) notice of a withdrawal under rule 17 (withdrawal) which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the “paying person”) without first—

(a) giving that person an opportunity to make representations; and

35 (b) if the paying person is an individual, considering that person’s financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

40 (b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the “receiving person”); or

(c) assessment of the whole or a specified part of the costs or expenses incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

5 (a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

...

15 (8) In this rule “taxpayer” means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.”

13. The FTT Rules make provision for the case management powers of the FTT. Rule 5 relevantly provides:

20 “5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

25 ...

(i) require a party to produce a bundle for a hearing ...”

14. Rule 2 sets out the overriding objective of the FTT Rules, which is “to enable the Tribunal to deal with cases fairly and justly”. Rule 2(3) provides that the FTT must seek to give effect to the overriding objective when it (a) exercises any power under the Rules, or (b) interprets any rule or practice direction.

The decision of the FTT

15. In its decision the FTT recognised the limitations imposed by Rule 10 on costs orders that may be made by the FTT. In the case of Eclipse 35, which had opted out of the costs-shifting regime, the effect was that the FTT’s powers under Rule 10 were restricted to wasted costs or an order in consequence of unreasonable conduct. Although, as the FTT said, Rule 5 gives the FTT far-reaching general powers of case management, the FTT accepted that it could not make a direction under Rule 5 which in its effect disregards or circumvents those limitations (FTT, [34]).

16. The FTT nevertheless held that it had power under Rule 5 to make the Direction, which included provision as to sharing of costs. It construed Rule 10 as applicable to the “entirety of the legal costs of the successful party in the proceedings of the appeal”, or such part as would fall within wasted costs or unreasonable conduct.

17. The FTT contrasted Rule 10 with Rule 5. In relation to the giving of case management directions under Rule 5, the FTT said (at [36]):

5 “The purpose of such directions is to ensure the fairer and more
efficient management of the proceedings in the interests of the parties
and also of the Tribunal itself. In the course of giving such directions,
if the overriding objective of the Rules is thereby to be given effect to,
it must be within the Tribunal’s power to direct that the costs of
10 compliance with such directions are borne in a particular way by one
party rather than the other, or by both.”

The FTT went on to give an example, recognising that the circumstances might be unusual, where the costs of disclosure might be shared to some extent by the party for whose benefit the documents were disclosed. The FTT summarised its view of this
15 situation by saying:

 “It would be absurd to say that Rule 10 prevents the Tribunal from
giving a direction to that effect in such a case. The direction as to who
bears the cost of complying with the disclosure direction is a natural
and proper adjunct of giving the disclosure direction in the exercise of
20 the Rule 5 powers fairly and justly – just as it is when no direction is
given as to the cost of compliance, so that the cost falls entirely on the
party required to disclose the document. There is no conflict with Rule
10 in such a case – Rule 10 is concerned with the wider question of the
costs of the appeal proceedings, and not with compliance with detailed
25 case management matters.”

18. The FTT then turned to consider the circumstances of the particular case. It referred to the specific power in Rule 5(3) to direct a party to produce a bundle, and to its own earlier direction in this respect, to the effect that the parties were to agree the hearing bundles, to be prepared by Eclipse 35, or in default of agreement that each
30 party was to prepare its own bundles. The FTT made the obvious practical point that it was in the interests of the parties and the FTT alike that there be a single agreed bundle, compiled and organised in a way which best facilitated the presentation of a very complex case. The alternative, which the FTT recognised would have had the effect that costs would have been divided between the parties, would have been to
35 direct that each party prepare its own bundles; however, that would have been to the detriment of the efficient conduct of the hearing and the parties in preparing for the hearing.

19. The FTT thus held that the Direction, such that the costs of the preparation of the bundles would be shared, was fair and just in the circumstances of the case and
40 was (at [38]):

 “a proper exercise of the case management powers conferred on the
Tribunal by Rule 5. In no sense, having regard to the purpose of rule
10, could such a direction be said to be a purported award of costs
which Rule 10 prohibits in the circumstances of this case.”

Discussion

20. The issue in this appeal is whether the FTT was right, as a matter of law, to draw the distinction it did between the express power to award costs in Rule 10 and the case management powers in Rule 5, and to confine Rule 10 to costs orders in respect of the proceedings generally, so that it does not restrict directions as to costs of compliance with specific case management directions, or, as HMRC submit, the FTT made an error of law because Rule 10 exclusively governs the power of the FTT to make costs orders.

21. The starting point is the wording of Rule 10 itself. As Mr Pillai pointed out, the use of the word “only” is indicative of an exclusive, and all-encompassing regime. Mr Pillai referred me to a number of authorities, including *Hawkeye Communications v Revenue and Customs Commissioners* [2010] UKFTT 636 (TC), which have made reference to the limited powers of the FTT to award costs as a matter of general description of the FTT’s jurisdiction in that respect. However, none of those cases addressed the point in issue in this appeal, and cannot assist. Nor did I find the description of the costs regime in the Report of the Costs Review Group to the Senior President of Tribunals “Costs in Tribunals” (2011) of any assistance in this context.

22. On the other hand, some guidance may be found in *Revenue and Customs Commissioners v Atlantic Electronics Limited* [2012] STC 931 in this Tribunal. That case, like *Hawkeye Communications*, is also not directly in point, as it concerned the power of the FTT to make a direction in transitional cases that the former costs rules in Rule 29 of the Value Added Tax Tribunals Rules 1986 should apply in place of Rule 10 of the FTT Rules. But Warren J made some general remarks which can usefully be considered in this context. Having referred to the right of the taxpayer to opt-out of the Complex regime, Warren J noted that this had to be exercised within 28 days of the allocation of the case to Complex, and that this was to achieve certainty for both parties as well as preventing the taxpayer being able to “wait and see” before deciding whether to enter the full costs-shifting regime. Warren J then said (at [8]):

“It can be seen, therefore, that policy-makers have adopted a policy in cases other than Complex cases that there should be no general power to award costs. In those cases, rightly or wrongly, the inability to recover costs is not seen as likely to lead to a denial of access to justice. But in Complex cases, the choice of the taxpayer is to prevail; HMRC, the respondent in all tax appeals and a well-resourced body, is bound by that choice. HMRC themselves accepted this structure for the recovery of costs as a fair and reasonable response to the various and incompatible approaches which had been advocated by different associations of taxpayers’ representatives during the course of the Tax Modernisation Project and in the costs consultation process leading to the promulgation of the 2009 Rules.”

23. In response to a submission by counsel for HMRC in *Atlantic Electronics*, to the effect that, notwithstanding the fixing of a costs regime under the transitional rules, it would always be open to the FTT, at the end of an appeal, to make whatever costs order is then appropriate to ensure the proceedings are dealt with fairly and justly, Warren J said (at [22]):

5 “I reject the notion that there would remain a residual power under
para 7(3) to make a different costs order in exceptional circumstances
even where the tribunal had made a prospective direction. That would
lead to considerable uncertainty: it would mean that the tribunal could
not provide the certainty which the parties, in particular a taxpayer,
might hope to obtain and there would be considerable scope for
argument about what would amount to exceptional circumstances.
Further, in appeals commenced after 1 April 2009, it is clear that the
regime will be fixed one way or another at an early stage under r 10:
10 there is no residual power exercisable at the end of the proceedings to
achieve fairness and justice in exceptional cases. That shows that, as a
matter of policy, there is no reason to detect a residual power in
transitional cases.”

15 24. Mr Justice Warren also explored the relationship between Rule 10 and the
overriding objective in Rule 2. As Rule 10 appears in the same set of Rules, it was to
be seen as consistent with the overriding objective. The regime of no costs-shifting in
Default Paper, Basic and Standard cases is seen as fair and just; equally so the
optional (with the choice being given to the taxpayer) costs-shifting regime in
Complex cases. He said (at [28]):

20 “This is the regime which has been adopted, as a matter of policy – one
might say as a tribunal philosophy – in relation to tax appeals and that
is a policy which is to be seen as promoting the overriding objective.”

25 25. It is clear that Rule 10 reflects the powers provided in para 12, Sch 5 TCEA in
respect of provisions for costs in Tribunal Procedure Rules. It sets out the parameters
according to which costs orders may be made, the procedure for making an
application and for the summary or detailed assessment of the costs. In that respect it
can be described as comprehensive.

30 26. As well as expressing itself in terms of an exclusive provision as regards costs,
Rule 10 in its terms applies to orders “in respect of costs”, a further term suggesting a
broad scope of the provision. However, Mr Maugham, for Eclipse 35, submitted,
consistently with the FTT’s decision, that Rule 10 deals solely with orders that one
side bear the other’s costs of prosecuting or resisting an appeal at first instance. It
does not, he argued, clog the FTT’s power to give proper case management directions
under Rule 5, and specifically does not preclude the FTT from directing that the costs
35 of complying with a direction be shared, just as it does not preclude the FTT from
directing that one side bears the costs of complying with a direction.

40 27. Mr Maugham sought to illustrate this point by referring to the undoubted truth
that Rule 5(3)(i) expressly permits the FTT to direct that a party should produce a
bundle for a hearing. Plainly, as Mr Maugham said, complying with such a direction
will involve that party incurring costs. He also argued, again uncontroversially, that
such a party would be unable to resist such a direction on the basis that it breaches the
adjuration in Rule 10 because it is in substance a direction that such a party pays the
costs.

28. The argument then developed by Mr Maugham is that, once it is recognised that the word “costs” in Rule 10 must be read in the light of the power to make case management directions which have the effect of requiring a party to bear the costs of complying with the directions, it logically and necessarily follows that Rule 10 does not prevent the FTT from ordering that a party or parties should bear the costs of such compliance. As Mr Maugham put it, if notwithstanding Rule 10 the door is open to a costs direction against the party directed to comply with a direction, it is open to a costs direction against both parties in respect of that compliance.

29. I do not accept that submission. In my judgment there is a clear distinction to be drawn between a case management direction which, as with all such directions, will have costs consequences, and an order that costs be borne by a party or parties. The former is not restricted by Rule 10 simply because, although it will have the consequence that expense will be incurred in complying with it, it is not “an order in respect of costs”. The latter is such an order and, according to the clear terms of Rule 10, such an order may only be made by the FTT in the circumstances prescribed by that rule. The logic of Mr Maugham’s argument founders on the fact that it is seeking to equate two different powers of the FTT. I do not accept Mr Maugham’s submission that construing Rule 10 in this way would preclude the FTT from making any direction for the preparation of bundles, on the ground that such a direction would have costs consequences; that submission fails because such a direction (absent an order in respect of costs) is precisely what the FTT is empowered to make under Rule 5(3)(i).

30. I do not consider there is any principled distinction between costs of the appeal proceedings generally and costs of compliance with case management directions. An order that a party bears or parties bear (in whatever proportions) the costs of compliance with a case management direction, such as a direction for the production of bundles, disclosure or arranging for a transcript of the proceedings is an order in respect of costs within Rule 10.

31. I considered whether there was any scope for argument that the reference in Rule 10(3) to an application for costs being sent to “the person against whom it is proposed that the order be made” limited the scope of Rule 10 on the basis that a case management direction for sharing of costs might not be an order against any particular person. I also considered whether the requirement of Rule 10(3) that a schedule of the costs and expenses accompany the application restricts the scope of rule 10 to costs that have already been incurred, and would thus not apply to orders in respect of costs prospectively to be incurred. But I concluded that neither argument could be sustained. As to the first, I consider that any order that has the effect of imposing cost on a party who, absent the order, would not have any liability in respect of those costs is an order against that person. As to the second, the mechanics of Rule 10 are understandably geared to the common case of orders for costs being sought after the event. But those mechanical requirements do not, in my view, operate to restrict the scope of Rule 10(1) to those applications that are immediately capable of satisfying the requirements of Rule 10(3).

32. The detailed requirements of Rule 10 in fact provide a powerful argument that Rule 10 is a comprehensive and exhaustive provision regarding costs orders. Not only does Rule 10 provide for summary and detailed assessment, a procedure that would not apply if directions as to the bearing of costs could be made under Rule 5 as
5 being outside the scope of Rule 10(1), but a direction under Rule 5 would not have the protection, prescribed in relation to orders in respect of costs under Rule 10(1), of requiring, under Rule 10(5), the paying party to be given an opportunity to make representations, and that the FTT should consider the financial means of an individual paying party.

10 33. This construction of Rule 10(1) is in my judgment supported not only by a consideration of Rule 10, but also by reference to the FTT Rules as a whole. There is no express power in Rule 5 entitling the FTT to give any direction in relation to costs, prospectively or otherwise. Nor, in any other part of the Rules, is any separate provision made in respect of costs. Rule 23, which deals with the allocation of cases
15 to the four categories available under the FTT Rules, cross-references the costs implications of allocation of a case to the Complex category only to rule 10(1).

34. No separate recourse may be had to the overriding objective. Fairness and justice are principles that overlay the conduct of cases in the FTT, but there is no single measure of those principles. As *Atlantic Electronics* demonstrates, Rule 10
20 itself was conceived as a fair and just response to competing views of the merits and otherwise of a costs-shifting regime in the FTT. The overriding objective does not itself confer any powers on the FTT. Rule 2 makes clear that fairness and justice is an overriding objective of the Rules. It is both an aid to interpretation in that respect, and also educates the FTT in its exercise of any power under the Rules, but it cannot be
25 resorted to in the absence of any applicable power under the Rules.

35. I do not consider that Rule 10, construed to give effect to the overriding objective, can be regarded as being anything other than an exhaustive and all-encompassing provision concerning orders in respect of costs. Any other construction would, in my view, be an unwarranted interference with the balance struck by Rule
30 10, and would upset the overall fairness and justice which that balanced approach reflects. It will always be the case that individual circumstances might appeal to a particular tribunal's sense of fairness and justice. But the overriding objective has a broader perspective than that in each individual case, and does not override the proper application of the Rules, construed to give effect to that objective.

35 36. The interests of fairness and justice are reflected in the restriction of costs-shifting powers in all cases other than Complex cases to wasted costs and cases of unreasonable conduct. For Complex cases fairness and justice is respected by applying a costs-shifting regime, but only in those cases where the taxpayer has not opted-out. In all cases, the fair and just result is that the parties know at an early stage
40 what costs regime is applicable. The opt-out is a step which a taxpayer can make advisedly, with certainty, for both the taxpayer and HMRC, as to the scope of the power of the FTT to make an order in respect of costs in consequence of the taxpayer's decision, whether it is to opt out or not to opt out.

37. Although Mr Maugham referred in his skeleton argument to *Khan v Heywood & Middleton Primary Care Trust* [2006] EWCA Civ 1087 in support of an argument that Eclipse 35's (and the FTT's) construction of Rule 10 was more in keeping with the overriding objective, that case cannot, in my view, assist him. It concerned a provision in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, namely Rule 25, in respect of which there was an apparent, and acknowledged, contradiction between Rules 25(3) and (4), which dealt with the effect of withdrawal. The Court of Appeal adopted a particular construction of that Rule for a number of reasons, including (at [77]) the view that the process thereby held to be applicable was more in keeping with the overriding objective that the alternative interpretation.

38. *Khan* is nothing more than an example of construction of a procedural rule in the context of the overriding objective. I accept that Rule 10 in this case falls to be construed in the same way; that is the requirement of Rule 2 of the FTT Rules. In this case I am satisfied that the construction of Rule 10 which I consider to be correct does reflect fairness and justice in providing a comprehensive code with the balance that has been struck as to the interests of the parties.

39. Indeed, as Mr Pillai argued, *Khan* is also an example of a case in which the absence of a specific provision (in that case for revival of a withdrawn claim) could not be compensated for by resort to general case management powers. First, there was no specific provision for revival of a withdrawn claim. Secondly, such an order could not be brought within the concept of general case management. Thirdly, the fact that the rule concerning general case management was expressly subject to the more specific rules meant that, applying the reasoning of the Court of Appeal in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, the general case management powers could not include the power of revival.

40. *Vinos* was a case of a personal injury action where the question was whether an extension of time could be granted for service of the claim form. The specific provision in that regard, CPR 7.6(3), precluded such an order. The court held that neither the overriding objective nor the court's case management powers enabled the court to do what the specific rule expressly forbade.

41. The essential case of the claimant in *Vinos* was that the overriding objective of the Civil Procedure Rules gave the court a discretion to extend the time for serving the claim form. As with the FTT Rules, the overriding objective of the CPR is to enable the court to deal with cases justly, and the court is obliged, in the same way as the FTT is, to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule. The Court of Appeal rejected the claimant's case. In his judgment May LJ said (at [20]):

“Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored.”

Lord Justice May went on to say that the merits of a particular case are not relevant to the question whether there is a particular power under the rules.

42. Unlike the position in *Vinos*, Rule 5 of the FTT Rules does not have the introductory words “Except where these Rules provide otherwise ...”. But in common with *Vinos*, the specific provision in question, in this case Rule 10, does provide that the power may be exercised “only” in certain circumstances. In *Vinos* the introductory words were significant because the general case management powers also included a general power to extend time; a circumstance that does not apply in this case, as there is no reference to costs in Rule 5. I find, therefore, that the construction of Rule 10 as an exhaustive provision, which precludes the making of a costs order under Rule 5, is consistent with the reasoning of the Court of Appeal in both *Vinos* and *Khan*.

43. Mr Maugham sought to support his argument by reference to certain consequences which, he submitted, would flow from the conclusion contended for by HMRC. These were, emphasised Mr Maugham, not exhaustive of what he argued were the adverse consequences of that approach. He gave six examples, the first two of which amount to an argument that the FTT could not give effect to the overriding objective, because it could not make what it might consider a fair and just allocation of the cost of complying with a case management direction. For the reasons I have given, I do not accept that is a consequence of the proper construction of Rule 10. The construction that I have described does, for the reasons I have explained, in my view give effect to the overriding objective.

44. I set out below the other four consequences put forward by Mr Maugham:

(1) It creates perverse incentives to act in a manner inconsistent with the sensible administration of justice. As the FTT pointed out (FTT, at [38]), it would have been “to the detriment of the efficient conduct of the hearing”, and the parties in preparing for it, had the FTT directed each party to prepare its own bundle. In the absence of any power to direct sharing of costs of preparation of the bundles, for example, the FTT might feel driven by the overriding objective to direct that each side prepare its own bundles in order to ensure the fair allocation of costs between the parties. Alternatively, the side preparing the bundles might choose to cut corners to manage its costs.

In essence, this is a variation on the overriding objective theme. The overriding objective cannot supply a power that the Rules themselves exclude. The absence of powers to make orders in respect of costs outside the strict confines of Rule 10 will, of necessity, be a factor to be taken into account by the FTT in an appropriate case. The FTT might in a particular case feel compelled to make a direction that it would not otherwise have made if a full-costs-shifting power had been available to it. But that is not a reason for construing Rule 10 and Rule 5 in a different way; it is simply a consequence of the fact that the FTT is regulated by its Rules.

(2) It creates a “moral hazard” for the party that does not bear the cost of complying with the directions. Mr Maugham argued by reference to the facts of this case that HMRC had resisted attempts on the part of Eclipse 35 (which had been directed to prepare the bundles) to limit the volume of documents which had to go into the trial bundles and to limit the number of trial bundles that were

5 Even in a full costs-shifting jurisdiction the behaviours of the parties are likely
to be influenced by costs considerations. Where the tribunal has a limited costs
jurisdiction, different influences may come into play. But that fact does not
compel the conclusion that a general power to make directions in respect of the
costs of carrying out case management directions is to be inferred. Whatever
costs regime is applicable it remains the obligation of the parties, under Rule 2,
10 both to help the FTT to further the overriding objective and to cooperate
generally with the FTT. Any behaviour which interferes with the proper case
management of the proceedings can be adjusted by appropriate directions.
Where costs-shifting does not apply, or in a Complex case where it has been
dis-applied by the taxpayer having opted out, unreasonable conduct by a party
15 can nevertheless in an appropriate case give rise to an order in respect of costs.

I should make it clear that Mr Pillai disputed Mr Maugham's analysis of the
facts in this respect. It is not appropriate for me to make any finding in that
respect, and I do not do so. The conduct of HMRC may be an issue that will
require to be considered further, for the reasons I explain at the end of this
20 decision. It is not something that can affect my determination of this appeal.

(3) Mr Maugham argued that the absence of a power to direct sharing of costs
would create real difficulties in a case where the FTT wish to direct that a
hearing be conducted electronically. All the – not inconsiderable – costs of
such a hearing would, in a case other than a Complex case with no taxpayer opt-
25 out, fall to be borne by one side or the other.

It seems to me that this is simply a further example of a case management
direction in respect of which the FTT would, in the ordinary course of case
management, have to consider the cost implications when formulating the most
appropriate direction. It cannot affect the proper construction of the Rules.

(4) Mr Maugham makes a similar point about the production of transcripts.
30 He points to the fact that in this case it was agreed between the parties that the
FTT could direct that the costs of the transcript be shared. He submits that this
is inconsistent with the position adopted by HMRC on this appeal. He argues
that the consequence of HMRC's position is that, should the FTT wish there to
be a transcript, it would have to direct that the costs of preparing it should be
35 borne by one party alone.

There is of course a difference between directions which are agreed and those
which are not agreed. There is nothing wrong in principle with the FTT
recording in directions an agreement of the parties to share costs of complying
40 with any direction of the tribunal. No argument was addressed before me on the
possible ambit of Rule 34 (consent orders) in this context, although my own
preliminary view would be that the FTT could not make a consent order if that
would exceed the powers it has under the Rules. The issue of cost, and the
FTT's jurisdiction in this respect, will arise only where there is a dispute. In
45 that event, the FTT will be required to consider the appropriate direction taking

into account the limitation of its power to make an order in respect of costs. The constraint imposed on the FTT in this respect is a direct consequence of the restriction of its costs-shifting powers, and those constraints do not provide the basis for a different meaning to be attributed to the Rules.

5 *Summary*

45. In summary, I consider, for the reasons I have given, that the FTT wrongly construed Rules 5 and 10. It was wrong to find that there was a distinction between, on the one hand, “costs of the appeal proceedings”, which were the subject of Rule 10, and on the other “compliance with detailed case management matters”, in respect
10 of which a costs-sharing order could be made under Rule 5. Rule 10, properly construed, is exhaustive of the FTT’s power to make orders in respect of costs. There is no power in Rule 5 to make such orders, including orders that the parties share the costs of complying with a direction.

46. That construction is in line with the overriding objective, and gives effect to it
15 as required by Rule 2. The plain meaning of Rules 5 and 10 cannot be ignored, nor construed to mean something they do not, by reference to the requirement to interpret the Rules to give effect to the overriding objective. The FTT was wrong therefore to hold, by reference to the overriding objective, that it had the power to direct that the costs of complying with a direction should be borne by one party rather than the other,
20 or by both.

47. The effect, in a Default Paper, Basic and Standard case, and in a Complex case where the taxpayer has opted-out of the costs-shifting regime, is that the FTT has no power to direct the sharing of costs of complying with directions, except in exercise of its power to award wasted costs or in the case where a party or their representative
25 has acted unreasonably in bringing, defending or conducting the proceedings. The only case where the FTT would have full power to order costs-sharing is in a case categorised as Complex where the taxpayer has not opted out.

Decision

48. For the reasons I have given, this appeal is allowed.

30 **Unreasonable conduct**

49. In light of its own finding on the question of the power of the FTT to direct the sharing of the costs of the bundles, the FTT did not address the alternative application of Eclipse 35 that costs should be awarded to it under Rule 10(1)(b) on the ground that HMRC acted unreasonably in conducting the proceedings. That application was
35 made to the FTT in the response of Eclipse 35 on 24 February 2012 to HMRC’s set aside application of 7 February 2012. (Eclipse 35 at the same time made an application for wasted costs, but it no longer pursues that.)

50. Having regard to my decision on this appeal, Eclipse 35 seeks a direction that the matter be remitted to the FTT. As there was no decision of the FTT in this

Costs

10 51. Any application for costs of these proceedings should be made in accordance with Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008. However, as any order for costs will be for detailed assessment, I direct that no schedule of costs need be delivered under Rule 10(5)(b).

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ROGER BERNER

UPPER TRIBUNAL JUDGE

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RELEASE DATE: 22 March 2013

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Amended by direction of Judge Berner on 23 April 2013 pursuant to Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008.