[2020] UKUT 0290 (TCC)

Appeal number: UT/2019/0162 (V)

PROCEDURE – Costs – Whether FTT wrong to defer consideration of the costs of a "very late" application to amend a Statement of Case – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

WORLDPAY UK LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE JONATHAN RICHARDS**
JUDGE JONATHAN CANNAN

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London on 24 September 2020

Kieron Beal QC instructed by PricewaterhouseCoopers, for the Appellant

Owain Thomas QC and Matthew Donmall, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs, for the Respondents

DECISION

1. The appellant company ("Worldpay" or "WPUK") appeals, with the permission of the Upper Tribunal, against a case management decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") given orally on 5 June 2019 at the conclusion of a contested hearing. In the Decision, the FTT permitted HMRC to make a "very late" amendment to their Statement of Case which resulted in a hearing listed for seven days from 10 June 2019 being lost. The FTT reserved its decision on the costs of the application (including the costs thrown away by loss of the hearing) until conclusion of the FTT proceedings.

2. Worldpay does not seek to appeal against the FTT's grant of permission to amend. It regards this aspect of the Decision as a *fait accompli* since the substantive hearing has now been lost. However, it argues that the FTT erred in law in reserving the decision on costs rather than making an immediate award in Worldpay's favour.

The Decision and the background to it

The substantive VAT dispute

3. The substantive dispute between the parties is complicated. At this stage, we will not seek to summarise all of the parties' competing arguments, but will simply provide a high level summary sufficient for the purposes of this decision.

4. The Worldpay group (without, for the time being distinguishing between the various legal entities in that group) carries on a "merchant acquirer" business. Very broadly, a "merchant acquirer" is a financial institution that acts as an interface between merchants who wish to accept card payments from customers and the myriad financial institutions that issue those cards. Among other services, merchant acquirers transmit payments to and from those card providers and pay the "interchange fee" that must be paid to issuing banks under the rules of the Visa and Mastercard schemes. Until 1 January 2015, Worldpay took the position that supplies that it made of merchant acquiring services to its UK customers were exempt for VAT purposes.

5. In 2014 it was announced that as of 1 January 2015, both Visa and Mastercard would lower their interchange fees for cross-border transactions within the EU, so that these fees would be lower than UK domestic interchange fees. Worldpay restructured its business arrangements. The motive for, and the effect of, this restructuring is disputed but it resulted in Worldpay being able to offer UK merchants the benefit of these lower interchange fees. In very broad summary, a company in the Worldpay group ("WPBV") was established in the Netherlands, set up a merchant acquiring business and obtained the necessary regulatory approvals in the Netherlands. Worldpay then amended its contracts with 93 of its UK merchants so that, on Worldpay's case, WPBV (rather than Worldpay itself) provided them with merchant acquiring services from 1 January 2015. The restructured arrangement benefited from the lower interchange fees charged by Visa and Mastercard.

6. Worldpay's case is that WPBV needed to receive certain services from Worldpay so that WPBV could provide merchant acquiring services. Worldpay says that those services were provided pursuant to an Intra-Group Services Agreement ('IGSA').

7. Worldpay's position was that, from 1 January 2015, the arrangements should be analysed as follows for VAT purposes:

> (1) The services provided by Worldpay to WPBV under the IGSA are outside the scope of VAT (as they are supplied to a person outside the UK), but would, if made in the UK, be standard-rated[1]. Accordingly, under s26 of the Value Added Tax Act 1994 ("VATA 1994"), Worldpay is entitled to recover input tax associated with the making of supplies under the IGSA.
>
> (2) Worldpay did not make any VAT-exempt supply of merchant acquiring services to merchants based in the UK. Rather, merchants received merchant acquiring services from WPBV, rather than from Worldpay, with the services supplied by WPBV being VAT-exempt in nature[2].

8. The arrangements dealing with the settlement of funds due to merchants were significant because, by Article 135(1)(d) of the Principal VAT Directive, "transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts cheques and other negotiable instruments, but excluding debt collection" are exempt from VAT. WPBV would obtain payment from card issuers and pay those funds to Worldpay who would, in turn, pay them to the UK merchants. However, Worldpay argues that it makes these payments under an arrangement between Worldpay and the merchants (not involving WPBV) under which Worldpay acts as the merchants' "remittance agent" in return for a fee of around 1p per transaction[3]. Accordingly, on Worldpay's analysis, when WPBV remits monies to Worldpay that constitutes a discharge of WPBV's obligation to remit funds to UK merchants. Moreover, Worldpay argues that the fact that it owes a separate contractual obligation to WPBV to transfer money it receives to those self-same UK merchants does not amount to a separate remittance service provided to WPBV by Worldpay.

9. HMRC disagree with Worldpay's analysis. On their view, Worldpay is making exempt supplies of services to WPBV under the IGSA.

"Economic reality" and Halifax abuse

10. As we will discuss in more detail below, in their dispute with Worldpay, HMRC have invoked concepts of "economic reality" and "*Halifax* abuse". Indeed, the FTT's

[1] As a shorthand, we will throughout this decision refer to this as an argument that the services are "standard-rated".

[2] And, since the services were exempt in nature, merchants would not be obliged to account for VAT under the "reverse charge" mechanism.

[3] Originally in these proceedings, Worldpay accepted that this was consideration for an exempt supply. However, it is reconsidering its position in the light of developing EU jurisprudence in the area.

costs decision that is under appeal arose as a consequence of its decision to allow HMRC to amend their pleadings so as to allege *Halifax* abuse.

11. In VAT law, the concepts of "economic reality" and "*Halifax* abuse" are separate, although they can arise in close proximity when particular transactions are analysed.

> (1) "Economic reality", as relevant in this dispute, refers to the principle that the nature of the supplies that Worldpay makes cannot be decided purely by reference to the contractual arrangements. In addition to analysing the effect and terms of the contracts, is also necessary to consider whether those contracts reflect "economic reality" (see for example the decision of the CJEU in *HMRC v Newey* (Case C-653/11)).
>
> (2) "*Halifax*" abuse refers to the doctrine that emerged from the decision of the CJEU in *Halifax v HMRC* (Case C-255/02) as to how "abusive" transactions should be treated for VAT purposes. In order for the *Halifax* doctrine to be engaged, two conditions must be satisfied: first, a taxpayer must, notwithstanding a formal application of the applicable VAT directive and domestic law implementing it, be obtaining a tax advantage that is contrary to the purpose of those rules; second it must be apparent from objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Supreme Court emphasised in *Pendragon v HMRC* [2015] STC 1826, the "essential aim" of the transaction involves a consideration of objective factors and is not to be confused with the subjective intentions of the parties (see paragraph 31 of Lord Sumption's judgment). Moreover, determining the "essential aim" invites a consideration of both the overall scheme and its constituent parts (see paragraph 13 of Lord Sumption's judgment).

12. Evidence that bears on "economic reality" may be relevant to *Halifax* abuse (and *vice versa*). For example, if Worldpay was not in a "commercially real" way acting as remittance agent for merchants, that might suggest, though would not prove, that Worldpay had been constituted as the merchants' remittance agent with the essential aim of obtaining a tax advantage, which could be relevant to the second limb of the *Halifax* test. Moreover, the CJEU said, at paragraph 48 of its judgement in *Newey* that a "particular" example of a situation where contracts might not reflect economic reality is where *Halifax* abuse is present.

13. However, there is an important difference between considerations of "economic reality" and the *Halifax* concept. The parties agree that the burden of proof relating to questions of economic reality lies with Worldpay in the sense that, in order to displace HMRC's decisions, Worldpay must show that the IGSA provides for Worldpay to make taxable supplies to WPBV and that the provisions of the IGSA properly reflect economic reality. However, the parties also agree for the purposes of this hearing that the burden of pleading and proving *Halifax* abuse lies with HMRC (see, for example, the obiter comments to this effect in *Hilden Park LLP v HMRC* [2015] UKUT 0405 (TCC)).

The procedural background to HMRC's application to amend

14. On 19 December 2016, HMRC made a decision as to the VAT liability arising from Worldpay's restructured arrangements. HMRC concluded that Worldpay was making exempt supplies to WPBV under the IGSA, but they had two alternative bases for that conclusion:

> (1) First they argued that, under the IGSA, Worldpay was not simply providing services that WPBV then used to make its own exempt supply of merchant acquiring services. Rather, HMRC's conclusion was the IGSA itself involved Worldpay making a complete exempt supply of merchant acquiring services, with WPBV making an identical on-supply of those services to merchants.
>
> (2) Alternatively, they argued that even if Worldpay could demonstrate that it was not supplying a complete merchant acquiring service to WPBV under the IGSA, so that some aspects of Worldpay's supplies were components of WPBV's supplies, nevertheless Worldpay's services showed a significant degree of responsibility or liability for delivering the overall merchant acquiring service and so still fell to be treated as exempt.

15. HMRC's decision letter showed that they had a good grasp of the nature of Worldpay's arrangements and Worldpay's analysis of why it considered its supplies to WPBV were taxable. In their decision, HMRC did not suggest that Worldpay's arrangements were abusive in the *Halifax* sense, but made a request for information, to include copies of tax advice that Worldpay had received, which they justified as follows:

> [We] feel that there are indicators in the arrangements… that raise the possibility that the contractual arrangements do not reflect economic reality. This is something we need to consider further and to enable us to do so I would be grateful if you could provide me with [a list of information requested with the focus being on tax advice that Worldpay received and its response to that advice].

16. Worldpay appealed to the FTT against both HMRC's decision on liability and against various consequential assessments. Those appeals were, in accordance with the FTT's rules of procedure, allocated to the "complex" category with the result that the FTT had full power to make costs awards.

17. Initially, Worldpay's appeals against the liability decision and the assessments proceeded on different paths although on 27 September 2017, the FTT directed that those appeals should be heard together. On 13 July 2017, HMRC served their Statement of Case in the liability appeal.

18. HMRC's Statement of Case was, as is usual in the FTT, served before the parties had exchanged documentary and other evidence although HMRC had, as part of ongoing dialogue with Worldpay, received a large quantity of documents and information before the FTT proceedings commenced. HMRC's case set out in their Statement of Case was broadly similar to that they had articulated in their decision letter summarised at [14].

19. In paragraph 22 of their Statement of Case HMRC referred to ongoing correspondence between the parties arising out of the request for information set out in their decision letter of 19 December 2016. In addition, HMRC claimed to reserve the right to make further arguments stating, in paragraph 82 of the Statement of Case:

> HMRC's assessment is based on the evidence currently held by HMRC. HMRC have been in continuing correspondence with the Appellant. In particular HMRC has sought disclosure of any tax advice given in relation to the new arrangements. HMRC therefore reserves its position to develop further argument in relation to this issue pending completion of that disclosure and review of the relevant documentation.

20. HMRC's Statement of Case contained no pleading of *Halifax* abuse. Their request for sight of Worldpay's tax advice was originally justified in their decision letter on the grounds of concerns about "economic reality". However, HMRC had not spelled out precisely how advice that Worldpay had received on tax law could shed a light on whether contracts were consistent with economic reality. Moreover, the focus on tax advice suggested, without making explicit, that HMRC were considering whether obtaining a tax advantage might be an essential aim of the arrangements for the purposes of the *Halifax* test. However, that suggestion raised still further questions since tax advice might be expected to shed a light only on the subjective views of Worldpay and its advisers whereas, as noted in *Pendragon*, the second limb of *Halifax* is concerned essentially with objective considerations.

21. Both before and after service of HMRC's Statement of Case, correspondence continued as to the scope of HMRC's request for information. In a letter written on 23 June 2017, HMRC wrote:

> HMRC does not dispute that there was a commercial driver, or drivers, behind the setting up of WPBV. However, the existence of a commercial rationale for the restructure does not mean that tax was not also a driver.
>
> The intent of the information request … was to obtain the information necessary to allow us to consider whether and to what extent tax played a part in the decision to implement the Dutch arrangement and their design.

The reference to tax "drivers" raises the clear suggestion that HMRC had *Halifax* abuse in mind, rather than simply a question of whether the contracts to which Worldpay was party reflected economic reality. In addition, HMRC's justification of the request suggests that they were looking at the commercial rationale for, and the design of, the "Dutch arrangement" as a whole.

22. On 13 October 2017, Worldpay wrote to HMRC and asked to what extent HMRC were asserting that the arrangements in issue constitute an abuse of law. In a sense, that was the wrong question. HMRC could not "assert" that the arrangements constituted an abuse of law without pleading it, since they bore the burden of proof. The more accurate question would have been to ask whether HMRC were seeking information with a view to pleading a case of *Halifax* abuse.

23. HMRC's response of 27 November 2017 confirmed that *Halifax* abuse was not currently part of their case but HMRC said that they reserved the right to apply to amend their Statement of Case in response to information that Worldpay provided. The letter also recorded a suggested way forward for dealing with the information request:

> With regard [to] artificiality itself, HMRC note that we have repeatedly asked for disclosure of any tax advice given to your client with regards the structuring of the arrangements between WPUK, WPBV and the relevant merchants and we understand you propose to address all of these requests when serving your witness evidence… I would be grateful if you would confirm that this is the case. In that regard we trust you will agree that it is clearly premature for us to fully particularise our case in respect of economic reality (so far as it relates to artificiality) when you have not yet disclosed all relevant documents.

24. We were not shown any response from Worldpay to this letter. However, when Worldpay served its evidence in February 2018, its witnesses did explain what they saw as the commercial rationale of the arrangements as a whole. This method of addressing HMRC's requests for information introduced a "disconnect" between the witness evidence and the pleadings. HMRC had not pleaded any case on *Halifax* abuse and therefore Worldpay did not have a particularised pleading to address in their evidence. Nevertheless, apprehending in general terms that HMRC were concerned that tax was a "driver" for the arrangements as a whole, Worldpay's witness evidence sought to explain why the arrangements as a whole were driven primarily by commercial considerations. Worldpay did not, however, disclose their tax advice to HMRC.

25. In a letter dated 13 July 2018, HMRC served a detailed request for information and disclosure arising out of Worldpay's witness statements. Item 29 of that request, made by reference to paragraph 89 of the witness statement of Mr Dunn, a senior manager at Worldpay was:

> …please disclose all documents relating to the decision to make WPUK the purported remittance agent of the Merchants and to structure the amended contracts such that the Merchants made a separate payment for that purported service, including (but not limited to) disclosure of all correspondence concerning that change and tax advice relating to that change.

With the benefit of hindsight, this request can be seen as having a different focus from earlier enquiries as to commercial rationale as it focused on the rationale for a specific aspect of the arrangements, namely Worldpay's function as remittance agent. Moreover, although HMRC were continuing to request tax advice that Worldpay had received, the request was also capable of extending to correspondence between Worldpay and merchants relating to the remittance agent role.

26. In their letter of 13 July 2018, HMRC asked Worldpay whether, given the quantity of information requested, it was premature for the parties to provide the FTT with listing details, pursuant to applicable case management directions, with a view to fixing the hearing of the appeal. Worldpay, however, considered that the parties should proceed to provide the FTT with listing information since it would take some time to list the

hearing, which was then estimated to last six days. As a result, both parties gave the FTT their listing information and neither party indicated to the FTT that listing the hearing was premature because the process of disclosure was still ongoing. On 19 September 2018, the FTT notified the parties that the substantive hearing was listed to start on 10 June 2019.

27. HMRC's request for information was extensive. It took Worldpay until 5 March 2019 to provide responses on many issues which they did by serving further witness evidence and some 18 lever arch files of exhibits. HMRC accept that it was entirely reasonable for Worldpay's response to the request for information to take this long.

28. Worldpay did not, however, accept that Item 29 of HMRC's request (referred to in paragraph [25] above) was justified. As well as objecting to the width of that request given the extent of material that had already been provided, Worldpay argued that the VAT treatment of the remittance service provided by Worldpay was not in dispute.

29. In the light of that objection, HMRC made an application to the FTT for disclosure on 1 February 2019. The hearing of the disclosure application was listed for 5 April 2019.

30. In their skeleton argument served before the disclosure hearing, HMRC justified their request for Item 29 by arguing that it was relevant to their pleaded argument that under the IGSA Worldpay was providing WPBV with a complete merchant acquiring service which included an agreement to remit funds to merchants and that, accordingly, Worldpay's agreement to remit funds did not, as a matter of economic reality, arise from an entirely separate arrangement made between it and the merchants alone. Therefore, Item 29 was justified by reference to arguments that, because Worldpay's contracts did not reflect "economic reality", the VAT treatment of supplies under the IGSA could not be determined by reference to that contract alone. That justification did not depend on any assertion of *Halifax* abuse and, through counsel, HMRC confirmed to the FTT at the disclosure hearing that they did not plead that any of the contracts were shams, or abusive in the *Halifax* sense. HMRC did, however, indicate that, once they had the disclosure they were seeking they would then review their Statement of Case and amend it as a matter of urgency thereafter to reflect their case as to the economic reality of the transactions.

31. The FTT decided that Worldpay should give HMRC further disclosure. As regards Item 29, the FTT concluded that the question of whether Worldpay was providing payment services to WPBV was in issue and that documents passing between merchants and Worldpay in relation to the remittance function were relevant to that question. It therefore directed that Worldpay should disclose such documents, but need not disclose documents known only to Worldpay such as its tax advice.

32. On the morning of 10 May 2019, Worldpay sent HMRC by email the further disclosure that the FTT had directed. On the same day, and before HMRC had reviewed that additional disclosure, HMRC sent a draft of an amended Statement of Case to Worldpay indicating that they would make a decision on whether to make a formal application to amend shortly. In their cover letter, HMRC confirmed that the draft

amended Statement of Case had been prepared without any consideration of the additional disclosure which the FTT had ordered.

33. On 14 May 2019, HMRC applied to amend their Statement of Case so as to include a pleading of *Halifax* abuse for the first time. That draft Statement of Case set out HMRC's case in the alternative:

> (1) HMRC's primary case was that Worldpay was making an exempt supply, consisting of a complete merchant acquirer service, to WPBV under the IGSA with that supply including, as a matter of economic reality, Worldpay's provision (to WPBV) of the service of remitting money to merchants.
>
> (2) In the alternative, HMRC argued that, if Worldpay's supplies to WPBV did not constitute a complete merchant acquirer service but did include the provision of remittance services to WPBV, the services Worldpay supplied were part and parcel of a merchant acquirer's activities and were exempt.
>
> (3) As a further alternative, even if Worldpay's supplies to WPBV did not constitute a complete merchant acquirer service and did not include the provision of remittance services to WPBV, Worldpay's services were still part and parcel of a merchant acquirer's activities and so were exempt.
>
> (4) As a final alternative if the FTT concluded that (i) Worldpay was not supplying any remittance services to WPBV and (ii) that the absence of this service determined that Worldpay's services to WPBV were taxable then the contractual changes under which Worldpay was constituted as the "remittance agent" of the merchants amounted to an abuse of law applying the *Halifax* principle. HMRC set out the reasons why the Halifax principle was engaged in the following terms:
>
> > … (i) those contractual changes would result in the accrual of a tax advantage to WPUK which is contrary to the purposes of the PVD in rendering WPUK's supplies to WPBV taxable when but for those changes they would be exempt, giving WPUK thereby an entitlement to input tax deduction it would not otherwise have; and ii) the essential aim of this particular feature of the amended MSA was to obtain that advantage, there being no commercial rationale for WPUK to be acting as the remittance agent of the merchants rather than providing the remittance service as an agent of WPBV.

The decision of the FTT

34. The FTT gave its decision on HMRC's application to amend orally on 5 June 2019. As was then usual, the FTT hearing was not recorded. However, Worldpay produced a note of the FTT's oral decision and while HMRC initially did not accept that note as entirely accurate Mr Thomas QC confirmed to us during his submissions that, for the purposes of the Upper Tribunal proceedings, we could take that note as agreed.

35. The FTT referred to the authorities of *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 and *Quah Su-Ling v Goldman*

Sachs International [2015] EWHC 759 (Comm). It directed itself in the following terms, among others:

> (1) If the proposed amendment does not have a real prospect of success, it must be rejected.
>
> (2) There is a heavy burden on the party seeking a late amendment to justify the application. A particularly heavy burden applies to a party seeking a "very late" amendment to a pleading, namely an amendment that will cause a hearing date to be lost.
>
> (3) There had to be a good explanation of any delay in making the application.
>
> (4) The FTT had to look at all of the consequences including those of not admitting the amendment. It had to consider whether "costs could provide adequate compensation".

36. The FTT noted that it could not evaluate the prospects of success of HMRC's Halifax argument without seeing all of the evidence. However it concluded "in a negative way" that it was not satisfied that there was no real prospect of success.

37. The FTT characterised the amendment as "late" concluding that it was inevitable that, if HMRC's amendments were allowed, the hearing date would be lost. In fact, the FTT observed that:

> … if there was a category of very, very late, this would be in it.

38. The FTT considered the effect of losing the hearing date saying:

> 13… There will be a delay in the resolution of this dispute. The delay is likely to be at least 12 months. Costs may not be an entirely adequate remedy. Costs may not cover all the costs which are wasted. That assumes costs would be ordered.

39. In objecting to HMRC's application, Worldpay had argued that, if HMRC wanted to make a case based on *Halifax* abuse, HMRC should have pleaded that case in their Statement of Case. The FTT rejected that argument. It accepted Worldpay's general point that "pleadings come before evidence". However, it accepted that HMRC had only recently received relevant evidence saying:

> 18. Is HMRC right to say that they only recently got the relevant evidence? They received answers to the questions they raised in March 2019 and the further disclosure requested in May 2019. I do accept that this was relevant to the changes sought in the Statement of Case.

In our view, in this passage, the FTT was not finding that the documents served in May 2019 alone justified the amendments to the Statement of Case. Such a finding would have been wrong because, although the FTT was not shown HMRC's cover letter referred to at [32], that cover letter demonstrated that the draft amended Statement of Case had been prepared without any review of that material. Rather, we agree with Mr Thomas QC that the FTT was concluding that it was reasonable for HMRC to review

both the material disclosed in March 2019 and that disclosed in May 2019 before deciding whether to plead a case based on *Halifax* abuse.

40. Overall, the FTT concluded at [19] that HMRC had behaved reasonably. On receiving Worldpay's witness evidence, HMRC acted promptly in asking Worldpay for further information, waiting to see if that answered their questions and, when it did not, making an application for disclosure to the FTT. The answers that HMRC received to their questions were relevant to the pleaded case but also to the *Halifax* abuse issue. The core of the FTT's conclusion on this issue is to be found in the following extract from the parties' note of the decision:

> 20. It then comes down to whether HMRC ought to have pleaded the case on Halifax from the start. And whether the failure to do so means there is no good excuse for doing so now. What I've come down to in making that decision is that, this being a tax case, the Appellant holds all of the evidence. A significant amount of this evidence has recently been disclosed, which impacts upon the case to be heard. It is not unreasonable for HMRC to respond to that disclosure, and as a tax authority they are not going to have that evidence before they start the case.
>
> 21. To some extent, the real problem is that both parties allowed the hearing to be set down for listing before the exchange of evidence was complete. If I refuse the amendments requested, I will be depriving HMRC of the product of their reasonably pursued application for the further and better particulars and disclosure. My decision has not been easy and on balance, despite the inevitable expense and delay, I shall allow the amendments. There is a reasonable and good explanation for why the application was made late. It is important to see things in the round. Ultimately both parties should have made the Tribunal aware that the evidence process in this case was not complete. The amendments to the Commissioners' Statement of Case are allowed, and the hearing set for 10 June 2019 is adjourned.

41. Worldpay asked that the FTT should direct HMRC to pay its costs of HMRC's application, including any costs thrown away by the adjournment of the substantive hearing. The FTT set out the parties' submissions at as follows:

> 22. Counsel for the Appellant made an application for wasted costs thrown away as a result of the Commissioners' late application to amend, to be the subject of detailed assessment if not agreed, the Appellant having suffered prejudice in having its listing adjourned immediately before the start of the hearing. Counsel argued that no specific disclosure served in the past three months was being relied upon by the Commissioners for the late application to amend their case, and the disclosure actually provided in May 2019 bears no relation to the case now being pleaded by the Commissioners.
>
> 23. Counsel for the Commissioners applied for the Tribunal's decision on costs to be reserved until the conclusion of the hearing, arguing that the position of the Commissioners to make the amendments sought at an

> earlier date is based on a forecast of the documents relied upon by the Commissioners in taking that decision.

42. The FTT decided to reserve the question of costs and this is the only aspect of the Decision that is under appeal to this Tribunal. The FTT's decision on Worldpay's costs application was as follows:

> 24. The Tribunal ruled that the costs of and occasioned by the application, including any costs thrown away as a result of the adjourned hearing, should be reserved to the conclusion of the appeal.
>
> 25. Part of my decision was on the basis that both parties were at fault for allowing the hearing to be set down at a stage when the evidence in the appeal was not complete, without making the Tribunal aware of it. It is tempting to say no order as to costs. But I consider on balance it is fairer to reserve the question of costs. If Mr. Beal is then in a stronger position to make further submissions and to make good what he says, he may make his application later.

The Grounds of Appeal against the Decision

43. With the permission of the Upper Tribunal, Worldpay appeals against the FTT's costs decision. As we have noted, it does not appeal against the decision to permit HMRC to amend their Statement of Case, regarding this as a *fait accompli* once the hearing was lost. However, Worldpay does not agree with the FTT's decision to permit the amendment and places its criticisms of that decision at the heart of its appeal against the costs decision.

44. Essentially, Worldpay puts its case in two ways:

> (1) As Ground 1, it argues that the Decision was infected by errors of law and principle which vitiated its decision to reserve the question of costs.
>
> (2) As Ground 2, it argues that the decision as to costs was so plainly wrong as to be perverse.

45. As will be seen, some of those arguments overlapped. However, in this decision we will endeavour to follow the above structure which Mr Beal QC adopted in his written and oral submissions.

46. In our analysis, we will keep firmly in mind that Worldpay's appeal is against the FTT's decision on costs and not against its decision to permit HMRC to amend their Statement of Case. Moreover, the decision of the FTT that is under appeal involved the exercise of a case-management discretion. The parties were rightly agreed that this Tribunal should be slow to interfere with the exercise of a case-management discretion, particularly where that discretion related to the award of costs. In *Atlasjet Havacilik Anonim Sirketi v Ozlem Kupeli and others* [2018] EWCA Civ 1264, Hickinbottom LJ set out the applicable principle as follows:

> 5. In relation to that rule[4], several points are worthy of note.
>
> i) In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR rule 1.1, i.e. it must make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order – and, if so, the order it makes – the court has to make an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be.
>
> ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below (CPR rule 52.21(3)). No one suggests that there was a serious irregularity in this case.
>
> iii) Before an appeal court concludes that the costs decision below was "wrong", it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was "wholly wrong" (see, e.g., *Adamson v Halifax Plc* [2002] EWCA Civ 1134; [2003] 1 WLR 60 at [16] per Sir Murray Stuart-Smith, adopting (post-CPR) the conventional (pre-CPR) approach he described in *Roache v News Group Newspapers Limited* [1998] EMLR 161 at page 172).
>
> iv) An appeal court will only rarely find that the exercise of discretion below is "wholly wrong", because not only is that discretion particularly wide but the judge below is usually uniquely well-placed to make the required assessment, having heard the relevant evidence.

Ground 1 – Errors of principle and/or law

Failure to appreciate that an award of costs was necessary to mitigate prejudice to Worldpay

47. Worldpay did not criticise the FTT's self-direction as to the principles it would apply when deciding HMRC's application to amend, which we have quoted at [32]. For a more detailed examination of relevant principles it referred us to, among other authorities, the decision of the High Court in *Bilta (UK) Ltd v Royal Bank of Scotland plc* [2018] EWHC 1429 (Ch). In that decision, in the course of a summary of applicable principles, Marcus Smith J said, at [17]:

> (5) Even if a proposed amendment passes the criteria of arguability and clarity and materiality, it may still be refused. In this context lateness is a critical factor. Lateness is a critical factor because of the disruption that an amendment may cause to the other party or parties to the proceedings. Thus, the court must consider precisely what prejudice the other party or parties to the proceedings will suffer. It may be that such prejudice can be compensated for in costs but that is not always the case.

[4] i.e. Rule 44.2 of CPR setting out the principles that a court should apply when deciding whether to award costs

> The closer to trial, the more likely the other party or parties will be prejudiced in a way that cannot be compensated in costs simply because they will be forced to fight on two fronts. They will be forced to deal with the response to the amendments that are allowed and they will be forced to prepare for trial.
>
> …
>
> (7) The most extreme case of lateness is one where permitting the amendments would cause the trial date to be lost. The parties, the court and other court users have a legitimate expectation that trial fixtures will be kept. In such a case the burden on the party seeking to amend is particularly heavy.
>
> (8) The court must always take into account the amending party's explanations as to why an amendment is being moved at a particular time, and weigh this explanation in the balance.

48. Applying the correct principles, Worldpay argues that the FTT can only have given HMRC permission to amend on being satisfied that costs were adequate compensation for loss of the hearing date. However, the FTT lost sight of this principle when it decided, in the costs section of the Decision, not to make an immediate award of costs to Worldpay.

49. We do not accept this argument. Worldpay accepts that there is no general principle that permitting one party to make a "very late" application to amend must always result in the other party being awarded its costs thrown away. Rather, the FTT had a discretion to exercise. In exercise of that discretion, the FTT concluded that HMRC behaved entirely reasonably and could not be blamed for applying to amend their Statement of Case soon before the hearing ([19] of the Decision). It attributed the blame for the hearing being lost to both parties allowing the hearing to be set down before the exchange of evidence was complete ([21] of the Decision). Worldpay considers the FTT was wrong to reach those conclusions, and we will address that argument in more detail in a later section. However, once the FTT concluded that Worldpay was just as much to blame for the loss of the hearing as HMRC, there was no "principle" to the effect that it was nevertheless obliged to make an immediate costs award in Worldpay's favour as the price of granting HMRC their permission to amend.

Failure to appreciate a principle to the effect that the issue of costs should be settled at or around the time of the grant of permission to amend

50. Worldpay referred to the decision of Rose J, as she then was, in *Capital Markets Company (UK) Ltd v Tarver* [2017] EWHC 2467 (Ch). In that case, having considered an application to amend pleadings, Rose J turned to the question of costs saying, at [59] and [60]:

> 59. . . . [The Court of Appeal in the case of *Crown Bidco Ltd v Vertu Holdings Oy* [2017] EWCA Civ] held that the first instance judge had rightly not been prepared to form any view about the truth of the allegation of fraud but they held that it was often better that issues as to costs should be decided there and then rather than at some distant date by a different judge who will have had no experience and is likely to

> have no appetite for the intricate arguments that can best be made when the detailed points are fresh in everyone's mind.
>
> 60. In my judgment, tempting though it is sometimes to put off to another judge a difficult decision, I feel I should resist that temptation given that a large number of counsel have addressed submissions to me over the past one and a half days. A postponement of a decision should only be made if it is impossible to reach a decision. Otherwise one risks simply generating more work and more submissions further down the line.

51. That passage does not establish any principle to the effect that decisions on the costs of an application to amend must necessarily be decided at or around the time of the application itself. At most it demonstrates an inclination that difficult decisions should not needlessly be postponed.

52. The decision in *Crown Bidco,* to which Rose J referred does not put the position any differently. In that case, the claimant had applied to amend its pleadings shortly before trial to make an allegation of fraud. Blair J at first instance allowed the amendment, adjourned the trial and directed the claimant to pay the defendant its costs thrown away. One aspect of the claimant's challenge to this decision was to the effect that the judge should not have made an immediate costs award and instead should have waited until conclusion of the trial to see whether fraud had been established. Otherwise, it was submitted, there was a risk that a fraudster could benefit inappropriately from an award of costs. The Court of Appeal rejected that argument. At [58], the Court of Appeal observed that the question of costs following an application to amend is "often better decided there and then rather than at some distant date by a different judge who will have had no experience and no doubt no appetite for the intricate arguments that can best be made when the detailed points are fresh in everyone's minds". However, the Court of Appeal established no principle that costs decisions always have to be made "there and then" and indeed, at [60] of their decision commented specifically that "another judge might have reserved the costs to the trial judge", emphasising the width of the discretion that is available.

53. The FTT did not defer its consideration of costs to avoid a "difficult decision". Rather, it considered that deferring the decision until the substantive hearing would give Worldpay an opportunity to make good its point that the disclosure provided did not justify the amended pleading. We do not consider that this involved any error of "principle" or law, although we will later in this decision consider Worldpay's arguments as to the exercise of the FTT's discretion.

Criticisms of the FTT's conclusions on the application to amend

54. In this section, we will address Worldpay's argument that, as a matter of principle, HMRC should have pleaded their *Halifax* case much earlier and that a failure to appreciate this principle led the FTT to conclude, incorrectly, that HMRC had a good reason for amending their pleadings so late. (When we consider Ground 2, we will consider Worldpay's challenge to the effect that, in exercising its discretion as to costs, the FTT should have been much more critical of HMRC's conduct). Worldpay's arguments based on the application of principle can be summarised as follows:

(1) HMRC bore the burden of pleading and proving a case based on *Halifax* abuse. They should, therefore, as a matter of principle, have pleaded their case on *Halifax* at the outset so that Worldpay could, in its evidence, address that case.

(2) An allegation of *Halifax* abuse is serious and not dissimilar to an allegation of fraud, a further reason why it should have been pleaded early in proceedings.

(3) In order to establish *Halifax* abuse, HMRC had to show, among other matters, that by reference to objective factors that the essential aim of the transactions, or constituents of them, was the obtaining of a tax advantage. HMRC had, at the time they made their decision on liability of 19 December 2016, full information as to the nature of the transactions that Worldpay had effected. Therefore, HMRC should have explained, in their Statement of Case, by reference to objective features of the transactions, why *Halifax* abuse was present. Disclosure from Worldpay was, as a matter of principle, not necessary, and was irrelevant, unless and until HMRC had done this.

55. Before we address the detail of these submissions, we observe that these points are essentially criticisms of the FTT's decision on the application to amend. As noted in the extract from *Bilta (UK) Limited* set out at [47] above, HMRC had to give particularly good reasons for amending pleadings late in the day where those amendments would result in loss of hearing date. Worldpay is arguing that, applying the correct principles, HMRC had no good reason. If that argument is correct, it must follow that the FTT was wrong to allow the amendment.

56. No particular difficulty would arise if Worldpay was challenging both the FTT's decision to permit the amendment and its decision on costs. In that case, Worldpay could argue that the FTT had been wrong, as a matter of law or principle, to permit the amendment. If that argument succeeded before the Upper Tribunal, the Upper Tribunal could have remade the decision to allow the amendment and having done so could, in exercise of its powers under s12(4) of the Tribunals, Courts and Enforcement Act 2007, have made a direction to the effect that HMRC should pay Worldpay its costs thrown away by the postponement of the hearing. However, in circumstances where Worldpay is not appealing against the decision to allow the amendment, Worldpay's collateral attack on that decision introduces a degree of unreality into proceedings. Worldpay is effectively saying that the FTT should, applying correct principles at the costs stage of its decision, have concluded that HMRC had no good reason to amend their pleadings so late even though the FTT had already decided that there were good reasons when permitting the amendment.

57. Moreover, we consider that the appropriate focus should, in the first instance, be on the decision that the FTT did make (to defer the determination of costs) and not on an alternative decision (to make an immediate award of costs) that the FTT could have made. Of course, we recognise that Worldpay's complaint is that the FTT should immediately have given it its costs. However, it seems to us that this is to conflate the consideration of whether there was an error of law in the FTT's decision with consideration of the way that decision should be remade if there was such an error. In

our judgment, in order to achieve the outcome it seeks, Worldpay must first satisfy us that the FTT was wrong to make the decision it did, to defer consideration of costs. If, and only if, it succeeds with that argument, it must establish that the Decision must be remade so as to provide for an immediate award of costs to Worldpay.

58. Our starting point, therefore, is the decision to defer consideration of the costs issue. We were told that Worldpay's application for costs was made in brief terms after the FTT had given its decision on the application to amend. In its submission on costs, Worldpay did not repeat its detailed criticisms of HMRC's conduct from the time they made their decision of 19 December 2016. There would have been little point in going through those criticisms all over again since by then the FTT had concluded that HMRC had behaved reasonably and that both parties were effectively to blame for the hearing date being lost. Therefore, the Decision records Worldpay's argument on the costs point specifically as being that none of the disclosure provided in March and May 2019 bore any relation to the case that HMRC were pleading in their amended Statement of Case. We note that the FTT's decision, both as it related to costs and to the application to amend was given *ex tempore*. As such, it could not be expected to recite each and every argument that was advanced. However, the impression that Worldpay's argument on the costs question specifically relied heavily on the asserted irrelevance of the recently disclosed material is borne out by the FTT's decision on permission to appeal in which it said:

> I cannot see how it can be said that a decision to defer a determination of a costs application until the end of the FTT proceedings can be said to be so unreasonable an exercise of discretion that it is wrong in law. Moreover the reason I decided to defer matters was because of the appellant's submission that it considered that, once the main hearing had taken place, it would be evident that the material newly disclosed to HMRC by the appellant did not justify HMRC's changed case.

59. It is true that the FTT indicated that it was "tempting" to make an immediate direction that there should be no order as to the costs of the application to amend. It clearly felt that such a direction could be justified on the basis that both parties were to blame for the hearing being lost (see [25] of the note of the Decision quoted at [41] above). However, the FTT did not make a direction of no order as to costs.

60. When the focus is placed on the decision that the FTT did make, we see no error of principle or approach. It was not obliged to decide costs there and then as we have concluded at [53] above. It decided to defer the consideration of the costs issue to enable Worldpay to make good its submission that none of the material that had recently been disclosed had any bearing on HMRC's newly pleaded case. That, in our judgment, was an entirely appropriate exercise of discretion and indeed very similar to the exercise of discretion which the Court of Appeal, at paragraph [60] of *Crown Bidco*, indicated could be appropriate.

61. We do not, therefore, consider that Worldpay's criticisms of the FTT's decision to allow the application to amend, which is not under appeal, would, even if justified, of themselves demonstrate an error of law in the FTT's decision to defer its consideration

of costs. However, given that Worldpay made detailed submissions on this issue, we will express some brief views on those criticisms.

62. We do not accept Worldpay's argument that the FTT "ignored" the fact that HMRC bore the burden of pleading and proving *Halifax* abuse. Worldpay had stressed this point in its skeleton argument before the FTT. Moreover, Judge Mosedale, the FTT judge, had herself released a decision in *Hilden Park LLP v HMRC* [2017] UKFTT 217 (TC) to the effect that the burden lay on HMRC where *Halifax* abuse was alleged. The FTT could not have failed, in this case, to have the burden of proof firmly in mind.

63. Nor do we consider that the fact that an allegation of *Halifax* abuse was "serious" necessarily meant that it had to be pleaded earlier than it was. Serious or not, HMRC could only plead the existence of *Halifax* abuse when they had a basis on which to do so. Worldpay itself argues that alleging *Halifax* abuse is akin to an allegation of fraud and so, on Worldpay's own argument, extreme care should be taken before pleading such a case.

64. There is no principle to the effect that a party bearing the burden of proof on a particular issue must always plead its position in a Statement of Case as originally served. As the FTT observed in the Decision, information disclosed in relation to a pleaded case might suggest that a different or alternative case can be advanced. Therefore, the substance of Worldpay's argument must be that because HMRC had, since they made their decision on liability, a full grasp of the transactions to which Worldpay was party, and the stated rationale for them, as a matter of principle, they had to "go first" and plead a case of *Halifax* abuse to which Worldpay then responded in its evidence.

65. We do not accept that broad proposition. We quite accept that, ever since they made their decision on liability in December 2016, HMRC would have had a good understanding of the relevant contracts and the nature of the arrangements at issue. However, we do not accept that this meant that, as a matter of principle, HMRC necessarily had everything they needed to plead a particularised case of *Halifax* abuse.

66. In *Pendragon*, Lord Sumption gave an indication of the sort of evidence that might be relevant in considering the "essential aim" of a transaction, viewed objectively mentioning:

> It may in an appropriate case include evidence not just of the background knowledge available to the parties, but of the financial position and objective commercial requirements of the party obtaining the tax advantage, the relationship between the participants, the reasonableness of the consideration, the mechanics of the performance, the normal course of the relevant business and potentially other matters.

67. Of course, it is not possible for us, without surveying all of the evidence and information that Worldpay has provided, to specify when HMRC could have pleaded their case that the constitution of Worldpay as remittance agent involved *Halifax* abuse. However, Worldpay's contention that HMRC had everything they needed at the time of their decision on liability, or at the time of service of their Statement of Case, is wide

of the mark. To give just one example, one of HMRC's requests for information arising from Mr Dunn's witness evidence asked for samples of invoices setting out details of the 1p per transaction fee for providing remittance services. If the response to that request showed that, despite the contracts, Worldpay never charged that fee, or merchants never paid it, HMRC might reasonably consider that material relevant to their consideration of whether to make the serious allegation of *Halifax* abuse.

68. Worldpay argues that it was "wholly inappropriate" for HMRC to "see if the coast was clear" before pleading *Halifax* abuse. As will be seen in our analysis of Ground 2, we do not consider that this Tribunal should express a concluded view on whether HMRC's conduct was reasonable or not, since we regard this as a matter for the FTT when it makes the decision on costs which it has reserved. We tend to agree with Worldpay that HMRC's initial focus on obtaining details of Worldpay's tax advice was unfortunate, at least in the absence of an explanation as to how that advice could shed a light on the objective characteristics of the transactions. However, that does not make it objectionable as a matter of principle for HMRC to review the results of legitimate requests for information and disclosure before deciding whether to plead *Halifax* abuse.

69. For these reasons we do not consider that Ground 1 is made out.

Ground 2 – errors in the FTT's exercise of discretion

Failure to have appropriate regard to obvious prejudice

70. This aspect of Worldpay's case puts some of the issues we have already addressed in a slightly different way. Essentially, Worldpay argues that, even if HMRC's conduct was sufficiently satisfactory for them to obtain permission to amend, the position remained that Worldpay suffered prejudice in the loss of the hearing and the only reasonable conclusion was that it should be compensated for that prejudice by means of an immediate costs award. Accordingly, Worldpay argues, in deciding instead to defer costs, the FTT reached a decision that was perverse.

71. Worldpay amplifies that point by arguing that the FTT should have concluded that there were only two possibilities. HMRC were either (i) inappropriately "holding back" their *Halifax* case or (ii) the precise nature of their *Halifax* challenge only occurred to HMRC late in the day. In either case, it argued, the only reasonable decision was to make an immediate costs award in Worldpay's favour.

72. We consider that these arguments, like similar arguments that we have addressed at [54] to [68] above, approach the FTT's decision from the wrong starting point and treat it as a decision to refuse Worldpay a costs award rather than, as it was, a decision to defer consideration of costs. Moreover, Worldpay is effectively asking the Upper Tribunal, on appeal, to approach the FTT's decision on costs in a manner very different from the way the parties asked the FTT to approach it. The FTT's decision indicates that Worldpay based its submissions on costs, as distinct from its submissions on the application to

amend, on an argument that the recent disclosure did not justify the *Halifax* case that was being pleaded. We do not consider that it was "plainly wrong" for the FTT to defer its consideration of that argument until after the full significance of all that disclosure had been examined at the substantive hearing.

73. We are conscious that Worldpay has, in its appeal to this Tribunal, made submissions on the costs issue that were much more detailed and wide-ranging than those it made before the FTT. Since we have concluded that the FTT was entitled, as it did, to reserve the question of costs, it would be wrong for us to express a concluded view on Worldpay's submissions that HMRC objectionably "held back" their case on *Halifax* abuse or alighted on it unduly late. To the extent that those submissions amount to criticisms of the FTT's decision to permit the amendment, that decision is not under appeal to this Tribunal. To the extent that they are relevant to what, if any, award of costs the FTT should make when it comes to consider the issue, it is appropriate for the FTT, rather than us, to consider them. We will therefore say only that in declining to interfere with the FTT's exercise of discretion as to costs, we should not be taken as either (i) concluding that, because HMRC's conduct was sufficiently "reasonable" for them to obtain permission to amend, it necessarily follows that there should be no costs award in Worldpay's favour or (ii) that we necessarily share the FTT's preliminary view that both parties were equally to blame for the loss of the hearing.

Uncritical acceptance of Counsel's submission that the May 2019 disclosure justified a pleading of Halifax abuse

74. Worldpay argued that the FTT was wrongly swayed by submissions of counsel for HMRC, made by way of reply in the course of the application to amend, to the effect that it was only the disclosure of material in May 2019 that enabled HMRC to articulate a pleading of *Halifax* abuse. It argues that this submission was factually incorrect since, as noted at [38], HMRC drafted the amendments to their Statement of Case without having seen the May 2019 evidence. It also argues that it was procedurally wrong for the FTT to accept Counsel's assurance and that a claim such as this should have been rooted in evidence.

75. We do not accept the premise of Worldpay's submission. The FTT did not base its conclusion on a finding that the May 2019 disclosure resulted in HMRC "turning a corner" in their perception of the case. The FTT had certainly observed that the May 2019 disclosure was "relevant" (at [18] of the note of the Decision). It also said, at [20], that a "significant amount of evidence has recently been disclosed", but that was a reference to both the material provided in May 2019 and that provided in March 2019. The FTT's core conclusion was, at [19], to the effect that it was reasonable for HMRC "to amend pleadings in the light of the evidence and disclosure received, even though that disclosure was only ordered because it was relevant to existing pleadings". Moreover, as we have said at [39] above, the FTT found that it was reasonable for HMRC to review all the material disclosed before deciding whether to plead the *Halifax* case. The FTT's conclusions, therefore, referred to HMRC's response to the totality of

evidence received and were not based on any mistaken finding that HMRC's amended pleading was justified by a review of the material disclosed in May 2019.

76. For the reasons set out above, we do not consider that Ground 2 is made out.

Disposition and concluding remarks

77. For the reasons set out above, Worldpay's appeal is dismissed.

78. Our task in this appeal has been simply to decide whether the FTT's decision, to defer the question of costs, contained an error of law. We have concluded that it did not. Reaching that conclusion does not require us to decide what costs direction should be made when the FTT comes to consider the question. That is a matter for the FTT. We should not, therefore, be taken as endorsing the FTT's initial view that no order for costs might be appropriate. Rather, in our view, the field remains open for Worldpay to argue, contrary to the FTT's initial impression, that even though HMRC met the high hurdle necessary to make a very late amendment to their pleadings, nevertheless the prejudice to Worldpay in the loss of the hearing should be compensated by an award of costs.

JUDGE JONATHAN RICHARDS

JUDGE JONATHAN CANNAN

RELEASE DATE: 20 October 2020