[2013] UKUT 038 (TCC)
Appeal number FTC/18/2012

PROCEDURE – JURISDICTION- alleged abuse of process –First-tier Tribunal has jurisdiction to deal with alleged abuse of process which affects fair hearing of tax appeal but does not have jurisdiction to consider an allegation of unlawful behaviour in public law - possible misunderstanding of Appellants' case - appeal allowed – case remitted to First-tier Tribunal

Case No: FTC/18/2012

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(TAX CHAMBER)

Between :

(1) BRIAN FOULSER **Appellants**
(2) DOREEN FOULSER

- AND -

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 6th December 2012

Alun Jones QC (instructed by **Keystone Law**) for the **Appellants**
Ms Fiona Dewar (instructed by **General Counsel and Solicitor for HM Revenue**) for the **Respondents**

DECISION
RELEASE DATE: 25 JANUARY 2013

Tribunal Judge: Mr Justice Morgan:

The background to the appeal

1. This is an appeal from the decision of Tribunal Judge Roger Berner, sitting in the First-tier Tribunal (Tax Chamber) ("the FTT"). The decision was released on 4th October 2011. The appeal is brought with the permission of the FTT granted on 10th February 2012. The appeal is on a point of law only, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007.

2. In summary, the matter which was before the FTT was an application by Her Majesty's Revenue and Customs ("HMRC") for an order striking out, or summarily dismissing, an application which had been made by Mr and Mrs Foulser for an order effectively debarring HMRC from taking any further part in the appeal brought by Mr and Mrs Foulser to the FTT against an assessment to tax made by HMRC.

3. The FTT acceded to the application made by HMRC and dismissed the application made by Mr and Mrs Foulser on the ground that the FTT had no jurisdiction to make the order which Mr and Mrs Foulser sought. They now appeal against the dismissal of their application.

4. The substantive proceedings which were before the FTT, and which had earlier been before the Special Commissioners, have a long history. Some of that history was briefly referred to in the evidence what was served in relation to the applications referred to in paragraphs 2 and 3 above. More information

about the earlier proceedings can be found in the decisions of the Special Commissioners, the High Court and the Court of Appeal dealing with certain issues in the earlier proceedings. These decisions are reported at [2005] STC (SCD) 374 (Special Commissioners), [2006] STC 311 (High Court) and [2007] STC 973 (Court of Appeal). In summary, in November 1997 Mr and Mrs Foulser made gifts of shares in a company, BG Foods Ltd. These gifts were part of a series of steps which they took as a result of advice they received from their tax adviser, a Mr Gittins. They later submitted self-assessments for the tax year 1997-1998 in which they claimed hold-over relief under section 165 of the Taxation of Chargeable Gains Act 1992. The inspector of taxes amended the self-assessments to disallow the claims to hold-over relief. Mr and Mrs Foulser appealed, under the Taxes Management Act 1970, to the Special Commissioners against these amendments. Their appeals were dismissed by the Special Commissioners (Dr Avery Jones, sitting alone) in a decision released on 22nd February 2005. Mr and Mrs Foulser's appeal to the High Court was dismissed by Lawrence Collins J on 20th December 2005 and their appeal to the Court of Appeal was dismissed on 17th January 2007.

5. The result of the earlier appeals was therefore that Mr and Mrs Foulser were liable to pay capital gains tax, to be assessed by reference to the market value of the shares at the date of the gift. The amount of the tax payable was not agreed and therefore fell to be determined by the FTT, as the successor to the Special Commissioners. Directions were given for that matter to be determined at a hearing before Dr Avery Jones in the week beginning 27th September 2010. The first day of that week was a reading day. The hearing

duly began on 28th September 2010 when the FTT heard evidence. The application by Mr and Mrs Foulser to debar HMRC from taking further part in their appeal against the amendments to their self assessments arose out of certain events which took place on the following day, 29th September 2010.

6. The FTT has not yet made detailed findings as to precisely what events took place on 29th September 2010. However, some of those events are not in dispute. In its decision, the FTT stated:

> "5 … I set out the following brief description merely to provide context for the discussion of the issues raised on HMRC's application. In the absence of having heard the evidence, nothing in this description amounts to a finding of fact.
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> 6 According to Mr Gittins' witness statement he left the house in Montpelier Street, London, where he had been staying since arriving on the previous Sunday, at around 7.30am. He was due to meet counsel for the Appellants in those proceedings at 8am. He was at that stage arrested on suspicion of cheating the Revenue and false accounting. He was told that HMRC had a warrant to search the premises.
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> 7 Despite informing the HMRC officers that he was on his way to a conference and then to the tax tribunal for the hearing, Mr Gittins was escorted back into the house and when inside asked to hand over his briefcase. He was then taken to Notting Hill police station where he was processed, spent time in a cell, and was questioned before being released on bail that evening. The Montpelier Street premises and other premises at Cockspur Street were searched under the warrant.
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> 8 In the meantime the tribunal, through the clerk assisting Judge Avery Jones on that day, had been informed of Mr Gittins' arrest. There is some dispute about the circumstances of the calls made, and the instructions given to the clerk with regard to information about the arrest being passed to the judge, but in any event, by agreement between counsel for the Appellants and counsel for HMRC, the judge was not informed of this. Instead, counsel met with the judge in chambers and a short adjournment was directed, without any of the detailed reasons having to be disclosed. The judge was subsequently given details of the arrest, and of the Appellants' consideration of making an application in respect of abuse of process, and he granted a further stay."

7. Since the 29th September 2010, there has been no further hearing as to the merits of Mr and Mrs Foulser's appeal against the amendments to their self assessments. On or about 25th March 2011, as foreshadowed earlier, they applied to the FTT for an order debarring HMRC from taking any further part in their appeal to the FTT. They contended that the events of the 29th September 2010 produced the result that any further participation by HMRC in their appeal would amount to an abuse of process and that, accordingly, the right response of the FTT would be to debar HMRC from taking any further part in their appeal.

8. The FTT described the grounds on which Mr and Mrs Foulser advanced their application to debar HMRC as follows:

> "In support of their application the Appellants claim that the warrants to enter, search and make seizures from the Montpelier Street and Cockspur Street premises occupied by their adviser, Mr Gittins, Montpelier Tax Consultants (Isle of Man) Limited and associated companies, and the arrest and detention of Mr Gittins, were arranged by officers and agents of HMRC to take place on 29 September 2010 with the purposes, among other purposes, of:
>
> (1) obtaining sight of legally privileged and confidential material held by Mr Gittins or associated companies relevant to the hearing of their tax appeal held in the week of 27 September 2010;
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> (2) alerting the tribunal hearing their tax appeal on that day to the arrest and detention;
>
> (3) causing the postponement of the hearing;
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> (4) causing publicity to the arrest of Mr Gittins and thus embarrassing the Appellants in the preparation and conduct of their appeal;
>
> (5) placing pressure oppressively on the Appellants to settle the subject matter of the appeal."

9. Both Mr and Mrs Foulser and HMRC served witness statements dealing with the events of 29th September 2010. HMRC have throughout denied that the events of 29th September 2010 took place for any of the purposes alleged by Mr and Mrs Foulser, as summarised in paragraph 8 above. HMRC have further denied that anything they did was an abuse of process.

10. On or about 4th April 2011, HMRC applied to the FTT for an order that the application made by Mr and Mrs Foulser in March 2011 be struck out or summarily dismissed on the grounds that:

> (1) the FTT has no jurisdiction to make the order sought by Mr and Mrs Foulser; and/or
>
> (2) the application is in any event bound to fail as the evidence in support fails to raise a prima facie case and the allegations (even if true) would not justify the sanction sought.

11. The application made by HMRC in April 2011 was heard by the FTT on 22nd September 2011. The witness statements which had been served on behalf of Mr and Mrs Foulser undoubtedly stated that their case was that the events of 29th September 2010 amounted to an abuse of process by HMRC which had produced the result that it was no longer possible for the FTT to conduct a fair hearing of Mr and Mrs Foulser's appeal against the revision of their self assessment. At the hearing of the appeal before me, there was some uncertainty as to how the case was argued on 22nd September 2011. In paragraph [10] of the later decision of the FTT, it stated that it understood that Mr Jones QC (who appeared before the FTT on 22nd September 2011) did not rely on any submission that the proceedings could not be fairly conducted but instead had put Mr and Mrs Foulser's case on the ground that HMRC had been

guilty of such serious misbehaviour that they should not be allowed to benefit to the detriment of Mr and Mrs Foulser. This understanding by the FTT was central to the reasoning in its later decision, as will be seen. On the hearing of the appeal before me, Mr Jones suggested that the FTT must have misunderstood his submissions at the hearing on 22nd September 2011. He told me that he did not mean to submit to the FTT that he was abandoning his case that the alleged abuse of process would prevent a fair hearing of the tax appeal. He thinks he might have said that in advance of the FTT making findings of fact as to the events of 29th September 2010, he could not yet demonstrate that a fair hearing of the tax appeal was not possible. He also accepts that he put the case more widely than that and submitted that even if there could still be a fair hearing of the tax appeal, the matters complained of amounted to an abuse of process in a wider sense and that the FTT could even then, and should, make a debarring order against HMRC. In fairness to the FTT, I note that following the release of its decision referring to its understanding of Mr Jones' position on 22nd September 2011, Mr Jones prepared written submissions seeking permission to appeal to the Upper Tribunal and in the course of those submissions, after referring to paragraph [10] of the FTT's decision, Mr Jones stated that: "[t]he position has now changed" and explained why it was said that the position had changed.

The decision of the FTT

12. In its decision, the FTT began by stating that the applications before it raised important issues concerning the jurisdiction and powers of the tribunal in a case of an alleged abuse of process. The FTT then set out the relevant

background. It then stated, at paragraph [10], that it understood that Mr Jones did not rely on any submission that the proceedings in relation to the tax appeal could not be fairly conducted. This was a point of central importance in the reasoning of the FTT. It referred in a number of places in its decision to the distinction between a case where a party alleged that a fair trial would not be possible and a case where a fair trial would be possible but it was allegedly unfair to have a trial: see at [11], [12], [43], [44] and [45].

13. The FTT then referred in detail to the submissions made by counsel. Between paragraphs [31] and [46], it considered the points arising. It referred to a number of the specific rules of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules"). It discussed Rule 8 which provided for orders striking out proceedings or debarring a respondent from taking any further part in the proceedings. It did not accept the submission made by Ms Dewar on behalf of HMRC that Rule 8 was an exhaustive statement of the circumstances in which the FTT could strike out proceedings or make a debarring order.

14. The particular reasoning of the FTT which led to its ultimate decision was expressed in these terms:

> "41 … Without therefore pre-judging any other circumstances that might arise, it is necessary for me to decide whether the particular power which the Appellants here seek to be exercised can be implied into the tribunal's jurisdiction under the Rules.
>
> 42 Were such a power to be implied, it could in my view only be so implied by a construction of the provision for the tribunal to regulate its own procedure as set out in rule 5, construed of course to give effect to the overriding objective to deal with cases fairly and justly. In this respect I should note that rule 5(1) does not contain the "subject to the provisions of these rules" language without which the EAT in Kelly thought it may

well have been that the industrial tribunal might have had the power to strike out for want of prosecution in the course of the hearing, and without the safeguards provided in the express provision in that respect. In an appropriate case, therefore, it seems to me that, if fairness and justice demand, this tribunal may well have power under rule 5 to make directions in circumstances outwith express provision elsewhere in the Rules.

43 Having said that, I have concluded that no such power as the Appellants assert in their application can or should be implied. I have reached this conclusion, not on the basis of a construction of the Rules themselves, but on the basis of the nature of the power which the Appellants assert. As appears from Ebrahim (at para 19 of the judgment of the court), in some of the second category of cases, those where a prosecution should not be allowed to proceed because it is not being pursued in good faith, or where the prosecutors have been guilty of such serious misbehaviour that they ought not to be allowed to benefit to the defendant's detriment, it is the High Court or the Divisional Court (and not the lower court) which will possess the requisite jurisdiction, and not any lower court.

44 In making this observation the court in Ebrahim referred to the judgment of the Divisional Court delivered by Buxton LJ in R v Belmarsh Magistrates' Court ex p Watts [1999] 2 Cr App R 188. That case concerned the jurisdiction of the magistrates' court to entertain a complaint of abuse of process on the ground that summonses were intended to be and were a collateral attack on a person's criminal conviction. The court there cited R v Horseferry Road Magistrates Court ex p Bennett [1994] 1 AC 42, HL and the distinction to be drawn between unfairness within the proceedings on the one hand, and on the other misconduct or law-breaking by public authorities in bringing a defendant within the jurisdiction at all. Holding that the Divisional Court and the magistrates' court in principle have concurrent jurisdiction in cases of allegations of abuse in magistrates' court cases, the court went on to say (at p 195):

"Within the general jurisdiction … there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have. So much is clear from Lord Griffiths's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint

> that is directed at the fairness or propriety of the trial process itself."
>
> 45 In my judgment this indicates that questions of a stay of proceedings, or an effective striking out of a party's case, which do not specifically involve issues of unfairness within the proceedings themselves, are appropriate for the jurisdiction of the Divisional Court, and not that of the lower courts. In argument Mr Jones posed the question as to where a remedy might be obtained if this tribunal did not have jurisdiction. It is not for me to answer that question, and the answer would not in any event affect my conclusion. If it were the case (which I doubt) that the Divisional Court did not have jurisdiction over cases of abuse such as that alleged by the Appellants, that could not constitute a reason for implying such a jurisdiction in the tribunal.
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> 46 It follows that I dismiss the Appellants' application. Accordingly, as I have found that the tribunal does not have jurisdiction to make the order which the Appellants have applied for, I need not express a view on HMRC's alternative applications, and it would not be appropriate for me to do so, as I would potentially be trespassing on another court's jurisdiction."

15. As explained by the FTT, it decided the matter before it on the basis of the first submission made to it by HMRC concerning the jurisdiction of the tribunal. For the reasons which it gave in [46] of its decision, the FTT did not think it right to deal with the second submission made by HMRC, namely, that the application to debar HMRC was in any event bound to fail as the evidence in support failed to raise a prima facie case and the allegations (even if true) would not justify the sanction sought.

The appeal

16. Mr and Mrs Foulser now appeal against the decision of the FTT. They submit that the FTT was wrong to hold that their case of an alleged abuse of process was of a kind which was not within the jurisdiction of the FTT. I have already referred (at [11] above) to the uncertainty as to how their case was argued at

the hearing before the FTT. The FTT clearly understood that Mr Jones on their behalf did not submit that the hearing of the tax appeal could not be fairly conducted by reason of the events of 29th September 2010. At the hearing before me, Mr Jones made it clear that he did wish to advance his appeal and, if the appeal were to be allowed, his clients' case at any subsequent hearing before the FTT, on the basis that the events of 29th September 2010 would prevent a fair hearing of the tax appeal and, in any event, amounted to an abuse of process which should lead to the FTT making the debarring order which was sought.

17. As the appeal to the Upper Tribunal is on a point of law only, there might have been a difficulty in dealing with this uncertainty as to how the case was argued before the FTT on 22nd September 2011. If Mr Jones had then argued that a fair hearing of the tax appeal was not possible, then he could similarly argue the appeal to the Upper Tribunal on the same basis. If he had made a concession on this point before the FTT but wished to withdraw that concession on appeal, there would be scope for argument as to whether he should be permitted to do so. Further, in view of Mr Jones' contention that Mr and Mrs Foulser now had further evidence, which was said to be relevant to the possibility of a fair hearing of the tax appeal, which they did not have at the time of the hearing before the FTT, there might have been an argument as to the powers of the Upper Tribunal to admit further evidence on this appeal and whether those powers should be exercised. If I refused to allow Mr and Mrs Foulser to argue their appeal on the basis which they now put forward and if I were to dismiss the appeal, then there might be a further application to the FTT for appropriate relief on the ground that Mr and Mrs Foulser had new

evidence to support their contention that a fair hearing of the tax appeal was not possible.

18. In the event, these difficulties were overcome by Ms Dewar, counsel for HMRC before the FTT and before me, realistically accepting that I should consider the appeal on the basis that Mr and Mrs Foulser's case included (and, if necessary, had always included) a submission that the events of 29th September 2010 meant that a fair hearing of the tax appeal was no longer possible.

19. At the hearing of the appeal, Mr Jones made it clear that his challenge to the decision of the FTT goes further. He submitted that even if the events of 29th September 2010 did not result in a fair hearing of the tax appeal being no longer possible, there was nonetheless an abuse of process by HMRC which made it unfair for HMRC to continue to resist the tax appeal and that the FTT had jurisdiction to make a debarring order against HMRC on that ground. This submission had not been accepted by the FTT and was disputed by HMRC on the appeal.

20. HMRC has not served a Respondent's Notice in relation to the second point which was argued before the FTT, but which was left undecided by it. Further, although the FTT discussed Rule 8 of the 2009 Rules and expressed the view that Rule 8 might well not be an exhaustive statement of the circumstances in which the FTT could strike out proceedings or make a debarring order, there was no Respondent's Notice seeking to challenge that view. Nonetheless, in the course of the hearing before me, Ms Dewar (without any objection from

Mr Jones to the submission being made) submitted that the FTT was wrong in this respect.

21. The parties' submissions on the appeal addressed various questions as to inherent jurisdiction, inherent powers and implied powers of a statutory tribunal such as the FTT and raised issues of importance in relation to the position of the FTT in these respects.

Discussion

22. I consider that the appeal against the decision of the FTT will have to be allowed in view of the matters which I described at paragraphs [16] – [18] above. I consider that the FTT would itself have accepted that it had jurisdiction to deal with and determine a contention that the events of 29th September 2010 had produced the result that a fair hearing of the tax appeal was no longer possible. The detailed reasoning of the FTT clearly supports such a conclusion. The reason why the FTT concluded that it did not have jurisdiction to deal with and determine the case being put forward for Mr and Mrs Foulser was that it understood that their case did not include this contention. I am now proceeding on the basis that this was a misunderstanding of the position. In fairness to the FTT, I am not holding that the FTT was in any way at fault in this respect. Nonetheless, in view of the realistic position adopted by Ms Dewar on behalf of HMRC on the hearing of the appeal, I will proceed on the basis that Mr and Mrs Foulser's case includes (and, if necessary, had always included) a submission that the events of 29th September 2010 meant that a fair hearing of the tax appeal was no longer possible. I did not understand HMRC to submit to me that I should hold,

contrary to the FTT's own reasoning, that the FTT did not have jurisdiction to deal with such a contention. The way in which the case was argued before the FTT and the circumstances in which I am prepared to allow this appeal may have to be considered again in the context of any applications as to the costs of this appeal.

23. It is not desirable that I should leave matters there. Much of the argument on the appeal related to whether the FTT could make an order debarring HMRC from resisting the tax appeal, even where a fair hearing of that appeal were possible, on the ground that there was serious wrongdoing by HMRC which would justify the FTT in making such an order. If I were to allow the appeal without dealing with this point, the same point will be made in front of the FTT. The FTT would be likely to follow its earlier ruling that such a submission is not open to Mr and Mrs Foulser. If that view affected the result of the application, there might then have to be a further appeal to the Upper Tribunal. In those circumstances, I ought to deal with this point. Similar reasoning applies to HMRC's submission that the FTT does not have any power to make a debarring order against HMRC except for the express power in rule 8 of the 2009 Rules. Although this point was not raised in a Respondent's Notice it was fully argued. I consider that Mr Jones had a complete opportunity to say everything he wished to say on the point. He did not suggest otherwise.

24. I start with the jurisdiction of the FTT. The FTT plainly has jurisdiction, pursuant to the Taxes Management Act 1970, to determine the facts and the law necessary to determine the dispute before it as to the value of the shares at

the relevant date. The FTT, which was created by section 3 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), does not have a "judicial review" jurisdiction. In using the phrase "judicial review", I refer to the jurisdiction which is given to the Upper Tribunal, but not the FTT, by section 15 of the 2007 Act. Section 15(4) makes clear that in exercising its judicial review jurisdiction, the Upper Tribunal is to apply the principles that the High Court would apply in deciding whether to grant relief on an application for judicial review. By section 15(1), the Upper Tribunal's powers to grant relief in a judicial review case include a power to make "a prohibiting order". By section 15(3), relief granted by the Upper Tribunal has the same effect as the corresponding relief granted by the High Court on an application for judicial review.

25. Thus, if a taxpayer wishes to contend that HMRC has acted unlawfully in public law so that the taxpayer is entitled to judicial review and that the appropriate relief is a prohibiting order preventing HMRC from a particular course of conduct, such a claim is within the jurisdiction of the Upper Tribunal and within the jurisdiction of the High Court. Section 18 of the 2007 Act contains provisions which deal with whether the application for judicial review may be brought in the Upper Tribunal rather than in the High Court. It is important to emphasise that a claim of the character referred to in this paragraph is not within the jurisdiction of the FTT.

26. It is not unusual for a dispute between a taxpayer and HMRC to involve arguments which are put forward by a way of a statutory appeal against a decision of HMRC and also arguments which are put forward by way of an

application for judicial review of a decision of HMRC. Recent examples are provided by the two cases which were considered by the Supreme Court and reported as R (Davies) v Revenue & Customs Comrs [2011] 1 WLR 2625. In those cases the taxpayers raised arguments as to the application of the general law as to residence for tax purposes and also contended that HMRC were acting contrary to a legitimate expectation on the part of the taxpayers, which had been created by Inland Revenue Booklet IR20. The first set of arguments was appropriate for the FTT pursuant to a taxpayer's statutory appeal and the second set of arguments was not appropriate for the FTT but could be put forward by way of an application for judicial review of the relevant decision by HMRC. The case management implications of there being parallel proceedings before the FTT and judicial review proceedings were later considered in Daniel v The Commissioners for Her Majesty's Revenue and Customs [2012] EWCA Civ 1741.

27. As I am allowing this appeal, I will remit Mr and Mrs Foulser's application of March 2011 and HMRC's application of April 2011 to the FTT for determination. When remitted, the FTT will have to analyse the arguments which Mr and Mrs Foulser wish to put forward by way of criticism of the alleged conduct of HMRC on 29th September 2010. If their contention is that those events have implications for a fair hearing of the tax appeal by the FTT, then there can be no doubt that the FTT can use whatever powers it has to ensure so far as possible that the procedures adopted for the hearing of the tax appeal are fair. I will refer later in this judgment to the extent of the powers of the FTT in this respect. Conversely, if the contention is that the events of 29th September 2010 amounted, in public law, to unlawful behaviour by HMRC

then a claim in public law for some sort of prohibiting order will be a claim which should be brought by way of an application for judicial review. As explained, an application for judicial review is not within the jurisdiction of the FTT and must be brought elsewhere, either in the High Court or the Upper Tribunal, in the latter case subject to section 18 of the 2007.

28. So far, I have considered the jurisdiction of the FTT, in relation to the arguments which Mr and Mrs Foulser might wish to put forward, simply as a matter of first principle. In the course of argument on this point, a large number of authorities were cited to the FTT and again on the appeal to the Upper Tribunal. The principal authorities, to which I will refer below, concerned proceedings in the magistrates' court. As will be seen, any difficulties which arise in this area are largely attributable to the fact that the phrase "abuse of process" has been used to describe two different things. One type of abuse of process is where a party abuses the procedure of the court or tribunal and the court or tribunal needs to react to that abuse by making appropriate orders, which might extend to an order striking out a case or a defence. Another type of abuse of process is where a party's conduct in bringing the process is unlawful in public law and a court is asked to exercise its judicial review jurisdiction to restrain such behaviour. The authorities dealing with the position of magistrates' courts are of some assistance in this context as they distinguish between the two types of abuse of process. However, one has to be a little careful about some of the language used in those authorities as they are dealing with a very different statutory context from that with which I am concerned.

29. The first such authority is R v Horseferry Road Magistrates' Court, ex p Bennett [1994] AC 42 where the House of Lords had to consider the position of a magistrates' court and of the High Court in relation to a prosecution which, it was argued, was an abuse of process. In that case, Mr Bennett alleged that he had been kidnapped from the Republic of South Africa and brought to England where he was prosecuted for an offence allegedly committed in England. He was brought before a magistrates' court to be committed for trial for the alleged offence. He sought an adjournment of the committal proceedings to enable him to challenge the jurisdiction of the magistrates' court to deal with the alleged offence as he said that the prosecution was an abuse of process. He did not allege that he would not get a fair trial but, instead, that it was unfair to try him at all, in view of the fact that he had been kidnapped, rather than having been brought within the jurisdiction pursuant to an available extradition procedure. The magistrates' court refused an adjournment. Mr Bennett sought judicial review of this refusal. The principal issue for the House of Lords was whether any court should inquire into the circumstances in which Mr Bennett was brought within the jurisdiction. It held that the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into those circumstances and that, if there had been a disregard of extradition procedures, the High Court might stay the prosecution as an abuse of process. The principal speech was that of Lord Griffiths, with whom Lord Bridge and Lord Slynn agreed. Lord Lowry gave a separate speech agreeing with Lord Griffiths and Lord Bridge. Lord Oliver dissented. Lord Griffiths considered the question of whether the circumstances of the case, and the alleged abuse of process, should be inquired into by the

magistrates court or by the High Court. He considered in detail the many authorities dealing with the powers of the magistrates' court to control various kinds of abuse of process. He said at 64B to E:

> "I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken"

30. This passage in Bennett distinguished between an abuse of process where the matter complained of directly affected the fairness of the trial and an abuse of process which involved an abuse of power by a public authority, which is subject to the supervisory jurisdiction of the High Court.

31. The distinction made in Bennett was also referred to in the judgment of Buxton LJ in R v Belmarsh Magistrates Court ex p Watts [1999] 2 Cr App R 188 at 194 to 195, where he said:

> "It will be recalled that the "abuse" complained of in Bennett was of a very particular nature, (allegedly) involving not specifically unfairness within the proceedings, but rather misconduct and indeed law-breaking by public authorities in bringing the defendant within the jurisdiction at all. As Lord Griffiths indeed said, it was something very different from

abuse affecting what his Lordship called domestic criminal trial procedures.

On the basis of these observations, and with other authority in mind, the law as to jurisdiction over allegations of abuse in Magistrates' court cases is in our view as follows:

1. The Divisional Court and the Magistrates' court in principle have concurrent jurisdiction.

2. The Divisional Court is able to consider abuse of all types, including cases of the type characterised by Lord Griffiths as domestic: see for instance Croydon Justices ex p Dean (1994) 98 Cr App R 76, [1993] QB 769, which has never been suggested to have been wrongly decided as a matter of jurisdiction.

3. Within the general jurisdiction referred to in paragraph 1 above there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have. So much is clear from Lord Griffiths's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself.

4. It will however always be open to magistrates in cases that do not fall within the narrow Bennett category to decline jurisdiction, and require the matter to be pursued in the Divisional Court, whether because of the complexity or novelty of the point, or because of the length of investigation that is required. Any such decision by a magistrate, being one taken within the limits of his judgement, will be unlikely to be overturned in this court.

5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly: see for instance *per* Lord Oliver of Aylmerton in Bennett at pages 132 and 70. Lord Oliver dissented in Bennett on the issue of whether the Divisional Court, or any other court, had any general supervisory jurisdiction of the order envisaged by the majority; but his observations about the general jurisdiction of the Magistrates' court are, with respect, a valuable synopsis of that jurisdiction, that accurately expresses the assumptions made by the other of their Lordships.

> 6. The category of domestic trial procedures to which Lord Griffiths referred in Bennett must include cases that fall foul of the Hunter rule."

32. In this passage, Buxton LJ referred to "a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have".

33. The distinction between the two types of case involving abuse of process was again referred to in R (Ebrahim) v Feltham Magistrates' Court [2001] 1 WLR 1293 at 1300 to 1302 by Brooke LJ in these terms:

> "18 The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried. We derive these two categories from the judgment of Neill LJ in R v Beckford (Anthony) [1996] 1 Cr App R 94, 101. He observed that in some cases these categories may overlap. There may, of course, be other situations in which a court is entitled to protect its own process from abuse, for example where it considers that proceedings brought by a private prosecutor are vexatious (see R v Belmarsh Magistrates' Court ex p Watts [1999] 2 Cr App R 188), but we are not here attempting to carry out an exhaustive review of this jurisdiction.
>
> 19 We are not at present concerned with the second of these two categories (which we will call "category 2 cases"), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction: see Ex p Watts, per Buxton LJ at p 195 B – D .
>
> 20 In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutor's conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutor's

> behaviour than to the fairness of any eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all.
>
> …
>
> 24 The first category of case (see paragraph 18 above: we will call these "category 1 cases") is founded on the recognition that all courts with criminal jurisdiction, including magistrate's courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court's process and a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In these cases the focus of attention is on the question whether a fair trial of the defendant can be had."

34. In this passage, Brooke LJ distinguished between: (i) cases where the court concluded that the defendant cannot receive a fair trial, and (ii) cases where it concluded that it would be unfair for the defendant to be tried. He noted that these two categories might overlap. He also noted that in "some" (and therefore not necessarily all) of the cases in the second category, it was the High Court rather than the magistrates' court which had jurisdiction to deal with the alleged abuse.

35. I consider that there is much in these authorities to support the distinction I earlier drew, based on first principles. I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to

determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority.

36. Thus far, first principles and the authorities relied on point in the same direction. Nonetheless, Mr Jones contended that in the present case the FTT had jurisdiction in relation to all of the contentions put forward by Mr and Mrs Foulser. Mr Jones submitted that all tribunals had an inherent or an implied power to prevent an abuse of process and his case was that the events of 29th September 2010 amounted to an abuse of process. Therefore, the FTT had power to deal with that case. He contended that even if his case fell into "category 2" as classified by Brooke LJ in Ebrahim, the FTT had power to determine it and to make a debarring order against HMRC. These submissions seem to me to ignore the distinction between the two different types of abuse of process. Further, they run together the separate questions of jurisdiction and powers. Nonetheless, before reaching my conclusions I need to consider his submissions as to the inherent or implied powers of the FTT.

37. Although Mr Jones referred only to the inherent powers or the implied powers of the FTT, it seems to me that I ought not to consider the scope of any

inherent or implied powers without first informing myself as to the express powers given to the FTT by the 2009 Rules.

38. The 2009 Rules were made pursuant to a number of provisions of the 2007 Act, in particular, section 22 and Part I of schedule 5. Section 22(1) provided that there are to be rules called Tribunal Procedure Rules for the FTT. Section 22 (4) provided:

> "(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—
>
> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
>
> (d) that the rules are both simple and simply expressed, and
>
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently."

39. Paragraph 1 of schedule 5 provided that the generality of section 22(1) is not to be taken to be prejudiced by the other paragraphs of Part I of schedule 5. Paragraph 16 of schedule 5 provided that rules may confer on the FTT such ancillary powers as are necessary for the proper discharge of its functions.

40. The potentially relevant rules are Rules 2, 5, 7, 8 and 15 of the 2009 Rules, which I will set out below.

41. Rule 2 provides:

> "**2 Overriding objective and parties' obligation to co-operate with the Tribunal**

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

42. Rule 5 provides:

"**5 Case management powers**

(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—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or

shortening would conflict with a provision of another enactment setting down a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management hearing;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal."

43. Rule 7 provides:

"**7 Failure to comply with rules etc**

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a

direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case);

(d) restricting a party's participation in proceedings; or

(e) exercising its power under paragraph (3).

(3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act (Upper Tribunal to have powers of High Court or Court of Session) in relation to, any failure by a person to comply with a requirement imposed by the Tribunal—

(a) to attend at any place for the purpose of giving evidence;

(b) otherwise to make themselves available to give evidence;

(c) to swear an oath in connection with the giving of evidence;

(d) to give evidence as a witness;

(e) to produce a document; or

(f) to facilitate the inspection of a document or any other thing (including any premises).”

44. Rule 8 provides:

“**8 Striking out a party's case**

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

45. Rule 15 provides:

> "**15 Evidence and submissions**
>
> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
>
> (a) issues on which it requires evidence or submissions;
>
> (b) the nature of the evidence or submissions it requires;
>
> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
>
> (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
>
> (e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—
>
> (i) orally at a hearing; or
>
> (ii) by written submissions or witness statement; and
>
> (f) the time at which any evidence or submissions are to be provided.
>
> (2) The Tribunal may—
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where—
>
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
>
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
>
> (iii) it would otherwise be unfair to admit the evidence.
>
> (3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose."

46. A comparison of the 2009 Rules with the rules which apply to the Upper Tribunal (apart from the Lands Chamber), namely, the Tribunal Procedure (Upper Tribunal) Rules 2008, reveals that Rules 2, 5, 7, 8 and 15 of the 2009 have their counterpart in Rules 2, 5, 7, 8 and 15 of the Upper Tribunal Rules.

47. There was considerable argument as to whether a statutory tribunal, like the FTT in this case, has inherent powers or implied powers, i.e. powers which are not expressed in the statute or rules which apply to it. In the past, there were cases which referred to an "inherent power" to prevent abuse of the processes of a statutory tribunal; see, for example, R (The Secretary of State for the Home Department) v Immigration Appeal Tribunal [2001] QB 1224 at [12]. However, the more recent approach has been not to use the word "inherent" but instead to refer to "implied powers" as the powers which a statutory tribunal might in some circumstances have, even though they are not spelt out in the statute or rules which apply to that tribunal.

48. The subject of inherent powers or implied powers was discussed by Hickinbottom J in R (V) v Asylum and Immigration Tribunal [2009] EWHC 1902 (Admin) at [27] – [30], (after referring to earlier cases which had used the phrase "inherent power"):

> "27 However, those cases represent a retreat from the proposition that all courts and tribunals have an inherent power generally to regulate their own procedure. They display a far more restricted approach to the so-called "inherent powers" of tribunals, namely a restriction to powers that are necessary for the proper functioning of the tribunal. That approach is generally reflected in the more recent cases, which make clear that inferior courts and tribunals do not have an open-ended general power to regulate their own procedure (see, e.g., Akewushola v The Secretary of State for the Home Department [2000] 1 WLR 2295 at 2301E-H per Sedley LJ, and The

Secretary of State for Defence v The President of the Pensions Appeal Tribunal [2004] EWCA 141 (Admin) at [25] and following per Newman J).

28 The use of the term "inherent powers" as applying to inferior tribunals in these cases must mean something different from the term as used of the High Court: and it seems to me that the references are not to the historical powers of the superior courts inherent in the High Court, but to powers that can properly be implied into the statutory scheme on the usual principles of statutory interpretation. It is well-settled law that it is justifiable to imply words into legislative provisions where there is an ambiguity or an omission and the implied words are necessary to remedy such defect (see, e.g., Elloy De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] AC 69 at page 77H).

29 In some statutory schemes it is necessary to imply many or even most of a tribunal's powers. For example, in R (IB) 2/04, a tribunal of Social Security Commissioners held that it was necessary to imply all powers of a social security appeal tribunal — because the relevant statute gave a right of appeal but did not expressly give the appeal tribunal any powers at all (see, particularly, paragraph 12 of that decision).

30 What is "necessary" by way of implication will depend upon the nature of the tribunal and its work, and of course the express powers that are given to it by the legislative scheme. However, in respect of any tribunal with a judicial function, it must be assumed (at least in the absence of the clearest wording) that Parliament intended the tribunal to deal with cases fairly and justly: and, consequently, provisions that are not incompatible with the express rules can be readily implied insofar as they are necessary for achieving fairness and justice. As Lord Bridge said in Lloyd v McMahon [1987] AC 625, at pages 702–3:

"My Lords, the rules of so-called natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. *In particular, it is well-established that when a statute has conferred on a body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."* (emphasis added).

> The implication of procedural rules on this basis is therefore little more than the practical application of the rules of natural justice read in the context of the tribunal's express statutory powers."

49. This discussion was found to be helpful by the Divisional Court (Moses LJ and Hickinbottom J) in Chief Constable of Nottinghamshire v Nottingham Magistrates Court [2009] EWHC 3182 (Admin) where Moses LJ said:

> "33 All the parties and the deputy judge laboured under the difficulty that they lacked the benefit of Hickinbottom J's learning in R (V) v Asylum and Immigration Tribunal [2009] EWHC 1902 (Admin). In that case he dismantled any superstition that a statutory tribunal, or for that matter a statutory court such as the magistrates, had any inherent jurisdiction. However, he accepted that having regard to the statutory function of the particular tribunal in question, and in that case the Asylum and Immigration Tribunal, the statute might itself impliedly confer powers which may be exercised to further the objective of the statute in question. He said, if I may be permitted to cite it, at para 30: [*cited above*]
>
> He then cited the passage of the speech of Lord Bridge of Harwich in Lloyd v McMahon [1987] AC 625, 702–703, and continued: "The implication of procedural rules on this basis is therefore little more than the practical applications of the rules of natural justice read in the context of the tribunal's express powers."
>
> 34 In so concluding I read Hickinbottom J as echoing at the words of Lord Reid in Wiseman v Borneman [1971] AC 297, 308 B-G , where Lord Reid acknowledged that a tribunal was entitled to exercise powers and adopt rules, which should be flexible, so as to ensure that they can carry out their task more effectively.
>
> 35 What Lord Reid and Hickinbottom J teach is that tribunals and magistrates do have power to control and regulate their own procedure, so as to ensure the effective resolution and determination of those functions imposed upon them by the statute in play. There is nothing inherent about that power. It is a power which the statute impliedly confers in order to achieve a statutory objective, which it is the tribunal in question's responsibility to fulfil."

50. I consider that the relevance of these authorities in the present case is as follows. If Mr and Mrs Foulser contend that the events of 29th September 2010

have made a fair hearing of the tax appeal impossible or that safeguards against possible unfairness must now be provided, then the FTT can deal with that contention and can exercise the express powers conferred by the 2009 Rules to deal with possible unfairness or to provide safeguards. It seems to me that the width of the express powers conferred by the 2009 Rules, to which I have referred, ought to be sufficient for these purposes. If it should turn out that the express powers conferred by the 2009 Rules are not sufficient, then the FTT can consider whether it has, and whether it ought to exercise, some implied power which might exist to enable it to achieve fairness in its procedures and/or to observe the rules of natural justice. Conversely, if the FTT considers that the events of 29th September 2010 do not make a fair hearing of the tax appeal impossible, with or without further safeguards, then any contention that HMRC acted unlawfully in public law must be put forward by way of an application for judicial review and such an application is not within the jurisdiction of the FTT. The cases which discuss the implied powers of a statutory tribunal have no bearing on this question. Those cases and any implied powers are only relevant to matters which are within the jurisdiction of the statutory tribunal. Those cases do not justify any widening of the jurisdiction of a statutory tribunal.

51. Mr Jones submitted that a hearing of his complaint by the FTT as a fact finding tribunal was superior to a claim to judicial review which in practice would not involve an order for disclosure against HMRC, nor cross-examination of HMRC's witnesses. He referred to a passage in the judgment of Jowitt J in R v Chief Constable of Warwickshire ex p Fitzpatrick [1999] 1 WLR 564 at 579 D-F which compared the constraints of an application for

judicial review with the determination of a dispute by a fact finding tribunal. In my judgment, if Mr and Mrs Foulser's contentions include a claim that HMRC acted unlawfully in public law then that claim cannot be advanced as the basis of seeking relief in public law before the FTT but can only be advanced as a claim for judicial review. As a claim for judicial review it will be subject to the time limits for such a claim and all the other procedural rules which apply to such claims. If and in so far as those procedural rules impose constraints on Mr and Mrs Foulser's ability to obtain disclosure and cross-examine witnesses, then they are bound by those constraints and are not free to disregard them by asking the FTT to exercise a jurisdiction which it does not have.

52. As explained, the FTT proceeded on the basis that Mr and Mrs Foulser's case did not include a contention that the events of the 29th September 2010 had made a fair hearing of the tax appeal impossible. The FTT therefore understood that Mr and Mrs Foulser contended instead that HMRC was guilty of an abuse of process in the sense of unlawful behaviour in public law. On that basis, the FTT was right to hold that such a contention was not within the jurisdiction of the FTT. However, for the reasons explained in paragraphs [16] – [18] above, it has now been established that Mr and Mrs Foulser's case does involve the contention that the events of 29th September 2010 have made a fair hearing of the tax appeal impossible. On that basis, the FTT does have jurisdiction to deal with and determine that contention.

53. The matter must therefore be remitted to the FTT for determination. I have considered whether it would be helpful for me to address the various matters

of complaint put forward by Mr and Mrs Foulser and to determine whether the consideration of the complaint is within the jurisdiction of the FTT or whether the complaint is in truth an allegation of unlawful behaviour in public law and therefore outside the FTT's jurisdiction. I have considered the matters of complaint. I do not think that it is possible to say at this point, simply by reference to the way in which the complaints are expressed, that the subject matter is purely a matter of public law.

54. Accordingly, I will allow the appeal and remit the application made by Mr and Mrs Foulser in March 2011 to the FTT for determination. I will also remit the application by HMRC in April 2011 to the FTT. There was a second ground to that application which has not yet been determined. The second ground put forward by HMRC was that Mr and Mrs Foulser's application was in any event bound to fail as the evidence in support failed to raise a prima facie case and the allegations (even if true) would not justify the sanction sought. That second ground was argued before the FTT on 22nd September 2011. Plainly a lot of time has gone by since that date. It will be a matter for the FTT as to what course should now be taken in relation to any further consideration of, and determination of, that second ground.

55. As explained, at the hearing of the appeal, Ms Dewar for HMRC raised a point of law as to the express powers of the FTT to make an order debarring HMRC, if it found that such an order was justified to avoid unfairness to Mr and Mrs Foulser. In summary, HMRC submitted that the FTT did not have such a power, even in such a case. Although the principal case of Mr Jones for Mr and Mrs Foulser was that the powers he relied on were inherent or implied

powers, he responded to Ms Dewar's submissions by arguing that the FTT did have such a power. The FTT had considered this point and was minded to hold that it did have such a power in such a case. For the reasons given earlier in this judgment, even though this point was not raised by a Respondent's Notice, I ought to deal with it.

56. I have already set out any relevant express powers conferred by the 2009 Rules. Rule 7(2)(c) identifies one type of case where the FTT may exercise its powers under Rule 8. Rule 7(2)(d) identifies another type of case where the FTT may restrict a party's participation in proceedings. Rule 8 obliges the FTT to strike out a party's case or to make a debarring order against a Respondent in certain circumstances: see Rule 8(1) and (2). Rule 8(3) permits the FTT to strike out an Appellant's case or to make a debarring order in certain other circumstances. Rule 8(7) provides that the references to striking out a party's claim is to be read, in the case of a Respondent, as referring to an order barring the Respondent form taking further part in the proceedings. Mr and Mrs Foulser do not contend that on the facts of the present case, even if they establish that there cannot be a fair hearing of the tax appeal, that the FTT could make a debarring order under Rule 8.

57. HMRC argue that it must have been intended that the only circumstances in which a claim can be struck out or a debarring order made are those stated in Rules 7 and 8. They submit that it would be wrong to read any other general rule, which does expressly refer to striking out or a debarring order, as conferring a power to make such orders.

58. Rule 2(1) provides that the overriding objective of the 2009 Rules is to enable the FTT to deal with cases fairly and justly. By Rule 2(3), the FTT must seek to give effect to the overriding objective when it exercises any power under the Rules. By Rule 5(1), the FTT may regulate its own procedure. By Rule 5(2), the FTT may give a direction in relation to the conduct and disposal of proceedings at any time.

59. In paragraph [42] of its decision, the FTT held that if fairness and justice demanded, the FTT "may well" have power under Rule 5 to give directions in circumstances which were outside the express provisions elsewhere in the Rules.

60. Before reaching my conclusions on this point, I ought to refer to certain authorities which were relied upon by Ms Dewar which were Kelly v Ingersoll-Rand Ltd [1982] ICR 476, O'Keefe v Southampton City Council [1988] ICR 419 and Care First Partnership Ltd v Roffey [2001] ICR 87.

61. In Kelly, the Employment Appeal Tribunal considered the rules applicable to an industrial tribunal. Those rules expressly allowed a tribunal to strike out an originating application in certain circumstances. The tribunal purported to strike out an originating application in circumstances which did not come within the express rule. It was held that the tribunal did not have such a power. In particular such a power was not conferred by a rule which provided that the tribunal "may regulate its own procedure" because that rule was "subject to the provisions of these Rules" and it was therefore held that the power to regulate its own procedure did not allow the tribunal to strike out in a case which did not comply within the restrictions in the express power to strike out.

This approach was applied by the Employment Appeal Tribunal in O'Keefe with the same result.

62. Care First Partnership Ltd was a decision of the Court of Appeal which considered the rules then applicable to employment tribunals. The employer submitted that the tribunal had a power to dismiss a claim summarily on the basis that the claim had no reasonable prospect of success. The rules provided in one place for a case which was judged to have no reasonable prospect of success but did not allow the tribunal to strike out the case on that ground. Other rules allowed the tribunal to strike out a case on other grounds but not on the ground that the case had no reasonable prospect of success. It was held that a rule which allowed the tribunal to conduct the hearing in such manner as it considered appropriate did not allow the tribunal to dismiss the case without hearing the evidence. It was also held that rules dealing with the conduct of the hearing and to regulate the procedure of the tribunal "are concerned with procedure and do not provide a jurisdiction to strike out": see at 95H.

63. The point which has been argued in the present case has been argued in advance of any findings of fact in this case. It is therefore not established that this is a case in which the FTT would consider that a debarring order was the appropriate response to whatever the FTT finds went wrong in this case, if anything went wrong. An order that a party be barred from putting forward its case is a very serious order indeed. It is not appropriate for me to attempt to define the type of case in which the FTT might consider it justified to make such an order, rather than an order which is less far reaching in its effect. Further, the difficulty of deciding the present point is increased because it

seems very likely that most, if not all, cases which justified the making of a debarring order could be brought within the express terms of Rules 7 and 8. I also acknowledge that the decisions relied upon by Ms Dewar do cause me to be hesitant before rejecting her submission. I am less troubled by the decisions in Kelly and O'Keefe than the decision in Care First Partnership Ltd. The reasoning in the first two of those cases is readily distinguishable. Both of those cases attached importance to the fact that the rule which allowed the tribunal to regulate its procedure was expressed to be "subject to the provisions of these rules" and this was held to cut down the effect of the general power to regulate procedure. Indeed, in Kelly, the Employment Appeal Tribunal stated that, but for those words, the power to regulate procedure might well have conferred a power to strike out for want of prosecution. The decision in Care First Partnership Ltd is readily understandable and distinguishable from the present case but I have noted the comment that the power to regulate "procedure" did not extend to an order striking out a claim.

64. The point which has been argued would only arise in a case where the FTT considered that a debarring order was justified and no lesser order would meet the justice of the case but yet, for whatever reason, the facts of the case did not come within Rules 7 and 8. In my judgment, in that somewhat exceptional case, I am not persuaded that I should hold that the FTT could not produce the desired just result by using its power under Rule 5 to "regulate its procedure", particularly to deal with the case fairly and justly (as required by Rule 2(1) and (3)). Accordingly, I am not prepared to accept the submission of Ms Dewar for HMRC that the FTT could not make a debarring order against HMRC if, on

the facts, the FTT considered that the only way to deal with the case fairly and justly was to make such an order.

The way forward

65. The overall result is that I will allow the appeal and remit Mr and Mrs Foulser's application of March 2011 and HMRC's application of April 2011 for determination by the FTT in accordance with this decision of the Upper Tribunal.

66. The length of this judgment has been dictated by the range of argument addressed to me on this appeal. That may serve to disguise the fact that I consider the legal position to be relatively straightforward. It may assist the FTT's further consideration of the matter if I state my views as to what remains to be dealt with by it, as follows:

    i) The FTT has jurisdiction to determine the tax appeal under the Taxes Management Act 1970;

    ii) In accordance with the 2009 Rules, the FTT will wish to deal with the tax appeal fairly and justly;

    iii) If the events of 29th September 2010 have resulted in a risk that (absent further directions) the tax appeal cannot be dealt with fairly and justly, then the FTT has a number of powers which it can exercise to eliminate or reduce that risk;

iv) Accordingly, the focus of the FTT's further consideration of the outstanding applications should be on assessing the risk of unfairness and deciding the appropriate directions (if any) which should be given;

v) Insofar as Mr and Mrs Foulser wish to contend that the events of 29th September 2010 were unlawful in public law and that an order should be made prohibiting HMRC from resisting the tax appeal, the FTT does not have jurisdiction to determine a claim in public law or to make such an order in public law;

vi) It will be for the FTT to decide whether it is appropriate to determine what remains of HMRC's application of April 2011; the FTT may wish to take into account the fact that that application was argued some time ago and the matter will not be fresh in its mind; the FTT may also wish to take into account the fact that it may be more helpful to consider whether the events of 29th September 2010 have given rise to a risk of unfairness, or even to a perception of a risk of unfairness, which calls for appropriate directions from the FTT, rather than it being strictly necessary to decide all of the many disputes of facts as to those events.

67. For the avoidance of all doubt, apart from the matters I have expressly decided, nothing in this decision is to be regarded as indicating any evaluation of any argument which either side wishes to put forward. That evaluation will be carried out by the FTT, as to matters within its jurisdiction, and has not been carried out by me. Similarly, although I have discussed the legal position as to possible applications for judicial review, I do not express any view as to

whether there are any grounds for such an application nor as to the relevance to any such application of the passage of time since 29th September 2010.

68. Finally, I direct that any applications as to the costs of this appeal are to be made in writing within 21 days of the release of this decision.

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MR JUSTICE MORGAN

Release date 25 January 2013