[2017] UKUT 0214 (TCC)

Appeal number: UT/2016/0152

PROCEDURE – application to admit new ground of appeal – application to introduce new evidence – applications refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

BRAMLEY FERRY SUPPLIES LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Colin Bishopp
Judge Ashley Greenbank

Sitting in public at Royal Courts of Justice, Strand, London on 26 April 2017

David Bedenham, counsel, instructed by Rainer Hughes, solicitors, for the Appellant

Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The applications before us arise in the context of an appeal by the Appellant, Bramley Ferry Supplies Limited, against the decision of the First-tier Tribunal ("FTT") [2016] UKFTT 0378 (TC) (Judge Brooks), which was released on 11 May 2016 (the "FTT Decision").

2. In that decision, Judge Brooks decided that the Appellant's appeal had been made out of time and refused its application for a direction that the appeal should be admitted late.

3. The Appellant applied for permission to appeal against the FTT Decision. The application for permission to appeal set out two grounds of appeal.

> (1) The first ground was that the FTT made an error of law when holding, on the basis of the decision of the Court of Appeal in *R (on the application of Dinjan Hysaj) v. Secretary of State for the Home Department* [2014] EWCA Civ 1633, that the potential merits of the appeal should not be taken into account when considering the application to admit an appeal out of time.
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> (2) The second ground was that, when considering that application, the FTT made an error law in failing to take proper account of the fact that the delay in making the appeal was due to the failure of the Appellant's legal advisers and not of the Appellant itself.

4. The FTT refused permission to appeal. However, following an application to the Upper Tribunal, permission to appeal was granted.

5. Prior to the hearing, the parties requested a stay of proceedings to await the decision of the Supreme Court on an appeal from the decision of the Court of Appeal in the case of *BPP Holdings Limited v. HMRC* [2016] EWCA Civ 121, [2016] STC 841. The stay was granted.

6. By a notice dated 12 April 2017, the Appellant made two applications to the Tribunal:

> (1) for permission to appeal on an additional ground, namely that "the FTT's conclusion that the appeal had been filed out of time was against the weight of the evidence such as to constitute an error of law as per *Edwards v. Bairstow*"; and
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> (2) for permission to introduce new evidence in the form of a witness statement of Ms Natalie Wallis, a paralegal employed by the Appellant's solicitors, dated 12 April 2017.

7. We announced at the conclusion of the hearing that we would refuse both applications. Our reasons are set out below.

Application to admit an additional ground of appeal

The parties' submissions

8. Mr David Bedenham made the following submissions on behalf of the Appellant:

(1) The existing grounds of appeal related to the judge's refusal to permit a late appeal and did not challenge the finding of fact that the appeal was made out of time. In fact, the balance of the evidence was that the appeal was made within the 30 day time limit. This could be seen from the findings of fact in the FTT Decision: the notice of appeal was prepared on or before 1 May 2015; the grounds of appeal were settled by counsel on 27 April 2015; the email sending or, at least, apparently sending the notice of appeal to the Tribunal was dated 1 May 2015 and bore the same solicitors' reference as the notice of appeal (see FTT Decision [6] and [8]). The FTT disregarded that evidence in finding that the email was not sent to Tribunal before 24 December 2015. That evidence and the evidence of Ms Wallis (the subject of the second application) was inconsistent with and contrary to the FTT's conclusion such as to constitute an error of law in accordance with the principles set out in the decision of the House of Lords in *Edwards v. Bairstow* [1956] AC 14.

(2) Although the additional ground had been advanced at a late stage in the proceedings, it was in the interests of justice to permit the application. The Appellant traded in duty suspended alcohol. The licence granted to it in accordance with the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (its "WOWGR" licence) was fundamental to its business and the revocation of that licence, the subject matter of the intended appeal, was of critical importance to its survival. There was no prejudice to HMRC in the delay; the proceedings had been stayed to await the decision of the Supreme Court in *BPP* and there would be ample time for HMRC to prepare its response to the new ground of appeal.

9. Mr Simon Pritchard, for HMRC, objected to the additional ground of appeal:

(1) The application had been made far too late. The Appellant had the opportunity to raise the additional ground of appeal in its request for permission to appeal to the Upper Tribunal and in the notice of appeal. No application was made at either stage. No reason had been given for the delay.

(2) This was an entirely new ground of appeal. The other two grounds of appeal related to the judge's refusal to grant permission for a late appeal. They did not challenge the judge's finding of fact that the appeal was made out of time. The additional ground of appeal would be prejudicial to HMRC which would have to reconsider matters that it had thought were closed.

(3) The new ground of appeal had no merit. The burden of proof was on the Appellant to show that the notice of appeal was submitted on time. The Appellant had presented its evidence to the FTT that the appeal had been made on time. That evidence had been challenged by HMRC. The Appellant had failed to address the issues raised by HMRC; the Appellant had produced no evidence that the email had been received (such as the automated response from the Tribunal) and no detail of the attachments to the email. On the evidence before the FTT, the judge was entitled to reach the conclusion that the Appellant had not discharged that burden.

(4) If and to the extent that the additional ground relied upon the evidence of Ms Wallis, it was misconceived. The judge's findings of fact could only be

challenged under the principles in *Edwards v. Bairstow* by reference to the evidence before the judge at the time. Ms Wallis's evidence was not before the judge.

Discussion

10. There is no specific rule in the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Upper Tribunal Rules") governing the Upper Tribunal's power to admit a new ground of appeal. It follows that, in considering a new ground of appeal, the Upper Tribunal should exercise its powers in accordance with the overriding objective in Rule 2 namely "to deal with cases fairly and justly". In applying that principle, we considered that the following factors were of particular relevance.

11. There was a significant delay before the new ground was raised. The Appellant sought permission to appeal on 6 July 2016. There was no reference to the additional ground in that request. When permission to appeal was refused by the FTT, the Appellant sought permission to appeal from the Upper Tribunal on 18 August 2016. No reference was made to the additional ground of appeal. The additional ground was only raised in a notice of application to the Tribunal made on 12 April 2017, eight days before the scheduled hearing of the appeal. No good reason has been given for the delay.

12. The new ground of appeal is entirely new. It challenges the judge's finding of fact that the appeal was made out of time rather than his decision as to whether to permit a late appeal. We agree with Mr Pritchard that the Appellant could and should have raised this intended challenge when it first applied for permission to appeal, and that Mr Bedenham was unable to offer a satisfactory, or indeed any, explanation of the Appellant's failure to do so. We also do not accept Mr Bedenham's argument that there would be no prejudice to HMRC; absent a material and unforeseeable change of circumstance a respondent should be able to assume that a finding of fact which has not been challenged in an application for permission to appeal has been finally determined, and that it has no need to address the point further.

13. There is little merit in the additional ground. The Appellant produced evidence on this point to the FTT, in the shape of a witness statement provided by the senior partner, Mr Panesar, of the firm of solicitors acting for it. That evidence was challenged by HMRC, but Mr Panesar declined an invitation to give oral evidence. Even so, the judge took the evidence into account (FTT Decision [6] and [8]), but did not consider that the Appellant had discharged the burden of showing that the notice of appeal had been submitted within time. As he put it, he was "unable to find that the email was sent to the Tribunal before 24 December 2015" (FTT Decision [9]). The solicitors must have known that the burden of proof was on the Appellant, yet they simply failed to produce adequate evidence to discharge it. In our view, the judge was entitled, if not required, to give less weight to Mr Panesar's evidence when he declined to be cross-examined about it.

14. Furthermore, to the extent that the new ground of appeal relies upon the evidence of Ms Wallis – as Mr Bedenham suggested that it did – we agree with Mr Pritchard that it would be inappropriate to admit the new ground. The Upper Tribunal has jurisdiction to hear appeals from the FTT only on a point of law arising from the decision of the FTT: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. The decision of the House of Lords in *Edwards v. Bairstow* - to the effect that the courts can overturn on

appeal a decision of the fact-finding tribunal on a matter of fact where the facts that are found are such that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" (see Lord Radcliffe at page 36) – can only apply to the facts found by the tribunal on the evidence before it. There can be no error of law on the basis of the principles applied in *Edwards v. Bairstow* by reference to evidence that was not in front of the judge.

15. We also took into account the implications of allowing this application and the application to adduce new evidence on aspects of procedural fairness between the parties. This issue is discussed in the context of the application to introduce new evidence at [24] below.

Application to introduce new evidence

The parties' submissions

16. Mr Bedenham argued that the new evidence was required to support his new ground of appeal so that this ground "could get beyond the level of arguability". He made the following points in support of the application.

> (1) He stressed, once again, the importance of the substantive appeal to the Appellant. Ms Wallis's evidence was he said both relevant to the point at issue (that is, whether the appeal had been made in time) and important.
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> (2) The evidence had not been produced at the initial hearing because the Appellant had relied upon the evidence of Mr Panesar to the effect that the email and its attachments had been sent in time. The Appellant had failed to appreciate that better evidence could have been provided by Ms Wallis who was responsible for sending the email.
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> (3) There would be no prejudice to HMRC in admitting the evidence. HMRC would have the opportunity to consider the new evidence and determine its response given the Tribunal's agreement to stay the main proceedings behind the decision in *BPP*. The Tribunal's case management powers included the power to call new witnesses (rule 5(3)(d) of the Upper Tribunal Rules) and it would be possible for HMRC to cross-examine Ms Wallis on her evidence at the appeal hearing. The only reason for objecting to the introduction of the new evidence was that it had not been before the FTT.
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> (4) It was within the Upper Tribunal's powers to admit the new evidence. The Appellant did not need to meet the criteria in *Ladd v. Marshall* [1954] 1 WLR 1489. The principles laid down in *Ladd v. Marshall* for the introduction of new evidence related to the introduction of evidence in an original trial. There should be more flexibility shown in relation to the introduction of new evidence in appeals against procedural decisions.
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> In support of this submission, Mr Bedenham referred to the decision of the Court of Appeal in *Anglo Irish Asset Finance plc v. Flood and Riddell* [2011] EWCA Civ 799 where the court stated, at [11]:
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> > "The principles governing the circumstances in which permission will be given to adduce new evidence on appeal are more flexible in the case of appeals against procedural decisions than in the case of appeals against final judgments."

(5) Rather, the Upper Tribunal should deal with applications to introduce new evidence in accordance with the principles that govern the use of its general case management powers and accordingly by reference to the overriding principle to deal with cases fairly and justly. This would require the Tribunal to take into account all the facts of the case.

17. Mr Pritchard, for HMRC, objected to the application to introduce new evidence for the following reasons:

(1) When exercising any discretion to admit new evidence or exclude evidence under Rule 15(2) of the Upper Tribunal Rules, the Tribunal should have regard to the criteria set out in *Ladd v. Marshall*: see *Reed Employment Plc v. HMRC* [2014] UKUT 160, [2014] STC 1982 at [100].

(2) If those criteria were relevant, it was clear that the new evidence should not be admitted. The evidence could have been obtained with reasonable diligence before the original trial. It was self-evident that Ms Wallis was the person who should have been giving evidence.

(3) In any event, it was clear from the FTT Decision (at [9]) that the reason that the judge rejected the application to make a late appeal was not the content of the evidence. It was the failure of Appellant to address the legitimate challenges to the evidence raised by HMRC. That was mainly due to the failure of Mr Panesar to attend the hearing so that he could be cross-examined on his witness statement.

(4) There would be prejudice to HMRC in having to address a matter that had been closed. There was significant public interest in the finality of litigation. There had been a full hearing on this issue and a conclusion had been reached. The application was an attempt by the Appellant to reopen a closed issue.

Discussion

18. The Upper Tribunal Rules make specific provision for directions as to evidence in Rule 15. Rule 15(2) provides:

"(2) The Upper Tribunal may –

(a) admit evidence whether or not -

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

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

19. The Tribunal must exercise any discretion under Rule 15 with regard to the overriding objective in Rule 2 of the Upper Tribunal Rules to deal with cases "fairly and justly".

20. Some of the factors that we have taken into account in our consideration of the application to admit a new ground of appeal – such as the delay in making the application - apply equally to this application. We will not repeat them here. However, we should refer to one particular issue that was presented in argument, namely the relevance of the criteria for the admission of new evidence set out in the decision of the Court of Appeal in *Ladd v. Marshall* [1954] 1 WLR 1489.

21. In *Ladd v. Marshall*, Denning LJ, as he then was, set out three conditions that should be fulfilled to justify the admission of new evidence when he said (at page 1491):

> "…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."

22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v. Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the overriding objective. That requires us to take into account all of the circumstances of the case.

23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v. Marshall* criteria are of "persuasive authority as to how to give effect to the overriding objective": see *Reed Employment* [97]. The *Ladd v. Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100]. So whilst we take into account the fact the stay has been granted and that there is a possibility for HMRC to respond to the introduction of new evidence, we also have regard to the fact that the first of the criteria in *Ladd v Marshall* is not fulfilled. The Appellant has had an opportunity to put this evidence before the FTT; the evidence of Ms Wallis could have been obtained with reasonable diligence before the hearing.

24. Furthermore, as Mr Pritchard pointed out, the documents attached to Ms Wallis's witness statement are essentially the same as those that were attached to the witness statement of Mr Panesar, which was in evidence before the FTT. That evidence was challenged and the Appellant failed to rebut the challenges raised by HMRC, at least in part because Mr Panesar did not attend the hearing and so was not available to be cross-examined on his statement. In making this application and the application to admit a new ground of appeal, the Appellant seeks to have a "second bite at the cherry" having seen the concerns raised by the judge about the strength of the evidence, which he set out in the FTT Decision after taking into account all of the other matters raised at the initial hearing. If we were to allow the application to introduce a new ground of appeal and adduce new evidence in these circumstances, we would permit an unsuccessful

party to reopen issues that have been dealt with appropriately at the original hearing and risk the hearing becoming an iterative process. In our view, it would not be in the interests of effective case management and accordingly not in the interests of justice, to permit the Appellant to reopen this issue in this way.

Conclusion and determination

25. For the reasons given above, we reject the applications.

Colin Bishopp
Upper Tribunal Judge

Ashley Greenbank
Upper Tribunal Judge

Release date: 7 June 2017