[2014] UKUT 0244 (TCC)

Appeal number FTC/110/2013

CASE MANAGEMENT - whether First-tier Tribunal erred in law in allowing evidence from appeal to be admitted in later appeal by same appellant and directing that appeals be consolidated - no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FIRST CLASS COMMUNICATIONS LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge John Clark

Sitting in public in London on 23 April 2014

Aseel Rashid, solicitor of AR Legal, for the Appellant

Jonathan Kinnear QC and Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. First Class Communications Limited ("FCC") appeals against a decision of the First-tier Tribunal ("the FTT") released on 9 May 2013, [2013] UKFTT 342 (TC), ("the Decision"). The Decision followed a hearing to consider an application for directions by the Respondents ("HMRC"). FCC opposed two of the proposed directions. Notwithstanding FCC's objections, the FTT (Judge Barbara Mosedale) decided that:

(1) evidence previously served by HMRC in an appeal by FCC under reference LON/2007/1103 ("the 2007 Appeal") should be admitted in another appeal by FCC under reference TC/2010/3995 ("the 2010 Appeal"); and

(2) the 2007 Appeal and the 2010 Appeal should be consolidated.

2. FCC appeals against the decision to grant the application on the grounds that Judge Mosedale erred in law in that:

(1) she took into account matters that should not have been taken into account and did not take into account matters that should have been taken into account; and

(2) she made findings that no reasonable tribunal, properly directing itself, could have made which were thus outside the generous ambit of the discretion entrusted to the FTT on case management issues.

3. For the reasons given below, we have decided that there is no error of law in the Decision and FCC's appeal is dismissed.

Background

4. The 2007 Appeal and the 2010 Appeal are appeals against decisions by HMRC that FCC was not entitled to deduct input tax incurred on various transactions.

5. The 2007 Appeal was against HMRC's decision, dated 8 June 2007, to refuse FCC's claim to deduct input tax of £369,136.25 incurred by FCC in VAT accounting period 03/06. The input tax was VAT shown on three invoices issued to FCC by Future Communications Limited ("Future Communications"). The invoices were for supplies of Samsung Serene mobile phones to FCC. HMRC considered that the mobile phones did not exist. If the phones did not exist then the invoices held by FCC did not comply with regulation 14(1)(g) and/or (h) of the Value Added Tax Regulations 1995. If the invoices did not comply with the VAT Regulations then FCC was not entitled to deduct the input tax shown on them.

6. At different times in 2008 and 2009, HMRC served seven statements from six witnesses in relation to the 2007 Appeal. The witness statements contained evidence that HMRC relied on to show that, on the balance of probabilities, the Samsung Serene mobile phones did not exist at all or, at least, in the quantities shown. Sami El Homsy, the sole director of FCC, made a witness statement in response. Mr El

Homsy's evidence was that the phones shown on the invoices did exist, he had seen some of them and they had been inspected.

7. The 2010 Appeal concerned two decisions, dated 1 and 7 April 2010, by which HMRC refused FCC's claims to deduct input tax of £332,056.11 incurred on purchases of mobile phones in 56 transactions in VAT accounting periods 06/06 and 09/06. The grounds for the refusal of the claims were that HMRC considered that FCC, through the controlling mind of its sole director Mr El Homsy, knew that the transactions were connected with the fraudulent evasion of VAT or, alternatively, should have known that they were so connected. It is settled law that, where a taxable person knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, that taxable person loses the right to deduct input tax on those goods (see Joined Cases C-439/04 and C-440/04 *Kittel v Belgian State* and *Belgian State v Recolta Recycling SPRL* [2006] ECR I-6161, [2008] STC 1537). Six of the 56 transactions in the 2010 Appeal involved Future Communications. In five of the six transactions, Future Communications was the supplier of the mobile phones to FCC. Those mobile phones were not Samsung Serenes.

8. On 13 February 2013, HMRC made an application to the FTT for three directions. One direction, relating to the service of an abridged version of one of the witness statements previously served in the 2007 Appeal, was agreed. The remaining directions were for the 2007 Appeal and the 2010 Appeal to be consolidated and for evidence in the 2007 Appeal to be admitted in the 2010 Appeal. Those directions were not agreed and the application was listed for hearing. The hearing before Judge Mosedale took place on 26 April 2013. HMRC submitted that the evidence in in the 2007 Appeal might lead a tribunal hearing the 2010 Appeal to conclude that the FCC's witnesses, principally Mr El Homsy, lacked credibility. FCC submitted that the evidence in the earlier appeal was not relevant to the later one as the appeals concerned different periods and transactions. Judge Mosedale released the Decision, granting HMRC's applications, some two weeks later.

The FTT's case management powers

9. The FTT has wide case management powers under rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules"). Rule 5 provides, in relevant part, as follows:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
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> (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 -
>
> …

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues …;

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

(d) … require a party … to provide documents, information or submissions to the Tribunal or a party."

10. Rule 15 of the FTT Rules deals with evidence and submissions and provides that

"(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;

…

(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 practice direction; or

(iii) it would otherwise be unfair to admit the evidence."

11. The FTT's powers under these rules must be exercised so as to give effect to the overriding objective which is set out in rule 2 of the FTT Rules, as follows:

"(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."

The Decision

12. As suggested by FCC and contrary to the submission of HMRC, Judge Mosedale considered whether the evidence that had been served in the 2007 Appeal

should be admitted in the 2010 Appeal before deciding whether to consolidate the two appeals.

13. In [17] of the Decision, Judge Mosedale accepted that the evidence in the 2007 Appeal was relevant to the 2010 Appeal because, if accepted, it would adversely affect the credibility of FCC's witnesses, principally Mr El Homsy.

14. At [19], Judge Mosedale observed that it was no part of HMRC's case in the 2007 Appeal that FCC knew or ought to have known that the Samsung Serene phones did not exist. At [21], she further observed that HMRC had not sought to amend their statement of case in either the 2007 Appeal or the 2010 Appeal. Judge Mosedale held that the evidence in the 2007 Appeal would not be relevant to and could not be admitted in the 2010 Appeal

> "… unless HMRC made clear to the appellant what the new allegation is: without an allegation in the [Second Appeal] that (a) the goods [in the 2007 Appeal] did not exist and (b) the appellant knew or ought to have known the goods [in the 2007 Appeal] did not exist …"

15. Judge Mosedale held, in [22], that HMRC should have applied to amend their statement of case in the 2010 Appeal but declined to dismiss HMRC's application on the "technicality" of HMRC's failure to make such an application. Judge Mosedale decided to treat HMRC's application as an application both to amend the statement of case in the 2010 Appeal and to admit the evidence from the 2007 Appeal in the 2010 Appeal. She considered that, if she were to dismiss the application, HMRC would probably make a further application to amend their statement of case. She reasoned that her approach would save time and avoid delay. She then considered whether to grant the application.

16. At [24], Judge Mosedale noted that HMRC had not made the application until two and a half years after filing their statement of case in the 2010 Appeal and after the evidence had closed (on 27 July 2012). FCC objected to the new evidence being admitted on the ground that it would delay the hearing. Although no date had been set for the hearing of the 2010 Appeal, FCC stated that it was ready to be listed. Judge Mosedale did not accept this: she found that, even if HMRC had made the application promptly, the 2010 Appeal would still not have been ready to be listed because FCC was considering making an application for disclosure of information about the IMEI (International Mobile Equipment Identification) numbers of the mobile phones in the 2007 Appeal. She considered that the information would be relevant to both appeals and the application would delay them being listed. That, of course, assumed that HMRC's application to admit evidence from the 2007 Appeal in the 2010 Appeal would have been granted.

17. Judge Mosedale also considered, at [30]-[31], that admitting the evidence would not cause any "procedural prejudice" to FCC because the evidence from the 2007 Appeal was already well known to FCC, who had provided evidence in response to it. She concluded that granting the application did not mean that the hearing of the 2010 Appeal, which had not been listed, need be delayed.

18. Judge Mosedale then considered whether the delay in making the application was, by itself, sufficient to exclude the evidence. She reviewed various case law authorities on the effect of delay on applications to admit evidence or amended pleadings. At [42]-[48] of the Decision, she set out her reasons and decision as follows:

> "42. My conclusion is that delay in making the application is not by itself sufficient to exclude evidence or a new allegation. While I consider that the Tribunal has an interest in good case management and encouraging parties to proactively pursue their cases and make relevant applications promptly, the tribunal has no interest in simply punishing a party for failing to act in this manner. This does not mean that there is no incentive on a party to act promptly. While the Tribunal should not administer sanctions simply for a failure to act promptly, it must and will apply sanctions (such as refusing an application) where the failure to act promptly leads to procedural prejudice to the other party.
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> …
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> 44. It is, as so many things are, a question of degree. The longer the delay, the more likely there will be procedural prejudice. The greater the procedural prejudice, the less likely it will be admitted. It is also clear that the importance of the evidence to the person seeking to rely on it must be weighed in the balance. Evidence critical to one party's case is more likely to be admitted than evidence of only peripheral relevance.
>
> 45. I accept that HMRC have had three years to realise the relevance of this evidence to their case in the [Second Appeal], but they have done nothing until now: the delay is not explained or excused and it appears simply it was a failure to appreciate the potential relevance of the [First Appeal] to the [Second Appeal].
>
> 46. It was not suggested to me that the evidence is critical to HMRC's case, and that without it they do not consider they can make out their allegation of knowing involvement in fraud. On the other hand, the allegation is clearly potentially significant to their case. It is of more than peripheral relevance. HMRC's case may be significantly prejudiced if it is not admitted.
>
> 47. The new evidence may be prejudicial to the appellant's case. They do not want it in. But that is not the issue. The issue is whether there is procedural prejudice: will the appellant be handicapped by the allegation being made now rather than when it should have been made in the Statement of Case? I have determined that I cannot see, for the reasons given above, any significant procedural prejudicial to the appellant for the allegation to be made, and the evidence to be admitted, now. And as I have also determined that the evidence and allegation may potentially be of real help to the Tribunal in reaching its conclusions, and that HMRC's delay by itself is not a reason to refuse to admit it, my decision on balance is to admit it.
>
> 48. My decision is therefore that it is admitted as long as HMRC formally notify the appellant within 7 days of the additional allegation they make in respect of it, and as outlined at the hearing before me and

> set out in paragraph 21 above. And it follows that all evidence served by the appellant in response to the 7 witness statements in the [First Appeal] now admitted (and including evidence in response to Mrs Clifford's original, long witness statement) is also admitted in evidence in the [Second Appeal]."

19. Judge Mosedale then considered whether the 2007 Appeal and the 2010 Appeal should be consolidated. She took account of the factors in the decision of Turner J in *Maharani Restaurant v HMRC* [1999] STC 295. *Maharani Restaurant* was an appeal against a direction that two VAT appeals should be heard together. The case pre-dated the FTT Rules. The direction was made under rule 19(3) of the Value Added Tax Tribunals Rules 1986 which provided that the VAT Tribunal could make any direction as to the conduct of the appeal which it thought necessary or expedient to ensure the speedy and just determination of the appeal.

20. In *Maharani Restaurant*, Turner J referred to a number of factors that should properly be considered in deciding whether to exercise the power to consolidate separate proceedings. These include

(1) commonality of appellants;

(2) commonality of witnesses;

(3) degree of overlap of evidence;

(4) risk of prejudice to the appellants in relation to the presentation of similar fact evidence;

(5) avoiding the need for witnesses to give evidence more than once (and the risk that their evidence on the same point might be accepted in one appeal but not in another);

(6) cost of holding more than one appeal or single consolidated appeal;

(7) length of hearing required for separate appeals and for single consolidated appeal; and

(8) listing and delay.

21. Judge Mosedale set out her conclusion on the application to consolidate the two appeals at [74]-[75] of the Decision:

> "74. Avoiding inconsistent findings on factual matters now central to both appeals because of my decision to admit the evidence, saving time and costs, and convenience to witnesses outweigh, in my view, the increase in complexity in having a joined hearing and strongly indicate that the appeals should be consolidated. I would be inclined to this view even if that resulted in the [Second Appeal] being delayed until the [First Appeal] were ready: but as I have explained, because of my decision to admit the new evidence, it does not appear that the [Second Appeal] is ready to be listed as the appellant's proposed disclosure application will relate to both.
>
> 75. My decision is … to consolidate the appeals."

22. In [76], Judge Mosedale noted that she might have reached a different decision on consolidation if she had not allowed the evidence in the 2007 Appeal to be admitted in the 2010 Appeal.

Grounds of appeal

23. FCC contended that Judge Mosedale had erred in law in directing HMRC to amend the statement of case in the 2010 Appeal and allowing their application that evidence from the 2007 Appeal should be admitted in the 2010 Appeal. Specifically, FCC submitted that Judge Mosedale made the following errors of law, namely that she:

(1) failed to have proper regard to the fact that HMRC had not shown that they would suffer sufficient prejudice in the 2010 Appeal, if the 2007 Appeal evidence was not admitted;

(2) had regard to a non-existent allegation in finding that the evidence in the 2007 Appeal was relevant to the 2010 Appeal;

(3) failed to have proper regard to the prejudice that would be caused to FCC;

(4) took into account case law which was not relevant which led her to conclude that lateness was not, in itself, a reason not to admit the evidence;

(5) When considering relevant case law, made conclusions that no reasonable tribunal would have made, namely that:

(a) a late application to serve evidence made through 'oversight' is more deserving than one that is made late and with deliberate lack of forewarning;

(b) FCC would not suffer 'actual prejudice' through HMRC's late application to serve evidence;

(c) the new evidence (even if the statement of case was amended) was relevant enough to outweigh the lateness factor;

(d) HMRC were not required to justify their late application to amend the statement of case in the 2010 Appeal unless it would 'lead to procedural prejudice to the other party, such as the loss of a hearing date or an inability to prepare for the new evidence properly'; and

(6) failed to give proper effect to the Jackson reforms and the new Civil Procedure Rules ("CPR") which came into force on 1 April 2013.

24. In relation to the decision to consolidate the 2007 Appeal and the 2010 Appeal, FCC submitted that Judge Mosedale erred in law by basing her decision to consolidate the appeals solely or predominantly on having admitted the 2007 Appeal evidence in the 2010 Appeal. Mr Aseel Rashid who represented FCC accepted, rightly in our view, that the outcome of this challenge depended on the outcome of FCC's appeal in relation to the decision to admit the evidence. Mr Rashid pointed out that Judge Mosedale had indicated, at [76], that she might have reached a different conclusion on consolidation if she had not allowed the 2007 Appeal evidence to be

admitted. He also accepted that if the evidence from the 2007 Appeal is evidence in the 2010 Appeal then the two appeals should be consolidated to save costs and time as well as to avoid the risk of inconsistent findings.

Discussion

Approach to appeals against case management decisions

25. The hearing before us was not a re-hearing of the application. It was an appeal on a point of law. The issue for us is not whether we would have made the same decisions and directions as Judge Mosedale. The only issue is whether Judge Mosedale made any error of law. In *HMRC v Ingenious Games LLP and others* [2014] UKUT 0062 (TCC), Sales J stated as follows in [56]:

> "The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *Walbrook Trustee (Jersey) Ltd & Ors v Fattal & Ors* [2008] EWCA Civ 427, [33]; *Atlantic Electronics Ltd v HM Revenue and Customs Commissioners* [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: *Goldman Sachs International v HM Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [23]-[24]."

26. We gratefully adopt Sales J's description of the proper approach to an appeal against a case management decision and apply it in this case. Accordingly, provided that we are satisfied that Judge Mosedale applied the correct principles, took into account all relevant matters and did not take account of any irrelevant matters then we will not allow this appeal unless we consider that her decision was so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the FTT in matters of case management.

Prejudice to HMRC

27. FCC submitted that Judge Mosedale did not have proper regard to the fact that HMRC had not established that they would suffer sufficient prejudice if the evidence from the 2007 Appeal was not admitted in the 2010 Appeal. FCC relied on the statement, in [46] of the Decision, that it had not been suggested that the evidence was critical to HMRC's case or that without it they could not make out their allegation in the 2010 Appeal of knowing involvement in fraud. In making this submission, it seems to us that FCC failed to acknowledge that Judge Mosedale went on to say later in the same paragraph that the allegation that the phones in the 2007 Appeal did not exist was clearly potentially significant to their case in the 2010 Appeal and that

HMRC's case might be significantly prejudiced if it was not admitted. We consider that FCC has not shown that Judge Mosedale did not have proper regard to the issue of prejudice to HMRC. It is, moreover, clear that, contrary to FCC's submission, she found that HMRC's case in the 2010 Appeal could be significantly prejudiced if the application was not granted.

Non-existent allegation

28. FCC contended that Judge Mosedale exceeded her discretion in requiring HMRC to amend their statement of case in the 2010 Appeal to include an allegation that FCC knew or ought to have known that the phones in the 2007 Appeal did not exist when HMRC had never sought to amend their statement of case. In the absence of an amendment, the allegation did not exist in either appeal and Judge Mosedale had erred in considering it. FCC submitted that, as she recognised in [21], if the allegation is left out of account, the evidence in the 2007 Appeal had no relevance in the 2010 Appeal and should not have been admitted.

29. We do not accept the premise on which this submission is based. The FTT has wide powers of case management under the FTT Rules. Specifically, rule 5(3)(b) gives the FTT power to permit or require a party to amend a document. There is nothing to suggest that the power is only exercisable where a party makes an application for a direction. It follows that we reject the submission that Judge Mosedale exceeded her discretion in requiring HMRC to amend their statement of case in the 2010 Appeal. It further follows that, having decided to require HMRC to make the amendment, she was correct to have regard to the allegation that FCC knew or ought to have known that the phones in the 2007 Appeal did not exist when assessing the relevance of that evidence in the 2010 Appeal.

Prejudice to FCC

30. FCC submitted that Judge Mosedale failed to have proper regard to the prejudice caused to FCC. FCC submitted that the prejudice arises from the fact that, if the Decision stands, the case against it has changed radically. The 2007 Appeal, which FCC has been running for seven years, is effectively scrapped and replaced with a quasi-criminal trial alleging that FCC entered into 59 transactions that it knew or ought to have known were connected with fraud. FCC contended that the Decision had re-engineered HMRC's approach to the case against it and the case was now much more complex. FCC also argued that thousands of pounds that it had spent over the past seven years had been wasted and it speculated that it would now cost thousands of pounds more to fight the "re-engineered case". FCC said this was not merely a matter of procedural prejudice but of an injustice.

31. We do not accept that Judge Mosedale did not consider the possible prejudice to FCC of admitting the 2007 Appeal evidence into the 2010 Appeal. Judge Mosedale discussed the possible prejudice to FCC caused by the delay at [24]-[30] and [47] and considered the risk of a complex hearing at [58]-[64]. As she observed at [30], the evidence was already well known to FCC at the time of the application as HMRC had served it some years previously and FCC had already responded to it. The legal and

evidential issues in the 2007 Appeal and the 2010 Appeal remain the same as before the Decision. The only change was that, following the Decision, the evidence in the 2007 Appeal is now also evidence in the 2010 Appeal. Although the issues in the two appeals are different, eg the allegation of knowledge of a connection with fraud only relates to the 2010 Appeal, we agree with Judge Mosedale when she observed, at [40], that it is well within the capabilities of the tribunal to keep the issues in mind and consider them separately.

Irrelevant case law

32. FCC contended that Judge Mosedale's conclusion that delay was not enough on its own to justify refusing HMRC's application was one that no reasonable tribunal could have reached. FCC argued that Judge Mosedale reached this conclusion because she wrongly considered irrelevant case law. This ground refers to the discussion at [32]-[47] of whether the effect of delay is sufficient by itself to refuse to allow the statement of case to be amended and the evidence to be admitted. Judge Mosedale discussed two cases which had been cited to her, namely *Mobile Export 365 Ltd & Anor v HMRC* [2007] EWHC 1737 (Ch) and *The Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties and Nottingham City Council* [2011] EWHC 1918 (Ch), [2011] 1 WLR 3235. In *Notts Fire Authority*, Peter Smith J discussed two decisions of the Court of Appeal, namely *Cobbold v London Borough Of Greenwich* [1999] EWCA Civ 2074 and *Swain-Mason & Ors v Mills & Reeve (a firm)* [2011] EWCA Civ 14, [2011] 1 WLR 2735, which Judge Mosedale also discussed. Finally, she considered a decision of the Upper Tribunal, *HMRC v Atlantic Electronics Limited* [2012] UKUT 423 (TCC), which had not been cited to her.

33. Essentially, FCC argued that Judge Mosedale had relied on cases that were not relevant because they were factually different from the 2010 Appeal. FCC submitted that *Mobile Export 365* was irrelevant because it concerned sequential exchange of witness statements where the delay in serving the statements was caused by the other party and those factors were not present in the 2010 Appeal. FCC submitted that *Notts Fire Authority* was irrelevant because it concerned an application to rely on late evidence that was vital to a party's case and it could not be said that the 2007 Appeal evidence was vital to HMRC's case in the 2010 Appeal. FCC also contended that Judge Mosedale was wrong to consider *Cobbold*, which related to a late application to amend pleadings, because in that case, unlike the 2010 Appeal, the amendment had been notified, by way of unsigned witness statement, over 10 months in advance and accepted by the other party, although later rejected.

34. We can deal with these submissions without going into the detailed facts of each case because Judge Mosedale did not base her decision on the facts of these cases but on the principles derived from them. In [42]-[47], Judge Mosedale gave her reasons for concluding that delay, by itself, is not enough to exclude evidence. She referred to *Atlantic Electronics* and *Swain-Mason* as authority for the proposition that delay combined with procedural prejudice may lead to late evidence being excluded. She then considered the relevance of the evidence, length of delay, the reason (or lack of it) for the delay and the possible prejudice to each party in the context of the facts of

FCC's appeals. Those factors were derived from the cases discussed. The relevance of those factors is not diminished because the facts of the cases differed from the facts of FCC's appeals. We consider that Judge Mosedale correctly identified the relevant factors to be considered in deciding whether the 2007 Appeal evidence should be admitted in the 2010 Appeal. Our view is that Judge Mosedale did not make any error of law in her approach to and application of the case law discussed in the Decision.

35. FCC separately submitted that Judge Mosedale had wrongly preferred *Cobbold* to *Swain-Mason*. This is based on her statement in [39] that Peter Smith J in *Notts Fire Authority* preferred the Court of Appeal's decision in *Cobbold* to its later decision in *Swain-Mason*. On the basis of that statement, FCC contends that she wrongly ascribed primacy to *Cobbold* and *Notts Fire Authority* whereas she should have applied *Swain-Mason*. In our view, this submission is unsustainable. Apart from the reference to Peter Smith J's preference, Judge Mosedale makes no comment and gives no indication that she preferred *Cobbold* to *Swain-Mason*. Indeed, we note that she referred to *Swain-Mason* in her reasons at [42]-[47] and made no reference to *Cobbold*.

Incorrect conclusions on relevant case law

36. FCC further contended that, when considering relevant case law such as *Atlantic Electronics* and *Swain-Mason*, Judge Mosedale reached conclusions that no reasonable tribunal could have reached, namely that:

> (1) a late application to serve evidence made through oversight is more deserving than one that is made late and with deliberate lack of forewarning;
>
> (2) FCC would not suffer actual prejudice through a late application to serve evidence;
>
> (3) the 2007 Appeal evidence was sufficiently relevant to the 2010 Appeal to outweigh the delay;
>
> (4) HMRC were not required to justify their late application to amend the statement of case in the 2010 Appeal unless it would "lead to procedural prejudice to the other party, such as the loss of a hearing date or an inability to prepare for the new evidence properly";

37. In relation to the first point, FCC criticised Judge Mosedale for distinguishing the situation in *Atlantic Electronics* from the facts of HMRC's application in relation to the 2010 Appeal. She observed, in [41], that, in *Atlantic Electronics*, HMRC knew that they were preparing evidence that they would apply to admit late but did not warn the other party whereas, in this case, HMRC simply failed to realise the significance of the 2007 Appeal evidence to the 2010 Appeal ie mere oversight. FCC argued that Judge Mosedale should have reached the same conclusion as the FTT and Upper Tribunal in *Atlantic Electronics*. In our view, this criticism is unfounded. We do not accept that Judge Mosedale concluded that a late application to serve evidence made through oversight is more deserving than one that is made late and with deliberate lack of forewarning. In [41], she observed that delay without good cause is a factor to

be considered, together with prejudice, when considering whether to admit evidence late. We agree with Judge Mosedale that delay (and the reason, if any, for it) is a factor that should be taken into account. The facts of the application in *Atlantic Electronics* were very different from those of this case and there is no reason why Judge Mosedale should have reached the same conclusion on the different facts of this case as the FTT and Upper tribunal did in that case.

38. The second point under this heading is that Judge Mosedale was wrong to conclude that FCC would not suffer actual prejudice through a late application to serve evidence. We reject this criticism. It is clear that Judge Mosedale considered the possible prejudice to FCC. At [30] and [35], she referred to there not being much, if any, procedural prejudice to FCC and, at [47], found that there was no significant procedural prejudice to FCC. These are findings of fact and FCC does not seek to challenge them on the basis of the well-known dicta of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14. In the absence of such a challenge being successfully made out, we cannot disturb Judge Mosedale's conclusion on the facts.

39. FCC's third point is that Judge Mosedale was wrong to conclude that the 2007 Appeal evidence was sufficiently relevant to the 2010 Appeal to outweigh the delay. FCC suggested that she did not apply the observations of Lloyd LJ in *Swain-Mason* that a heavy onus lies on the party seeking to make a very late amendment (or by extension application to admit evidence). That submission ignores the fact that Judge Mosedale quoted the passage at [38] and referred to it in [43] (discussed below). In [44], she discussed the importance of relevance to an application to admit evidence late before concluding, at [46], that the evidence was of more than peripheral relevance to HMRC's case in the 2010 Appeal. As she observed at [44], it is a question of degree. We do not accept that Judge Mosedale made any error in relation to this issue. She clearly weighed the delay against the relevance of the evidence. We could only interfere with her decision on this point if it was plainly wrong. In fact, we regard it as plainly correct.

40. FCC's final point under this head is that Judge Mosedale erred in not requiring HMRC to justify the delay in applying to amend the statement of case in the 2010 Appeal unless it would lead to procedural prejudice to the other party, such as the loss of a hearing date or an inability to prepare for the new evidence properly. This refers to a comment in [43] where Judge Mosedale, having referred to the comment by Lloyd LJ in *Swain-Mason* that a heavy onus lies on the party seeking to make a very late amendment, stated:

> "a very late amendment needs a great deal of justification as it is almost bound to lead to procedural prejudice to the other party, such as the loss of a hearing date or an inability to prepare for the new evidence properly."

It seems to us that she was saying the very opposite of what FCC alleges she said. Her statement occurs in the course of a discussion of what more than the fact of delay is needed to justify deciding that evidence or a new allegation should be excluded. In [46], Judge Mosedale set out the factors that she regarded as justifying the late amendment to the statement of case in the 2010 Appeal, namely that the allegation

was of more than peripheral relevance and HMRC's case could be significantly prejudiced if the evidence was not admitted. Accordingly, she did require HMRC to justify the delay in applying to amend the statement of case in the 2010 Appeal and concluded that they had done so.

Effect of the Jackson reforms

41. FCC submitted that Judge Mosedale did not have sufficient regard to the need to adopt a more robust approach to delay and late applications following the implementation of the recommendations of Sir Rupert Jackson in the new version of the Civil Procedure Rules ("CPR") which came into force on 1 April 2013. FCC acknowledged that Judge Mosedale did not have the benefit of the judgment of the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 on how the courts should approach applications for relief from the consequences of a failure to comply with rules, practice directions and court orders following the coming into force of the new CPR but said that we should consider her decision in the light of that and subsequent cases. In addition to *Mitchell*, FCC relied on the decision of the Court of Appeal in *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 and the decision of the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Limited, Monarch Realisations No 1 PLC (in administration)* [2014] UKUT B1 (TCC).

42. The circumstances of this case are very different to those considered by the Court of Appeal in *Mitchell* and *Durrant* or by the Upper Tribunal in *McCarthy & Stone*. In *Mitchell*, the application under CPR 3.9 was for relief from the sanction for failure to file a costs budget on time. The sanction was clearly set out in the CPR. The Court of Appeal said that where the CPR provides a sanction, the starting point is that it has been properly imposed and complies with the overriding objective of the CPR. The Court found that the defaults were not minor or trivial and there was no good excuse for them. The defaults resulted in an abortive hearing and an adjournment, which had serious consequences for other litigants.

43. *Durrant* was factually closer to the present case. It was an appeal against a decision to grant relief from a sanction for non-compliance with an order requiring service of witness statements by a specified date. The order in *Durrant* was as follows:

> "Defendant do file and serve any witness statements by 4 pm on 12 March 2013. The Defendant may not rely on any witness evidence other than that of witnesses whose statements have been so served."

That order was made in the context of repeated failures to file witness statements on time. The defendant served two witness statements a day late, four two months late and two a few days before trial, when it applied for relief. The Court of Appeal acknowledged that posting the first two witness statements just before the service deadline might be characterised as a trivial non-compliance (and thus excusable under *Mitchell*). However, this had to be weighed against the facts that:

(1) The defendant had failed to comply with the original deadline for service;

(2) The order had specified a sanction for non-compliance; and

(3) The defendant's explanations came nowhere near providing a good reason for non-compliance which was not the result of any unforeseeable event but of incompetence.

44. In *McCarthy & Stone*, HMRC applied, after a time limit had already expired, for an extension of time to serve a notice of appeal on the Upper Tribunal. The Upper Tribunal considered *Mitchell* and *Durrant* and decided that, although the CPR do not apply to tribunals, the Upper Tribunal should adopt the same approach to compliance with rules, directions and orders as the courts that are subject to the CPR. That approach meant that, while having regard to all the circumstances of the case and the need to deal justly with the application, the Upper Tribunal should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UT Rules"), directions and orders than to the other factors. Although the CPR do not apply to tribunals, they are a useful guide, especially when considering procedural matters not covered in detail or at all by the FTT Rules or the UT Rules. Of course, nothing in the CPR takes precedence over specific rules contained in the FTT Rules and the UT Rules.

45. Mr Jonathan Kinnear QC, who appeared with Mr Howard Watkinson, for HMRC, referred us to a recent decision of the Court of Appeal that again considered a decision relating to CPR 3.9. In *Chartwell Estate Agents Ltd v Fergies Properties SA & Anor* [2014] EWCA Civ 506, the parties had failed to comply with a direction for simultaneous exchange of witness statements. When one of the parties applied for an extension of time to lodge witness statements, the other party opposed it. At first instance, the judge found that the default was not trivial and there was no good excuse for it. He also found that there was fault on both sides and that applying the new CPR 3.9 robustly would effectively mean the end of the action, which was too severe so he granted the extension of time.

46. In the Court of Appeal in *Chartwell*, Davis LJ, who gave the only full judgment, described the decision in *Mitchell* as of the utmost importance and repeated the mantra that a tougher and more robust approach is called for but held that the judge was entitled to decide the matter as he did. He held that the judge was required, by CPR 3.9, to consider "all the circumstances of the case" so as to enable him to deal with the application justly. Davis LJ said, at [50], that the "circumstances included the important fact that the trial date would not be lost if relief were granted and a fair trial could still be had; and the fact that no significant extra cost would be occasioned if relief were granted." He referred again to these factors at [58] and, in [59], held that there was no proper basis for interfering with the judge's evaluation of the position and his exercise of discretion. At the end of his judgment, Davis LJ made the following comments on the approach of appellate courts to case management decisions:

> "62. I would also wish to repeat the point emphasised in *Mitchell* that appellate courts will not lightly interfere with a case management decision. Robust and fair case management decisions by first instance

> judges are to be supported. In the present case, Globe J had directed himself correctly. [Counsel for the defendants]'s submission … in essence founded itself on the proposition that the judge had not been robust in the way enjoined by *Mitchell* just because the judge had not found in favour of the defendants and refused relief from sanction. That will not do. There may be cases where, although a judge purports to direct himself in accordance with *Mitchell*, his approach thereafter does not comply with it. But that is not this case. The appellate courts will not interfere if a judge has correctly directed himself, has adopted the correct approach in principle and has taken all the circumstances into account. It is also to be emphasised that the courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature. The objective under CPR 3.9 is to achieve a just result, having regard not simply to the interests of the parties but also to the wider interests of justice. As has been said by the Master of the Rolls (in his 18th lecture), enforcing compliance is not an end in itself. In the well-known words of Lord Justice Bowen: 'The courts do not exist for the sake of discipline'. Such sentiments have not been entirely ousted by CPR 3.9, as to be interpreted and applied in the light of *Mitchell*.
>
> 63. Accordingly, the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted. If parties understand this then at least satellite interlocutory appeals should be avoided and at all events will get no encouragement from the appellate court."

47. We consider that, even without the benefit of *Mitchell*, Judge Mosedale in this case adopted an appropriately robust approach to the application by HMRC. At [42], she anticipated the comments of Davis LJ in [62] of *Chartwell* when she said:

> "While I consider that the Tribunal has an interest in good case management and encouraging parties to proactively pursue their cases and make relevant applications promptly, the tribunal has no interest in simply punishing a party for failing to act in this manner".

That comment does not indicate that Judge Mosedale failed to apply a sufficiently robust approach.

48. Also in [42], Judge Mosedale noted that:

> "While the Tribunal should not administer sanctions simply for a failure to act promptly, it must and will apply sanctions (such as refusing an application) where the failure to act promptly leads to procedural prejudice to the other party"

We would observe that the existence of procedural prejudice to a party is only one circumstance where it would be appropriate for the FTT to impose sanctions and there may be other factors that might lead a tribunal to impose sanctions.

49. In considering whether FCC would suffer any procedural prejudice, Judge Mosedale had regard to the same factors as the judge at first instance in *Chartwell*, namely the hearing date was not at issue as neither appeal had been or was ready to be listed and granting the application would not make the trial overly complex or result in any significant extra cost. Adopting the language of Davis LJ, we consider that Judge Mosedale adopted the correct approach in principle and considered all the circumstances before making a robust and fair case management decision, which we support.

Disposition

50. For the reasons set out above, we conclude that there was no error of law in Judge Mosedale's decision to direct that HMRC should amend the statement of case in the 2010 Appeal, the evidence from the 2007 Appeal should be admitted as evidence in the 2010 Appeal and the two appeals should be consolidated. Accordingly, we dismiss FCC's appeal against the Decision.

Greg Sinfield

Judge of the Upper Tribunal

John Clark

Judge of the Upper Tribunal

Release date: 28 May 2014