[2014] UKUT 0496 (TCC)

Tribunal ref: FTC/114/2014

PROCEDURE — HMRC barred from further participation — F-tT rule 8 — whether F-tT applied correct principles — no — whether F-tT's decision outside reasonable exercise of judicial discretion — yes — decision set aside and remade — no barring order

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

BPP HOLDINGS LIMITED
BPP LEARNING MEDIA LIMITED
BPP UNIVERSITY COLLEGE OF PROFESSIONAL STUDIES LIMITED
Respondents

Tribunal: Judge Colin Bishopp

Sitting in public in London on 14 October 2014

Miss Jessica Simor QC and Mr Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants

Mr Sam Grodzinski QC, instructed by Simmons & Simmons LLP, for the respondents

DECISION

Introduction

1. The respondent taxpayers, to whom I shall refer collectively as BPP, make supplies of education and of books and other materials which are pertinent to the supplies of education. Some of BPP's supplies of education are exempt but those relevant to the dispute between them and the present appellants, HMRC, are standard-rated for VAT purposes; the parties disagree about the correct tax treatment of the supplies of books and other materials. HMRC say they are standard-rated, BPP that they are zero-rated because they come within Group 3 of Sch 8 to the Value Added Tax Act 1994 ("VATA").

2. Until late 2006 a company within the BPP group made what was accepted by BPP to have been a single supply of standard-rated education and books to the group's students. Following a corporate reconstruction two separate companies, within the BPP trading group but in different VAT groups, made the supplies of, respectively, education and books. BPP took the view that the supplies of books were now zero-rated, and did not account for VAT on those supplies. HMRC maintained that the change in the manner of supply made no difference to the VAT treatment, and in the alternative that the arrangements into which the BPP group had entered following the 2006 changes were abusive in the sense developed by the European Court of Justice in *Halifax plc and others v Revenue and Customs Commissioners* (Case C-255/02) [2006] STC 919. On 29 November 2102 they issued two assessments for the VAT for which they maintained BPP should have accounted during the period following the change in the manner the supplies were made.

3. In the meantime, the relevant law was amended when Notes (2) and (3) to Group 3 of Sch 8 to VATA were introduced, with effect from 19 July 2011, by s 75 of the Finance Act 2011. The significance of that amendment, HMRC say, is that if there was any doubt about the tax treatment of the supplies before that date it was now laid to rest, and the supplies of books and other materials made by companies within the BPP group on or after 19 July 2011 were clearly standard-rated. They made a decision to that effect which is set out in a letter of 6 December 2012. BPP had, in fact, been standard-rating the supplies of books since July 2011, and the decision was prompted by an approach to HMRC in which BPP contended that s 75 did not, after all, apply to those supplies. A claim for repayment of the disputed VAT has since been made.

4. There had been extensive correspondence and some discussions between the parties in the period leading up to the making of the assessments and the decision, requests by BPP for review and letters from HMRC following the requested reviews. In the course of the correspondence HMRC explained their perception of the facts relevant to BPP's supplies, a perception which changed in some respects over time, as well as their interpretation of the law.

5. The two assessments and the decision were appealed to the Tax Chamber of the First-tier Tribunal ("the F-tT") in time, but by way of three separate appeals. A direction was, however, made that the appeals should proceed together and that HMRC should serve a single statement of case by 2 October 2013. The statement of case was in fact served on 21 October, accompanied by a request for an

extension of time. It seems that there was no direction formally extending time, but the application was not opposed by BPP. BPP did, however, take the view that the statement of case did not adequately set out HMRC's position, and on 11 November 2013 BPP sent what was termed a request for further information to HMRC, at the same time seeking a response within seven days. Although, as I shall explain, I agree that the statement of case fell short of what could reasonably be expected and that the request was justified that was, in my view, an excessively short time-scale. HMRC appear to have accepted that the requested information should be supplied but prevaricated about the time within which that could be done, and on 22 November BPP applied to the F-tT for a direction that the information should be supplied within 14 days of the making of the direction, and that in default HMRC should be barred from further participation in the proceedings in accordance with rule 8(1) and (7) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to which I come below. All references below to rules are to those rules, unless otherwise indicated.

6. The application came before Judge Hellier on 9 January 2014. By this time, the parties had agreed that the information should be provided by 31 January, but they did not agree upon the imposition of the automatic bar in the event of default for which BPP had applied; HMRC resisted the making of any direction which would come into effect upon default. The relevant part of the direction made by Judge Hellier, it seems as a compromise, was in these terms:

> "UPON the Respondents having agreed to provide by 31 January 2014 replies to each of the questions identified in the Appellants' request for further information dated 11 November 2013;
>
> And UPON hearing Counsel for the parties, the following Directions are made:
>
> 1. If the Respondents fail to provide replies to each of the questions identified in the Appellants' Request for Further Information by 31 January 2014, the Respondents may be barred from taking further part in the proceedings …."

7. The direction went on to impose a timetable for the future conduct of the appeals, leading to a hearing which was fixed, in March, to start on 17 November 2014.

8. As I have said, BPP had sought a direction in accordance with rule 8(1), which provides for an automatic striking out of the proceedings in the event that the party concerned fails to comply with a direction. Instead, Judge Hellier made his direction in a form which, if breached, would engage rule 8(3), which provides that:

> "The Tribunal may strike out the whole or 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."

9. Striking out the proceedings is not, of course, an appropriate remedy if it is a respondent who is at fault, and rule 8(7)(a) caters for that eventuality:

> "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 ….”

10. On 31 January, the last day for compliance, HMRC served a document which, they said, met the terms of the direction. BPP disagreed, and on 14 March they issued an application for a direction that Judge Hellier’s earlier direction should be enforced, by the imposition of a barring order.

11. On 24 April 2014 HMRC informed BPP that they were withdrawing the two assessments, following the decision of the F-tT in the similar case of *Kumon Educational UK Company Limited and another v HMRC* [2014] UKFTT 109 (TC). The December 2012 decision, however, was not withdrawn, and the appeal against it has continued. HMRC asked the F-tT, when they informed it of the withdrawal of the assessments, to stay the appeals for a month, without giving a reason; BPP said they did not see the need for any stay but would agree to seven days. HMRC then said they had suggested the stay because they thought BPP wanted time to reflect; and when BPP said they needed no time to reflect HMRC said they wanted the stay anyway, though again without explaining why. There was a suggestion in argument before me that BPP’s actions had confused HMRC and led them into late service of the disclosure statement for which Judge Hellier’s direction provided, countered by a contention that any confusion HMRC had suffered had been brought on by their own conduct. I do not think there is anything of real significance in this episode in the context of the matter before me, since it has nothing to do with the failure to provide the requested information, but I shall have some observations to make about it later.

12. The application for a barring order was not rendered otiose by the withdrawal of the assessments, and BPP pursued it. It came before Judge Mosedale on 23 June 2014, and in a decision released on 1 July she granted the order BPP had requested. On 25 July HMRC applied for a direction lifting the barring order—a direction the F-tT is able to make by virtue of rule 8(5)—and for permission to appeal. That application came before Judge Herrington on 12 September.

13. Judge Herrington declined to lift the barring order, taking the view that it was not permissible to adopt that course unless one of two conditions is satisfied: that the judge making the direction sought to be changed was plainly in error, in overlooking or being ignorant of a material fact or a clearly relevant legislative provision or judicial authority; or there has been a material change of circumstance (whether of fact or in the interpretation of the law by a higher court or tribunal) since the direction was made. He took a similar view about HMRC’s alternative argument that he should apply rule 41, which confers a power of review. There is no appeal before me against Judge Herrington’s refusal to intervene, but I think it appropriate to record that I entirely agree with his approach; neither rule 8(5) nor rule 41 is intended to be used as a substitute for an appeal. Judge Herrington did, however, give permission to appeal against Judge Mosedale’s direction, and it is that appeal which is before me.

14. Miss Jessica Simor QC, appearing for HMRC with Mr Sarabjit Singh, accepted that the statement of case served in October 2013 was insufficient, that the reply to the request for information served in January 2014 did not address its

deficiencies adequately, and that HMRC did not fully remedy its default until the service of Mr Singh's skeleton argument for the hearing before Judge Mosedale; Miss Simor did not appear before her. Mr Sam Grodzinski QC, who appeared for BPP both before Judge Mosedale and before me, agreed that the skeleton argument did set out HMRC's case in sufficient detail to represent compliance with Judge Hellier's direction, though he did not accept that its doing so cured HMRC's earlier default. He also pointed out that HMRC had not made any attempt to make good the deficiencies in the statement of case or the reply when faced with BPP's application, and had not addressed the matter at all until Mr Singh's skeleton argument was served.

Judge Mosedale's decision

15. Judge Mosedale set out, in rather more detail than I have done, the background to the dispute between the parties, recording that all that remained in issue was the VAT treatment of BPP's supplies following the legislative amendment of July 2011. She described the procedural steps which had taken place, mentioning the lateness of the statement of case and of the disclosure statement. She returned to those failings at [82]:

> "While none of these other delays are particularly significant, HMRC does not appear in this appeal to have appreciated the importance of adhering to directions."

16. At [16] to [32] Judge Mosedale described the shortcomings in the statement of case and the document served in response to Judge Hellier's direction, as she perceived them. As it was accepted before me that her criticism of them was justified I can deal with this part of her decision shortly. The essence of the criticism is that the part of the statement of case which was devoted to the appeal against the decision relating to the post-July 2011 position ran to only three paragraphs, which referred the reader to the arrangements described in a letter of 29 November 2012 which HMRC had sent to BPP with the two assessments, and set out a rather bare outline of HMRC's view of the relevant law. One of the three paragraphs has since been abandoned.

17. BPP's position, which prompted the request for information, was that HMRC had not identified the facts on which they relied. Incorporation of the letter of 29 November 2012—which, with its annexes, ran to over 20 pages, and much of which was immaterial to the post-July 2011 position—was insufficient because, although it set out what HMRC understood of the arrangements, it did not identify (as Judge Mosedale agreed) those facts on which HMRC relied in order to support their argument that the relevant supplies were standard-rated. The information which BPP sought, relevant to the extant appeal, was set out at paragraph 16 of the request, and directed to contentions made in one of the paragraphs of the statement of case which related to the post-July 2011 supplies. It was in these terms:

> "HMRC are requested to identify, with the same degree of particularity as will be relied upon at the hearing of these appeals, each and every matter on which they rely in support of their argument that:
>
> a. 'There is a single composite supply of standard rated education services'.

b. The supply of printed matter by BPP LM is 'connected with' the supply of education services by BPPH, within the meaning of Notes 2 and 3 to Group 3, Schedule 8 of the VAT Act 1994 (as amended by s 75 of the Finance Act 2011)."

18. BPP LM and BPPH are acronyms for, respectively, the second and first of the respondents. There was no modification to the form of that request before it was incorporated in Judge Hellier's direction.

19. Judge Mosedale then described the terms of the reply served on 31 January 2014, which began with these paragraphs:

"1 Rule 25(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") requires a Statement of Case to "*set out the respondent's position in relation to the case*".

2 Contrary to the Appellants' apparent understanding in their request for further information, there is no obligation on the Respondents under the Rules or elsewhere to set out in their Statement of Case, or in a reply to a request for further information concerning that Statement of Case, every fact, matter and submission they will rely upon at the hearing of the appeals. Indeed such a task is impossible, given that matters may emerge from the Appellants' disclosure and witness evidence and future tribunal/court decisions that the Respondents will seek to rely upon at the hearing.

3 The Respondent's Statement of Case already sets out their position in relation to the Appellants' case. In this reply, the Respondents will elaborate upon that position in response to the Appellants' request for further information, but they do not accept that at the hearing of these appeals they will be confined to relying only on those facts, matters and submissions set out in this reply …."

20. The reply went on to deal with matters relevant to the appeals against the assessments and then turned to paragraph 16 of the request. Judge Mosedale put it this way:

"[30] Paragraph 21 contained a reply to [16(a)]. [16(a)] related to HMRC's case that there was a single composite supply post 18 July 2011 and HMRC's reply referred the reader to HMRC's reply to question [10(a)(i)]. That question had dealt with HMRC's case that there was a single composite supply pre 19 July 2011. As the SOC had done, it referred the reader to the letter of 29 November 2012. It also contained a few paragraphs which dealt with HMRC's view that the facts established that there was a tripartite arrangement and that [BPPH] acted as agent for [BPP LM], although it did not state on what primary facts it relied in support of these propositions.

[31] This reply is now (largely) irrelevant as Mr Singh informed the appellant that HMRC no longer pursue this part of the decision. In other words, of the entire SOC the only element that remains outstanding is HMRC's case that the post July 2011 supplies were caught by the amendments to Group 3 introduced by s 75 FA 11. And that was [16(b)] of the Request.

[32] Paragraphs 22-24 contained a reply to [16(b)]. Paragraphs 22-23 only set out in full Notes 2 & 3. The Reply was in §24. It said:

> 'The supply of printed matter by LM is "connected with" the supply of education services by [BPPH] within the meaning of Notes 2 and 3 because if those supplies had been made by a single supplier, they would have been treated as a single supply of services and that single supply would have been a taxable supply.'"

21. At [37] Judge Mosedale recorded Mr Grodzinski's two core complaints about the reply:

> "• In terms the Reply stated that HMRC would not list all the facts and matters that HMRC at that time intended to rely on at the hearing;
>
> • The Reply actually failed to state any [of] the facts on which HMRC at that time intended to rely at the hearing in respect of the one outstanding live issue remaining between the parties."

22. She rejected the first complaint in part, on the basis that the opening passage of the reply should be taken merely to contain a description of what a statement of case should contain, in order to comply with rule 25, adding that it was correct that HMRC could not be expected to set out facts and matters of which they were not then aware but which might come to their notice later, and that paragraph 3 did not amount to an overt refusal to comply with Judge Hellier's direction. However, she did find that the professed intention to "elaborate", contained in paragraph 3, amounted to an indication that HMRC considered they could legitimately provide something less than Judge Hellier had directed and that, to this extent, the complaint was well founded. She then went on to observe at [42], by reference to the decision of the Court of Appeal in *Fearis v Davis* [1989] 1 Fleet Street Reports 555, that "where a party consented to provide a reply to a request for further and better particulars then they were required to provide the reply in the agreed terms even if it went further than pleadings would ordinarily require". HMRC had, therefore, to do as the direction required, and could not offer something less because they had thought better of the agreement.

23. Miss Simor did not disagree with that proposition; indeed it is implicit in her acceptance that HMRC had not fully complied with the direction until the service of Mr Singh's skeleton argument that she recognised that only full compliance would suffice. At [54] Judge Mosedale said:

> "I find that the Reply did not comply with the Directions of Judge Hellier. It failed to identify each and every matter on which HMRC intended to rely in support of their argument that the supply of printed matter by [BPP LM] was 'connected with' the supply of education services by [BPPH], within the meaning of Notes 2 and 3. HMRC were in breach of Judge Hellier's directions."

24. Judge Mosedale went on, at [67] to [74], to deal with the fact that compliance had been achieved on service of Mr Singh's skeleton. She recorded, at [72], Mr Singh's argument that what was said in his skeleton could be derived from letters written by HMRC to BPP or their representatives, though she rejected that as an exculpating factor, even if it were true, on the basis that BPP was entitled to know, in a single document, what was the case it had to meet. She concluded that part of her decision with observations about prejudice:

> "[73] There is very clear prejudice to the appellant in not knowing HMRC's case. Litigation is not to be conducted by ambush. The appellant has the

> right to be put in the position so that it can properly prepare its case: it needs to know HMRC's case not only before it gets to the hearing but before it prepares its witness statements and really before it prepares its list of documents.
>
> [74] It accepts that, since Mr Singh's skeleton was served, it now knows HMRC's case, but it knows it very late. So the real prejudice to the appellant is in the delay. Only now can the parties proceed to exchange list[s] of documents and witness statements. While the Directions were issued in January, they were issued to correct a failure in the SOC. The SOC was due on 2 October 2013, so it is in my view fair to say that HMRC's continued failure to make a proper statement of their case has delayed the progress of this appeal by about 8 months."

25. At [85] the judge directed her attention to the fact that, albeit late and in an unsatisfactory manner, the default had been remedied, and said this:

> "[85] … Mr Singh suggested that the Tribunal should only bar HMRC where the breach was incapable of remedy or had not been remedied. I agree with Mr Grodzinski that this is not the right test … Very few breaches are [irremediable] and an inability to bar litigants other than where the breach was [irremediable] would be a licence for any litigant to drag on proceedings for years.
>
> 86. I consider the fact that the breach was [remediable] and was in fact eventually remedied does not preclude the Tribunal from barring HMRC."

26. Judge Mosedale then turned to the reason for HMRC's default, observing at [75] that "I did not leave the hearing with any clear understanding of why this default had occurred". She added, at [78], that it should have been obvious to a lawyer that the reply served in January did not comply with Judge Hellier's direction, and concluded at [80] that "whatever the reason was, it was not one which could even partly justify the default". I am in much the same position: Miss Simor did not offer any explanation for the default and I agree with Judge Mosedale that a competent lawyer, mindful of the fact that HMRC had agreed to provide the information and of Judge Hellier's direction, should have realised that the reply was insufficient. Miss Simor also offered no explanation of HMRC's failure to remedy the insufficiency when BPP's application for a barring order was issued.

27. Judge Mosedale's analysis of the criteria relevant to the exercise of her discretion whether or not to implement the barring order for which Judge Hellier's direction provided is intermingled with her conclusions about the delay, the prejudice to BPP, the reasons (or absence of reasons) for the default and HMRC's overall conduct of the appeals. She began, at [55], from the evident, though unspoken, assumption that some sanction should be applied, and it is apparent from what she said at [83] that she encountered some difficulty in identifying any sanction, short of a barring order, which might be appropriate:

> "Barring is a draconian remedy. The difficulty for the Tribunal is that it is virtually the only sanction that the Tribunal has. No one suggests in this case that costs would be an adequate remedy."

28. At [87] she did, however, mention another possibility:

> "The appellant had applied for a different sanction in the alternative: that was that HMRC be restricted in the hearing to relying on the facts pleaded in its Reply. Mr Grodzinski considered that in effect this would be the same as a barring order as no facts were pleaded in the Reply. I also agree with him that this is an unsatisfactory sanction as it might lead to dispute about the precise scope of what HMRC could do in the hearing."

29. Nevertheless, she recognised at [95] that, even though that course was unsatisfactory and no other appropriate sanction might be identifiable:

> "There is no presumption that I will order HMRC to be barred. I must simply weigh all the factors: if I am in doubt whether barring is appropriate, I think I must err on the side of not barring HMRC."

30. At [55] Judge Mosedale also recorded Mr Grodzinski's argument that she should follow what she described as the *Mitchell* line of authority, a reference to the judgment of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537, [2104] 1 WLR 795. *Mitchell* was concerned with the consequences of the then recent amendment of rule 3.9 of the Civil Procedure Rules ("the CPR"). That rule, as amended, reads as follows:

> "on any application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

31. The claimant in *Mitchell* should have delivered a costs budget by 11 June 2013, seven days before a case management hearing at which it would be considered. It was in fact filed, and only after some prompting, on 17 June. The consequence of the failure of a party to file a costs budget in time was spelt out by CPR rule 3.14: that party's budget should be treated as comprising only the court fees, an amount considerably smaller than the total the budget showed when it was served (and much less than the defendant's budget too). At a later hearing the master refused to grant any relief from that sanction. That refusal was upheld by the Court of Appeal, which explained that the amendment to rule 3.9 heralded (and was intended to ensure) a much stricter approach to a failure to comply with a rule or direction, and that relief from a sanction would be significantly less likely to be granted in the future than had become the norm in the past.

32. Judge Mosedale recorded at [57] Mr Singh's recognition, in the light of the decision of this tribunal in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), [2014] STC 973 ("*McCarthy & Stone*"), that what was said in *Mitchell* was of relevance to tribunal proceedings, though adding at [59] that he did not concede that it could be applied in a case where the imposition of a sanction, rather than relief from a sanction already imposed, was being considered. The judge accepted, at [61], that *Mitchell* was "not strictly relevant" but added that "it contains some useful guidance", and then said this:

> "[62] At §45 of *Mitchell* Lord Dyson said that the court must proceed on the assumption that the sanction was properly applied and the applicant must justify its claim for relief. That guidance is obviously inapplicable to this

situation. No sanction has yet been applied and I must not assume that barring is the appropriate sanction for the breach of the unless order.

[63] But I consider that the guidance in *Mitchell* is relevant in this appeal in so far as it stresses that in consideration of the overriding objective, significant weight should be given to the factors (a) and (b) of CPR 3.9 to ensure fair and just hearings.

[64] What did he mean by this? While Lord Dyson at [36] & [37] said these two factors were of 'paramount importance' and that other circumstances should be 'given less weight' nevertheless, even where CPR 3.9 was concerned, it was clear he did not mean that these two factors would always outweigh other factors as CPR 3.9 itself said all relevant factors must be considered.

[65] I conclude that in considering whether to grant the appellant's application to bar HMRC from further participation in this appeal I must consider all relevant factors. I will include in my consideration factors (a) and (b) from CPR 3.9 and accord them significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly."

33. At [94] the judge recognised that the effect of Judge Hellier's direction was to impose on her, once default had occurred, a discretion whether or not to implement the barring order about which his direction warned, but rejected the argument that his not having imposed an automatic barring order was a relevant consideration. At [95] she observed that "My objective in exercising my discretion is the overriding objective of dealing with cases fairly and justly", then at [96] she said:

> "While the factors identified in *Mitchell* are not directly relevant, for the reasons I have given, I have to give significant weight when considering the overriding objective to the importance of compliance with directions of the tribunal and avoiding unnecessary delays and expense. On any view the delay here is 5 months; in reality it was a delay of 8 months in HMRC giving a proper statement of its case. Moreover the appellant has been put to some expense (various letters and two hearings) in chasing HMRC to deliver a proper statement of its case."

34. At [99] the judge mentioned that the reply had been served in time, even if, as she put it, it "did not come even close to complying with the Unless order." Her overall conclusion was set out at [100]:

> "I have come to the conclusion that HMRC should be barred. There has been unnecessary delay and expense. Tribunal directions have been breached. There is clear prejudice to the appellant in having to wait 8 months for a proper statement of HMRC's case and not barring HMRC would leave the appellant without a remedy for this prejudice. There was no good reason for the delay in stating its case, the failure lasted for a significant period of time, and HMRC were clearly on notice from the first that the appellant did not consider their SOC satisfactory, and clearly on notice from January that a failure to comply might lead to a barring order yet they did not correct the position for another 5 months. Barring is the appropriate sanction."

The parties' arguments in summary

35. Miss Simor acknowledged that it is too well recognised to need authority that, before I could properly allow the appeal, I must be persuaded that Judge

Mosedale's decision is undermined by a material error of law, or that it was one which no judge, properly instructed in the law and taking account of the relevant while disregarding the irrelevant, could reasonably reach. It is not enough that I would myself have reached a different conclusion; she must demonstrate that the decision was one outside the reasonable exercise of judicial discretion.

36. Although she offered no explanation of the default, Miss Simor did point out that HMRC had respected the time limit imposed by Judge Hellier, had provided a reply, even if an inadequate reply, which went some way to meeting the requirements of his direction, and had, albeit belatedly, remedied the default before the application came before the judge. The fact was that there was no impediment to the hearing of the remaining substantive appeal on 17 November—indeed this appeal had been expedited in order that it could proceed on that date—there was no real prejudice to BPP which could not be remedied in costs, and the barring of HMRC from further participation had the effect of handing BPP an unwarranted windfall.

37. She based her case on five primary arguments: that the judge was wrong to apply what was said in *Mitchell* to the application; that she failed properly to apply the overriding objective of rule 2 of the tribunal rules; that, even if the judge was right in her conclusion that CPR rule 3.9 should be applied, by analogy, to proceedings in the tribunal, the further decision of the Court of Appeal in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906 ("*Denton*") showed that her approach was wrong; that there is a public law interest in ensuring that supplies are correctly taxed; and that in any event Judge Mosedale had exercised her discretion unreasonably.

38. Mr Grodzinski argued that although Judge Mosedale had referred to *Mitchell*, she recognised its limited relevance and did not base her decision on it; that Judge Hellier's direction had clearly spelt out the possible consequence of non-compliance and it was impossible for HMRC to argue that enforcement of that possible sanction was contrary to the overriding objective; that this argument held good irrespective of anything said in *Mitchell* or *Denton*; and that there was nothing in the "public law" argument, which had already been rejected by the F-tT in *Compass Contract Services Ltd v HMRC* [2014] UKFTT 403 (TC).

The F-tT's application of Mitchell

39. As Miss Simor and Mr Grodzinski recognised, I have already dealt with the question whether the amended rule 3.9 of the CPR, and what was said in *Mitchell*, apply in the F-tT in my decision in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) in which I disagreed with the reasoning of Judge Sinfield in *McCarthy & Stone*, and declined to follow it. They did not seek to argue the point again, and Mr Grodzinski tacitly accepted that I would continue to prefer my own reasoning, which I do not think it necessary to repeat, or even summarise, here. Judge Mosedale could not have taken either *Denton*, in which judgment was handed down on 4 July, or my decision in *Leeds*, which was released on 29 July, into account. I therefore proceed on the footing that, in so far as she did so, Judge Mosedale was wrong to base her conclusions on rule 3.9 and *Mitchell*. That is not to be taken as a criticism of her; at the time the application came before her she was bound to adopt that course by virtue of what this tribunal had said in *McCarthy & Stone*.

40. I recognise, as did Judge Mosedale, that if one assumes it applies to proceedings in the F-tT at all, *Mitchell* is only indirectly in point, though there is an obviously close parallel between the factors to be considered when determining whether a sanction should be imposed, and those which come under consideration when determining whether relief from a sanction already imposed should be granted. Mr Grodzinski argued strongly that the judge had taken care to put *Mitchell* to one side because it was only of indirect relevance, but in my judgment there can be no real doubt that she did apply what was said in that case, even if by analogy. What she said at [63], [65] at [96], set out above, is consistent only with the conclusion that she attached significant, albeit not paramount, weight to the specific factors identified at paras (a) and (b) of rule 3.9 of the CPR, namely the conduct of litigation with efficiency and at proportionate cost and, perhaps more pertinently in this case, the need to ensure compliance with rules and directions. If I am right in what I said in *Leeds City Council* such an approach is incorrect: there is no warrant, in the F-tT, for giving particular weight to those factors such that they play a disproportionately prominent role in the application of the overriding objective, to which I come shortly.

41. It necessarily follows that, understandable though it is, Judge Mosedale's approach to the question before her was wrong, in a material respect, and her decision cannot stand. Accordingly I must allow the appeal.

42. As I have mentioned, the hearing of the substantive appeal is to begin on 17 November 2014. The parties were anxious to preserve the hearing if the outcome of this appeal made that possible, and to that end I was asked, should I allow the appeal, to re-make the decision and I now proceed to do so.

The overriding objective

43. The overriding objective as it applies in the F-tT is set out at rule 2:

> "(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."

44. It will be observed that although costs and the avoidance of unnecessary delay feature in the rule, nothing is said about ensuring that compliance with the rules and directions is enforced. That is not to say that such compliance is an irrelevant factor. The rules are designed, so far as it is possible to do so, to put the parties on an equal footing and to ensure that appeals before the F-tT may be resolved fairly, at a reasonable speed and without undue expense. Directions are made for the same purpose, and they may, as in this case, operate as a warning to a litigant of the automatic or possible consequence of a failure to comply. They are not, therefore, to be lightly disregarded. But sub-rule (2) merely sets out some of the ways in which the overriding objective, of dealing with cases fairly and justly, is to be achieved. They do not supplant it.

45. It is important too to bear in mind what is said in sub-rule (3)(a): in exercising its powers, the F-tT "must seek to give effect to the overriding objective". Important though compliance is, it cannot trump the requirement that the tribunal must deal with cases fairly and justly.

46. With those factors in mind, I come to the circumstances of the case before me.

The relevant facts

47. The decision which underlies the remaining appeal was made, as I have said, after lengthy correspondence and several meetings between the parties. It is not, I think, unreasonable to conclude that the decision was made after detailed consideration of all the relevant factors as they were known to HMRC. They had the opportunity for further consideration, should that be required, during the review process, which concluded with a letter to BPP's then representatives of 17 June 2013, some six months after the letter setting out the decision. The time within which a taxpayer must serve his notice of appeal is 30 days from the date of the decision, meaning the letter of 17 June: see VATA s 83G. The appeal was made within that time limit, though on the last day. The grounds of appeal added nothing of any substance to what had already passed between the parties.

48. Rule 25(1)(c) provides that a statement of case must be served within 60 days of notification of the appeal by the tribunal to the respondent. In other words, the respondent has twice as long to respond to an appeal as the appellant has to make it. Here, not even that period proved sufficient, as HMRC took more than two weeks longer. In my view the reason given for the delay, that HMRC needed to engage in internal consultation, is difficult if not impossible to understand; the consultation should have been concluded before the decision was made or, failing that, during the review period. In addition, HMRC's failure to apply in advance for an extension of time was lamentable; at the very least it was discourteous to the appellant and the tribunal.

49. It is true that rule 25 demands little of a statement of case: that it identifies the relevant legislative provision, and that it sets out "the respondent's position in relation to the case". Brief though that part of the statement of case which is devoted to the remaining appeal is, it does not seem to me to offend that very

limited requirement. I do, however, agree with both BPP and Judge Mosedale that in the context of a case such as this rather more is to be expected (not least in the performance of HMRC's obligation to help the F-tT further the overriding objective, as rule 2(4)(a) requires) even if rule 25 does not demand it in so many words. HMRC were right to accept that they should provide more, and it is a matter for some surprise that, having agreed to do so, the further information was supplied only in part and in very grudging terms when the reply was served at the end of January. The absence of any explanation of why HMRC dealt with the matter in such an inadequate manner is unhelpful. It does not seem to me that an approach of this kind comes close to what appellants and the F-tT are reasonably entitled to expect. In making that observation I do not overlook the contention that BPP already knew what HMRC's case was, as it had been explored in some detail in extended discussions. There is some merit in that contention although, as I have said, there was some shifting of ground over time and I agree with Judge Mosedale that BPP was entitled to know which of the facts led to HMRC's conclusions, and was correspondingly entitled to have rather more than a general exposition of the facts without discrimination between the relevant and the irrelevant.

50. I mentioned above my view that the time which BPP sought to impose upon HMRC for provision of the additional information was too brief. In my view that approach was unnecessarily aggressive, though I accept that BPP may well have felt somewhat frustrated. It is, of course, right to say that BPP moderated its approach thereafter, and I do not find anything else to criticise in its conduct.

51. It is additionally unfortunate, and again unexplained, that HMRC failed to remedy the deficiencies in the January reply until Mr Singh's skeleton argument was served, even when they knew that the adequacy of what had been supplied was in issue. I am left to speculate whether the failure was due to an inability to understand what is required of a litigant who has agreed to provide particulars, despite a change of mind, as *Fearis v Davis* shows, or is attributable to some other reason. What is clear, however, is that HMRC's attitude was unhelpful. Similarly, HMRC's application for a stay in a supposed gesture to BPP, which BPP neither requested nor desired, demands an explanation yet none, or none which carries any conviction, was forthcoming. The more likely reason, in my view, is that it was HMRC which wanted some time for reflection but were reluctant to admit as much.

Conclusions

52. It will be readily apparent from what has gone before that I find much which is unsatisfactory in HMRC's conduct in this appeal, and little to explain, still less to justify, that conduct. The net result is that there has been a period of several months, whether one counts the starting point as the date on which the statement of case was served, 21 October 2013, or the date on which the further information was served, 31 January 2104, during which BPP can reasonably claim to have been unaware of exactly what HMRC's case was. BPP has been put to unnecessary expense in seeking to ascertain what was being argued against it. On the other hand, as Mr Grodzinski accepted, it has been possible to agree on the relevant facts, and the hearing fixed for 17 November has not been lost. In those

circumstances I detect no reason to think that the fairness of the hearing, or the F-tT's ability to deal with the matters before it, have been compromised.

53. I was referred during the course of argument to numerous authorities dealing with the consequences which should follow if a party to litigation fails to comply with a rule or direction, including a direction imposing an automatic striking out provision (generally referred to as "an 'unless' direction") and with the considerations the court or tribunal should take into account when considering an application for relief from sanctions. Many of them turn on their own facts, a point made by the Court of Appeal in a case on which both parties relied, *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666. Ward LJ, at p 1674, offered some guidance on the principles to be followed but the nature of that guidance, as I read it, emphasises the fact that each case turns on its own circumstances. It is also apparent from what he said that an order striking out a litigant's case, or barring him from further participation, is to be regarded as a last resort.

54. What was said in *Hytec v Coventry* and in most of the other cases to which I was referred, at least so far as it relates to the courts, must be read with care following the change in approach described in *Mitchell*, as explained in *Denton*. I do not, in those circumstances, think there is anything to be gained by conducting a detailed analysis of them here. Rather, I think the approach to be adopted in the F-tT is to be found, if with some necessary modification, in the decision of Morgan J, sitting in this tribunal, in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC). At [34] he said:

> "… Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

55. That guidance can, I think, be readily modified to meet the circumstances of this case. The purpose of Judge Hellier's direction, so far as relevant now, was to ensure that BPP was provided with the information it required (and which HMRC had agreed to supply) with reasonable promptitude. The delay, however one measures it, extended over several months. There was no good explanation—or even any explanation—for the delay. The consequence for BPP of extending the time—in this case treating HMRC's belated supply of the information in June as sufficient compliance with Judge Hellier's direction—is that they will be in the position in which they now find themselves, namely able to prepare for a hearing of the substantive appeal in November. The consequence of a refusal—in the context of this appeal, the consequence of my making the same direction as did Judge Mosedale—is that HMRC will be prevented from further participation in the appeal.

56. I interpose at this point some observations about Miss Simor's argument that there is a public law impediment to the making of a barring order against HMRC, because there is a public interest in the correct taxation of supplies. I

think one can, in fact, go further: there is a public interest in the correct application of all tax legislation. The argument was the subject of some debate in the hearing before me, and it can, I think, be coupled with Miss Simor's further argument that I should bear in mind that HMRC do not have bottomless pockets, and some allowance should be made for the fact that their resources are limited.

57. Mr Grodzinski did not dispute the proposition that tax should be correctly imposed. But, he said, there is a countervailing imperative that a trader such as BPP should know where it stands: it is in competition with other traders which supply its books to students, some taking BPP's courses. Because they supply only the books, those traders can zero-rate their supplies; BPP is subject to uncertainty and, the longer the appeal takes to conclude, the longer that uncertainty. I see the force of that argument. Some uncertainty, and consequent competitive disadvantage while it continues, may be inescapable, but any prolongation of the period of uncertainty must be capable of justification.

58. It is, of course, common knowledge that government finances are currently under strain and that all government departments have been required to take economy measures. Where the government's priorities should lie is a matter for political judgment and not for me; but I do not find it an attractive argument that the appeals process should be compromised, to the detriment of individual taxpayers, because the government (which of course is the respondent to any tax appeal) chooses not to devote resources to that process. There may perhaps be cases in which ensuring that the correct tax treatment is applied is so important that it is a factor which outweighs all others, but if that is so this is not an example of such a case.

59. Against that background I return to the question now before me, namely whether the barring order for which Judge Hellier's direction potentially provided should be implemented. In my judgment it is clear that it should not. There has been prejudice to BPP, in that it has been put to expense in securing the information it required, and has suffered a significant, unnecessary and unwarranted delay in the process. There has been little, and in most respects no, explanation of the failure by HMRC to do what was required of them. It follows that HMRC attract little sympathy.

60. However, the consequence of my imposing a barring order will be that the F-tT's decision on the merits of the appeal, whatever it might be, will be unsatisfactory, in that it may hand an unwarranted windfall to BPP but perhaps more importantly will not adequately determine whether or not its supplies are zero-rated. The consequence of my refusal of a barring order, on the other hand, is that the F-tT will be able to reach a conclusion after full argument, and will be able to deal with the case fairly and justly, and thus in accordance with the overriding objective.

61. I do not go so far as to say that there should never be a barring order (or, in the case of an appellant, a direction striking out the appeal) unless the overriding objective is incapable of performance. There is nothing in rule 8 which could be read in a way which supports that proposition. Thus even if the F-tT remains able to perform the overriding objective, and even if there is no prejudice to the opposing party which cannot be remedied by a costs direction, a litigant's conduct might be such that the ultimate sanction is all that remains to mark the tribunal's

disapproval of and unwillingness to tolerate that conduct. It is true, as Judge Mosedale recognised at [83], which I have set out above, that the F-tT has little by way of sanction in its armoury, but it does not seem to me that it is legitimate to impose the ultimate sanction for want of any other.

62. As I have made clear, there is much in its conduct of this appeal for which HMRC deserve criticism. But in my judgment their failings are not so grave as to warrant a barring order, once one puts aside the notion, engendered by *Mitchell* before it was explained in *Denton*, that the enforcement of rules and directions is a factor of particular importance, to be afforded substantial weight. The most compelling factor, in my assessment of this case, is that there is no risk to the hearing, nor of compromise to the F-tT's ability to apply the overriding objective.

63. I was, and remain, puzzled by the statement at [83] of Judge Mosedale's decision, that neither party had suggested that costs would be an adequate remedy. In a sense, costs are never an adequate remedy in that they merely reimburse to the receiving party money he should never have been required to expend; but it seems to me that a direction in BPP's favour for costs, perhaps even indemnity costs, would serve the dual purpose of marking the F-tT's disapproval of HMRC's conduct and of effecting that reimbursement.

64. Miss Simor argued that I should instead make a direction for indemnity costs in HMRC's favour, since it should have been apparent to BPP, once the judgment in *Denton* and my own decision in *Leeds City Council* were released, that it should have agreed to the lifting of the bar. I do not think there is any merit in this argument. First, it does not seem to me that a party can be lightly criticised for defending a position in which it finds itself. Second, this was not a case of an inadvertent slip quickly corrected, or of an error, even if not quickly corrected, which was innocent and of little real consequence. It is a case in which there has been a prolonged failure to do what, as Judge Mosedale rightly said, it should have been obvious to any lawyer ought to be done. The prejudice to BPP of HMRC's conduct is not great, but it is real. It does not seem to me that BPP should be exposed to the costs of this application, and certainly not on the indemnity basis.

65. I do not, however, make any costs direction at this stage, but will do so on receipt of written representations unless in the meantime the parties are able to agree on a direction.

Colin Bishopp
Upper Tribunal Judge

Release date 3 November 2014