[2016] UKUT 0347 (TCC)

Appeal number: UT/2015/0068

PROCEDURE– refusal to reinstate appeals –whether change of circumstances should be considered by Upper Tribunal-no-whether error of law in FTT's decision-no-appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CLEAR PLC (IN LIQUIDATION) **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

Tribunal: Judge Timothy Herrington
Judge Nicholas Aleksander

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 17 May 2016

Valentina Sloane, Counsel, instructed by The Khan Partnership LLP, for the Appellant

Lucy Wilson-Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a case management decision of the First-tier Tribunal ("FTT") (Judge Blewitt, as she then was) released on 9 January 2015 (the "Decision").

2. By the Decision the FTT refused to extend time to reinstate the following two appeals made by the appellant ("Clear") against decisions of the Respondents ("HMRC"):

> (1) An appeal against HMRC's decisions of 26 June 2007 and 3 June 2008 denying Clear a right to deduct input tax. In those decisions HMRC alleged that the transactions underlying the VAT input tax reclaim were connected to the fraudulent evasion of VAT and the Appellant knew or should have known of the fraud. In those appeals, evidence had been served by HMRC, by Clear in defence and by HMRC in reply, amounting to over 30 witness statements, the final round of evidence being served in September 2010. The total sum at stake is in excess of £12 million; and
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> (2) An appeal against HMRC's decision of 10 November 2010 denying Clear a right to deduct input tax on the grounds that Clear had not demonstrated any evidence of there being a taxable supply for the purposes of section 24 (1) of the Value Added Tax Act 1994. In relation to this appeal, no procedural step has been taken after the filing of the notice of appeal. The sum in dispute is approximately £1.28 million.

In this decision we refer to the first of these appeals as the "MTIC appeal", the second of these appeals as the "Supply Appeal" and them both collectively as the "Appeals".

3. Permission to appeal against the Decision was granted by Judge Bishopp on 6 July 2015.

Background

4. In the Decision Judge Blewitt summarised what she aptly described as the "chequered history" of these appeals from the voluminous correspondence she was provided with covering the period since Clear went into liquidation. In terms of setting out the factual background we can do no better than repeat what Judge Blewitt said at [7] to [27] of the Decision as follows:

> "7. The Applicant was incorporated on 4 January 2002 and registered for VAT with effect from the same date. Mr Imran Kara was the director of the company from the date of incorporation. The company was wound up on 2 March 2011. Mr Timothy James Bramston was appointed as Liquidator by the Secretary of State with effect from 11 March 2011. The Liquidator instructed Blake Lapthorn LLP to advise in relation to the appeals.

8. On 14 April 2011 the Tribunal issued a Direction requiring the Liquidator to indicate before 31 May 2011 if it intended to proceed with MAN/2007/0820, in default of which the appeal would be struck out. The deadline for compliance with the Direction was subsequently extended by consent to 31 August 2011, 4 November 2011 and finally 28 February 2012.

9. I was provided with a significant volume of correspondence between the representatives of Clear Plc and the Liquidator. Due to the sheer volume of the documents, I do not intend to repeat the contents of each and every letter but the overview set out below provides the background leading to this application.

10. On 15 April 2011 AQDC International Limited ("AQDC"), a company controlled by Mr Kara, filed with the Upper Tribunal an application for permission to appeal against TC/2009/14440. Permission to appeal was granted on 11 May 2011. A purported assignment of the rights in the appeal from Clear Plc to AQDC was sent to the liquidator on 7 July 2011. It appears that this was the first time the Liquidator became aware of the purported assignment.

11. On 11 July 2011 Blake Lapthorn wrote to Zatman & Co (the former representatives of Clear Plc) stating that the purported assignment on 1 March 2011 was void. I should note at this point that throughout the proceedings the Liquidator took the position that the assignment was void as a result of Section 127 of the Insolvency Act 1986 which provides that unless the Court orders otherwise, any disposition of a company's property is void after commencement of the winding up; in this case the presentation of the petition pre-dated the purported assignment. Clear Plc did not contest the Liquidator's position and no attempt was made to validate the assignment.

12. Zatman & Co wrote to Blake Lapthorn on 12 July 2012 proposing that the assignments be validated by the Court or that the Liquidator assign the appeals to AQDC. Over the course of a number of months Blake Lapthorn continued to state in correspondence to Zatman & Co that AQDC had no standing to pursue the appeals and that the Liquidator was not in a position to consider ceding conduct of the appeals. It was made clear on numerous occasions that the Liquidator required the documents pertaining to the appeals, any advice from Counsel on the same and an interview with Mr Kara in order to consider the position both in relation to the appeals and the company's affairs generally. Zatman & Co responded by stating that Mr Kara was overseas and not expected back in the UK for a number of months.

13. On 21 February 2012 Blake Lapthorn wrote to Zatman & Co stating that the Liquidator would shortly be discontinuing the appeals. Zatman responded by reiterating its request that the appeal be assigned to AQDC. Blake Lapthorn requested further information by letter dated 27 February 2012 to Zatman & Co which it required before considering the issue of assignment.

14. On 28 February 2012 the time limit set by the Tribunal for notice by the Liquidator that the appeal would be pursued expired.

15. On 8 March 2012 Mr Kara and AQDC instructed The Khan Partnership in relation to the issue of assignment. The Khan Partnership immediately wrote to Blake Lapthorn stating that they were awaiting the relevant documentation and requested confirmation that no steps had been taken to withdraw the appeals.

16. The Khan Partnership continued to correspond with Blake Lapthorn on the issue of assignment. On 3 April 2012 Blake Lapthorn wrote to The Khan Partnership refusing to *"blindly assign the right to pursue the appeals to any entity"* and stating that AQDC had no standing to attend the case management hearing listed before the First-tier Tribunal on 10 April 2012 which The Khan Partnership had indicated it would attend on behalf of AQDC. The Khan Partnership sought to postpone the hearing with the consent of Blake Lapthorn; no consent was given and on 10 April 2012 the hearing went ahead and HMRC's application to strike out the appeal was successful.

17. On 2 May 2012 The Khan Partnership sought Blake Lapthorn's consent to vacate the case management hearing listed before the Upper Tribunal in respect of TC/2009/14440. The hearing went ahead on 4 May 2012 with The Khan Partnership present although it was not permitted to make any representations on the basis that it had no standing to do so. The UKBA's application to strike out the appeal was not resisted by the Liquidator.

18. On 14 May 2012 Commission Agreement Proceedings were commenced against Mr Kara that he account for £2.367 million to the Liquidator.

19. In response to correspondence from The Khan Partnership dated 17 May 2012, Blake Lapthorn wrote on 18 May 2012 stating that no application for reinstatement would be made in respect of the appeals.

20. On 19 October 2012 The Khan Partnership wrote to Blake Lapthorn contesting the Liquidator's refusal to assign the appeals and stating that in the absence of cooperation an application for assignment would be made to the High Court.

21. On 5 and 6 November 2012 Blake Lapthorn requested further information from The Khan Partnership in order to consider the reinstatement request with the Liquidator.

22. On 6 December 2012 The Khan Partnership wrote to Blake Lapthorn enclosing a draft deed of assignment and a draft application with an offer to indemnify the Liquidator as to any liability as to costs.

23. On 14 January 2013 Blake Lapthorn wrote to The Khan Partnership suggesting a possible assignment and asking for proof that Mr Kara was a creditor of Clear Plc. The Khan Partnership responded on 22 January 2013 asking for a response to the draft application. On 28 January 2013 Blake Lapthorn reiterated its previous requests for an interview with Mr Kara.

24. On 31 January 2013 The Khan Partnership served on Blake Lapthorn an application to the High Court seeking an order that conduct of the appeals be ceded to Mr Kara.

25. On 5 February 2013 Blake Lapthorn responded with reasons as to why an interview with Mr Kara was sought:

"the Liquidator wishes to interview Mr Kara in respect to the merits of the appeals and the credibility of Imran Kara as a witness. Only in an interview conducted in person will the liquidator be able to ascertain the extent to which (if any) Mr Kara is lying. As the Tribunal Judge at the First-tier Tribunal Hearing in Manchester (18 & 19

November 2010) found, much of the evidence of Mr Kara was wholly implausible and untenable. Such an exercise cannot be usefully conducted in correspondence or via video link."

26. The Khan Partnership responded by letter dated 6 February 2013 in which it disputed the relevance of an interview in assessing the merits of the appeal. On 27 February 2013 Director Disqualification Proceedings were issued against Mr Kara by the Official Receiver; the proceedings were stayed until 31 December 2014.

27. On 24 June 2013 the parties agreed a draft order ceding conduct of the appeals to Mr Kara. The High Court approved the terms of the Order on 9 October 2013."

5. We were also helpfully provided with a chronology of the various events, much of which is reflected in Judge Blewitt's summary. It is also helpful to refer to various other events which are not referred to in her summary, some of which occurred after the application to reinstate was made but which are relevant to the issues we have to consider on this appeal.

6. On 27 February 2013 the Official Receiver issued Director Disqualification proceedings against Mr Kara (the "DDQ Proceedings"). The Official Receiver's report which supported those proceedings relied, among other things, on the same matters which were the subject of the Appeals. Specifically, the Official Receiver contended that Mr Kara was, in his opinion, unfit to be concerned in the management of a limited company because between various dates in 2006 Mr Kara caused or allowed Clear to participate in transactions which were connected with the fraudulent evasion of VAT, such connections being something which Mr Kara either knew or should have known about and consequently he caused or allowed Clear wrongfully to claim the sum of £12,304,766.71 from HMRC. That is precisely the subject matter of the MTIC Appeal. Additionally, the Official Receiver contended that between various dates in 2009 Mr Kara caused or allowed Clear wrongfully to offset the sum of £1,275,592.50 against a VAT payable to HMRC. That is precisely the subject matter of the Supply Appeal.

7. On 23 October 2013, just 2 weeks after conduct of the Appeals was ceded to Mr Kara, Clear applied to the FTT to reinstate the Appeals. On 23 December 2013 the DDQ Proceedings were stayed pending the consideration of the application to reinstate.

8. In addition to the Appeals, Clear also had another appeal in the Upper Tribunal relating to the seizure of a Platinum Sponge in respect of which restoration was sought. It is referred to at [10] of the Decision. That appeal had been struck out on 3 May 2012 because it was not being pursued by the Liquidator. The conduct of this appeal ("the UT Appeal") was also ceded to Mr Kara on 9 October 2013 and on 23 October 2013 an application was made to the Upper Tribunal to reinstate the appeal.

9. On 10 April 2014 Judge Herrington dismissed the application to reinstate. He summarised his reasons at [72] as follows:

"(1) The lack of co-operation shown by Mr Kara to the Liquidator;

(2) The overall lapse of time since the strike out application, a particularly strong factor in the light of the emphasis now put on the need for litigation to be conducted effectively as recognised in *McCarthy & Stone*, regardless as to whether any party is particularly at fault in that regard. For example, the fact that the application for an order in the High Court was delayed because of the attention needed to be given to the Commission Proceedings and that was not entirely because of fault on the Applicants part (although as indicated above in my view they were not completely blameless), does not mean that the delay ensuing should not be taken into account, particularly where it is the Respondents, who are clearly blameless in this regard, who are prejudiced as a result.

(3) The delay in pursuing the ceding of the conduct of the appeal, exacerbated by the failure to recognise the invalidity of the purported assignment; and

(4) The absence of a specific provision in the Rules permitting reinstatement meaning that the burden is a heavy one on the Applicants to show special circumstances justifying the setting aside of the strike-out direction."

10. Judge Blewitt made further references to Judge Herrington's decision in her own reasoning which we refer to later.

11. On 10 September 2014 the Commission Proceedings, referred to by Judge Blewitt at [18] of the Decision and also by Judge Herrington in the extract from his decision set out above, were settled.

12. The stay in relation to the DDQ Proceedings having expired on 10 August 2015, Mr Kara swore an affidavit in opposition to the application for a disqualification order. On 9 February 2016 the Official Receiver filed a second report in support of his claims in the DDQ Proceedings in response to Mr Kara's affidavit. The second report says that it was clear from Mr Kara's affidavit that, in relation to the subject matter of the MTIC appeal, Mr Kara did not accept that a fraud had occurred, and in the event that it had, he does not accept that he knew or ought to have known of that fraud. The Official Receiver's second report stated that its purpose was to introduce the evidence of various HMRC officers in the form of affidavits and witness statements which, the Official Receiver contends, set out direct evidence that Clear's transaction chains lead back to fraudulent tax losses and that HMRC consider that they were part of a scheme to defraud the public revenue. In all some 24 statements were filed. We have not found it necessary to examine these in detail and we are not in a position to make findings as to whether these contain the same evidence as was provided in relation to the MTIC Appeal before Clear went into liquidation or whether it has been updated in any respect.

The Decision of the FTT

13. Although Judge Porter, who made the direction striking out the Appeals, did not specifically refer to the power he was exercising in making that direction, it is clear from his decision that he did so because of the Liquidator's failure to comply with the terms of the "unless" direction referred to at [8] of the Decision. If that were so, strictly speaking no further direction to strike out was necessary because Rule 8 (1) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules")

provides that the proceedings will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction *would* lead to the striking out of the proceedings. Judge Porter may therefore have proceeded on the basis that the relevant power was that in Rule 8 (3) (a) which gives the Tribunal a discretion to strike out where 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.

14. A strike out pursuant to either of these powers brings into play Rule 8 (5) of the Rules which provides that if proceedings have been struck out under either of those provisions the appellant may apply for the proceedings to be reinstated. The FTT referred specifically to this provision and then set out correctly the relevant Rules which it must have regard to when making its decision at [28] to [30] of the Decision as follows:

> " 28**.** Rule 8 (6) of The Tribunal Rules provides as follows:
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> *"An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant."*
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> 29. By virtue of Rule 5 (3) (a) the Tribunal has the discretion to extend time:
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> "*In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—*
>
> *(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;"*
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> 30. The parties also highlighted the overriding objective to deal with cases fairly and justly as set out in Rule 2 (2):
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> "*(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."*

15. It was common ground before Judge Blewitt that the test to be applied in determining whether to extend time pursuant to Rule 5 (3) (a) was that set out by Judge Bishopp in *Leeds City Council v Commissioners for HM Revenue and Customs* [2014] UKUT 0350 (TCC) (citing *Data Select Limited v Revenue and*

Customs Commissioners [2012] UKUT 187 (TCC)). Consequently, Judge Blewitt determined the application having asked herself the five questions set out in *Data Select*, namely (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 of the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. She then considered the overriding objective to deal with cases fairly and justly and in doing so sought to balance the interests of both parties.

16. We digress at this point to observe that in recent times there has been some debate, both in this Tribunal and in the courts, as to the correct approach to applications for relief from sanctions, which approach has translated across to applications of this nature as well. That debate was initiated by changes to the Civil Procedure Rules (CPR) in 2013. Although those rules do not apply directly to the tribunals, the impact of judgments of the courts in that regard, such as *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 and *Denton v TH White Ltd* (and related appeals) [2014] EWCA Civ 906, have been considered by the Upper Tribunal first in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and, post-*Denton*, in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC). Prior to the introduction of a new CPR 3.9 in 2013, which was designed to ensure that time limits and similar requirements were enforced more strictly in the courts, the practice of both this Tribunal and the FTT had been to follow the approach described in *Data Select* where Morgan J, in formulating the five questions referred to at [15] above, had applied by analogy the matters referred to in the old version of CPR 3.9. In *Leeds City Council*, this Tribunal (taking a different view from that taken by the Tribunal in *McCarthy & Stone*) held that until a change is made to the relevant tribunal rules which reflected the terms of the new CPR 3.9, the approach set out in Data Select should continue to apply. Judge Blewitt in this case followed *Leeds City Council* in her approach, although Judge Herrington in his decision in the UT Appeal had applied the stricter approach taken in *McCarthy & Stone, Leeds City Council* not having yet been decided by the time of his decision.

17. This difference of view was resolved by the Court of Appeal in *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121. The Senior President of Tribunals said at [37] of his judgment:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and

> timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it."

18. The Court of Appeal therefore held that with the tax tribunal rules being silent on the question, it was appropriate that the tribunal accord the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders significant weight as part of its consideration of the overriding objective set out in Rule 2 of the Tribunal Rules, which in this case requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time.

19. Consequently, were Judge Blewitt making the Decision today, the correct approach to the application for extension of time with which this Appeal is concerned, would be to consider the overriding objective and all the circumstances of the case and in that context to apply by analogy the new provisions of CPR 3.9, as interpreted in *Mitchell* and *Denton*. This would require the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, as set out in the new CPR 3.9, to be given particular weight when considering all the circumstances of the case. This indicates that a tribunal should take a stricter approach than might have been the case before the new rule was implemented, but it is still the case that a consideration of all the circumstances must be made before deciding the application. However, Judge Blewitt is not to be criticised for taking the approach she did bearing in mind the conflicting Upper Tribunal decisions on the issue when she made the Decision, but it does indicate that if we were to decide to set aside and remake Judge Blewitt's decision it is likely that we would apply a stricter approach than she did in applying the approach set out in *Data Select*, which clearly would not be advantageous to Clear. The FTT would have to do the same were we to decide to set aside the Decision and remit it to the FTT.

20. We therefore approach consideration of the Decision on the basis that Judge Blewitt correctly identified the factors to be considered, although the weight to be given to those factors now weighs more heavily against Clear in the light of the decision of the Court of Appeal in *BPP*.

21. Judge Blewitt recorded at [32] to [36] of the Decision the principal points advanced by Clear in support of its application as follows:

> (1) The appeals were struck out as a consequence of the conduct of the Liquidator. Thereafter, Mr Kara had sought to regain control of the conduct of the appeals from the Liquidator and the application to reinstate the appeals was made promptly and without delay following the Liquidator ceding conduct to Mr Kara;
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> (2) HMRC were aware throughout proceedings that Mr Kara intended to pursue the appeals so that it was not entitled to assume that matters had been finally settled following the strike out; and
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> (3) There would be no serious prejudice to HMRC if the Appeals were reinstated whereas Clear would be severely prejudiced if the appeals were not reinstated given the large amount of money at stake.

22. It is clear from [38] of the Decision that Clear accepted that there may be prejudice to HMRC in reinstating the MTIC appeal if it were pursued on a factual basis, and therefore in its oral submissions the scope of the reinstatement application in respect of the MTIC Appeal was narrowed to consideration of the legal issues which at that stage were currently before the Court of Appeal in the case of *Fonecomp v HMRC*, namely the question as to whether the *Kittel* principle, on which HMRC's case in the MTIC Appeal depended, applied to contra-trading.

23. Judge Blewitt's reasoning underlying her decision to refuse the application was set out at [68] to [77] of the Decision.

24. It is clear that the length of the delay in pursuing the Appeals, both before Judge Porter's decision to strike out the Appeals and thereafter until the application to reinstate was made and what Judge Blewitt held not to be a good explanation of such delay weighed heavily in Judge Blewitt's decision. She said at [69]:

> "I considered the length of the delay in this case and explanation for it. It is clear that from the date of appointment of the Liquidator the consistent view was taken that the purported assignment of the rights of the appeals was invalid in law. Despite the Applicant's repeated correspondence on the point, that position was not challenged nor was any action taken to validate the assignment. It was submitted that the Applicant had made vigorous efforts to regain conduct of the appeals. I do not accept this to be the case; to the contrary the Applicant took no action to remedy the situation in respect of the assignment and failed to engage in any meaningful way with the Liquidator."

25. Judge Blewitt placed particular reliance on the letter from Blake Lapthorn of 3 April 2012, referred to at [16] of the Decision and set out in full at [70] of the Decision. This letter made reference to Mr Kara's refusal to attend for interview and the Liquidator's refusal to assign the appeals to a person or entity that he had never met or had knowledge of. She then said at [71] of the Decision:

> "I did not accept the submission that the reluctance on the part of Mr Kara to attend for interview was caused by the Liquidator's wish to investigate the company's affairs generally. The correspondence makes quite clear that the Liquidator required an interview to assess the merits of the appeals and Mr Kara's credibility as a witness in addition to the company's wider affairs. It was in Mr Kara's interests to cooperate with the Liquidator and I did not accept that the Liquidator could be properly criticised for taking the stance it did."

26. Judge Blewitt also found that there was further inaction on the part of Clear following the striking out of the Appeals. In that regard, she relied on Judge Herrington's findings in the UT Appeal that the question of reinstatement was not pursued actively between May and October 2012, which Judge Herrington found arose because of the institution of the Commission Proceedings which in turn resulted in a complete breakdown of the relationship between Mr Kara and the Liquidator.

27. Judge Blewitt did however accept that once an order was obtained ceding conduct of the appeals the application for reinstatement was made promptly at [73] of the Decision. She went on to say in that paragraph:

> "However that must be balanced against the lengthy period over which no meaningful action was taken by the Applicant. The position of the Liquidator was clear from the outset. The Liquidator was also entitled to expect cooperation from the Applicant which was not forthcoming. Matters were further delayed by the Commission Agreement proceedings being, it would seem, prioritised yet no explanation has been provided as to why this prevented the issue of assignment being pursued simultaneously, particularly in circumstances where the Applicant was professionally represented and aware of the deadline for making an application to reinstate proceedings. Taking into account all of the circumstances I was satisfied that the length of delay and poor explanation for it was a significant factor weighing against reinstatement."

28. Judge Blewitt considered the issues of prejudice to the parties at [74] and [75] of the Decision. She accepted that there would be clear prejudice to the Appellant if the appeals were not reinstated "given the values involved" and that this factor weighed in favour of reinstatement. As regards HMRC's position she said:

> "However, this must be balanced against the prejudice to HMRC which is two-fold: first there is a strong argument in finality of litigation. A substantial amount of time has elapsed over which HMRC was entitled to assume that matters had been concluded. Second, the impact of the time that has elapsed on the quality of evidence. Although the Applicant now restricts its application in respect of MAN/2007/0820 to the arguments pursued in *Fonecomp*, the evidence (if any is still within HMRC's possession) which would have to be reviewed in respect of those arguments is unknown. In balancing these factors I concluded that the prejudice to HMRC outweighed that of the Applicant."

29. She also held in relation to the Supply Appeal that although different considerations applied and the burden of proof in that appeal rests with the Appellant rather than HMRC, those considerations were not sufficient to overcome the impact of the lapse of time on the evidence and the public interest in the finality of litigation: see [76] of the Decision.

30. Finally, she concluded at [77]:

> "I considered the overriding objective to deal with cases fairly and justly and in doing so I have balanced the interests of both parties. The significant period of time which has elapsed, taken together with the lack of co-operation shown by Mr Kara to the liquidator from the outset and the absence of any meaningful action to address the issue of the purported assignment or pursue the ceding of the conduct of the appeals all lead me to conclude that the prejudice to the Applicant in refusing this application does not outweigh those factors."

Grounds of appeal

31. Permission to appeal was granted on the following three grounds:

(1) That the FTT erred in its conclusion that the prejudice suffered by Clear would be outweighed by the prejudice suffered by HMRC if the appeals were to

be reinstated. In support of this ground, Clear submitted that the FTT was manifestly wrong in not accepting that the MTIC Appeal would ultimately be determined purely on an issue of law in the light of the concession given at the hearing, that in relation to the Supply Appeal the FTT failed to take account of the fact that the burden of proof rests on Clear and consequently any prejudice arising from the risk of deterioration of evidence is borne by Clear, and that the FTT was wrong to place emphasis on the importance of finality because in relation to the MTIC Appeal the point of law concerned was the subject of ongoing litigation;

(2) That there was manifest error in the FTT's findings as to the conduct of Clear in seeking to reinstate the appeals. In support of this ground, Clear submitted that the FTT failed adequately to take into account that the relationship between Clear and the Liquidator had effectively broken down as a result of the Commission Proceedings and had wrongly concluded that Mr Kara could be properly criticised for failing to attend an interview with the Liquidator; and

(3) That the FTT erred in failing to take into account the extent of the prejudice that Clear would suffer if the Appeals were not reinstated bearing in mind the amount a stake in the Appeals.

32. It became apparent, however, from Miss Sloane's skeleton argument that Clear now sought to argue the first ground on an entirely different basis from that set out in the grounds of appeal. Matters had moved on since permission to appeal was given as *Fonecomp* has since been determined in the Court of Appeal. As Miss Wilson-Barnes correctly submitted, in the light of the Court of Appeal's judgment Clear's first ground of appeal as originally submitted was now unsustainable, bearing in mind that Clear had also conceded in the hearing before Judge Blewitt that it would not seek to challenge HMRC's decisions in respect of the MTIC Appeal other than on the legal arguments in respect of contra trading which the Court of Appeal has now rejected.

33. Furthermore, as described at [12] above, since the stay on the DDQ Proceedings ended the Official Receiver has filed evidence in those proceedings to support his contention that Mr Kara should be disqualified as a director by virtue of his conduct in relation to the matters which are the subject of the Appeals. This evidence was filed between November 2015 and February 2016, however it was not until 29 April 2016 that Clear indicated to HMRC that it wished to rely on these developments in support of its appeal in this Tribunal.

34. Before Judge Blewitt, HMRC argued that it would be neither fair nor just for HMRC to be required to prove their case after a considerable lapse of time. Miss Sloane now argues that this is no longer the case as HMRC have now produced some 25 witness statements in the DDQ Proceedings setting out direct evidence that Clear's transactions lead back to fraudulent tax losses. Miss Sloane submits that this concurrent litigation covering the same issue raises an additional point of justice and fairness to be considered when balancing respective prejudice. Miss Sloane now submits that if HMRC are successful in one set of proceedings, they can rely on the court's findings in the other set of proceedings whilst in contrast, the present position

is grossly unfair to Mr Kara who is now bearing the burden of preparing all the evidence and arguments he would deploy in the Appeals, yet will be unable to rely on the findings of the court in the DDQ Proceedings in order to overturn the assessments even if HMRC's case in the DDQ Proceedings is rejected.

35. It is implicit in these submissions that if Miss Sloane were permitted to argue the first ground on this revised basis that the concession (that HMRC's factual findings would not be challenged in the MTIC Appeal) has been withdrawn.

36. Miss Sloane now submits that the circumstances are exceptional and the case falls into the narrow category of cases in which the judge's discretionary decision is plainly wrong because it proceeded on a false premise, namely that HMRC were being required to prove their case after such a long period of time. This was no longer the case because HMRC were now seeking to prove their case in the separate DDQ Proceedings.

37. In essence, Miss Sloane seeks to persuade us that there is a change of circumstances because of the use of the evidence relating to the Appeals in the DDQ Proceedings and this change of circumstance could materially influence the decision whether to reinstate as it is directly relevant to the question of prejudice to HMRC. She submits that we should therefore admit the new evidence, set aside the Decision and either remake it or remit it to the FTT for a new decision to be made in the light of the changed circumstances.

38. Miss Wilson-Barnes submits that it is not open to Clear to change its position on its first ground of appeal unless Clear is given permission to amend its grounds of appeal and to withdraw the concession. The Upper Tribunal would then need to accede to an application to rehear the issue of prejudice. Miss Wilson-Barnes submits that Clear through its skeleton argument appears to seek to apply to do all of those matters without making formal application. Miss Wilson-Barnes therefore resisted the attempt to argue the appeal on the revised basis and resists any application to amend the grounds of appeal and withdraw the concession.

39. We accept that it is not open to Miss Sloane to argue the first ground of appeal on the basis set out in her skeleton argument without this Tribunal having first allowed an application to amend the grounds of appeal and to withdraw the concession. All of that is clear from the cases that Miss Sloane cited to us and relied on in support of Clear's revised arguments on the first ground and which we refer to below. We did not therefore take Miss Sloane to disagree with Miss Wilson-Barnes on this point.

40. We have therefore proceeded to consider Miss Sloane's arguments in relation to the first ground of appeal in the context of considering whether we should grant permission to amend that ground of appeal and to withdraw the concession. Were we to grant the application to amend and withdraw the concession we would then consider the arguments in the context of the amended grounds of appeal as a whole.

Discussion

41. We are conscious of the fact that the Decision relates to case management and it is well-established that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. The position was summarised by Norris J in this Tribunal in *Goldman Sachs International and another v Revenue and Customs Commissioners* [2009] UKUT 90 (TCC), at [23] and [24]:

> "23. … I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in *Walbrook Trustee v Fattal & Others* [2008] EWCA Civ 427, not as establishing any novel proposition but as containing in paragraph 33 the following convenient statement from the judgment of Lord Justice Lawrence Collins:
>
> > "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
>
> 24. I am clear that the principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system."

42. We shall bear this passage in mind when considering the grounds of appeal. In short, we will need to be satisfied that Judge Blewitt was plainly wrong if we are to set aside her decision.

Ground 1

43. We start by considering the application to amend this ground of appeal.

44. There is no question that this Tribunal has the power to admit evidence that was not available to the FTT: see Rule 15 (2) (a) of the Tribunal Procedure (Upper Tribunal) Rules 2008. We can also do so in the context of agreeing to amend the grounds of appeal. In exercising the latter power, we should have regard to the need to ensure that no prejudice arises to HMRC as a result of the late application and the need for them to have adequate time to consider the amended grounds and any evidence that is sought to be admitted in support.

45. In considering whether to exercise the power to admit fresh evidence, in common with other tribunals, this Tribunal applies the principles laid down in the well-known Court of Appeal judgment in *Ladd v Marshall* [1954] 1 WLR 1489 where Denning LJ said at page 1491:

> "To justify the reception of fresh evidence or a new trial three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if

given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

46. It is clear that this test is applicable in cases where the evidence concerned existed at the time of the original trial but for some reason was not made available. That is not the case here; Miss Sloane seeks to adduce what she describes as new evidence, but is in reality a change of circumstance relating to the use of evidence that previously existed that has arisen since the Decision was made. On the back of that change of circumstance she then seeks to argue the question of prejudice to HMRC on a different basis.

47. Miss Sloane's starting position is that the well-known passage from Lord Diplock's speech in *Hadmor Productions v Hamilton* [1983] AC 210 at page 220 A to E provides authority for the proposition that where there has been a change of circumstances after a judge has made his order that would have justified his acceding to an application to vary it, there can be an application to set aside a judge's exercise of discretion. Lord Diplock said:

> "….. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it….."

48. Miss Sloane latches on to the words at the end of this passage indicating that it is open to a judge to set aside his decision following a change of circumstance since it was given. However, in our view Miss Sloane takes these words out of context. Lord Diplock was considering the question of when it was appropriate to interfere with the exercise of a judge's discretion purely in relation to the granting of an interlocutory injunction. It is obvious that a change of circumstances in relation to an interlocutory order should require it to be revisited. Indeed, the FTT's own rules, as interpreted in a number of cases, make provision for this in permitting a direction to be set aside if there is a change of circumstances. Indeed, the direction made by Judge Porter in this case to strike out the appeal could have been made the subject of such an application to the FTT. It will be recalled that there was such an application to this Tribunal in relation to the UT Appeal, where Judge Herrington's decision not to set aside his original direction to reinstate the UT Appeal was taken after consideration whether

there had been a change of circumstances since the making of the direction, and whether in all the circumstances it was in the interests of justice to set aside the direction.

49. However this is entirely different to making a change of circumstance the foundation for a right of appeal in circumstances where section 11 of the Tribunals, Courts and Enforcement Act 2007 (the " Act") makes it clear that an appeal only lies to this Tribunal on a point of law. In our view therefore *Hadmor Productions* does not assist Miss Sloane's argument and provides no authority for the wide-ranging principle that she seeks to establish.

50. We therefore turn to the other cases that Miss Sloane cited in support of a change of circumstances giving rise to a right of appeal. The cases concerned relate to matters heard in the Employment Tribunals.

51. The first case is *Saint Andrew's Catholic Primary School v Blundell* [2012] ICR 295. In that case, a teacher was awarded compensation in respect of victimisation discrimination by the school where she had been employed. It was relevant to the appeal as to whether the claimant had been undertaking a course of study during a particular period. After the hearing was concluded, but before judgment, the school sought a third party disclosure order from the tribunal requiring a university where the claimant had been enrolled to provide details of her courses and dates of attendance. The tribunal never formally responded and handed down judgment without any reference to the application. Before the Court of Appeal, in which it challenged the failure to make an order for discovery, in amended grounds of appeal the school sought to admit fresh evidence which had arisen after the tribunal's decision relating to the claimant's undertaking of a degree course on the grounds that it was appropriate and in accordance with the overriding objective to have regard to it. The school also sought a remission for rehearing of the decision on compensation.

52. Although Miss Sloane relies on this decision as authority for the proposition that it is open to an appellate tribunal to allow grounds of appeal to be amended where there is a change of circumstances, in our view this case amount to no more than a case on the application of the principles in *Ladd v Marshall.* Although the head note to the case refers to new evidence having a "arisen" after the tribunal's decision it is clear from the facts, as recited in the judgment of the Master of the Rolls, that the evidence concerned was previously in existence but came to the attention of the school after the tribunal decision. We therefore do not see this as a case that turned on a change of circumstance after the determination of the appeal. The main point of interest in the case is that the Court of Appeal referred to the observation of Underhill J in the Employment Appeal Tribunal case of *Adegbuji v Meteor Parking Limited* (2010), unreported, that the best way of dealing with fresh evidence would almost always be for the applicant to ask the tribunal to review its decision pursuant to the relevant rules of the Employment Tribunal's Rules of Procedure, because the original tribunal was in the best position to determine whether the second and third of the *Ladd v Marshall* principles were satisfied .

53. It may be that the relevant Employment Tribunal Rules of Procedure permit reviews of decisions long after the event and in very wide circumstances, although we were not taken to those rules. As far as the FTT is concerned, as Miss Sloane observed, section 9(10) of the Act prohibits a decision of the FTT being reviewed more than once and since Judge Blewitt had herself undertaken a review when she received the application for permission to appeal against the Decision it was no longer possible for the FTT to review its decision.

54. Despite that restriction on review, we do not consider that it is open to us to amend grounds of appeal simply on the basis of a change of circumstance, unless there is genuinely fresh evidence to be admitted and it is appropriate to amend the grounds of appeal in the light of that evidence. In this case the evidence concerned, that is the evidence as to Clear's trading activities, was in existence and known to the parties at the time of the hearing before Judge Blewitt. There is a change of circumstance in that the evidence concerned is now to be used in different proceedings, which we discuss in more detail below, but we see nothing in the *Blundell* case which suggest that where such an event occurs the change of circumstances should give rise to a right of appeal, notwithstanding no error of law on the part of the tribunal below.

55. The second case is *Aslam v Barclays Capital Services* (2011), unreported, where the Employment Appeal Tribunal had to consider whether to admit as further evidence an important email relating to the central issue in the case which should have been disclosed by the employer but, in breach of its duty of disclosure, had not been. Again, this is an email that was in existence at the time of the original hearing. Again, the Employment Appeal Tribunal decided to admit the email having applied the *Ladd v Marshall* principles.

56. In this case, the Employment Appeal Tribunal was not of the view that it was an appropriate case for review by the original tribunal because the tribunal made adverse findings as to the credibility of the claimant which it would be difficult for the tribunal to revisit. The Employment Appeal Tribunal therefore allowed the appeal, set aside the judgment and remitted the matter for rehearing before a different tribunal.

57. Aside from the application of the *Ladd v Marshall* principles, the Employment Appeal Tribunal also reached the conclusion that the non-disclosure of the email resulted in a hearing below which was unfair. We can envisage circumstances in which either the right to set aside an FTT decision where the unavailability of relevant evidence has made the hearing unfair or a right of appeal on the grounds of an error of law, the error being in the manner in which the hearing was conducted, can arise in circumstances where evidence that should have been made available was not.

58. We have therefore considered whether the circumstances in this case can be properly described as being analogous to those in *Aslam.*

59. The basis of Miss Sloane's contention that this Tribunal has jurisdiction to consider the amended grounds is that the Decision proceeded on the basis of a premise which has now turned out to be false. She submits that Judge Blewitt's view

that the prejudice to HMRC that would occur if the Appeals were reinstated outweighs the prejudice to Clear due to the impact of time that has elapsed on the quality of the evidence and the public interest in the finality of litigation can no longer be sustained as rational. Miss Sloane refers to the representations of HMRC made in advance of the hearing before Judge Blewitt to the effect that it would not be fair to require them to revisit the evidence many years after the relevant events have occurred (which may need to be updated) and significant resources may need to be devoted to the exercise in circumstances where they have properly treated the litigation as having been finally disposed of. HMRC stated that they had made no check as to what, if any, papers they still had. Neither, HMRC represented, would it be fair and just to allow HMRC's witnesses to be subjected to cross examination of historic matters and to challenges to their credibility after such a lapse of time. Miss Sloane submits that in the light of those representations Clear adopted the position that in relation to the MTIC Appeal it wished only to pursue a point of law based on the *Fonecomp* proceedings.

60. Miss Sloane submits that now that the Official Receiver has introduced sworn affidavits and witness statements from 25 HMRC officers setting out direct evidence that in HMRC's view Clear's transaction chains lead back to fraudulent tax losses HMRC have overcome any apprehended practical difficulties in locating and collating evidence and have completed the substantial work of revisiting and presenting that evidence in the form of affidavits and witness statements. She submits that HMRC are positively asserting that they are able to prove their case after this length of time and Mr Kara is being required to defend himself against that case. The issues are live and the evidence covers the same ground as the Appeals.

61. In those circumstances, Miss Sloane submits that it is plainly wrong to accord significant weight to finality in litigation and the impact of the time that has elapsed on the quality of the evidence, such as to outweigh the severe prejudice to Clear from being denied the right to pursue the Appeals. She also submits that finality in litigation does not carry its usual weight in circumstances where concurrent litigation will deal with the same issues and evidence, relying on the decision of this Tribunal in *Christopher Ashton v The Financial Conduct Authority* [2015] UKUT 569 (TCC). In that case the Tribunal decided to admit a reference out of time relying among other things on the fact that the proceedings would run concurrently with another reference brought by Mr Ashton which had been admitted. Moreover, she submits, if HMRC are successful in establishing involvement in MTIC fraud in one set of proceedings, they can rely on the court's findings in the other set of proceedings. She relies on *The Secretary of State for Business, Innovation & Skills v Potiwal* [2012] EWHC 3723 (Ch) in this regard. Therefore, Miss Sloane submits, in order to meet the requirements of fairness and justice, the Upper Tribunal should permit the reinstatement of the Appeals. She submits that the new evidence in the form of the witness statements filed in the DDQ Proceedings could materially have influenced the FTT's decision and is directly relevant to the question of prejudice to HMRC.

62. We reject Miss Sloane's characterisation of the DDQ Proceedings and HMRC's role in relation to them. As we have stated at [6] above, those proceedings were commenced on 27 February 2013 and the Official Receiver relies, among other

things, on the same matters which are the subject of the Appeals. Clear therefore knew that the Official Receiver would be seeking to rely on HMRC's contentions that Mr Kara knew or ought to have known that Clear participated in transactions which were connected with the fraudulent evasion of VAT. It must therefore have anticipated that the Official Receiver would seek to support his case by making use of the evidence that had already been filed in the MTIC Appeal. It made the concession at the hearing before Judge Blewitt (that it would not contest the factual basis of HMRC's decisions in relation to the MTIC Appeal) in that knowledge.

63. Therefore in our view there was no change of circumstance when, in response to Mr Kara's affidavit opposing the application for a disqualification order, the Official Receiver filed the second report referred to at [12] above supported by the evidence of the relevant HMRC officers. It is important to emphasise in this context that the DDQ Proceedings are entirely the responsibility of the Official Receiver. HMRC is not a party to the proceedings and it is wrong, as Miss Sloane sought to do in her skeleton argument, to characterise those proceedings as HMRC seeking to prove their case in separate proceedings. It is clearly open to the Official Receiver to call upon witness evidence to support its case in the form of evidence from the relevant HMRC officers. We have no detail as to how that evidence was prepared and who took responsibility for it, but the fact of the matter is that there is a world of difference between HMRC's officers appearing as witnesses in proceedings brought by another party, and them having responsibility for undertaking all the work that is necessary to run and prove their case in the separate Tribunal proceedings. In our view nothing has changed in that regard, they would still be in the position of being asked to devote resources to undertake work on appeals which were struck out a considerable time ago and to revisit the evidence so as to ascertain whether new information has come to light all of which, as appears from [38] of the Decision, was understood by Clear and led it to narrow the scope of the MTIC Appeal.

64. Neither do we accept that the DDQ Proceedings and the Appeals can be regarded as concurrent proceedings such that finality in litigation does not carry its usual weight. The situation here is entirely different from that in *Ashton;* in that case the Respondent would be seeking to make its case in both references, one of which had already been admitted, using material that was common to both. In this case, as we have indicated HMRC is not a party to the DDQ Proceedings and is not seeking to make a case there. That is entirely a matter for the Official Receiver.

65. Neither in our view does *Potiwal* assist Clear. In that case HMRC had successfully defended an MTIC appeal in the FTT and the Secretary of State sought to disqualify Mr Potiwal from acting as a director of any company on the basis of the findings of the FTT that he, as the sole director, caused a company to participate in transactions which were connected with the fraudulent evasion of VAT, such connections being something which Mr Potiwal either knew or should have known about, those being the findings of the FTT in relation to the company's appeal. Briggs J held that it would be an abuse of process to allow Mr Potiwal to re-litigate that issue in the disqualification proceedings.

66. As Miss Wilson-Barnes submitted, the ratio of that case, as set out by Briggs J at [29] was as follows:

> "Where, as here, the issue as to a director's knowledge of a complex MTIC fraud has been fully and fairly investigated by an experienced tribunal and the director found to have had the requisite knowledge, it seems to me that right-thinking members of the public would regarded as an unpardonable waste of scarce resources to have that issue relitigated merely because, by a simple denial and without deducing any fresh evidence, Mr Potiwal seeks to require the complex case against him to be proved all over again."

67. Miss Wilson-Barnes is right when she characterises Miss Sloane's submissions on *Potiwal* as an argument that the abuse of process argument would work the other way, so that if the Official Receiver was successful in disqualification proceedings then it would follow that HMRC would have proved its case on the MTIC Appeal without Clear having had the opportunity of arguing its case in the FTT on that appeal. We see no basis for that conclusion; each case involving an allegation of abuse of process must be considered on its own facts. It would seem likely that the evidence in the DDQ Proceedings is less intensive than that which would be produced in the MTIC Appeal and that the Companies Court will take a more broad brush approach than would be the case in the FTT. That being so, and with Briggs J making it clear that the position is different where fresh evidence is produced in the later proceedings, that it is open to doubt that the FTT would have to accept in full the findings in the DDQ Proceedings. Indeed, Miss Wilson-Barnes drew our attention to *Secretary of State for Business Innovation & Skills v Hirani* (2013), unreported, another case of director disqualification proceedings, where the Companies Court declined in those proceedings to take account of the findings and conclusions of an Employment Tribunal in relation to factual matters which were also at issue in the disqualification proceedings.

68. We therefore reject Miss Sloane's submission that there was new evidence in the form of the witness statements filed in the DDQ Proceedings and that that new evidence could materially have influenced the Decision, in particular on the question of prejudice to HMRC. In any event, in our view to bring the jurisdiction of this Tribunal into play, new evidence would have had to have been produced which leads to the conclusion that the Decision involved the making of an error on a point of law. It is only in those circumstances that the powers of the Upper Tribunal to set aside a decision of the FTT, as set out in section 12 (2) of the Act arise. It follows from our analysis as set out above that the circumstances on which Miss Sloane relies come nowhere close to satisfying us that an error of law such as that identified in *Aslam,* namely that the appellant had not had a fair hearing, is present in this case.

69. It is clear to see the potential to undermine the important principle of finality of litigation were we to set aside a decision of the FTT in circumstances such as those in this case. On the basis of Miss Sloane submissions, it could be many years after a decision had been taken to strike out appeals that the appellant comes along with evidence of how material in relation to those appeals was being used in a different context in a manner which was unfair to him. It can only be in exceptional circumstances, such as those identified in *Aslam,* that the important principle of

finality can be outweighed a long time after an appeal has been determined and for the reasons set out above we see no evidence of exceptional circumstances in this case.

70. Our conclusion therefore is that Clear's amended grounds of appeal are unarguable and have no realistic prospects of success. In those circumstances we do not give permission to amend the grounds of appeal.

71. We have been able to come to that conclusion without finding it necessary to consider whether Clear should be permitted to resile from the concession it made before Judge Blewitt, but in view of the submissions we received on that point we will deal with it briefly. We were referred to the judgment of Mann J in *BT Pension Scheme Trustees Ltd v Secretary of State for Business, Innovation and Skills* [2011] EWHC 2071 (Ch) where at [44] he set out the general principles to be applied where on an appeal a party wished to resile from a concession he had made below as follows:

> " (i) The resiling party has the burden of establishing that the previously forgone point should be raised.
>
> (ii) It will be harder to raise a point which has been expressly conceded.
>
> (iii) If taking the point would risk causing prejudice to the other party, in the sense that it might have been deprived of the opportunity of dealing with the case differently in court below, then it is unlikely that resiling will be allowed. The greater the risk, the less likely it is that it will be allowed.
>
> (iv) There is a low threshold of risk for these purposes (… "any possibility"..).
>
> (v) The burden of establishing no risk is on the party who wishes to withdraw the concession, and the other party should have the benefit of any doubt in this area."

72. It is somewhat difficult to apply these principles in the circumstances of the current case, although it is clear that the burden is on Clear in this case and it is a heavy burden to satisfy. In this case, Miss Sloane relies on the change of circumstance occasioned by the filing of what she characterises as new evidence in the DDQ Proceedings. We have clearly found that there is no such change of circumstance in this case. It therefore appears to us that the attempt to resile from the concession is an attempt to "blow hot and cold" on the question as to whether Clear wished to challenge HMRC's factual findings on which it had expressed its position very clearly, on which the FTT relied in making the Decision and on which HMRC has clearly strongly relied in believing that there was finality on that point. We would therefore have refused permission to resile from the concession.

73. Since we have refused permission to amend the first ground of appeal and it is clear that the original ground, in relation to the MTIC Appeal is unsustainable in the light of the Court of Appeal's decision in *Fonecomp*, we find no error of law on the part of the FTT in relation to the first ground in respect of the MTIC Appeal.

74. In relation to the Supply Appeal, in its original ground Clear contended that the FTT erred by failing to take account of the fact that the burden of proof rests on Clear

so that any prejudice arising from the risk of deterioration of evidence is borne by Clear rather than HMRC. However, as Miss Wilson-Barnes submitted, no evidence was ever served before that appeal was struck out in April 2012. Clear is therefore seeking to reinstate an appeal which concerns transactions made in 2009, and in respect of which no step other than service of the notice of appeal has been taken. Judge Blewitt had this issue very much in mind where she concluded at [76] of the Decision that the burden of proof argument was not sufficient to overcome the arguments that the time which has elapsed will undoubtedly impact on the evidence and the public interest in the finality of litigation. We agree with Miss Wilson-Barnes that it is likely that both parties and not just Clear would need to adduce evidence so that this is a matter that does prejudice both parties. It appears to us that Judge Blewitt took this factor fully into account and there is no basis to say that conclusion was plainly wrong. She was entitled to conclude she did on this point and we therefore conclude that a decision on this point did not involve an error of law.

75. Consequently, we find that Clear's first ground of appeal discloses no error of law on the part of the FTT.

Ground 2

76. Miss Sloane submitted that the new circumstances that she relied on in relation to Ground 1 magnified the prejudice to Clear which resulted from Judge Blewitt's failure to take into account the breakdown of the relationship between Mr Kara and the Liquidator. Plainly in the light of our conclusions in relation to Ground 1 this is unsustainable. We therefore need to look at Ground 2 on its own merits.

77. Miss Sloane attacks the finding at [77] of the Decision that "the lack of co-operation shown by Mr Kara to the liquidator from the outset and the absence of any meaningful action to address the issue of the purported assignment or pursue the ceding of the conduct of the appeals" weighed against reinstatement. Miss Sloane submits that the only lack of co-operation shown by Mr Kara was to decline to attend an interview and that cannot rationally be a significant factor in the balance. She submits that Mr Kara's conduct was understandable and justifiable in the context of hostile relations, where the liquidator had stated that he wanted to interview Mr Kara about the affairs of the company generally and then issued the Commission Proceedings against Mr Kara. Miss Sloane submitted that the FTT erred in failing to take into account that the relationship between Clear and the Liquidator had effectively broken down, a finding of fact made by Judge Herrington in the UT Appeal.

78. In addition, Miss Sloane submits, Judge Blewitt perversely failed to take account of the fact that Mr Kara offered to attend an interview on the telephone or by video-link, offer to respond to the Liquidator's questions in correspondence and that there was in any event no need for the liquidator to interview Mr Kara before assigning the appeals, as shown by the Liquidator's belated actions in 2013. The Liquidator could have applied under the Insolvency Act 1986 for an order compelling Mr Kara to submit to an interview but never did so.

79. In our view Miss Sloane in her submissions fails to take into account that Judge Blewitt placed strong weight, which in our view she was entitled to do, on the overall length of delay in pursuing the appeals and the reasons for it. In particular, she placed weight on the long delay in pursuing the Appeals before Judge Porter decided to strike them out, which was before the Commission Proceedings were instituted and which Judge Herrington found led to the breakdown in relations. This is clearly apparent from [69] of the Decision, as quoted at [24] above. It is relevant that in spite of his finding that the institution of the Commission Proceedings led to the breakdown in relations the overall lapse of time since the strike out application in relation to the UT Appeal was a strong factor against reinstatement of those proceedings, as is clear from the summary of Judge Herrington's decision set out at [9] above. In essence, Judge Blewitt came to the same conclusion. It cannot therefore be said that Judge Blewitt failed to take into consideration the breakdown in relations. She clearly did but, in common with Judge Herrington, did not find that it outweighed the other factors which were relevant to the overall lapse of time. Judge Blewitt, in common with Judge Herrington, also found that the question of reinstatement was not pursued actively between May and October 2012, as recorded at [26] above.

80. In our view Judge Blewitt was also justified in placing weight on Mr Kara's refusal to attend for interview. She gave clear reasons for this at [71] of the Decision. In our view her conclusion that the Liquidator was justified in taking the stance he did in wishing to assess Mr Kara's credibility by face-to-face meeting before agreeing to the assignment of the Appeals was one that she was entitled to come to. We agree with Miss Wilson-Barnes that the failure to attend for interview cannot be said to be an insignificant factor. The evidence shows that the Liquidator made numerous requests for contact details or attendance at interview. Judge Blewitt was clearly entitled to place the reliance she did on the letter from Blake Lapthorn referred to at [25] above. Neither can it be said that Mr Kara can be exonerated because the Liquidator did not pursue matters by seeking an order under section 235 of the Insolvency Act 1986.

81. We therefore find that Clear has come nowhere near satisfying us that Judge Blewitt was plainly wrong in her conclusions at [77] of the Decision. She has clearly taken all relevant factors into account and then carried out a balancing exercise in the light of those factors. We can therefore find no error of law on the part of the FTT in relation to Ground 2.

Ground 3

82. As with Ground 2, Miss Sloane submitted that the new circumstances that she relied on in relation to Ground 1 magnified the prejudice to Clear which resulted from what she submitted was Judge Blewitt's failure to take into account the extent of the prejudice to Clear in not reinstating the Appeals, bearing in mind their value. For the reasons we gave at [76] above, this is unsustainable.

83. Miss Sloane submits that because of the large amounts at stake in the Appeals, the FTT failed to take into account the extent of the prejudice to Clear when balancing that prejudice against any prejudice to HMRC. Although it is clear that in other cases

the large amount at stake has been a factor which has tipped the balance in favour of the appellant, depending on how the judge in question has exercised his or her discretion, in our view it does not always have to be the case and the size of the amount at stake cannot be in itself a determining factor. It must simply be weighed in the balance with the other factors. It is clear from [74] and [75] of the Decision that Judge Blewitt did precisely that. She gave due consideration to the value factor but concluded that it was outweighed by the strong argument in favour of finality of litigation and the impact of time that has elapsed on the quality of the evidence. In our view she was perfectly entitled to come to that decision and we cannot say that she was plainly wrong in her conclusion. We can therefore find no error of law on the part of the FTT in relation to Ground 3.

Conclusion

84. We find that Judge Blewitt exercised the discretion with which she was entrusted with care having considered all relevant factors and considering none that were irrelevant. Her decision was plainly within the generous ambit of the discretion entrusted to her and there is no proper basis on which we should interfere with it.

Disposition

85. The appeal is dismissed. We direct that any application for costs be made within 28 days of the release of this decision in accordance with the requirements of the Tribunal Procedure (Upper Tribunal) Rules 2008.

TIMOTHY HERRINGTON **NICHOLAS ALEKSANDER**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 25 July 2016