[2020] UKUT 0011 (TCC)

Appeal numbers: UT/2018/0027
UT/2018/0028
UT/2018/0029
UT/2018/0066

INCOME TAX – loss relief – appeal part-heard – Appellants' Counsel unable to attend resumed hearing – adjournment sought but refused – whether Appellants denied a fair hearing

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

RICHARD MUNGAVIN

ERNEST THOMSON

TERENCE WORSFOLD

Appellants

- and –

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: Mr Justice Nugee

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 1NL on 29 November 2019

Mr Ernest Thomson and Mr Terence Worsfold in person

Ms Sadiya Choudhury, instructed by the General Counsel and Solicitor to Her Majesty's Revenue and Customs, for the Respondents

DECISION

Introduction

1. In this matter there are four appeals before the Upper Tribunal (**"the UT"**) from decisions of the First-tier Tribunal (Judge Jonathan Richards and Mrs Elizabeth Bridge) (**"the FTT"**).

2. The first three appeals (nos. UT/2018/0027, 0028 and 0029) are appeals by each of the three Appellants (Mr Mungavin, Mr Thomson and Mr Worsfold), but there is no relevant difference between them, and I will refer to the appeals together as **"the First Appeal"**. The First Appeal is brought against the decision of the FTT not to adjourn the resumed hearing of an appeal that had been adjourned part-heard and was due to resume on 4 December 2017, the decision being made on that day and their reasons for doing so being set out in a written Decision released on 8 December 2017. I will call this **"the December 2017 Decision"**. Permission to appeal was refused by the FTT (Judge Richards) in a Decision dated 21 February 2018 but granted by the UT (Judge Greg Sinfield) on 17 April 2018.

3. The other appeal (no. UT/2018/0066) (**"the Second Appeal"**) is an appeal against the decision of the FTT contained in a letter dated 24 April 2018 to proceed with the hearing of oral closing submissions (**"the April 2018 Decision**"). This appeal was brought by Mr Mungavin alone, but he was not present or represented at the hearing before me, and it became apparent that Mr Thomson and Mr Worsfold thought that they could rely on the Second Appeal as well, a point I come back to below. Again permission to appeal was refused by the FTT (Judge Richards), in a Decision dated 4 June 2018, but granted by the UT (Judge Sinfield), on 27 July 2018.

4. Each of the appeals raises the question whether it was fair to proceed with the relevant hearings.

Background – the underlying transactions

5. There is a lengthy background to the December 2017 and April 2018 Decisions which it is necessary to set out in some detail. I will start with giving an account of the underlying transactions.

6. Each of the Appellants entered into a financial contract, described as a contract for differences, with Pendulum Investment Corporation (**"Pendulum"**), a company incorporated in the Seychelles (a **"Pendulum CFD"**). Each claimed to have done so in the course of a trade in dealing with derivatives, and to have suffered a substantial trading loss which could be set against other income.

7. It is not necessary to go into all the details of the Pendulum CFDs, which were complex instruments: they can be found set out in the substantive decision of the FTT dated 16 July 2018, the neutral citation of which is [2018] UKFTT 396 (TC) (**"the Substantive Decision"**), which records the way in which the contracts were structured, and the way in which they worked in practice, in considerable detail and with conspicuous clarity. But it is helpful to set out some of the features of these transactions, and I will take Mr Thomson's Pendulum CFD as an illustration. These are all taken from the Substantive Decision, and references in this section are to paragraphs of the Substantive Decision (or of the Appendices to it which contain the details of each Appellant's transactions with Pendulum).

8. Mr Thomson entered into his Pendulum CFD on 29 March 2006. It had a Designated Issue Value of £325,000. But he only had to pay upfront a sum of £16,250 (ie 5% of

the Designated Issue Value), called the Initial Margin. That was payable to Pendulum within 5 days, although he in fact paid it about a month late. The terms of his Pendulum CFD were such that if the Designated Index (the FT-SE 100) had either risen by a certain amount (165 points) or fallen by a certain amount (160 points) at the end of Phase One (a period lasting from 29 March to 4 April 2006) he would receive back twice the Initial Margin, ie £32,500: [28]-[34], Appx 1 [2]-[5]. (The FTT considered this was the better view of the contract, although the contracts were ambiguous and there was an argument that he would receive back £32,500 *and* the return of his Initial Margin – nothing in the event turned on this: [35]-[36]). The evidence before the FTT was that the possibility of a Pendulum CFD achieving success at the end of Phase One was a real one, but it was not a likely outcome: [65(6)], fn 8. Out of 222 cases of investors entering similar Pendulum CFDs of which HMRC were aware, only about 23 or 24 achieved success at the end of Phase One, or roughly 10%, and most, if not all, of those reinvested their winnings in a further Pendulum CFD: [59]. None of the current Appellants was successful at the end of Phase One: [38].

9. Failure to achieve success at the end of Phase One had at least two consequences. First, the Pendulum CFD entered Phase Two. This, and successive phases up to Phase Five, gave further opportunities for payments to be made to the investor, depending on the level of the relevant Index at the end of each Phase: [30(5)-(8)]. The Phases were increasingly lengthy, in Mr Thomson's case lasting until the end of the 2nd, 7th, 15th and 25th years of the CFD respectively: Appx 1 [3].

10. Second, failure to achieve success at the end of Phase One triggered an obligation on the investor to make a further substantial payment to Pendulum, called the Margin Call Balance: [30(5)]. In Mr Thomson's case the sum was £308,750 (calculated as the Designated Issue Value of £325,000 less the Initial Margin of £16,250): Appx 1 [2], [7]. But he did not have to pay this in cash. He was offered, and accepted, a loan in that sum from an entity called Bayridge Investments LLC (**"Bayridge"**). Bayridge discharged Mr Thomson's liability to pay the £308,750 to Pendulum, although Bayridge did not pay cash either – the FTT found that there was a series of book entries which were treated by Pendulum as discharging Mr Thomson's obligation: [38]-[41], Appx 1 [7].

11. The terms of the Bayridge loan were, in the words of the FTT, *"completely uncommercial"*: [42]. No interest was charged on the loan, and it was not repayable unless success were achieved at the end of one of the later Phases, or until a longstop date 50 years in the future, when the nominal amount of the loan would become repayable, albeit its real value would have been eroded by 50 years of inflation: [39(2)-(4)].

12. By the time of the hearing, Mr Thomson's CFD had reached the end of Phases Two and Three without success, and he remained liable for the Bayridge loan: Appx 1 [8]. But as can be seen the actual cost to him of the transaction was £16,250 in cash (the Initial Margin Call), and a liability to repay Bayridge £308,750 without interest, probably not until 2056, the net present value of which would be much smaller.

13. However for the purposes of his tax return for the relevant year (2005/06) he claimed to have suffered a trading loss in relation to his Pendulum CFD of £318,500, calculated as the amount he had "paid" to acquire it of £325,000 less its market value at 5 April 2006 of £6,500: [86]-[87]. The market value had been given to him by Pendulum, and was supported by the fact that Pendulum had in May 2006 offered to

repurchase his CFD at the price of £6,500, the basis of the offer being said to be the fair market value as at 5 April 2006: [45], [84], [86].

14. As the FTT perceptively said, for the arrangements to function as a tax avoidance scheme they had to produce a tax loss without an economic loss: [65(5)]. If the scheme worked, this is precisely what they did: for an outlay of £16,250 and a liability to Bayridge many years in the future, Mr Thomson claimed to have suffered a trading loss for tax purposes of £318,500. (The actual loss claimed in his tax return was slightly less at £314,677.50 due to some net profits from Mr Thomson's other (online) CFD trading: [87]).

15. Mr Thomson sought to set some of his claimed trading loss sideways against his total income for 2005/06, and to carry back the remainder against his profits and income for the three previous tax years: [89].

16. HMRC opened an enquiry into Mr Thomson's return. They closed it in April 2010 and issued a closure notice that concluded that no loss relief was available for any of the trading losses claimed: [90].

17. Mr Thomson appealed to HMRC, and following a review by HMRC in August 2010 in which they upheld their conclusions, notified the appeal to the FTT in September 2010: [91]. Mr Thomson attended two meetings with HMRC in November 2013 and September 2014: [92]-[93]. No agreement was however reached and HMRC charged Mr Thomson with a penalty on the basis that he had been negligent in connection with his tax return. They abated the penalty by 32.5% (out of a maximum 40%) to reflect his "co-operation", and by 25% (out of a maximum 40%) to reflect the "seriousness" of his behaviour, but did not give him any discount for "disclosure" because he continued to maintain that the trading loss was available, thereby leading to a total discount of 57.5%: [95]-[96]. Mr Thomson appealed the penalty as well: [97].

18. The other two Appellants, Mr Worsfold and Mr Mungavin, had Pendulum CFDs that were in all essential respects identical to each other, and which differed little from that of Mr Thomson. Each of Mr Worsfold and Mr Mungavin took out a Pendulum CFD on 30 March 2005, and paid £15,000 by way of Initial Margin, the Designated Issue Value being £300,000: Appx 2 [2]-[5], Appx 3 [1]. In their tax returns for 2004/05 they each claimed to have sustained a substantial trading loss on the Pendulum CFD (Mr Worsfold's claimed loss was £295,437): [127], [157]. HMRC disallowed the losses, issuing closure notices in January 2009: [132], [159]. HMRC also later issued each of them with a penalty, discounted in each case by a total of 45%, made up of 30% to reflect "co-operation" and 15% to reflect "seriousness": [136], [162]. Each appealed both the closure notice and the penalty to the FTT: [132], [137], [159], [163].

Procedural history up to the December 2017 Decision

19. Mr Worsfold and Mr Mungavin appealed to the Special Commissioners against their closure notices on 22 January 2009, and Mr Thomson notified his appeal against his closure notice to HMRC on 27 April 2010 and to the FTT on 6 September 2010. Their appeals were stayed on a number of occasions because of ongoing criminal investigations into suspected criminal activity by Mr Watkin Gittins, chairman of the Montpelier group of financial and tax advisers which had promoted the Pendulum arrangements (**"Montpelier"**), and some users of those arrangements (not including any of the Appellants). However, the stays in the Appellants' appeals lapsed in 2015 and the appeals began progressing normally.

20. On 14 March 2016 the FTT (Judge Marilyn McKeever) directed that the appeals of all three Appellants (both in relation to the closure notices and the penalty appeals which had by then been brought as well) be joined and heard together at a single hearing. On 11 October 2016 the hearing of the appeals was listed for 10 days starting on Monday 20 March 2017.

21. The Appellants were to be represented at the hearing by counsel, Ms Alison Graham-Wells (now deceased), who was suffering from stage IV metastatic breast cancer at the time. She was instructed by a Montpelier entity (Montpelier Tax Consultants Ltd), and Mr Gittins in practice conducted the appeal.

22. The witnesses due to give evidence were as follows. For the Appellants, there were the three Appellants themselves, Mr Gittins, and an accounting expert, Mr Guy Wiltcher; for HMRC, Officer Mark Bradley, the HMRC officer who had overarching responsibility for the enquiries into the returns of users of the Pendulum arrangements, and HMRC's accounting expert, Mr Stephen Harrap. On 17 February 2017, HMRC wrote to the FTT suggesting a possible running order which envisaged the completion of the evidence for the Appellants by the end of Day 5, leaving up to 2 days for HMRC's evidence, and 3 days for submissions. On 23 February 2017 Mr Gittins sent an e-mail to the effect that the Appellants had no objection to the running order but did not think the appeals would take 10 days, saying that their view was that one week was all that was required.

23. The Appellants' skeleton argument was due 21 days before the hearing, that is on 27 February 2017. On 23 February 2017 Ms Graham-Wells applied for an extension of time for serving and filing the skeleton until 8 March 2017 on the grounds that Montpelier had understood that skeleton arguments were not due until 14 days before the hearing date, that is 6 March 2017. The application stated that due to ongoing medical treatment commitments, counsel was unable to complete the Appellants' skeleton argument by the due date. It added that she had scheduled treatment on 24 February 2017 and would not be fit to work again before 28 February 2017, and asked for an extension up to 8 March on the grounds that counsel's recovery from treatment *"can be unpredictable"*.

24. On 8 March 2017 Mr Gittins applied for a further extension until 10 March on the grounds that counsel had been unwell the night before and was still feeling poorly that day. The skeleton argument, although dated 10 March 2017, was not in fact received by HMRC until the afternoon of 13 March 2017, one week before the hearing. The skeleton argument also stated that it did not address the penalty appeals due to time constraints and a skeleton argument specific to those appeals would be provided as soon as possible and no later than the start of the hearing. No such skeleton was in the event provided.

25. After the hearing began, it soon fell behind the proposed timetable, Day 1 (Monday 20 March 2017) being largely taken up with an application to admit new evidence. Mr Thomson started giving evidence towards the end of Day 1, and was still in the course of being cross-examined on the morning of Day 3 (Wednesday 22 March). But shortly before 11.20 Ms Graham-Wells indicated that she was in a little bit of pain, as a result of which the hearing was adjourned. It had been hoped that the hearing could reconvene shortly but in fact Ms Graham-Wells was obliged to leave the RCJ in a wheelchair and was taken to hospital by ambulance, and the hearing did not resume until the next day.

26. On Day 4 (Thursday 23 March) Ms Graham-Wells explained that she had had to go to hospital because she was very high clot risk and the pain she was experiencing was symptomatic of a clot on the lungs; fortunately tests while she was in the ambulance showed that this was not the case, but it was thought appropriate that she go to hospital as a precaution anyway. She indicated that she had taken quite strong painkillers and was tired but felt fit enough and her doctors had no concerns about her continuing. But it became clear that there was no likelihood of the case being finished in the allotted time, and after a discussion about timetabling, the FTT decided that they would press on with hearing as much of the evidence as possible. Judge Richards indicated that if Ms Graham-Wells had asked for an adjournment on the basis of her own health, the Tribunal would look on that sympathetically but she agreed that that was not the application that was being made, and that she would never have accepted the case had she thought her health was going to compromise the listing.

27. The evidence of all 3 Appellants and their expert, Mr Wiltcher, took until the end of Day 7 (Tuesday 28 March). Mr Gittins was called on Day 8 (Wednesday 29 March) but his evidence was not completed that day, and at the end of the day Ms Graham-Wells raised the question of timetabling again, suggesting that the hearing be adjourned after Mr Gittins' evidence (that is at the end of the Appellants' evidence). She admitted to *"getting tired so I am mixing my words"* and that *"I have to say … that I am beginning to struggle"*, and added:

> "So, in my clients' interests, I think it would be better that, once we have dealt with all of the appellants' evidence, that we stop then."

The FTT decided that in those circumstances they would not hear Officer Bradley's evidence as they did not want to take the risk of going part-heard on his evidence.

28. The FTT revisited the question the next morning (Day 9, Thursday 30 March). Ms Graham-Wells reiterated that she did not want to take Officer Bradley's evidence that week because she was *"struggling"* and in response to an explicit question from Judge Richards whether both parties were content not to start Officer Bradley's evidence, she said *"I don't think I am going to be able to last"*. Ms Choudhury's position was that she did not want Officer Bradley's evidence to go part-heard and had he been going to give evidence she would have asked the Tribunal to sit early and late and take shorter lunch breaks to avoid that risk, but that in the light of Ms Graham-Wells' indication that she would not be in a position to do that, she was content. The FTT identified, and reserved, a listing for 5 days from 19 to 22 June and 26 June 2017 when both counsel and the Tribunal itself were available and at the end of Mr Gittins' evidence the hearing was adjourned to those dates.

29. On 16 May 2017 however Montpelier applied to the FTT for an adjournment of the June hearing because Ms Graham-Wells had been admitted to a hospice, and had been advised by her doctor not to work before the end of June. Ms Graham-Wells herself sent an e-mail to Judge Richards explaining that she had been admitted to the hospice because she had developed a potentially serious infection (sepsis), and although she had made a good recovery, was advised that she needed rest to ensure her immune function recovered and hoped to make a phased return to practice in the summer. A letter from her oncologist which she attached was not quite so positive: it referred to the fact they planned to start a course of chemotherapy in the near future, that Ms Graham-Wells was not fit to undertake tribunal work at least until July 2017, and that:

> "we could perhaps discuss a phased return to work after July depending on how she gets on with her chemotherapy treatment."

In the light of this HMRC did not oppose the adjournment, but asked the FTT to relist the hearing as soon as possible in the autumn, raising the possibility that if Ms Graham-Wells were unable to attend due to her health, alternative counsel would have to be instructed; they said that although it was undesirable for new counsel to be instructed part-way through an appeal, circumstances sometimes made it necessary. The adjournment was duly granted by Judge Morgan (in the absence of Judge Richards on holiday).

30. On 31 May 2017 Judge Richards wrote to the parties with three options for a resumed hearing: (1) a 7-day hearing to complete the evidence and hear oral closing submissions; (2) a 4- or 5-day hearing to hear Officer Bradley's evidence (but not HMRC's expert evidence) and closing submissions on the question of whether each Appellant had been carrying on a trade on a commercial basis and with a view to (or reasonable expectation of) profit; or (3) a 3-day hearing to hear HMRC's evidence but not submissions. He added:

> "Given the situation in which we find ourselves, I think there is much to be said for Option Three. It would ensure that all the evidence is in and enables progress to be made. If Ms Graham-Wells continues to be unwell, new counsel would only need to prepare a cross-examination of two witnesses to prepare for an "option three" hearing. Much of the "heavy lifting" on closing submissions could be done in writing with potentially a short further hearing of a day in which counsel could emphasise their written closing submissions and deal with questions from the Tribunal."

31. On 19 June 2017 Mr Gittins sent an e-mail to the FTT agreeing that Option 3 was preferable, saying:

> "as Judge Richards correctly points out Option 3 only requires (if necessary) new counsel for the Appellants to be briefed on the cross examination of the witnesses. In addition it is to be hoped that Ms Graham-Wells will be fit for the hearing and if so it is likely that post her illness a three day hearing would be preferable leaving time later for her to prepare closing submissions in writing."

HMRC's preference was for Option 2, or failing that Option 1.

32. On 26 June 2017 Judge Richards gave written directions that there be a further 3-day hearing to hear the remainder of HMRC's evidence (ie Option 3). The reasons he gave for choosing this particular format included the following:

> "All the options have their own different merits. Unfortunately, those merits also depend on unknown future events, particularly relating to the speed of Ms Graham-Wells's recovery and whether or not the appellants need to instruct new counsel to act at the hearing….
>
> If the appellants need to instruct new counsel, it would be manageable for new counsel to prepare for a 3-day hearing at which just two witnesses need to be cross-examined. By contrast, it would be much more of an undertaking for new counsel to prepare for a hearing at which oral submissions relating to the whole appeal must be made. It would be unfortunate if the Tribunal listed a 5 or 7-day hearing only to be confronted by an application by the appellants for the hearing to be vacated because new counsel is not in a position to conduct it."

33. On 26 July 2017 the FTT notified the parties that the resumed hearing had been listed for Monday 4 to Wednesday 6 December 2017.

34. On 22 August 2017 the Appellants applied for the hearing to be postponed on the grounds that Ms Graham-Wells was double-booked. This application was refused by Judge Kempster on the papers on 7 September 2017. On 11 September 2017 HMRC asked Montpelier to confirm that Ms Graham-Wells would attend the hearing. Mr Gittins replied on 28 September 2017, saying among other things:

> "The Respondents are well aware of Ms Alison Graham Wells illness. The position at the moment is that the Appellants are hopeful that Ms Graham Wells can represent the Appellants at the aforesaid hearing but contingency plans are in place in case she is not [able] to do so."

35. However on Friday 24 November 2017 (10 days before the adjourned hearing was due to take place) Mr Gittins sent a letter by e-mail to Judge Richards applying to vacate and reschedule the hearing. The grounds for this application were that although a decision had been made some 8 weeks before, after discussion with Ms Graham-Wells, that she would be able to attend the hearing, matters had taken a turn for the worse the day before. Ms Graham-Wells had sent Montpelier an e-mail at 15.23 stating that her oncologist had advised her not to undertake the hearing. Mr Gittins' letter said that it was not possible to properly brief new counsel in the time available.

36. HMRC wrote to the FTT on 28 November 2017, this time opposing the adjournment and pointing out that Montpelier had informed them previously that the Appellants had a contingency plan in place in case Ms Graham-Wells was unable to attend. Montpelier responded to this letter on the same day stating that Ms Graham-Wells' health had deteriorated unexpectedly and it had been too late to trigger the contingency plan. On 30 November 2017 they sent the FTT a letter from Ms Graham-Wells' oncologist dated 23 November 2017 stating that:

> "She has chemotherapy on a 3-weekly cycle. She has been able to continue some of her work based at home and some court appearances during this time, however, her side effects at this time precluded any court or tribunal work as they have rendered her not medically fit for these duties."

37. On 30 November 2017 Judge Richards gave written directions refusing the application to vacate the hearing, but permitting it to be renewed at the commencement of the hearing. He stated:

> "The parties should be aware that my strong impression is that the appellants' application to vacate the hearing should be refused. The appellants have known of Ms Graham-Wells's poor health for a long time now and have had plenty of time to put in place contingency plans. Moreover, the Tribunal's directions of 28 June 2017, and Judge Kempster's refusal of the appellants' most recent request for a postponement of the hearing, will have put them on notice that, given the appeal is part-heard, the Tribunal regards it as important that the hearing on 4-6 December should go ahead. The timetable for hearing this appeal has already been more than adequately adjusted to deal with Ms Graham-Wells's illness. If the appellants' contingency plans have failed, that suggests to me that the contingency plans were not adequate; it does not suggest to me that the hearing should be postponed again."

38. On the afternoon of 1 December Ms Graham-Wells sent by e-mail a letter to the FTT giving more detail about her medical condition. In relation to the contingency plans, she said that Montpelier had regularly made enquiries as to her state of health and fitness to continue, and confirmed that they had a discussion with her on 11 September solely to discuss her fitness. Her letter included reference to the fact that she had returned 2 4-day trials in November because she was concerned her fatigue

levels would escalate; that she had undertaken a 1-day hearing on 17 November, but had become incredibly fatigued following it; that she had been suffering from unexplained and severe nosebleeds; and that at her routine oncology clinic appointment on 23 November her oncologist was *"aghast"* that she was planning to undertake the present hearing and advised her she was medically unfit to undertake a 3-day hearing. That was something she had not expected.

39. None of the Appellants nor Montpelier were in attendance at the December hearing. They were represented by counsel, Mr Michael Clarke, who was, however, only instructed to renew the application for the adjournment. His main submission was that Ms Graham-Wells' unavailability was due to a sudden and unforeseen circumstance and there had not been sufficient time for a contingency plan to be put in place after she was informed she was unable to work on 23 November. HMRC contended that even though the particular medical issue that had arisen might have been unforeseen, it was reasonably foreseeable that Ms Graham-Wells could suffer from a complication that would mean she was unable to attend the hearing. This could be seen from the fact that unexpected complications in her health had resulted in the March hearing going part-heard and the adjournment of the June hearing.

40. The FTT refused the application and indicated that they would give full written reasons in the next few days. Mr Clarke withdrew and the hearing then continued. Both of HMRC's witnesses were sworn in and gave evidence. In the absence of any representative for the Appellants, they were not cross-examined, but Ms Choudhury put some questions to them which she thought, based on her reading of the transcripts and Ms Graham-Wells' skeleton, that the Appellants would have wanted to put to them. The Tribunal itself also asked a number of questions of them. The hearing was then adjourned for written closing submissions to be filed, with a 2-day hearing to follow for oral closing submissions. In the event directions were given that the written closing submissions be filed by 26 January 2018 (later extended to 23 February 2018), and the 2-day hearing was listed for 9 and 10 May 2018.

The December 2017 Decision

41. As stated above, the FTT set out their reasons for refusing the adjournment in a written Decision released on 8 December 2017. References in this section are to the paragraphs of the "Notes and Reasons" in this Decision.

42. After setting out the procedural history at [1]-[13], the FTT said they had been guided by the overriding objective of dealing with the cases fairly and justly set out in rule 2 of the Tribunal Rules (ie the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules SI 2009/273) (**"the FTT Rules"**); they commented that, as was so often the case, a number of the considerations in rule 2 pointed in different directions: a further postponement would add to delay and costs, whereas a refusal would mean that the Appellants would not be able, by counsel, to cross-examine HMRC's witnesses: [14].

43. The FTT then considered Mr Clarke's central submission that Ms Graham-Wells' problems were not a direct result of her cancer and that the situation was no different from that of any appellant whose representative was suddenly and unexpectedly taken ill: [15]. They did not accept that submission. They thought the medical evidence suggested that Ms Graham-Wells was suffering side-effects from her chemotherapy and that it was foreseeable that she might suffer problems that could cause her to be unable to conduct the hearing: [16(1)]. The Tribunal had already made a number of accommodations to address her poor health, and in particular had chosen Option 3

when relisting the hearing, contrary to HMRC's wishes, precisely because that would be easier for any replacement advocate if she were unwell: [16(2)]. Whether or not Ms Graham-Wells' current medical problems were in fact connected to her cancer, the Tribunal had made it clear that it could not carry on postponing the hearing if she were unwell: [16(3)].

44. They then said that the mere fact that they did not accept Mr Clarke's central point did not of itself mean the application had to be refused, and that it was necessary to examine the parties' conduct and the respective prejudice they would suffer: [17]. They then set out what they considered to be relevant considerations:

    (1) The Appellants had known for some time that their counsel was seriously ill. The Tribunal had sought to make it as easy as possible for other counsel to take over if necessary; the contingency plans that were put in place were not able to deal with Ms Graham-Wells becoming unavailable on 23 November although this was precisely the eventuality that contingency plans should have addressed: [17(1)].

    (2) They did not accept Mr Clarke's submissions that given the unexpected turn of events on 23 November 2017, there was not enough time for new counsel to be briefed. The Appellants should have brought in new counsel earlier to become familiar with the appeal and be ready to step in at short notice: [17(2)].

    (3) The Appellants would of course suffer prejudice in being unable to cross-examine Officer Bradley and Mr Harrap as they wished, but that prejudice was not as great as it might seem. The majority of Officer Bradley's evidence related to the "trading issue"; but whether or not they were trading largely depended on their own actions and motivations on which they had given evidence. Officer Bradley's evidence was also relevant to the question whether they had been negligent in completing their tax returns (which was the key issue in relation to penalties); again that depended on their actions, and although Officer Bradley commented on that his evidence would not be determinative: [17(3)].

    (4) So far as Mr Harrap's evidence was concerned, it would be of limited, or no, relevance if the Appellants lost on the trading issue, although if they won on that issue, it would be relevant and the Appellants would suffer some prejudice: [17(4)].

    (5) They did not accept that the amount of work required to prepare to cross-examine HMRC's witnesses was as great as Mr Clarke had suggested. The evidence that Officer Bradley and Mr Harrap gave was virtually identical across the three appeals, and even if a new advocate did start from a standing start on 23 November, Ms Graham-Wells could have briefed him or her on a core of questions to be put; that might not be perfect but it could have been adequate: [17(5)].

    (6) The Appellants chose to take no part in the adjourned hearing. They could always have attended, by themselves or counsel, and made the best of the situation by conducting a cross-examination off Ms Graham-Wells' notes. In the event Ms Choudhury put some questions by way of cross-examination of her own witnesses: [17(6))].

45. Having thus considered in detail the prejudice that would be suffered by the

Appellants, the FTT said that HMRC would suffer prejudice in increased costs if the hearing were postponed [17(7)]. They then said that it was appropriate to take into account the efficient administration of justice. When the hearing was last postponed, it resulted in an adjournment of over 5 months; if the hearing were adjourned again, it might not be possible to reconvene until April or May 2018. There would then need to be a further hearing for closing submissions, and the Tribunal might not be making a decision until June 2018, involving evidence heard over 15 months before. Although the proceedings were transcribed they would regard this as *"extremely undesirable"*: [17(8)].

46. Having weighed up the actions of the parties and the competing prejudices that they would suffer in the light of the overriding objective, they concluded that the hearing should not be postponed, and that it was in the interests of justice to proceed in the absence of the Appellants: [17].

47. The FTT reverted to the question of whether the December 2017 Decision had substantively prejudiced the Appellants in their Substantive Decision. I deal with this below.

Procedural history up to April 2018 Decision

48. On 2 February 2018 the Appellants applied for permission to appeal the December 2017 Decision. The Appellants also applied for a stay of further procedural steps in the proceedings, including the filing and service of the written submissions as well as the hearing listed for May pending the outcome of that application.

49. Judge Richards refused permission to appeal the December 2017 Decision in a written Decision released on 21 February 2018. He also refused the application for a stay on the grounds that it would lead to even further delay in determining the appeals and the release of the substantive decision.

50. On 23 March 2018 the Appellants applied to the UT for permission to appeal the December 2017 Decision. They did not seek to appeal the FTT's refusal of a stay. As already noted, the UT (Judge Sinfield) granted permission to appeal the December 2017 Decision on 18 April 2018. Although the grounds of appeal referred to a stay, Judge Sinfield noted that the FTT's decision to refuse a stay had not been appealed.

51. By a written Decision dated 19 April 2018 Judge Richards gave directions for the hearing due to take place on 9 and 10 May 2018. The FTT had by that stage received the parties' written closing submissions and had evidently undertaken a considerable amount of work on them, as his directions contained detailed questions arising out of the respective submissions which had occurred to the FTT when reviewing them.

52. By letter from Montpelier dated 18 April 2018 (but evidently not considered by the FTT before giving the directions just referred to) the Appellants sent the FTT a copy of the UT's decision to grant permission to appeal the December 2017 Decision, and applied to adjourn the hearing due to take place on 9 and 10 May until after the determination of that appeal, on the basis that if the hearing proceeded but the appeal later succeeded, there would be a breach of natural justice.

53. By letter dated 24 April 2018 that application was refused. This is the April 2018 Decision which is the second decision appealed against.

The April 2018 Decision

54. The April 2018 Decision is quite short and I can cite it in full, as follows:

> "The purpose of the hearing on 9 and 10 May 2018 is to enable the parties, where necessary, to expand or explain their closing written submissions, to deal with questions from me and Mrs Bridge and to address each other's arguments. Whatever the outcome of the Appellants' appeal to the Upper Tribunal, the FtT will still ultimately have to make a decision in this appeal and oral arguments on 9 and 10 May will enable the FtT to do so.
>
> I therefore consider that the hearing on 9 and 10 May continues to fulfil a useful function. Moreover it is efficient for that hearing to take place within a reasonable time of the parties submitting their written submissions. I will not therefore postpone the hearing on 9 and 10 May.
>
> The parties may, at the hearing, make submissions as to what the FtT should do following conclusion of the hearing. If the appellants feel that the FtT should defer making a formal determination of the appeal until after the appeal to the Upper Tribunal has been heard they may make submissions accordingly at the hearing (and HMRC may respond to those submissions)."

Procedural history – up to Substantive Decision

55. On 1 May 2018 the Appellants applied for permission to appeal the April 2018 Decision on the grounds that the FTT had given insufficient weight to the prejudice that they had suffered in not being able to cross-examine HMRC's witnesses which would inevitably affect their ability to make closing submissions.

56. On 8 May 2018 the Appellants informed the FTT that they would not be attending and would not be represented at the hearing starting the following day. This was because they considered the process had been unfair to them and they had been prejudiced. The FTT decided to proceed in the Appellants' absence at the start of the hearing on 9 May 2018.

57. On 4 June 2018 Judge Richards refused the application for permission to appeal the April 2018 Decision on the grounds that the FTT had not made an arguable error of law in refusing to adjourn the May hearing.

58. On 4 July 2018 Mr Mungavin (but not the other two Appellants) applied to the UT for permission to appeal the April 2018 Decision. As already noted the UT (Judge Sinfield) granted such permission on 27 July 2018.

59. On 16 July 2018 the FTT released the Substantive Decision.

The Substantive Decision

60. In the Substantive Decision the FTT dismissed the Appellants' appeals against the closure notices. They did so on the basis that in each case the Appellant was not carrying on a trade when entering into the Pendulum CFDs; even if carrying on a trade was not doing so on a commercial basis; and did not do so with a view to profit or where profit could reasonably be expected. The effect of that was that no relief was available at all.

61. So far as the penalties were concerned, they concluded that each of the Appellants had been negligent in completing his tax return. That justified the levying of penalties. They then considered the quantum. In Mr Thomson's case they agreed with HMRC's total discount of 57.5%. In the case of Mr Worsfold and Mr Mungavin however, where HMRC had allowed each of them a total discount of 45%, made up of 30% to reflect "co-operation" and 15% to reflect "seriousness", they replaced that with a total discount of 60%, agreeing with HMRC's figure of 30% for "co-operation", but increasing the discount for "seriousness" (or rather lack of it) from 15% to 30%. To

that extent their appeals were allowed.

62. Having set out their conclusions, the FTT devoted a section at [283] to [286] to explaining why they did not consider that the fact that the Appellants had not cross-examined Officer Bradley and Mr Harrap by their counsel had affected the overall determination of the appeals. I think it helpful to cite what they say in [284] in full:

> "The appellants' claims for loss relief which is the subject of this appeal have failed because none of them was carrying on a trade, on a commercial basis, with a view to profit. That in turn was because of the transactions that the appellants undertook and, where relevant, their subjective reasons for undertaking them. No evidence from Officer Bradley was needed to establish that the appellants' transactions lacked the hallmarks of trading: that was evident from the transactions themselves. Similarly, we did not need Officer Bradley's evidence to determine that the appellants all entered into their CFD transactions online and with Pendulum in order to generate a tax loss that did not correspond to an economic loss as that emerged clearly both from the appellants' dealings with Montpelier and the artificial nature of the Pendulum arrangements. Officer Bradley has given evidence that points in the same direction. However, the appellants would have failed in their appeals against HMRC's closure notices even if Officer Bradley had not given evidence at all."

In a footnote they pointed out that since the appeals were against closure notices, the burden was on the Appellants to demonstrate that the closure notices overstated their liability to tax.

63. At [285] they said that since Mr Harrap's evidence only went to the amount of tax loss available, and they had concluded that the Appellants were not entitled to any relief, his evidence was equally unnecessary, and the fact he was not cross-examined by the Appellants' counsel had not altered the outcome of the appeals.

64. At [286] they dealt with the penalties. On the question of whether the Appellants had been negligent in connection with their tax returns, they said that Officer Bradley did not need to give evidence to establish the negligence: it was established by reference to the Appellants' own failure to take reasonable care to ensure the returns were correct. In relation to quantum, they said that while Officer Bradley did explain the process that HMRC took to mitigating the penalties, that was evident from the penalty notices themselves. And the FTT had considered for themselves the extent to which penalties should be reduced, and Officer Bradley's evidence:

> "has not had a material effect on the outcome of the appellants' appeal against penalties either."

Procedural history – after the Substantive Decision

65. On 10 September 2018 the Appellants applied for permission to appeal the Substantive Decision. In a decision dated 27 November 2018 Judge Richards refused permission to appeal on all grounds except in relation to Ground 1, which was that the hearing was unfair as a consequence of the procedure followed and the decisions taken by the FTT to refuse two separate adjournment applications by the Appellants. Judge Richards granted permission in respect of that ground so that the UT could consider not just the case management decisions, but also their effect on the Substantive Decision itself. However, the appeal in respect of Ground 1 was not in the event notified to the Upper Tribunal, nor was an application for permission made to the Upper Tribunal in respect of the other grounds.

The Second Appeal

66. I will deal first with the Second Appeal, that is against the April 2018 Decision. As referred to above, this appeal was only brought by Mr Mungavin, and he was in fact neither present nor represented at the hearing before me. It was apparent however that Mr Thomson and Mr Worsfold, who appeared in person, were under the impression that they could benefit from the Second Appeal; it also appeared that Mr Mungavin may have been assuming that Mr Thomson and Mr Worsfold could put forward arguments on his behalf.

67. Rather than take up time with an investigation of how it had come about that only Mr Mungavin had appealed but that Mr Thomson and Mr Worsfold had thought they could take advantage of it, I decided to allow them to join in the Second Appeal (granting permission out of time), and, to avoid any question of an adjournment, to allow them to address me both on their own behalf and on behalf of Mr Mungavin.

68. In fact however in discussion with Ms Choudhury I reached the conclusion that it was unnecessary to give any separate consideration to the Second Appeal. She accepted that if the Appellants succeeded in the First Appeal, the only fair thing would be to put both parties back into the position they were in on 4 December 2017, that is with the appeal to the FTT part-heard, with all the Appellants' evidence called, but with none of HMRC's. It would then be necessary to remit the case to the FTT for the FTT to give directions for the hearing of the balance of the appeal, which would involve HMRC's witnesses being called and available for cross-examination, and fresh closing submissions. In other words Ms Choudhury accepted that the fact that the Appellants, despite being given permission to appeal the Substantive Decision, had not notified that appeal to the UT, did not actually matter: if the First Appeal succeeded, the matter would have to go back to the FTT anyway.

69. It therefore seemed to me – and as I understand it Ms Choudhury agreed – that the Second Appeal was otiose. If the Appellants succeed in the First Appeal, they do not need the Second Appeal. But if they fail in the First Appeal, the foundation for the Second Appeal falls away. The whole basis for the application to adjourn in April 2018 was that the First Appeal was outstanding; but if the FTT were justified in refusing an adjournment in the December 2017 Decision, there was no reason why the resumed hearing on 9 and 10 May 2018 should not also go ahead, and the April 2018 Decision cannot be faulted.

70. It is therefore unnecessary to give any separate consideration to the Second Appeal and I do not propose to do so. The only question I need to resolve is whether there is any valid ground for appealing the December 2017 Decision.

The First Appeal

71. Two grounds of appeal are relied on:

    (1) Ground 1 is that the FTT took into account irrelevant material or did not take into account relevant material, or that the decision was plainly wrong. This is supported by 7 particular matters which I detail below.

    (2) Ground 2 is that in considering the question of an adjournment the dominant consideration is the right of a litigant to a fair trial, and the Appellants have been wrongly denied of that right.

72. These grounds were elaborated on in the written application for permission to appeal to the UT prepared by Montpelier. Mr Thomson and Mr Worsfold also filed a short

skeleton argument and made some oral submissions in support.

Ground 1

73. Ground 1 treats the FTT's decision to refuse an adjournment as a case management decision of the ordinary type to which the well-known principles set out by Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 apply. He said at [33]:

> "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".

Those principles apply just as much, if not more so, in the tribunal system to appeals to the UT against case management decisions of the FTT: see *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC) at [24] per Norris J where, having cited the above passage, he said:

> "I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system."

74. Ground 1 therefore focuses on particular matters which are said to have been either wrongly taken into account, or wrongly left out of account; and an overall submission that the decision was plainly wrong. It was advanced by reference to 7 sub-grounds, (a) to (g).

Ground 1(a) – failure to give sufficient weight to the prejudice to the Appellants

75. Ground 1(a) is that the FTT failed to give sufficient weight to the prejudice that would be suffered by the Appellants' loss of opportunity to effectively cross-examine Officer Bradley and Mr Harrap. This is in my judgment by far the most significant of the points advanced under Ground 1 (and also overlaps with Ground 2), and I will deal with it in detail.

76. As the formulation of this Ground shows, it is not, and could not be, suggested that the FTT ignored the potential prejudice to the Appellants. The FTT was well aware of it, as appears from the December 2017 Decision at [17(3)]. What the FTT there said was that:

> "The hearing was the opportunity to cross-examine Mr Harrap and Officer Bradley. Of course they will suffer prejudice if they cannot do so in the manner of their choosing. However that prejudice is not as great as it may seem."

They then gave detailed reasons for that conclusion.

77. The following points were made in the application for permission to appeal. First, the FTT had allowed 3 days for the hearing in December 2017 and since one would expect there to be little examination in chief, the Appellants reasonably anticipated that most of that time would be used for cross-examination. It was a volte-face for the FTT to then say in the December 2017 Decision that the prejudice was not very great. Had the Appellants known that cross-examination was not thought to be absolutely necessary, they might have taken a different view on instructing substitute counsel (Mr Clarke) to carry out a limited cross-examination.

78. This submission to my mind overestimates the significance to be attached to the fact

that the FTT allowed 3 days for the December hearing. Although the FTT no doubt has power to limit the amount of time allotted to any particular case or part of it, it is not for the Tribunal to tell the parties what cross-examination is necessary or desirable: the primary responsibility for deciding what cross-examination was required was that of the Appellants and their legal advisers. In fact on Day 9 of the first hearing (30 March 2017) Ms Graham-Wells' own estimate was that she would need *"at least a day, possibly slightly longer than a day"* for her cross-examination of Mr Bradley, and *"no longer than a day"* for that of Mr Harrap. In the light of this, and the experience with the first hearing, it is scarcely surprising that the FTT decided to fix 3 days out of an abundance of caution: this cannot be taken as any endorsement by the Tribunal that it would take the whole of the 3 days, let alone that such cross-examination would in the event be necessary or fruitful. Rather it was an attempt to ensure that the evidence would definitely be concluded at the December 2017 hearing, with the Appellants being given the opportunity to ask the questions they wanted. There was therefore in my judgment no volte-face when the FTT concluded in December 2017 that the cross-examination would in fact have been of limited value. As Judge Richards put it when refusing permission to appeal on this ground:

> "It is for the appellants themselves to decide how to cross-examine HMRC's witnesses and it is not for the Tribunal to tell them how to do so. Therefore in the [December 2017 Decision] where the Tribunal sets out its view that the prejudice in not being able to cross-examine is "less than it might appear", there is no "volte face". Rather, the Tribunal is simply noting that one might naturally assume that an inability to use chosen counsel to cross-examine HMRC's witnesses might amount to significant prejudice but that, because of the nature of the specific evidence he was giving, this was not necessarily true of Officer Bradley's evidence."

I agree.

79. Second, it is suggested that the FTT seem to have thought that questions put to HMRC's witnesses by Ms Choudhury (and the Tribunal itself) would alleviate the prejudice to an acceptable degree.

80. I do not think this is a fair reading of the December 2017 Decision. The FTT's reasoning is not that although there is *prima facie* significant prejudice to the Appellants, it is alleviated to an acceptable degree by the fact that Ms Choudhury asked her own questions. By the time the FTT referred to this (at [17(6)]) they had already concluded (at [17(3)]) that while *"of course"* the Appellants would suffer prejudice, it was not as great as one might expect. This conclusion had nothing to do with the fact that Ms Choudhury asked some questions, but was based on the nature of the evidence that Officer Bradley and Mr Harrap were to give. The fact that Ms Choudhury did ask some questions is an additional factor mentioned by the FTT, but was expressly recognised by them not to be the same as a detailed cross-examination by Ms Graham-Wells would have been. I do not think they concluded that it was or could be an adequate substitute; rather, as already referred to, they relied on the limited significance of HMRC's evidence. Had that evidence been crucial, I agree that it is unlikely that Ms Choudhury's questioning could have been a sufficient substitute for a proper cross-examination by counsel acting for the Appellants; but the basis of the FTT's decision is that the evidence was very far from crucial, and the inability to conduct a proper cross-examination of it was therefore of limited prejudice to the Appellants.

81. Third, it is said that Ms Graham-Wells had been intending to conduct a detailed examination. But little indication is given of the areas which she had intended to

address in such cross-examination; indeed it is said that the Appellants did not wish to set out details of the lines of cross-examination that she would have pursued. This makes it difficult for the Appellants to challenge the conclusion of the FTT that the evidence of HMRC's witnesses was of limited importance. But this seems to me the key question underlying the whole of the appeal.

82. I should explain in more detail why I take this view. Without attempting to lay down any exhaustive rules, it seems to me that in general the proper function of factual witnesses, even of those involved in a case in a professional capacity such as Officer Bradley, is to give evidence of facts relevant to the issues in the case of which they can speak from their own knowledge (including in appropriate circumstances evidence of hearsay statements). Save insofar as they are able to give relevant evidence of their own, it is not the proper function of a witness's evidence to comment on documents, or on other witnesses' evidence, or to speculate on other persons' motives or intentions; far less is it the proper function of a witness's evidence to raise points of law, or to argue a party's case. And, again speaking generally, it seems to me that the proper purpose of cross-examining a factual witness is two-fold: first, to seek to undermine or qualify or mitigate the effect of evidence they have given which is adverse to the cross-examining party – for example by challenging the credibility or reliability of the witness, or otherwise testing the completeness or accuracy of their evidence – and second, to elicit further factual testimony helpful to the cross-examining party. It is not the proper function of cross-examination to argue the case, or debate issues of law, or seek to get the witness to agree with factual propositions of which they cannot themselves give relevant evidence. In practice counsel is often allowed considerable latitude to stray into these areas, but strictly speaking evidence in cross-examination is no more admissible if it is not evidence of facts of which the witness can speak of his own knowledge than it is in chief.

83. That means that in assessing whether a party is significantly prejudiced by not being able to cross-examine a witness, it is important to look with care at whether there is reason to suppose (i) that that witness gives evidence which is adverse to the cross-examining party, which might have been undermined or qualified if cross-examination had taken place, and which might have a significant effect on the outcome of the case; or (ii) that further evidence favourable to the cross-examining party could have been elicited from that witness.

84. In the present case the issues in the appeals to the FTT can be divided for these purposes into four areas, two in relation to the appeals against the conclusions in the closure notices, and two in relation to the appeals against the penalties:

    (1) First, there were the issues as to whether the Appellants were entitled to loss relief at all. These can be summarised as whether the Appellants were conducting a trade in CFDs, whether any such trade was on a commercial basis, whether any such trade was with a view to profit or with a reasonable expectation of profit, and whether the Appellants entered into the Pendulum CFD in the course of such trade. These issues can be conveniently referred to together as **"the trading issues"**.

    (2) If, but only if, the Appellants succeeded on the trading issues, there was then an issue as to the quantum of allowable loss. If the Appellants failed on any of the trading issues, loss relief was not available and the question of quantum did not arise.

(3) So far as the penalties are concerned, the first issue was whether HMRC were entitled to levy penalties at all. This depended on whether the Appellants were negligent in completing their tax returns.

(4) If so, the remaining question was as to the appropriate level of penalty, which depended on the appropriate discount to be given.

The trading issues

85. Taking each of these in turn, in relation to (1) the trading issues, the point made by the FTT in the December 2017 Decision (at [17(3)] was that Officer Bradley's evidence largely consisted of an explanation of the terms of the Pendulum CFD. Since the Appellants had provided copies of the relevant contractual documents, that duplicated the Appellants' evidence. In other words Officer Bradley's evidence was not needed to establish the terms of the contractual documents, nor would cross-examination affect this. He also gave evidence as to the Appellants' other activity involving CFDs, and his conclusions on that. (That was relevant to the question whether they were engaged in a trade as the Appellants each conducted online transactions in CFDs prior to taking out the Pendulum CFD in an attempt to establish that they were trading in CFDs). That again distilled the Appellants' own evidence. He also gave evidence as to other users of the Pendulum CFD.

86. The Appellants did not suggest that the FTT's summary of Officer Bradley's evidence was inaccurate, but I asked at the hearing to be provided with a copy of it to satisfy myself that what the FTT said was a fair summary of his evidence, and a copy of the evidence was provided to me after the hearing. There are in fact three witness statements, one in respect of each Appellant. They follow the same format, as follows:

(1) Paragraphs 1 to 4 of each statement are formal.

(2) Paragraphs 5 to 8, under the heading *"Introduction"*, are indeed introductory.

(3) Paragraphs 9 to 17 of each statement, under the heading *"Background"*, set out the history of the relevant Appellant's appeals, such as his tax return, the enquiry into it by HMRC, the closure notice, the stays pending the criminal investigation into Mr Gittins and others, and the appeals themselves.

(4) Paragraphs 18 to 39 of each statement, under the headings *"The Contracts for Difference"* and *"The Bayridge Loan"*, give an account of the relevant Appellant's Pendulum CFD and Bayridge loan. These are narrative accounts of what can be seen from the documents, although they identify some ambiguities of interpretation.

(5) Paragraphs 40 to 47 (40 to 49 in the case of Mr Mungavin), under the heading *"Further alleged trading activity"*, give an account of the other alleged trading activity relied on by the relevant Appellant. These are again almost entirely factual accounts without comment, although in each case Officer Bradley draws a contrast between the size of the online transactions and the ostensible size of the Pendulum transaction.

(6) Paragraphs 48 to 56 (50 to 58 in the case of Mr Mungavin), under the heading *"The Wider Picture"*, give an account of Pendulum CFDs taken out by other subscribers of whom HMRC were aware. (This was not a complete analysis as HMRC did not know of all the users, the scheme not being a disclosed scheme).

(7) Each statement then goes on to consider the question of penalties, which I deal with below.

87. Having considered the statements for myself, I am satisfied that the FTT's description of them in the December 2017 Decision at [17(3)] is indeed a fair and accurate summary. Of the sections which I have referred to, the formal, introductory and background sections do not contain evidence of anything which was likely to be in dispute or relevant to the issues that the FTT had to decide; the contracts for difference and Bayridge loan sections consisted almost entirely of an account of the documents which were in evidence anyway; and the further trading activity section summarised matters on which the Appellants themselves relied. The only parts of these sections which might have been contentious were Officer Bradley's comments on the ambiguities in the Pendulum CFD, and the contrast he drew between the size of the Appellants' other CFD transactions and that of the Pendulum CFD, but each was really in the nature of a comment that could have been made by way of submission on the undisputed facts and documents. Cross-examination on these aspects of his evidence would in reality have been no more than arguing the case.

88. The only part of his evidence relevant to the trading issues that went beyond what could be found in the Appellants' own evidence was the wider picture section where Officer Bradley summarised by reference to a spreadsheet the results of enquiries into other users of Pendulum CFDs. Much of this is taken up with an analysis of the sums payable to and by Pendulum and how much the relevant index would have to move before Pendulum lost money, which was of only tangential relevance to the questions the FTT had to decide. The only point on which the FTT in the event placed some reliance was Officer Bradley's evidence that the investor was successful at the end of Phase One in only 23 of the 222 identified Pendulum CFDs. That formed the basis of the FTT's finding that only about 10% of Pendulum CFDs achieved success at the end of Phase One, and that there was a meaningful likelihood that a Pendulum CFD might do so, although it was not the most likely outcome. Had that been seriously in dispute, that might have been something that could have been explored in cross-examination of Officer Bradley. But the FTT recorded in the Substantive Decision at [59] that these figures (23 out of 222) were put to Mr Gittins in cross-examination who did not dispute them beyond suggesting that HMRC *"might have overlooked one taxpayer who achieved success at Phase One"*. In those circumstances, it cannot be said that the inability to cross-examine on this aspect of Officer Bradley's evidence was of any significance.

89. So far as the trading issues are concerned therefore, in my judgment the FTT were justified in taking the view that Officer Bradley's evidence was of very little importance. Whether each Appellant was trading or not turned not on Officer Bradley's evidence but on his own evidence of what he did, and whether in the circumstances that was to be characterised as a trade. Whether such a trade, if it existed at all, was carried out on a commercial basis, was again a characterisation of the undisputed facts rather than anything on which Officer Bradley could, or purported to, give evidence; as was the question whether the trade could be reasonably expected to be profitable. And the question of whether each Appellant carried out such a trade with a view to profit was primarily a subjective question which turned on his own evidence.

90. It is therefore difficult to fault the conclusion of the FTT in the December 2017 Decision (at [17(3)]) that:

> "Whether or not [the Appellants] are trading depends on their own actions and motivations and they have all provided witness statements and exhibits dealing with those matters. In short, we do not consider that Officer Bradley's evidence will be determinative of the trading issue."

91. In my judgment they were fully entitled to take this view, and to conclude, in the light of it, that an inability for the Appellants to cross-examine Officer Bradley on the trading issues was unlikely to cause the Appellants any significant prejudice.

92. In their skeleton argument before me, Mr Thomson and Mr Worsfold said that it was wrong of the FTT to predetermine what would have been the outcome of any cross-examination as they would not know exactly how such cross examination would have proceeded. It is of course true that the FTT did not know quite what questions Ms Graham-Wells would have asked, but for the reasons I have given, I think they were entitled to look at the evidence Officer Bradley was to give and consider to what extent that evidence was likely to be of any significance to the trading issues.

93. In oral submissions to me, Mr Worsfold and Mr Thomson said that the question of whether a transaction was in the nature of a trade or an investment was of general interest, for example to City traders, and had differing tax consequences; they had been looking forward to seeing Ms Graham-Wells put these points to Officer Bradley. These points were elaborated on in their oral replies, as follows:

    (1) Mr Worsfold said that he regarded himself as a trader; that he had continued trading from 2005 to the present day and had declared profits and losses for income tax purposes, and had been taxed accordingly; and that he would have liked the opportunity to see Ms Graham-Wells put this particular point to Officer Bradley. He could not say what else she might have asked, but he had every confidence in her.

    (2) Mr Thomson said that they did not get an opportunity to challenge Officer Bradley on what a derivatives trader actually was. HMRC relied for example on how organised the trade was, and how regular it was, but City traders for example were not like that: sometimes they only traded four times a month. Just because someone was not sat at a desk and doing it for 8 to 9 hours a day did not mean that they were not trading. He and the other Appellants made profits and losses; they had admittedly not carried out detailed research but in his submission they were trading.

    (3) He also had a specific point that another HMRC officer had said that his case was not one of avoidance and he never had the opportunity to challenge Officer Bradley on what the other officer had meant by that. This is relevant to the question of penalties and I deal with it below.

94. I accept that if Officer Bradley had been cross-examined, the Appellants would have wanted to explore with him what in his view distinguished their online CFD transactions from other cases where there was trading, how regular or organised transactions had to be to count as trading, and the like. Nevertheless I do not think that their inability to do this has caused them significant prejudice. There are two aspects to this.

95. First the proper purpose of cross-examination, as I have said, is not to argue the case or debate the issues with a witness but to challenge his evidence, or elicit further evidence from him. Nothing was put before me that indicated either that Officer Bradley gave relevant factual evidence on the trading issues adverse to the Appellants

which required to be challenged, or that it would be possible to elicit further factual evidence from him that would be helpful to the Appellants. Arguing with him over where the line was to be drawn between cases of trading and cases of not trading might have been forensically useful, but however much the Appellants were looking forward to seeing Ms Graham-Wells do it (and however capable she would have been of doing it well), it would have been just that: arguing the case, not eliciting factual evidence from him.

96. But I would not want to rest my decision on the technical question of what the proper purpose of cross-examination is, and over and beyond that there is a second point which to my mind is unanswerable. This is that the Appellants not only needed to establish that they were trading, but also that they were doing so on a commercial basis and with a view to profit or a realistic expectation of profit; and that the entry into the Pendulum CFD was part of their trade. That was a hopeless endeavour where the FTT found that the Appellants entered into the Pendulum CFD for the purpose of generating an artificial tax loss. That turned on the terms of the CFD, the background leading up to their entry into it, and whether the FTT accepted their evidence, not on anything Officer Bradley said, or might have said in cross-examination.

97. On this point the FTT made a series of adverse findings in the Substantive Decision about their evidence. At [3] the FTT said that they had concluded that:

> "all three appellants' evidence deliberately understated the extent to which they were motivated by tax considerations when deciding whether to enter into the Pendulum CFD and surrounding arrangements."

In relation to Mr Thomson, they rejected his evidence that he was motivated by genuine commercial considerations when he decided to start transacting in CFDs (at [71]), and found that the whole structure of his averred trading in CFDs, both with Pendulum and online, was a tax-driven device designed to achieve his goal of making a relievable tax loss on the Pendulum CFD (at [205]). In relation to Mr Worsfold, the FTT rejected his evidence that he would not have been interested in entering into tax planning arrangements (at [107]), and his evidence that he was primarily attracted to the Pendulum CFD by the prospect of making a profit, concluding that his true motivation was to obtain the trading loss that he believed was likely to be generated by the Pendulum CFD (at [126]). In relation to Mr Mungavin, the FTT rejected his evidence that he did not realise he could set losses made in connection with his Pendulum CFD against his other income, concluding that he would have been aware before entering into the Pendulum CFD of the ability to use a trading loss to shelter income from tax (at [144]); they also found that an answer he gave in cross-examination when he affected to be stoical at the ostensible loss he sustained on his Pendulum CFD was misleading, concluding that he was not concerned because that was precisely the result he was expecting in order to obtain the desired tax loss (at [155]).

98. These conclusions were fatal to the Appellants' appeals on the trading issues. None of them turns in any way on Officer Bradley's evidence. They arise out of consideration of the undisputed documented facts and the evidence that the Appellants gave under cross-examination. The FTT would, so far as I can see, have reached exactly the same conclusions on these matters even if Officer Bradley had not given evidence at all.

99. In those circumstances it seems to me that the FTT were right when they said in the Substantive Decision at [284] (cited in full at paragraph 62 above) that no evidence

from Officer Bradley was needed to establish that the Appellants' transactions lacked the hallmarks of trading, or to establish that the Appellants all entered into their CFD transactions online and with Pendulum in order to generate a tax loss, and that the Appellants would have failed in their appeals against the closure notices even if Officer Bradley had not given evidence at all.

100. It is true that they did not express themselves quite so decisively in the December 2017 Decision. But that is explicable by the fact that although they had by then heard the Appellants' evidence, they had not received written, or heard oral, closing submissions, and so quite properly refrained from reaching any definitive conclusions on the evidence they had heard. It would however be unrealistic to suppose that they had not already formed some provisional views as to the credibility (or rather lack of it) of the Appellants' evidence on the key issues of whether each of them was trading, on a commercial basis, and with a view to profit or in circumstances where profit could reasonably be expected. It is not necessary to rely on this as for the reasons I have already given the FTT was in my judgment entitled in any event to conclude that the prejudice to the Appellants in not being able to cross-examine Officer Bradley on the trading issues was less than it might at first seem; but if they had indeed already come to a provisional view that the Appellants' evidence on the key issues was likely to be rejected by them, that would be a further reason for regarding anything that Officer Bradley had to say on the subject as unlikely to have an effect on the outcome.

Quantum of loss

101. The FTT accepted in the December 2017 Decision (at [17(4)]) that if the Appellants succeeded on the trading issues, the question of the quantum of loss available to them would arise and Mr Harrap's evidence would be significant so the Appellants would suffer prejudice in not cross-examining him.

102. In fact however in the light of the FTT's conclusion on the trading issues, this issue did not arise and Mr Harrap's evidence was irrelevant. The Appellants therefore in the event did not suffer any prejudice at all from not being able to cross-examine him.

103. Had the FTT had reached a different conclusion on the trading issues, I can see that a real question might have arisen whether the FTT had sufficiently taken into account the prejudice to the Appellants. But in circumstances where the FTT in the event reached a decision on the trading issues adverse to the Appellants (and, for the reasons just given, this conclusion was based on the FTT's assessment of the documents and of the Appellants as witnesses, and was not affected by the inability to cross-examine Officer Bradley), it does not seem to me that the Appellants can rely on this. As I have already suggested, the FTT may very well have already reached a provisional view that the Appellants' evidence was likely to be rejected, which might explain why they did not regard the Appellants' inability to cross-examine Mr Harrap as significant enough to merit an adjournment; but whether that is so or not, I see no reason why the question of actual prejudice to the Appellants cannot be looked at with hindsight. With hindsight, the inability of the Appellants to cross-examine Mr Harrap has caused them no prejudice at all.

Negligence

104. HMRC contended that each Appellant had been negligent in submitting an incorrect tax return and thereby rendered himself liable to a penalty in accordance with s. 95(1)(b) of the Taxes Management Act 1970. The onus of establishing negligence was on HMRC.

105. In each of Officer Bradley's statements the next section (paragraphs 57 to 59 (59 to 61 in the case of Mr Mungavin)) addressed this question under the heading *"The Liability of the Appellant to a Penalty"*. He set out the maximum penalty for the relevant Appellant (the difference between the tax payable as shown on the return and the tax that would have been payable had the return been correct). He then set out HMRC's contentions as to why the relevant Appellant had been negligent. These consist of a series of facts drawn from the documents together with what are in effect submissions as to why HMRC considered that they demonstrated negligence. Officer Bradley was not himself the officer responsible for concluding that the Appellants had been negligent, so this is not an account of his own reasons for reaching a determination but is an account of the matters relied on by HMRC.

106. The FTT said of this in the December 2017 Decision at [17(3)]:

> "Turning to the penalties, the relevant question is whether HMRC have discharged their burden of proving that the appellants negligently submitted incorrect tax returns and, if so, how much if any mitigation of the penalties is appropriate. Again that depends on the appellants' actions and while Officer Bradley provides a commentary on those actions, ultimately his commentary will not determine the matter one way or the other."

107. I have considered whether this is a fair characterisation of this part of Officer Bradley's evidence. In my judgment it is. The underlying primary facts referred to by Officer Bradley would all appear to be matters that could be proved without his evidence, and indeed were likely to be undisputed. Thus for example in the case of Mr Thomson, the first matter relied on is that Mr Thomson held a meeting with a representative of Montpelier and made a note in which he recorded *"pays £2k for a loss of £98k"*. That is not evidence given by Officer Bradley on the basis of being at the meeting, but is drawn from a document which he refers to, and it would be surprising if the note itself were disputed. Officer Bradley then makes comments on this, including reference to the fact that Mr Thomson was himself an accountant, and says:

> "HMRC consider that this shows that the Appellant understood that the arrangements were not commercial and that he could not reasonably believe that the arrangements could represent part of a trade, a requirement of which is that it is conducted commercially with a view to making profits in a reasonable time."

This is in effect a submission as to what can be inferred from the primary facts, and whether that goes to demonstrate negligence on the part of Mr Thomson. A similar analysis could be conducted of the other matters referred to by Officer Bradley in the case of each of the Appellants.

108. As can be seen this is not really evidence of which he can speak from his own knowledge. It is a reference to the actions (or failure to act) on the part of the Appellants together with HMRC's submissions as to why those matters indicated negligence. It was no doubt a helpful exercise for Officer Bradley to set out in this fashion the matters relied on by HMRC, but strictly speaking this was not evidence that he either needed to give, or was in a position himself to prove. He could not prove the primary facts as he had no more knowledge of them than anyone else: either they could be proved from the documents and other matters he referred to (in which case his evidence was not needed) or they could not (in which case his evidence would not assist). And as to what inferences could be drawn from those facts, again his evidence was not strictly evidence of facts he could speak to of his own

knowledge, but amounted to a series of submissions. And as to the ultimate question whether the Appellants were negligent, it is well established that a question such as that is not a matter for the witnesses but is a matter for the Court or Tribunal to assess having regard to the facts they have found.

109. In their written application for permission to appeal the Appellants said that Ms Graham-Wells would have explored in respect of the penalties issues the exact decision making process which was highly relevant as Officer Bradley was not the officer who made the penalty decisions and his witness statement provides no detailed analysis of why it is alleged each Appellant was negligent as a matter of law. In oral submissions to me, Mr Worsfold said that the penalties were significant sums, that Ms Graham-Wells had not addressed them in her skeleton argument, and that the loss of the opportunity to challenge HMRC's assessment of penalties was therefore significant.

110. I can understand that had Ms Graham-Wells been in a position to cross-examine Officer Bradley she might well have taken the opportunity to challenge his assertions both as to what could be inferred from the primary facts and as to whether that amounted to negligence. But I do not think she needed to do this. As I have sought to explain, what he said about the inferences that could be drawn and why HMRC contended that each Appellant was negligent was not evidence that he was giving from his own knowledge that needed to be challenged: it was in the nature of submissions. Even without challenging it in cross-examination, there was nothing to stop submissions being made that an inference should not be drawn or that, even if drawn, such inferences did not constitute sufficient material on which to make a finding of negligence.

111. This is what I understood the FTT to mean when they said that although Officer Bradley provided a commentary on the Appellants' actions, ultimately his commentary would not determine the matter one way or the other.

112. And when it came to the Substantive Decision, one does not find the FTT saying that because Officer Bradley had not been challenged on a point his evidence was accepted. Instead what one finds is that the FTT, having found the primary facts, reached conclusions of their own as to what each Appellant did or did not do, and whether that amounted to what a reasonable taxpayer, exercising reasonable diligence, would have done. Indeed at [286] they said:

> "Officer Bradley did not need to give evidence to establish that the appellants were negligent in the submission of their tax returns. The taxpayers' negligence was established by reference to their own failure to take reasonable care to establish the returns were correct."

I have seen nothing to suggest that that assessment was wrong, and in those circumstances I agree with the FTT that the inability of the Appellants to cross-examine Officer Bradley on the question of negligence was not as prejudicial as it might at first appear.

113. Mr Thomson, as referred to above (paragraph 93(3)), had a specific point that he would have wished to explore with Officer Bradley, namely that another HMRC officer had said that his was not a case of avoidance. He did not expand on this, but it would appear that this is the same point as is referred to in Officer Bradley's evidence (at paragraph 64) as follows:

> "HMRC accepts the Appellant's behaviour would not be regarded as fraudulent and

> this was confirmed by the then Operational Leader for FIS [HMRC's Fraud Investigation Service] Liverpool on 31 October 2014 **[Doc 31]**. The Appellant acknowledged this in an e-mail of 31 October 2014 **[part of Doc 32]** and also suggested that it had been confirmed that he was not in a tax avoidance scheme. This misstates the position. The Operational Leader actually said in relation to the Pendulum arrangements "at no point had these arrangements been referred to as tax avoidance. In many cases of avoidance there is a technical dispute, often backed by a QC's opinion so it is the case that reasonable care had been taken. This was not the case here. Pendulum CFD's had never been described as avoidance". The relevant point here is that the Appellant has not referred to the arrangements as being in the nature of tax avoidance in his tax return for the year in question. Whilst the Appellant's intention may have been to avoid tax, he has not made any disclosure of this on his relevant return."

It can be seen that the factual evidence here given by Officer Bradley consists of two things: first the content of communications between the Operational Leader for FIS Liverpool and Mr Thomson, and second the fact that Mr Thomson did not refer to the Pendulum CFD as tax avoidance in his tax return. Both were documented. Either Officer Bradley's account of these documents was accurate (in which case it was a matter for argument what could be inferred from that); or it was not, in which case that could be demonstrated by showing the FTT the documents in question. This is a neat example of how cross-examination of Officer Bradley would not in fact have elicited any further factual material: he could not himself give evidence as to what the Operational Leader had said or what was in his mind, beyond what was apparent from what he had written. In those circumstances I do not think that inability to cross-examine Officer Bradley along these lines significantly prejudiced Mr Thomson.

Quantum of penalties

114. Much the same applies to the assessment of the quantum of the penalties. Again Officer Bradley was not personally responsible for HMRC's decisions as to the amount of discount given to each Appellant, but in his witness statements he included a section at paragraphs 60 to 65 (62 to 67 in the case of Mr Mungavin) under the heading *"The Amount of the Penalty"* which set out HMRC's approach to the setting of the penalties, the amount of discount allowed under each of the three heads of "disclosure", "co-operation" and "seriousness", and the reasons why HMRC had adopted that course.

115. The FTT accepted that they were not limited to a supervisory jurisdiction but had full power to determine the amount of penalty payable, and considered the appropriate amount of the penalties themselves (and as already referred to in fact reduced the penalties payable by Mr Worsfold and Mr Mungavin). They did however endorse the approach of HMRC by reference to the three heads as a reasonable one; and agreed with HMRC on their approach to disclosure (where 0% discount was allowed as the Appellants declined to accept that there was anything incorrect in their returns), co-operation, and, in Mr Thomson's case seriousness; but took a different view to HMRC on seriousness in the case of Mr Worsfold and Mr Mungavin.

116. As with the issue of negligence, I can see that Ms Graham-Wells might have wanted to use the cross-examination of Officer Bradley as an opportunity to challenge the assessment of HMRC as to the level of discount, but I do not think she needed to do that to make submissions that the overall level of penalty was too high. Although it was helpful and relevant for Officer Bradley to explain what HMRC's approach had been and why they had adopted the discounts they had, the FTT's decision as to the

appropriate level of penalties did not depend on his evidence so much as on the underlying facts that they found as to what the Appellants did or did not do, and their own characterisation of those acts or omissions.

117. In the Substantive Decision at [286] they said:

> "Officer Bradley explained the process that HMRC took to mitigating the penalties, but that was evident from the penalty notices themselves and the explanations accompanying them. As we have noted, we have considered for ourselves the extent to which the penalties should be reduced and therefore Officer Bradley's evidence has not had a material effect on the outcome of the appellants' appeals against penalties either."

Again I have seen nothing to suggest that this assessment is wrong, and in those circumstances the prejudice to the Appellants in not being able to cross-examine Officer Bradley on the level of penalties was not as prejudicial to them as it might at first appear.

Conclusion on Ground 1(a)

118. I have considered this Ground at length as it does seem to me to be by far the most important point raised by this appeal. But having done so, I am entirely satisfied for the reasons I have sought to give that the FTT were not only entitled to conclude, but were right to conclude, that the actual prejudice to the Appellants in not being able to cross-examine HMRC's witnesses through their own counsel as they would have wished was nothing like as great as at first blush it might appear. I dismiss this Ground of appeal.

Ground 1(b) – errors in respect of delays and Ms Graham-Wells' medical condition

119. Ground 1(b) is that the FTT failed to properly evaluate the reasons for previous delays, the medical evidence produced, and submissions made in respect of Ms Graham-Wells' medical condition. A considerable number of suggested errors are relied on.

Late skeleton argument

120. The first is that the FTT wrongly said that Ms Graham-Wells' skeleton argument was some two weeks late because of her illness, whereas the true position was that the lateness was caused by Montpelier's error.

121. The facts are set out at paragraphs 23-4 above. As there appears, it is correct that Montpelier made an error in thinking the skeleton was due on 6 March 2017, 14 days before the hearing date, whereas it was in fact due on 27 February 2017, 21 days before the hearing date. The skeleton was in the event dated 10 March 2017 and not provided to HMRC until 13 March 2017, that is 2 weeks late. (The material before me does not disclose when or how it was sent to, or received by, the FTT). It can be seen that although one week of this might be attributable to Montpelier's error, that cannot have accounted for the other week, and that (i) Ms Graham-Wells initially sought an extension of 9 days to 8 March as she had scheduled treatment and her recovery from it could be unpredictable; (ii) a further 2 days' extension to 10 March was sought because she had been poorly on 7 March 2017; (iii) it was served on HMRC 3 days beyond that date; (iv) it was not complete, as it did not address the penalties issue *"due to time constraints"*; and (v) a further skeleton addressing such issues, although promised for the start of the hearing, was never in fact provided.

122. In those circumstances it seems to me that it is wrong to say that the delay in filing the

skeleton was simply due to Montpelier's error. It would be more accurate to say that it was due to a combination of Montpelier's error and Ms Graham-Wells' difficulties, which were certainly at least in part due to her medical condition. I do not think the thrust of the criticism, which is that the FTT was wrong to say that the extension of time for the skeleton argument was an example of accommodations that the FTT had made to address her poor health, is made out. In any event the FTT expressly referred to this as "minor" and I do not think it can be thought to have had any significant bearing on their decision. The point that the FTT was making was not that she had had a number of indulgences and so could not expect any more; it was that there was a history of accommodations made because of her medical condition, and that that formed part of the background such that her case could not be equated with that of an advocate who was suddenly and unexpectedly taken ill. That point seems to me a valid one regardless of how much of the delay in filing the skeleton was due to her medical condition, as certainly some of it was.

Adjournment on Day 3

123. The second group of errors relied on is that the FTT said that on the first day of the hearing Ms Graham-Wells was taken unwell, collapsed and taken to hospital in an ambulance, causing the hearing to be adjourned for the rest of Day 1 and Day 2, and to be resumed on Day 3. The true position (as set out in paragraphs 25-6 above) is that the incident happened on Day 3, not Day 1; that she did not collapse but was in pain, but did have to be taken in a wheelchair out of the RCJ because of a suspected blood clot, and was taken by ambulance to hospital; and that the hearing resumed on Day 4 with the loss of less than one day, not between 1 and 2 days.

124. I do not think these errors are material, or affect the point the FTT was making. The fact is that the proceedings were undoubtedly interrupted due to Ms Graham-Wells' medical condition. I do not see that it matters whether this happened on Day 1 or Day 3, nor whether Ms Graham-Wells collapsed or was in pain with a suspected serious complication, nor whether the time lost was less than a day or between 1 and 2 days. It was an example of the proceedings being disrupted due to Ms Graham-Wells' underlying medical conditions, and may very well have contributed to the fact that the first hearing was in the event adjourned after the Appellants' evidence, as if most of Day 3 had not been lost, it is distinctly possible that it would have been possible to complete at least Officer Bradley's evidence in the time available. The FTT relied on this as another example of the background which meant that Ms Graham-Wells' unavailability in December 2017 was not to be equated with the case of someone taken unexpectedly ill where there had been no reason to think this might happen. They were in my judgment entitled to do so.

Adjournment on Day 9

125. The next point taken is the suggestion that the FTT erred in saying that the adjournment of the first hearing at the end of the appellants' evidence was due to Ms Graham-Wells' ill health.

126. What the FTT in fact said in the December 2017 Decision at [4] is:

> "Partly because of Ms Graham-Wells's health and partly because we were not sure we could get through Officer Bradley's evidence in time, we agreed to finish at the end of the appellants' evidence."

127. The facts are set out at paragraphs 27-8 above. As there set out, Ms Graham-Wells first suggested at the end of Day 8 that the FTT stop after the appellants' evidence,

and that was explicitly on the basis that she was struggling and that she felt obliged to suggest it in her clients' interests; on Day 9 she repeated that she did not want to take Officer Bradley's evidence because she was struggling, and that she did not think she was going to able to last. It is true that the FTT, and counsel, were agreed that it would be undesirable for Officer Bradley's evidence to go part-heard and hence that they should not start him if they could not be sure to finish him; but if it had not been for Ms Graham-Wells' condition, Ms Choudhury would have pressed the FTT to sit longer hours if necessary to ensure that his evidence was finished. Since Ms Graham-Wells' estimate was just over a day, that would not have been an unrealistic suggestion in normal circumstances. But in the light of what Ms Graham-Wells had said, Ms Choudhury did not feel able to pursue it.

128. In those circumstances I think the FTT was entirely justified in saying that the hearing was adjourned partly due to Ms Graham-Wells' health. Indeed it seems to me that that was the primary reason for the adjournment as without it, there would have been a good prospect of completing Officer Bradley's evidence.

Adjournment of June hearing

129. The next point taken is that the FTT was wrong to say the adjournment of the hearing listed for June 2017, in good time, occasioned further cost without explaining how that extra cost was incurred or quantifying it.

130. What the FTT actually said (at [16(3)] of the December 2017 Decision) is that:

> "Further delay and cost was occasioned by the postponement of the hearing in June."

I do not think the FTT meant that they had any evidence of any specific cost having been incurred, but simply that any adjournment is likely to occasion increased costs. It may be that this was incorrect and that it did not in fact cost HMRC any more to prepare for a resumed hearing in the autumn than in June, but the general point that adjournments not only cause delays (which was undoubtedly the case here) but also tend to increase costs does not seem to me to be wrong. In any event, I do not see that this error, if error it was, was material. As before, the point the FTT was making was that the appeals had been disrupted on more than one occasion by having to make accommodations for the consequences of Ms Graham-Wells' condition, and it was this that made her case different from that of someone otherwise fit and well who was taken unexpectedly ill at the last moment.

Foreseeability of further problems

131. The next point taken is that the FTT were wrong to say, as they did at [16(1)] of the December 2017 Decision, that:

> "since Ms Graham-Wells has such a serious illness, and is undergoing chemotherapy, it was foreseeable that she would suffer some problems, whether arising from her cancer, or from side-effects from the treatment of it, that could cause her to be able to conduct the hearing."

132. That is said to be erroneous in two respects. The first is that Ms Graham-Wells' sepsis and nosebleeds were not ordinary or expected side effects and the nosebleeds were unexplained; that should have been accepted by the FTT rather than their concluding that the specific reasons for the adjournment request were foreseeable.

133. That in my judgment misunderstands what the FTT were saying. They did not say, or purport to decide, that the specific problems which manifested themselves in November 2017, and which meant that Ms Graham-Wells was unable to attend the

December hearing, were foreseeable. What they were saying was that it was foreseeable that she might be unable to conduct the hearing due to problems arising either from her cancer or from her treatment. In the light of the history which they had recounted (the delay in filing the skeleton, the necessity for Ms Graham-Wells to go to hospital during the March hearing, her inability to complete the March hearing, and her inability to attend the June hearing), they were entirely justified in my judgment in concluding that whether or not any specific problem could have been anticipated, it was foreseeable that she might suffer further problems that would mean she could not attend the December hearing either.

134. The second respect in which this is said to be erroneous is that it amounted to a finding that a representative with a long-term health problem ought not to be instructed at all, something that raised serious policy and disability discrimination issues; and that this was compounded by the FTT saying (as they did at [16(3)] of the December 2017 Decision) that:

> "The Tribunal's letters and directions referred to above made it clear to the applicants that the Tribunal could not carry on postponing the hearing if Ms Graham-Wells was unwell."

135. I do not think either of these criticisms is a fair one. As to the first, the FTT did not seek to dissuade the Appellants from instructing Ms Graham-Wells. Anyone who reads the file cannot fail to be struck by her determination to carry on in practice as long as possible despite suffering from advanced cancer, and the FTT appears to have been sympathetic to her wishes in that regard. Nothing the FTT said indicated that they thought she ought not to carry on, or that the Appellants ought not to continue to instruct her.

136. As to the second, the FTT no doubt had in mind that in setting out the options for the December hearing, and choosing Option 3 (against the preference of HMRC), they had done so because, in their own words:

> "If Ms Graham-Wells continues to be unwell, new counsel would only need to prepare a cross-examination of two witnesses to prepare for an "option three" hearing."

and:

> "If the appellants need to instruct new counsel, it would be manageable for new counsel to prepare for a 3-day hearing at which just two witnesses need to be cross-examined."

(see paragraphs 30 to 32 above). That does indeed make it clear that the FTT expected that if Ms Graham-Wells were unavailable for the December hearing through illness, the appropriate course would be for the Appellants to instruct new counsel to conduct the cross-examination rather than adjourn until Ms Graham-Wells might be able to attend.

Contingency plans

137. The final point taken under this head is that the FTT were wrong to conclude, as they did in [17(1)] of the December 2017 Decision, that the Appellants had failed to put in place reasonable contingency plans. It is said that the Appellants did have contingency plans that were reasonable but that due to the unexpected events which happened late in the day they could not be implemented.

138. What appears to have happened (see paragraphs 35 and 38 above) is that the

Appellants identified Mr Clarke as a replacement counsel to step in if necessary, and (it is said) were prepared to incur the extra cost of him getting up to speed if necessary. But they regularly checked with Ms Graham-Wells and her clerk to confirm if she was returning to work and able to appear, and had a specific conversation with her on 11 September 2017 solely to discuss her fitness. As a result of that they stuck with Ms Graham-Wells and did not instruct Mr Clarke. For her part Ms Graham-Wells returned other work to concentrate on this case.

139. In those circumstances it is submitted that it is unfair to have expected the Appellants to instruct second counsel "just in case" given the cost of doing so in circumstances where Ms Graham-Wells had reasonably informed them that she fully expected to be fit and able to appear.

140. That does not I think really address the FTT's point, which is that given the history there was an obvious risk that for whatever reason Ms Graham-Wells might be unable to appear at any resumed hearing. As referred to above, that is why they set the directions for the December hearing that they did, expressly contemplating that other counsel might have to be instructed and choosing Option 3 precisely because it would be easier for other counsel to step in to conduct cross-examination. That was also something envisaged by Mr Gittins (see his e-mail of 19 June 2017 at paragraph 31 above).

141. In the event that was precisely what happened: Ms Graham-Wells was, due to her ill-health, unable to appear at the December hearing. She was told that on 23 November 2017, 11 days before the December hearing. In my judgment the FTT was justified in concluding that the Appellants should have had contingency plans that were able to cope with that situation. That need not have meant instructing Mr Clarke to get fully up to speed before that date; it could have meant asking him to have a preliminary briefing from Ms Graham-Wells and familiarising himself with at least the outline of the case (as the FTT said at [17(2)]). That would not mean the Appellants incurring the full cost of instructing him "just in case", but would have made it easier for him to be in a position to step in if necessary.

142. To some extent this point is tied up with the question whether there was enough time for Mr Clarke to prepare cross-examination between 24 November and 4 December 2017, which forms the basis of Ground 1(d), and I can see that it might have been difficult for any contingency plan to have covered all possibilities: if Ms Graham-Wells had been taken ill the night before the hearing, the Appellants could only be ready to proceed if they had instructed substitute counsel to be fully prepared, and it might well not be reasonable to expect them to do that. But that is not the situation in which the Appellants found themselves. Instead the foreseeable risk that Ms Graham-Wells might be unable to appear had materialised by 23 November, and what the FTT concluded was that reasonable contingency plans to address such a situation ought to have been in place. I do not think that conclusion can be regarded as wrong.

Conclusion on Ground 1(b)

143. I have now considered all the points advanced under Ground 1(b). For the reasons I have given none of them is in my judgment such as to enable the FTT's decision to be set aside as flawed. In any event, as the FTT are careful to say (at [17] of the December 2017 Decision), they did not simply take the view that having rejected Mr Clarke's central submission that Ms Graham-Wells' position was no different to that of any other advocate suddenly and unexpectedly taken ill, the adjournment must

be refused. They went on to consider the extent of the prejudice that the Appellants would really suffer in not cross-examining HMRC's witnesses, as I have already discussed above. Minor errors in their assessment of the medical history would not affect that, or could be supposed to change their conclusion.

Ground 1(c) – prejudice suffered by the Appellants in changing counsel

144. Ground 1(c) is that the FTT failed to give sufficient weight to the fact that a change of counsel at such a late stage would prejudice the Appellants.

145. Two slightly separate points are advanced. The first is that there would be a significant cost in changing counsel. I do not think this is a sustainable criticism: the Appellants themselves say that they were prepared to incur such a cost if necessary, and in fact said that they would change counsel if an adjournment were granted anyway.

146. The other is that there would have been a vast amount of work for new counsel to do, the transcript of the March hearing alone running to many hundreds of pages. This is really duplicative of Ground 1(d) which I consider next.

Ground 1(d) – lack of time for new counsel to prepare

147. Ground 1(d) is that the FTT wrongly rejected the submission that there was inadequate time to instruct new counsel. It is said that given the amount of work to do, it was unrealistic to expect new counsel to get up to speed between 24 November and 4 December, a period of 5 working days (in fact 6 working days and 2 weekends).

148. What the FTT said (at [17(2)] of the December 2017 Decision) is:

> "Since the appellants knew that Ms Graham-Wells was so unwell, they should not have proceeded from a standing start on 23 November. Rather, new counsel should have been brought in earlier, perhaps to take over the whole appeal or at very least to become familiar with the appeal so that he or she could step in at short notice."

149. That seems to me an appropriate view for them to take. If the Appellants had lined up Mr Clarke to be ready to take over if necessary, and had instructed him to acquire some familiarity with the case, I do not think the conclusion that he could have been ready in time is an unrealistic one. It is important to appreciate that Ms Graham-Wells had not been told to stop working altogether, only not to appear at the hearing. She presumably had a fairly good idea already of the lines of cross-examination she had intended to pursue, and could have worked up the cross-examination with Mr Clarke so as to brief him. Even reading 7+ days of transcripts is not an overly time consuming task if one is guided as to what to look for.

150. This Ground is not in my judgment made out.

Ground 1(e) – wrongly attributing prejudice to HMRC

151. Ground 1(e) is that the FTT was wrong to attribute prejudice to HMRC in the form of increased costs. It is said that the only prejudice to HMRC identified by the FTT was increased costs, but this could have been catered for by a costs order.

152. I do not think there is anything in this ground. It was obvious that an adjournment at such a late stage would cause HMRC increased costs, as well as further delay in the resolution of the appeals. HMRC in fact in opposing the adjournment said they had incurred costs in trial preparation, booking of hotels and travel for witnesses, all of which would be wasted.

153. It has long been recognised that the fact that an order can be made for costs is not now to be regarded, if it ever was, as a complete answer to the prejudice caused by a last-minute adjournment of a hearing, and I do not think the FTT can be faulted for accepting that an adjournment would inevitably prejudice HMRC.

Ground 1(f) – failure to consider alternative case management options

154. Ground 1(f) is that the FTT failed to consider alternative case management options. The FTT identified a number of days in February and March 2018 at which the members of the Tribunal were available (for the purpose of trying to fix a date for oral closing submissions), and it is said that it would have been possible to use those days for cross-examination instead, dispensing with oral closing submissions and proceeding on written submissions alone.

155. The short answer to this is that this was not suggested by Mr Clarke. The FTT was entitled to deal with the application that was made to them and did not have to consider alternative possibilities that were not put before them.

Ground 1(g) – failure to invest sufficient time in the application

156. Ground 1(g) is that the FTT failed to invest sufficient time to consider such an important application. The FTT announced their decision orally on 4 December 2017 after having only risen for 7 minutes. That is said to have been insufficient.

157. There is nothing in this Ground. A judge should of course take whatever time is necessary to reach a decision, and in the case of a tribunal with two members, it is no doubt also necessary to ensure that they are agreed, or if not, to discuss their disagreement. But it is the universal experience of judges that it is often possible to reach a conclusion, even on a potentially important point, without lengthy consideration, even if, as in this case, it is not possible to give a fully reasoned decision immediately.

158. Moreover the FTT had already considered and rejected the application to adjourn on 30 November, and in his directions of 30 November 2017 Judge Richards had said that he was prepared to reflect on the decision and it could be renewed at the outset of the hearing. In other words the application made orally by Mr Clarke was not sprung on the FTT out of the blue, but was a renewal of an application which the FTT had already considered once. It is not surprising therefore that they felt able to reach a decision quickly. Either that decision was flawed or it was not; if it was flawed it does not matter how long they took to reach it, and if it was not, then it does not matter how quickly they arrived at their conclusion.

Conclusion on Ground 1

159. Having considered all the various points made under Ground 1, I do not consider that any of them amounts to a reason for allowing the appeal.

Ground 2 – the requirements of a fair trial

160. Ground 2 is that in considering the question of an adjournment the dominant consideration is the right of a litigant to a fair trial, and the Appellants have been wrongly denied of that right.

161. For the principle, reliance was placed on two decisions, *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 (***"SH"***) and *Nwaigwe (adjournment: fairness)* [2014] UKUT 418 (IAC) (***"Nwaigwe"***). In *SH* an Immigration Judge in the FTT (Immigration and Asylum Chamber) had refused an

adjournment to allow an applicant for asylum to obtain his own evidence that he was a minor so as to counter evidence adduced by the Home Office that he was over 18. On appeal to Senior Immigration Judge King, the latter had found that that decision was one that was *"properly open to him and was not Wednesbury unreasonable or perverse or unfair"*. On further appeal to the Court of Appeal Moses LJ, giving the only reasoned judgment, held that this was to apply the wrong test. He said at [13]:

> "First, when considering whether the Immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair."

And at [14]:

> "The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration Judge to take the view that such opportunity should not be afforded to the appellant."

162. It is to be noted however that in the result, although holding that Judge King had applied the wrong test, Moses LJ did not think it necessary to remit the matter to the FTT, as he was able to reach a clear view that it would not have made any difference, the independent assessment being by then available.

163. *Nwaigwe* was another case where the FTT (Immigration and Chamber) had refused an adjournment. On appeal to the UT, McCloskey J applied what Moses LJ had said in *SH*, saying at [7]:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted <u>reasonably</u>. Rather, the test to be applied is that of <u>fairness</u>: was there any deprivation of the affected party's right to a fair hearing? Any temptation to review the conduct and decision of the FtT through the lens of <u>reasonableness</u> must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion."

Again it is to be noted that although he held that the FTT had applied the wrong test, the error was not material as the available evidence demonstrated that the Secretary of State's assessment was unassailably correct.

164. I am no doubt bound by the decision in *SH* (there being no relevant difference between the correct approach to an adjournment in the Immigration and Asylum Chamber and that in the Tax Chamber), and I do not in any event have any difficulty with the proposition that the refusal of an adjournment will be flawed if it was unfair.

165. Where I have difficulty however is seeing that in the circumstances of the present case this adds anything of substance to the points already considered under Ground 1. What is said is that the initial grounds (ie those that are now Grounds 1(a) to (g)) identify a number of errors of law and focus upon the supreme criterion of whether the Appellants have been denied a fair trial. No separate points are advanced under Ground 2.

166. So the question is whether the adjournment was unfair or deprived the Appellants of a fair hearing. This does not seem to me to differ in substance from the approach adopted by the FTT which was to decide the application by reference to the overriding objective referred to in rule 2 of the FTT Rules. Rule 2(1) provides that the overriding objective of the rules is to enable the Tribunal to deal with cases fairly and justly. I do not myself see any difference being dealing with a case fairly and justly, and the supreme criterion of fairness applicable on an application for an adjournment.

167. In any event the real question it seems to me is whether the prejudice to the Appellants in not being able to cross-examine was such as to make it unfair to refuse the adjournment. I have considered that in detail above under Ground 1(a). For the reasons there given, I agree with the FTT that the prejudice to the Appellants was not significant. In those circumstances I do not think it rendered the refusal of the adjournment unfair, or such as to deny the Appellants a fair trial. Nor for the reasons I have given did any of the other points relied on under any of the other Grounds.

168. In those circumstances, although I accept the principle derived from *SH* and *Nwaigwe*, I do not consider that the refusal of an adjournment in this case by the FTT was unfair.

169. If one stands back from the detail, the position seems to me to be this. On the factual findings of the FTT, based on the documents and their assessment of the Appellants' own evidence, these Appellants all entered into Pendulum CFDs in the hope that they could generate a tax loss (without a corresponding economic loss) which could be used to 'shelter' (a euphemism for avoiding paying income tax on) their income; and then filed tax returns claiming trading losses without any disclosure that the losses arose from what the FTT found to be a tax avoidance scheme. That meant that they were both ineligible for the tax relief they had claimed, and had exposed themselves to penalties for negligence in completing their tax returns. None of these conclusions depended on the evidence given by HMRC's witnesses, nor would cross-examination of those witnesses be likely to have any effect on them. In those circumstances the refusal of the adjournment was not unfair, nor did it deprive the Appellants of a fair hearing.

170. Moreover the FTT were justified in concluding as they did in the Substantive Decision (paragraphs 62 to 64 above) that the fact that the Appellants had not cross-examined Officer Bradley and Mr Harrap by their counsel had not in the event affected the overall determination of the appeals, and even if there had been potential unfairness, in the light of this conclusion it would not have affected the outcome of the case.

171. In those circumstances I will dismiss Ground 2 as well as Ground 1, and therefore dismiss the appeal.

MR JUSTICE NUGEE

RELEASE DATE: **15 January 2020**