[2021] UKUT 0151 (TCC)

Reference number: UTJR/2019/006 (V)

Capital Gains Tax – JUDICIAL REVIEW – whether agreement reached at ADR - application for judicial review refused.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
IN THE MATTER OF A JUDICIAL REVIEW
BETWEEN

THE QUEEN (on the applications of) MUKESH SEHGAL PROMILA SEHGAL — **Claimants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Defendants**

TRIBUNAL: MR JUSTICE TROWER
JUDGE PHYLLIS RAMSHAW

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, London on 28th, 29th and 30th April 2021.

Michael Firth, counsel, instructed by TT Law for the Claimants

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

Introduction

1. This is the judgment on a claim for judicial review. Permission to bring judicial review proceedings was granted by the Administrative Court and the claim was subsequently transferred to the Upper Tribunal pursuant to section 31A(3) of the Senior Courts Act 1981. The claimants seek judicial review of the defendants' decisions, made on 25 January 2019, to amend the claimants' self-assessment returns for the tax year 2006/07 by means of closure notices issued pursuant to section 28A of the Taxes Management Act 1970 ('the decisions').

2. The parties complied with the pre-action protocol. A letter was sent on behalf of the claimants on 17 September 2018 expressed to be treated as a pre-action letter. This was followed by a formal pre-action letter dated 14 December 2018. The defendants replied on 24 January 2019. Proceedings were issued on 5 February 2019.

3. Three grounds for judicial review are claimed, namely:

(1) The decisions were taken in breach of an agreement reached by the parties at an alternative dispute resolution ('ADR') meeting held on 25 October 2017 (the 'ADR meeting')

(2) The decisions were taken in breach of the claimants' legitimate expectations arising out of the ADR meeting

(3) The decisions were irrational.

4. The remedies sought include a declaration that the decisions are void, an order quashing the decisions, an order mandating the defendants to reconsider their decisions and mandating that such decisions as they may then make should be consistent with certain facts agreed at the ADR meeting as set out in an email from Brian White ('Mr White') to the defendants dated 27 October 2017 (the 'relevant facts') and such other relief as is considered appropriate.

5. This case is relatively unusual in that both parties are agreed that, before the Upper Tribunal can determine if the grounds of claim are made out, we need to make factual findings on disputed evidence. The principal factual issue we have to decide is whether the parties agreed the relevant facts at the ADR meeting held on 25th October 2017. If we were to find an agreement was reached, we would need to determine the terms and nature of that agreement and whether the claimants are bound by the agreement or prevented from resiling from it in accordance with the principles established by relevant authorities in respect of the three grounds for judicial review that are claimed.

6. For the reasons set out below we have found that the parties did not agree the relevant facts, did not agree that the dispute was to be settled on the basis of the relevant facts and the claimants had no legitimate expectation that this would occur.

Background

7. Neither party has argued that the underlying tax dispute has any direct relevance to the issue we have to decide. We understand that the tax dispute is before the First-tier Tribunal. The following description of the tax dispute is taken from the parties' pleadings and should not be considered to be endorsed (or as findings made) by this Tribunal. The history is relevant only as background to the parties' agreement to enter into the process that led to the ADR meeting.

8. In 2005 the claimants' son, daughter and son-in-law bought the shares in Visage Ltd, a company established by the claimants, for a combination of cash and loan notes through a new holding company Visage Group Limited. In the 2006/07 tax year the debtor on the loan notes was substituted such that they became the loan notes of Manakin Limited. The loan notes were subsequently redeemed on 12 May 2006.

9. In 2009 the defendants opened enquiries into the claimants' personal tax returns for the tax year 2006/07. The issue under consideration in those enquiries was whether the redemption of the loan notes gave rise to a Capital Gains Tax liability. The parties disagreed, inter alia, on the situs of the loan notes.

10. The defendants' enquiries continued over a number of years. Correspondence was exchanged between the parties. On 17 May 2017 the defendants wrote setting out their view on the loan notes redemption. They were of the view that a Capital Gains Tax liability had arisen and indicated that they intended to make amendments to the claimants' tax returns accordingly.

11. On 14 June 2017 the claimants applied to the defendants for ADR, in the form of mediation. The application was accepted, and the ADR meeting was arranged. The claimants claim that it was at the ADR meeting that the parties agreed the relevant facts and the individuals attending on behalf of the defendants agreed that they would recommend the enquiries be settled on the basis of the relevant facts.

12. Initially the claimants also claimed that the defendants' representatives, at the ADR meeting, agreed to recommend that no tax was due, although subsequently Mr Firth indicated we were not required to decide this point[1]. The claimants also contend that

[1] Mr Firth indicated, on the final day of the hearing, that the Upper Tribunal was no longer required to decide the 'recommendation no tax due' argument. Although we are not required to make a finding on that issue it formed part of the initial correspondence, pleadings, witness evidence and was repeated in oral evidence before us. We have therefore taken it into account as part of the factual matrix in respect of the claim that an agreement on facts was reached.

the relevant facts were subsequently set out in an email of 27 October 2017 sent to the defendants by Mr White, who was the claimants' tax adviser.

13. The 27 October email is at the heart of the claimants' case, because it is said (in the remedies sought document attached to their claim form) to set out the facts that had been agreed. The defendants contend that the email did not record facts that had been agreed between the parties and denied that any had in fact been agreed. They submitted that the email simply recorded the nature and extent of the discussions at the ADR meeting and submitted that the language of the email was consistent with that having been the case.

14. We will return to this email in more detail later in this judgment, but it is convenient to say this about it at this stage. It was addressed to two of the individuals who attended the ADR meeting on behalf of the defendants and the defendants' mediator and was described by Mr White as "*a summary of our discussions", "a short report for you to forward to SOLS Office*" and "*an agreed summary of our positive discussions at the ADR*". Nowhere did it identify itself as a statement of the facts that had been agreed.

15. Subsequent to the ADR meeting, the parties engaged in further correspondence which culminated in the defendants making the two decisions (a decision in respect of each of the claimants was made essentially differing only in respect of the amount of tax due). The defendants decided that the claimants' tax returns for the tax year 2006/07 should be amended with the result that the tax due from the first claimant is £4,939,680.80 and the amount due from the second claimant is £1,329,284.80. The reasons for arriving at the decisions are set out in letters from the defendants dated 23 July 2018.

16. The claimants' arguments and claim for judicial review are premised upon the basis that the decisions are not in accordance with the relevant facts. The defendants have not suggested otherwise – their case is that the relevant facts were not agreed. The Upper Tribunal has not (as set out above) considered the parties' arguments regarding the underlying tax dispute. It follows that the Upper Tribunal has not (and does not need to) consider if the decisions are or are not in accordance with the relevant facts and has not made any findings on the accuracy or otherwise of the facts said to have been agreed.

Approach to the evidence and drawing of factual conclusions

17. Both parties submitted that the Upper Tribunal, when determining the factual dispute in this case, should primarily draw on inferences from contemporaneous documentary evidence and known or probable facts. The witness evidence is said to be helpful where supported by such inferences from the documents. Both parties rely on *Gestmin SGPS SA v Credit Suisse (UK) Ltd & anor* [2013] EWHC 3560 ('*Gestmin'*).

18. In *Gestmin*, after discussing the fallibility of memory, the court referred, at paragraph 16, to:

'...Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate. '

19. Although there is some agreement regarding the course of the ADR meeting the parties in this case are diametrically opposed in their view as to what if anything of substance was agreed during or at the end of it. In oral evidence it was clear that the witnesses expressed genuinely held beliefs and strong views of what the outcome of the meeting was. The task of the Upper Tribunal in this case has required us to evaluate the witnesses' oral evidence and written statements in light of the objective documentary evidence. We accept Mr Firth's submission that the question of whether any form of agreement was concluded, and if so its terms, is to be determined objectively rather than by reference to subjective thoughts or beliefs.

20. The witness statements for the claimants were completed in February 2019 and for the defendants in May 2019. This is some time after the date of the meeting - 16 and 19 months respectively. The oral evidence was heard at the end of April 2021 - 3½ years after the ADR meeting. In these circumstances, we have found Leggatt J's discussion of the unreliability of human memory at paragraphs 20-21 in *Gestmin* a useful reminder when evaluating the accuracy of the oral evidence. We have sought to adopt the approach (advocated by both parties) as set out at paragraph 22 in *Gestmin*:

'20. *Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. the statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all

on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

21. We were also referred to paragraph 48 of the Court of Appeal's judgment in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413:

'48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence…'

22. In *Simetra* the Court of Appeal considered that the contemporary documents appeared on their face to provide cogent evidence that shed considerable light on the nature and purpose of the critical confirmations and the way in which they were understood. In this case the parties both rely on the contemporary documents to support opposing contentions as to what they confirm and the way they were understood. The points made by the Court of Appeal in the passage set out above, particularly regarding internal documents, have been of assistance in our evaluation of the evidence.

The witnesses

23. There were nine individuals present at the ADR meeting. For the claimants, Mr Mukesh Sehgal and Mrs Promila Sehgal themselves, their son Mr Raj Sehgal and their tax adviser, Mr White. For the defendants: Ms Sally Harper who was a caseworker; Ms Emma Musgrave who was, at that time, the Customer Compliance manager for the defendants and was the person responsible for making decisions in relation to the claimants' tax liabilities; Ms Adelle Cartwright who was due to replace Ms Musgrave as the Customer Compliance Manager for the defendants and Ms Andrea Johnson also a caseworker involved in the case. Also present was Ms Sharon Colling whose role was mediator or facilitator in respect of the ADR – she was employed by the defendants.

24. At the hearing we heard oral evidence from the claimants themselves, Mr Raj Sehgal and Mr White. Mr Raj Sehgal explained that he deals with many issues on behalf of his parents. He had been liaising with Mr White with regard to the tax issues arising in this case. Most of the discussion at the ADR meeting was carried out with him, not his parents. Mr White had been the claimants' tax advisor for a number of years. On behalf of the defendants we heard evidence from Ms Harper, Ms Cartwright and Ms Johnson. Written witness statements had been provided by all of the above witnesses.

25. Our impression of the witnesses was that they attempted generally to give their evidence as openly and honestly as their recollections permitted. The claimants' own written and oral evidence was fairly limited which reflected the limited input they had had. The witnesses' views as to what was agreed at the ADR meeting appeared generally to be honestly held but clearly given the opposing recollections as to what was agreed some of the witnesses must be mistaken.

26. There were two witness statements from Ms Colling in the bundle. She was unwell and unable to give evidence at the hearing. Mr Firth submitted that we should not place weight on aspects of her evidence that were controversial and unable to be tested in cross examination. We have taken into account the inability of her evidence to be tested when considering its weight.

27. In addition to the above witnesses, Ms Musgrave was present at the ADR meeting. The evidence indicates (and is not disputed) that she was the defendants' decision-maker in relation to the claimants' affairs. She was the customer relationship manager at the time of the ADR meeting. She was unwell at the time that the judicial review proceedings were initiated and did not therefore provide a witness statement. She was, however, in attendance at the hearing (which was held remotely). Mr Firth asked the Tribunal to draw adverse inferences from the defendants' failure to call Ms Musgrave as a witness. He submitted that her evidence would have been potentially highly relevant as she was the decision maker and participated as such in all of the discussions.

28. Ms Choudhury, in response, informed the Tribunal that Ms Musgrave had recently undergone a surgical procedure and was taking strong painkillers, that although she had been in attendance she had not been present throughout as she needed to take breaks and that she was not fit to give evidence because of the effect of the painkillers. Ms Choudhury indicated that medical evidence could be provided if required. The adverse inference Mr Firth invited us to draw was that Ms Musgrave's evidence would not have supported the defendants' case.

29. We do not draw any adverse inference from the failure to call Ms Musgrave as a witness. We accept the explanation provided on behalf of the defendants by Ms Choudhury. Although Ms Musgrave's evidence could potentially have been relevant, both parties urged us primarily to draw on inferences from the contemporaneous documentary evidence, and that is the approach that we took. There were in any event a number of witnesses who gave evidence that enabled the Tribunal to subject the documentary evidence to critical scrutiny.

Analysis and Findings

The lead up to the ADR meeting

30. The context of the ADR meeting is important. This was a dispute that had been ongoing for over 8 years. Although we do not have the correspondence that passed between the parties (and/or the claimants' advisers) it appears that matters had reached an impasse. The most recent manifestation of this was that the defendants wrote setting out their views of the facts, the legal and the tax position and signifying their intention to amend the claimants' tax returns in letters dated 17 May 2017. Mr White responded setting out contrary views and applied for ADR on 14 June 2017.

31. It is clear that both parties had much to gain from bringing this long running dispute to a close. We were taken to the guide to mediation and the memorandum of understanding and witnesses were asked questions about particular sections. Insofar as that questioning was intended to elicit evidence that the parties engaged in the ADR meeting with the genuine aim of trying to resolve the dispute or narrow areas of disagreement, we do not need to refer to it. We consider it is clear that both parties approached the ADR meeting with that aim in mind.

Note-taking at the ADR meeting

32. As we have already explained, the ADR meeting was the occasion on which the claimants claim an agreement was reached. There is no written record in the form of any notes taken by the witnesses for either side. We do not find this surprising for two reasons. First, discussions during the ADR meeting were (as usual) on a without prejudice basis. It is also unsurprising in light of the defendants' practical guide to ADR which discourages the taking of notes and requires any that are taken to be destroyed.

33. Mr Firth cross examined all three of the defendants' witnesses on their evidence in relation to note taking. He did so not with the aim of demonstrating that there was any significance in the absence of notes per se, but rather to illustrate the unreliability of their recollections more generally. The clear recollections of Ms Johnson and Ms Cartwright were that they were told by Ms Colling that they should not take notes.

34. Subject to one point this was also Ms Harper's recollection. She was however questioned on an apparent inconsistency in her evidence where on one reading she said she was told both that notes may be taken during the meeting but would then be destroyed and that notes should not be taken at all. We are not convinced that there is in fact any inconsistency in Ms Harper's evidence on this point. We accept that the

essence of her recollection was that she was told not to take notes. She had however understood that Ms Colling, as facilitator or mediator, would destroy any notes that she took at the end of the meeting

35. This point was then picked up by Mr Firth in his cross-examination of the defendants' three witnesses by reference to the witness statement of Ms Colling in which she stated that she explained to the meeting attendees that notes could be taken, but then encouraged them to be kept to a minimum and made clear that they must be destroyed at the end of the ADR meeting. Ms Colling's evidence was therefore that note-taking during the meeting was permissible but she made clear that this was undesirable and gave a very firm message regarding destruction.

36. We accept that there is some inconsistency between the evidence of Ms Colling and the other three defendants' witnesses on this point. Ms Colling's evidence is consistent with the documentary evidence (in particular the defendants' own practical guide to ADR) which confirms that note-taking is permissible but that notes should be kept to a minimum and then destroyed. We have concluded that it is more likely than not that the defendants' representatives were not told in terms by Ms Colling that notes could not be taken. However, the recollections of Ms Harper, Ms Cartwright and Ms Johnson that they were advised not to take notes are understandable in light of the message which we are satisfied they were given that note-taking was not desirable, should be kept to a minimum and must be destroyed. We do not consider it renders their evidence on other issues inherently unreliable.

The course of the ADR meeting

37. Much of what occurred at the ADR meeting was not in dispute. The meeting was opened by Ms Colling and the parties gave a short outline of their respective positions – these had been provided in writing prior to the meeting. Joint discussions then took place during which a number of the underlying documents were referred to. As Mr White said, he walked the defendants' representatives through the documents to make sure that they were understood. It is agreed that Mr White then referred to an authority, *McLaughlin v HMRC* [2012] UKFTT 245 (TC) ('*McLaughlin*'), which he had recently identified as being of potential relevance to the claimants' case. It is also agreed that the defendants' representatives then went into a separate room and had a discussion incorporating a lunch break, during which Ms Colling came into the room. Following the break, the attendees all returned to the meeting for a short period prior to the ADR meeting ending around 2pm. It is agreed that the meeting finished earlier than the allotted time.

38. There were a number of matters that arose during the course of the ADR meeting, but which are not central to the dispute as to whether agreement as to the relevant facts was reached, in respect of which the recollections of the witnesses differed. On these matters the parties relied on the version of events described by their witnesses in support of their respective cases on the central issue itself. We will deal first with our

conclusions in relation to those matters and then consider the effect and significance of the documentation which followed.

39. The first matter relates to the defendants' evidence that an offer to settle was made by Mr White early in the ADR meeting. In their witness statements Ms Johnson and Ms Harper said the offer was to take a helicopter view of all the family's tax affairs and settle all matters in dispute for a global sum of £1million. They said the offer was rejected by Ms Musgrave as it would not have been in accordance with the defendants' litigation and settlement strategy.

40. The defendants argued that the offer to settle was inconsistent with the claimants' assertion that an agreement was later reached that the defendants' representatives would recommend that no tax was due. The claimants, on the final day of the hearing, indicated that they no longer required us to make a finding on whether such an agreement was reached but the fact that it was advanced at the outset is a matter which in our view goes to the reliability of their evidence on the remainder.

41. Mr White and Mr Raj Sehgal disagreed that an early settlement offer was made. They said in oral evidence that at the end of the meeting they mentioned that they wanted to try to settle all the other disputes with the defendants by engaging in the ADR process. In his witness statement Mr Raj Sehgal refers to mentioning settling a separate EBT matter. Mr White in oral evidence said the reference to settling for a sum was a comment along the lines of 'who knows we may be able to persuade the family to pay a sum to settle'.

42. Mr Firth submitted that the claimants' version makes more sense particularly because the defendants had indicated in earlier correspondence that they would not consider other issues during the ADR meeting, so there would have been no point in reiterating it at this stage. Mr Firth argued that, in any event, it was a point of no consequence.

43. We do not accept that the claimants' version makes more sense as suggested by Mr Firth. It is clear from the documentary evidence that, before the meeting, Mr White had identified that there were five matters, including the loan notes disposal issue, that required resolution. He had said that the claimants had been keen to *'do a comprehensive settlement across all issues'*. The defendants had rejected covering all five disputes at the ADR meeting itself but an offer to settle, if accepted, could have been a very positive outcome for the claimants and is a natural question for them to have asked.

44. On balance we consider the defendants' evidence on this issue to be more reliable. It was very specific and consistent. A finding to this effect does not, however, take us very much further in determining whether an agreement on the facts was reached. In our view, it is neutral on the point.

45. The second matter relates to the question of whether there was any discussion about interest that might be payable. The significance of this was that, if interest was discussed, it could be an indicator that the defendants had not agreed the relevant facts

and nobody on the defendants' side had agreed to recommend that the enquiry be closed with no tax due.

46. In summary, two of the defendants' witnesses recall a discussion regarding the interest accruing in this case. In particular Ms Johnson explained that, before the meeting took place, she had prepared the figures regarding the interest that was accruing in relation to the specific dispute that was the subject of the ADR meeting.

47. Mrs Promila Sehgal indicated in her witness statement that the defendants' representatives said there was interest accruing on any liability. This was a reference not to the ADR meeting but to the ongoing enquiry. In oral evidence she said both that interest was not discussed at all and that interest was discussed at the end. Mr Raj Sehgal said in oral evidence that the discussion on interest had nothing to do with this case. It came about because the claimants had asked for a similar process to be adopted for other issues in dispute between the parties to be determined. In relation to that, someone mentioned to him that they could understand why that was the case, as interest must be accruing in relation to all issues.

48. We accept the defendants' evidence that interest was discussed in relation to the issues that were the subject matter of the ADR meeting, but it is not clear from the evidence when this discussion occurred. In our view, however, any discussion of interest, and precisely when it took place does not assist. We do not consider that it has any material relevance in determining if an agreement on the relevant facts was reached.

49. The next matter is that the parties do not agree on the reason that the defendants' representatives took a break after the *McLaughlin* case was disclosed. The defendants' evidence is that the *McLaughlin* case was unfamiliar to their representatives and that they requested a break from the ADR meeting to review this new case. The claimants' evidence, including in particular that of Mr White, was that the defendants asked for a break to review all the information and evidence that had been put forward by the claimants and that the discussion of *McLaughlin* was no more than a minor aspect of what the defendants' representatives wanted to discuss. This was said to support the claimants' case that the defendants' agreement to the relevant facts was given after a full discussion between their representatives over the lunch break.

50. In support of the claimants' case, Mr Raj Sehgal said in his witness statement that there was a short period in which Mr White discussed the *McLaughlin* case. In oral evidence he said that the discussion was only 2/3 minutes, that Mr White 'threw' it in but later on they conceded that it wasn't relevant to their case.

51. The evidence that Mr White gave in his witness statement was that 'we' (this must refer to the Sehgals and Mr White) referred briefly to the *McLaughlin* case and that the defendants appeared to be familiar with it. In oral evidence he said the discussion was a 4/5 minute discussion, that was not substantive. It was an interesting case illustrating that loan notes can have offshore situs. All in all, Mr White did not agree that the break was to enable the defendants to discuss *McLaughlin*.

52. We prefer the evidence of the defendants' witnesses on this point. We think it is clear that the purpose of the break was to consider the *McLaughlin* case, but it was also an opportunity for lunch. We accept that they also discussed the case more generally but that is no pointer to a conclusion that the defendants' representatives accepted the facts which had been asserted by the claimants. We will return briefly to this point when dealing with a submission that was made by Mr Firth in relation to the general structure of the ADR meeting.

The end of the ADR meeting

53. Turning to what occurred after the break, Mr White said that the defendants' representatives returned after an hour or so and asked a few follow up questions. He said that they advised that they now fully understood all the evidence and points put forward in the previous hour and agreed with what the claimants had explained. Both he and Mr Mukesh Sehgal said that the defendants suggested that 'we' summarise the factual position on a page or two and that they would put it forward to policy (or possibly the solicitor's department) with a recommendation for settlement with no tax liability. Mrs Promila Sehgal said that it was Mr White who agreed that he would produce the summary.

54. Mr Raj Sehgal's evidence was that the defendants had a few minor supplemental questions when they returned. They explained that they were satisfied with the explanations that had been provided. He stated that what was proposed was putting the agreed list of facts to the policy team with a recommendation for settlement based on those facts. He, like all of the other claimants' witnesses, stated that the defendants' representatives confirmed that the facts were agreed. He also described how Ms Musgrave nodded her head affirmatively when Mr White asked whether they would be recommending that no tax was due.

55. Mr Raj Sehgal also said that one of the reasons why he was clear that this was what was said by the defendants' representatives was that he could not understand why anyone would want to make a submission either to the policy department or to the solicitor's office where the facts had not been agreed.

56. Mr Raj Sehgal and Mr White's witness evidence was emphatic that all the facts had been agreed. Mr Raj Sehgal used the phrase black and white all facts agreed. However, he also said that after lunch Ms Colling said the way forward was the defendants would make a submission based on the summary and Ms Musgrave agreed. Ms Colling said, 'now we are all satisfied with what has happened the way forward is xxx do you agree, and Ms Musgrave said yes – I took it that as yes she was 100% satisfied with all the explanation'. When it was put to him that there were no statements made in the meeting by the defendants that the facts were agreed he said, 'when Ms Colling said is the way forward to make a summary and HMRC to make a policy submission Ms Musgrave said yes - that is to me that is signalling agreement.'

57. The claimants, Mr Raj Sehgal and Mr White all said in oral evidence that the way that Ms Musgrave gave her confirmation was by nodding her head, thereby signalling that a recommendation would be made that the enquiry be settled on the basis of no tax due. In particular, Mr Raj Sehgal said in his oral evidence that Ms Musgrave nodded her head but said there could be some other legal arguments policy may want to run. The witness statements all refer to a recommendation being made that the dispute be settled on the basis of no tax due.

58. The witnesses called by the defendants disagreed. In short their evidence was that a summary of the discussions was to be produced by Mr White that would be submitted to the solicitor's office with the *McLaughlin* case. Each of the three witnesses expressly disagreed that the summary document to be prepared by Mr White was to represent an agreed list of facts.

59. Thus, Ms Cartwright's evidence was that it was agreed during the break that the defendants could not comment on if or how *McLaughlin* affected the claimants' arguments without a referral to the solicitor's office, that Ms Harper would inform the claimants of this after the break and that Ms Harper proposed to do this following the meeting. She said that this was what occurred.

60. Ms Harper's evidence was in similar terms. She said that she told the claimants that it was appreciated that certain points had been clarified but disagreed that she said that they were satisfied with the explanations that had been given or that any recommendation would be made that the enquiry be closed on the basis that no tax was due. She described the document that Mr White agreed to submit as a summary of the claimants' case which would be considered by the defendants' solicitor's office alongside details of *McLaughlin*.

61. Ms Johnson's evidence was also consistent with that of her colleagues. The way that she put it was that no agreement was reached in relation to the facts of the case or tax in dispute. It was agreed that Mr White would note the key points made on behalf of the claimants at the meeting. It was agreed that the defendants would make a referral to their solicitor's office to obtain a view on *McLaughlin*, and whether this impacted the defendants' current view of the facts.

62. It was an important part of the claimants' case that the defendants' representatives did not express any disagreement with the facts being asserted by the claimants and that the defendants did not present any alternative facts nor did they offer any alternative factual analysis. The defendants did not assert that they did, although in her oral evidence Ms Harper said that she believed someone had said '*there are no new facts, our view has not changed*' during the morning session. Mr Firth submitted that her evidence was unreliable as she could not recall who said it, when it was said or the context in which it was said. He submitted that it could not have reflected the defendants' view because the defendants' evidence was that they did not discuss what they thought of what had been discussed until lunch, no final view can have been reached because they came back after lunch and asked further questions.

63. It is not clear if Mr Firth's submission is that it is also the claimants' view that the defendants did not discuss what they thought of what had been discussed until lunch. Mr Raj Sehgal's evidence suggests that the defendants had agreed matters before lunch. He said that he and the claimants had discussed over the lunch break visiting their grandson, his nephew. He said that they discussed over lunch that they had achieved so much; everything is agreed so this meeting is going to finish early. We do not place much weight on discrepancies as to timings as to when things were said as this evidence was given a long time after the event. However, we accept the claimants' case that there was no specific disagreement expressed by the defendants as to the facts asserted by the claimants.

64. Ms Choudhury questioned the claimants' witnesses about the lack of any new facts or documents. Mr White indicated in oral evidence his view that new documents could not have been produced at the ADR meeting (because the procedures provided that this was inappropriate) and it was agreed by all witnesses that no new documents had in fact been provided.

65. Mr Firth's questioning of the defendants' witnesses on this point concerned largely the undesirability of introducing new evidence at the ADR meeting. Their evidence was that although undesirable it was permissible. Nonetheless the short point is that the defendants' representatives were clear that nothing that was said caused them to change their overall view, but that the *McLaughlin* case was something new that they needed to consider.

66. In these circumstances, we accept Mr Firth's submission that the absence of new facts or documents does not point against agreement being reached. However, it does not take matters very much further, because, in our view, it does not point towards agreement having been reached either.

67. Mr Firth also submitted that it was significant that the defendants' representatives had thanked the claimants' team for clarifying the facts, an expression of gratitude that was not in dispute. He submitted that, taken with no expression of disagreement with the relevant facts this would reasonably be understood as agreeing them. We do not accept Mr Firth's submission. If what was agreed was for a summary to be produced setting out the claimants' case and the facts as asserted by the claimants and discussed during the meeting, then it would be neither necessary nor appropriate for the defendants to express disagreement nor for that to be recorded.

68. All in all, we are satisfied that the claimants' evidence on this point falls well short of establishing that the defendants' representatives agreed that the facts asserted by the claimants had now been agreed. We shall come on to explain why this conclusion is consistent with the documentation which exists, but the lack of certainty as to what had actually been agreed was not addressed with any conviction in the claimants' evidence and the way in which the defendants' agreement is said to have been conveyed is inherently ambiguous even on their own case.

69. We think that it is much more likely that the defendants' representatives simply indicated their agreement that they now fully understood the way that the claimants put

their case and that for the avoidance of any uncertainty in relation to that Mr White would prepare a written submission of what it was so that it could be considered by the defendants' solicitor's office.

Structure of the ADR meeting

70. Mr Firth also questioned the defendants' witnesses about the structure of the ADR meeting. He concentrated on the description of mediation in the HMRC mediation practical guide which identifies a private room stage that he said did not take place in the present case. Mr Firth also referred to Ms Colling's witness statement and the agenda which refers to joint and separate discussions. He submitted that it is precisely when the parties are deadlocked that the mediator is supposed to encourage the parties in private to consider their positions realistically. Off the back of this suggestion, the claimants contended that it is highly improbable that Ms Colling would have brought the ADR meeting to an end without having attempted a key stage of the mediation if it did not appear that significant agreement had been reached.

71. The defendants' representatives did not agree that the private room stage did not take place and pointed to the fact that Ms Colling came into their room while they were having the lunch break. They did however all accept that Ms Colling joined them for no more than a few minutes. The defendants' case, confirmed in evidence from Ms Harper that we accept, is that there was nothing further to discuss and that the *McLaughlin* case had been raised and advice needed to be sought on its relevance.

72. We have concluded that the claimants were correct in their suggestion that there was no private room stage, anyway of the type contemplated by the mediation guide. There was no suggestion by either side that Ms Colling had undertaken any role at that stage in trying to get the parties to consider their positions and to move matters forward. Mr Firth submitted that by attempting to present it as a private room meeting the reliability of the other evidence from the defendants' representatives is damaged.

73. We have not ignored the cumulative effect of small pieces of unreliable evidence, but we did not find this compelling as an indication of the general unreliability of the defendants' witnesses' other evidence. Whilst we agree that no private room discussions took place and that the meeting finished early, we do not consider that this is a particularly significant factor in support of the claimants' case. It finished early because there was nothing more to discuss. In our view the misdescription of a private room stage is only a relatively minor consideration when compared to the remaining evidence (including in particular the documents) that is considerably more illuminating in the light that it sheds on what was agreed. We address this below.

The relevant documents created at the end of the ADR meeting and subsequently

The exit agreement

74. At the end of the meeting Mr White and Ms Musgrave signed a pro forma document with the heading 'Alternative Dispute Resolution – Exit Document' followed by a sub-heading 'Clarification'. The names of the parties are then recorded, followed by a typed standard form of words:

> 'The parties have attempted ADR but were not able to reach resolution on the following issue(s).

There is then a space for three numbered issues and Mr White has written next to number 1:

> 'Taxpayer to prepare a summary to go to HMRC Solicitor office via CRM regard Manakin – 14 days'

Underneath this manuscript there is then a further typescript:

> 'This is the information and/or evidence that all parties named above
>
> - Agree would assist in subsequent litigation
> - Agree that can be disclosed/made public
>
> In signing this agreement I/we acknowledge that I/we are giving my/our consent that the outcome of the mediation process may be disclosed to resolve the tax position.'

75. The claimants' case is that the exit document reflected an agreement that Mr White was to prepare a summary of the facts that had been agreed. It was argued that the claimants would not have agreed to the meeting finishing early and without an attempt to use the private room discussion stage of the ADR process if significant agreement had not been reached.

76. In cross examination, when asked why the exit agreement says 'Clarification', Mr White said this was because the parties were unable to reach an agreement because the liability had not been agreed (although the relevant facts had been). The process was to go forward with a recommendation. In oral evidence Mr White's explanation as to why no mention was made of an agreement to recommend no tax was due was that there could have been other legal reasons the defendants could find to say tax was due.

77. Ms Choudhury submitted that if the claimants' understanding was correct at the very least it would be expected that the exit document would have stated that the defendants had agreed to make a recommendation to settle the enquiry on the basis of no tax due.

78. In our view, the starting point is that this form of document is designed to record that the parties were unable to reach resolution on the identified issue(s). It does not cater for partial resolution, and nor is it concerned to describe agreed issues. The form appears to be intended to record those issues on which the parties have been unable to reach resolution.

79. Mr Firth submitted that his clients' case is supported by the fact that the exit document does not identify any issues on which the parties were unable to reach agreement but instead refers to the agreement for a summary. The points that are anticipated as being set out at the numbered points are issues on which resolution has not been reached. If anything, this points to an intention that the summary to go to the defendants' solicitors and would reflect the issues on which the parties were not able to reach a resolution, not the issues on which they had.

80. The language used in the exit agreement is of an 'attempt' to use ADR but that the parties were unable to reach a resolution. No issues were then set out upon which resolution was not reached, but, given the express language of an attempt followed by 'but were not able to reach a resolution', we cannot infer that resolution of issues not specifically mentioned was in fact reached. One illustration of that is that there is no reference in the exit agreement to the *McLaughlin* case, which is the one issue on which all parties were agreed that the parties had not reached a resolution. It follows that, taken in context, the text inserted by Mr White cannot be described as an issue on which '*the parties … were not able to reach resolution*'.

81. We also considered whether it could be inferred from the fact that the document is headed 'clarification' that the drafter anticipated that the form would be used where some issues had been agreed. However, we do not think that this is a realistic inference to draw. Immediately under the numerals is the indication that whatever is set out above will not be subject to privilege. A key aspect of ADR is that the discussions are without prejudice. The numbered sections, in our view, are to record issues that were **not** resolved but the parties agree can be disclosed and would assist in subsequent litigation. An agreed statement of facts does not fall into that category. A statement of facts that were not agreed but which set out a summary of one parties 'marshalling' of the facts it relies on is not as starkly outside the description of an issue specifically not resolved but does not readily fall into that category either.

82. The claimants' arguments that they would not have agreed to the meeting finishing early and that Ms Colling would not have concluded the ADR meeting without attempting the private room stage unless significant agreement had been reached are not supported by this document. Taken in the round, this document records the outcome of the ADR meeting as unable to reach resolution. It seems very unlikely that it would have been used where issues had been resolved in the manner suggested by the claimants, i.e. that the facts were agreed and that it was agreed that a summary of those agreed facts was to be provided and used to recommend settlement based on the agreed facts and that the enquiry be closed on the basis of no tax due.

83. More generally it would have been a significant development for the facts to have been agreed in the way suggested by the claimants if that was in fact the case. In such circumstances, it would be very surprising if the only contemporaneous written record was such an ambiguous and unspecific form of words applied to a pro forma that seems ill-suited for that purpose.

84. Our view is that the exit agreement evidences an agreement that a summary was to be produced and was to be sent to the solicitor's office. It does not support an inference

that any aspect of the factual dispute had been resolved. At its highest, it is only consistent with the outcome of the ADR meeting being that there had been a clarification of some issues.

The email from Sharon Colling

85. An email was sent by Ms Colling to Mr White on 26 October 2017, the day after the ADR meeting. She says '*Thanks for your positive input into Alternative Dispute Resolution. In yesterday's meeting, you, your clients and HMRC agreed the way forward is a policy submission using the summary that you are putting together. You'll liaise directly with HMRC case team going forward.'* She asks for feedback and attached a feedback form. She closes by saying '*Thanks for taking the time to consider ADR to resolve your dispute'.* An email in similar terms was sent to the defendants.

86. Mr Firth submitted that 'using' a summary means using it as the basis for a submission and that a submission that referred to the summary only to reject it in its entirety would not be a submission 'using' the summary, because it would not be based on the summary. He also argued that an adverse inference should be drawn from Ms Colling's failure to deal with this point in her witness statement, in circumstances in which the claimants had made their position clear in their grounds of review. He made this submission in the light of what was said by Mr White and Mr Raj Sehgal to the effect that there would be no point in a policy submission being made on the basis of facts that had been rejected by the defendants. It would be a pointless exercise. Mr Firth argued that that would be an improbable result.

87. The defendants' case is simply that the obvious meaning of '*the summary that you are putting together*' was a summary of the claimants' views. There was no reason why it should be a summary of facts that had been agreed.

88. We agree that Ms Colling does not respond in her witness statement to this specific point, but we do not accept Mr Firth's submission. Agreeing to use a summary as a basis of a submission does not imply that what is set out in the summary is agreed. The subjective view of the parties as to what '*using a summary*' meant to them (which is all Ms Colling could provide by way of evidence to counter the point raised in the grounds of review) does not take matters very much further where Ms Colling was clear in her witness statement that no agreement on any aspect of the dispute was reached.

89. More generally, we consider that this email is very much more consistent with the defendants' case than that of the claimants. It was written at a time before the facts that the claimants said had been agreed were reduced to writing, so there was no clarity for Ms Colling on the form that the summary would take or its contents. It is most improbable that she would have recorded that a summary prepared by Mr White was to be submitted as reflecting agreed facts in circumstances in which neither she nor the defendants' representatives had any written record of what the claimants thought that those facts were.

The ADR feedback forms

90. These were pro forma forms that the parties completed. The first question asks for the statement that best describes the final outcome to be ticked. There are 4 options:

> Partial Resolution – some of the disputed issues agreed
>
> Complete resolution – agreement reached on all issues
>
> No Resolution - conflict still exists and no worthwhile clarification of disputed issues
>
> No Resolution – disputed issues clarified but no agreement reached

91. The defendants ticked the fourth option. Mr White, for the claimants, ticked the first option. The form also asks, 'Do you think the dispute/s would have settled without ADR'. The defendants inserted 'Yes' Mr White inserted 'No'.

92. These forms ask for the parties' subjective view of the ADR process and outcome. It was stated by Mr White in oral evidence that the purpose of the ADR meeting was to agree facts. His evidence was that it was not a complete resolution as someone in policy could raise a new technical point. If there had been no resolution, he would have indicated that. The facts had been agreed so there was partial resolution.

93. It was submitted that it would be reasonable to expect Ms Colling to have responded to the feedback form if partial resolution was an entirely inaccurate description of the outcome of the ADR meeting. In her witness statement Ms Colling simply indicates that she received complimentary feedback about the ADR experience. Mr Firth argued that it is reasonable to infer that the reason Ms Colling did not follow up is because she understood that there had been agreement on the facts.

94. Although Ms Colling's witness statement is very clear when she states that '*no agreement on any aspect of the dispute was reached and hence the Exit document records that parties were not able to reach resolution'*, her evidence could not be tested in cross examination and Mr Firth was unable to ask her why she had not responded to the feedback form or put the above inference to her. The weight we place on what she has said in her witness statement is therefore limited.

95. However, we do not accept that the inference Mr Firth asks us to draw from Ms Colling's failure to respond is the most probable explanation for her failure. The parties are agreed that an agreement was reached on the way forward. What the way forward was agreed to be is disputed. We think that it is much more probable that the reason Ms Colling failed to respond was because agreeing a way forward could be described as a partial resolution.

96. We also consider that the feedback forms do not take matters very much further. They reflect the subjective views of the parties and both the first and the fourth options are capable of being interpreted differently. The most that can be said is that both of

the parties expressed views in the forms that are consistent with the positions that they now adopt.

The email of 27 October 2017 from Mr White

97. We have already mentioned the email of 27 October 2017 from Mr White. It was addressed to Ms Musgrave, copying in Ms Harper and Ms Colling. The parties are agreed that this email contains the summary anticipated by the exit agreement. For the claimants it is argued that it sets out the agreed summary of the facts that were agreed in the meeting and that it strongly supports their case. The defendants argue that it is clear that it is just a summary of the discussion of the claimants' case that took place at the ADR meeting.

98. We set out the email in full:

> *Emma, Sally, Adele,*
>
> *As agreed at the ADR, we have prepared a summary of our discussions and we agreed that a short report for you to forward to SOLS Office would be helpful. I am sure you will add your own comments and colour, but we all thought this would be a helpful way forward, as we all made much progress on the day in terms of factual understanding.*
>
> *The Issues to address are as set out in your own ADR summary. We therefore went through the factual evidence at the meeting and specifically confirmed:*
>
> *1. The loan notes were transferred under the documentation effectively and legal review has confirmed that*
>
> *2. The driver was Bank of Scotland wanting to improve the Balance Sheet of Visage by replacing family debt with intragroup debt so that the suppliers would continue to extend the required credit as they would ignore intragroup debt (but deduct family debt). That is why the subsidiary chosen by BOS was in Jersey and not in the UK, so a supplier could not see the accounts of the Jersey subsidiary (a UK sub was searchable), MS and PS had little input really. BOS drove it as part of their debt push down and financial engineering they often applied. That is why all documents were approved by BOS and specifically signed by them. It became apparent that suppliers became nervous some months after the sale.*
>
> *3. The novation was effective as a matter of law and was approved by BOS at all times*
>
> *4. The notes were registered in Jersey as confirmed by the third party directors and signed and certified documents. We are agreed there was no specific required form of register.*

5. Manakin was in a position to repay the notes as the Loan Note Creditor was MATCHED by a DEBTOR from Visage. So there was no shortfall at all (nor insolvency of Manakin at any time) and indeed Manakin did of course discharge its indebtedness in full. The cash may have been sourced from Visage but the, accounting, legal documents, Board Minutes are crystal clear, and the source of the funds has no bearing on situs of the Notes

6. The UK note register did show Visage as redeeming its obligations BUT TO Manakin - that was misunderstood.

7. The notes were registered in Jersey; and the Jersey company discharged its liability. We equally have third party confirmation of all this;

8. The funds themselves were gifted to the children offshore and invested in Internationale, Fashion Direct and property companies (VRS and ASM). All the funds were lost as part of the Insolvency of the two fashion companies and the bank indebtedness of the property companies. So there was no overall profit at all

9. The driver as above was BOS's concerns re supplier credit at all times

10. The case of McLaughlin is helpful (TC 01870) and similar although here the driver was BOS and supplier credit concerns '

We trust that this agreed summary of our positive discussions at the ADR day is of assistance in your discussions. We also suggested ways of progressing the other outstanding matters.

Brian

99. The introductory paragraph to the email commences by stating that the claimants have prepared a '*summary of our discussions'*. Mr Firth said that if the defendants were to be correct it would have said that it was a summary of the claimants' views.

100. We disagree with that submission. In our view a '*summary of our discussions*' is a phrase which means, and would be interpreted by any reasonable person as meaning, what it says – i.e. a summary of what was discussed, no less and no more. In particular the phrase carries with it no implication that what was discussed was agreed. It does not state that those discussions had led to an agreed version of the facts, which would have been an easy and obvious thing to say if that was what was meant. The only agreement it refers to is an agreement that '*a short report for you to forward to SOLS office would be helpful'*. We cannot infer from the reference to '*short report for you to forward'* that this was intended to be a reference to a report of matters that had themselves been agreed.

101. There are other aspects of the introductory paragraph which are inconsistent with the email being intended to record facts that had been agreed. The first is that Mr White said that he was sure that the recipients "*will add their own comments and colour*". Mr White was asked in cross examination about the use of this phrase. He said he was just

being polite, but that it did not indicate that the matters then referred to were not agreed. Mr Firth's submission was that this evidence confirmed that the intention was to make a joint submission, and that the addition of comments and colour could include embellishment but not wholesale rejection.

102. We did not find Mr White's evidence on this point compelling and do not accept Mr Firth's submission. Colour may convey embellishment but comment is much wider. In our view this phrase sits unhappily with the idea that the document as drafted by Mr White was intended to record agreed facts, and even less happily with any form of agreement which the parties intended to have legal effect. It is much more consistent with the email being intended to reflect what one side thought had been discussed.

103. The second inconsistency is that the phrase *'we all thought this would be a helpful way forward, as we made much progress on the day in terms of factual understanding'*, recognises that progress has been made in understanding the facts, but falls well short of any assertion that the facts had been agreed. In our view this form of words is consistent with the defendants' witness evidence which was that the ADR meeting was positive because they now had a better understanding of the facts and of the claimants' arguments. This is reflected, in our view, in the wording Mr White has used in the email namely of factual understanding not agreement to the facts. If facts had been agreed, we would expect that to be expressly referred to.

104. The third inconsistency is in the second introductory paragraph. It says that "we" (by which in context he must have meant the claimants' attendees) went through the factual evidence and specifically confirmed the next 10 numbered matters. The only sensible way of construing that language is that Mr White was there recording that the claimants were specifically confirming what they said the factual evidence established. We consider that it is most unlikely that, if the email was intended to record agreed facts, it would have used language in that form rather than a simple statement to the effect that all parties present agreed that the confirmations that the claimants had given were accurate statements of the true factual position.

105. We turn next to the numbered points in the email, which are the matters (or relevant facts) said to have been confirmed. As a general point, it is difficult to characterise many of them as facts (as opposed to propositions or arguments) at all.

106. Point 1 as set out cannot sensibly be read as a fact that was agreed, because it amounts to a legal conclusion. Mr White said in oral evidence that the legal review was undertaken by Buckells the advising lawyers, who advised that the loan notes had been transferred under the documentation effectively. It is possible that Mr White has used shorthand and has inadvertently expressed this too broadly.

107. Points 2, 5 and 9 read as the claimants' explanation of the commercial rationale for the transaction and explanations of what happened. They consist of assertions that cannot sensibly be considered to be a set of facts that have been agreed between the parties.

108. Point 3 is a mixed question of fact and law, so is only capable in part of being an agreed fact.

109. Point 4 refers to an agreement. This is the only point that does so. The defendants' witnesses were cross examined as to who they thought was the 'we' referred to in the phrase 'We are agreed'. Their explanation was that they thought it referred to Mr White and the Sehgals. We agree with Mr Firth that this is implausible and we do not accept the evidence of the defendants' witnesses on this point. 'We' in this context clearly refers to the parties. We do not however accept Mr Firth's further submission that adopting an unrealistic interpretation of Mr White's email to avoid saying that any form of agreement was reached undermines to any significant extent the reliability of their evidence that no agreement was reached on the facts.

110. Furthermore, it is our view that what was said in point 4 does not support the claimants' case that an agreement on the facts was reached; rather it does the reverse. The parties had set out their positions before the ADR meeting. Ms Choudhury submitted that this refers to the point that the defendants accepted that Jersey law does not require the loan notes to be registered in Jersey. We accept that submission. This was a matter, in our view, that was agreed in the sense that the defendants had not disputed it prior to the ADR meeting. In that sense it was not a matter that was discussed and agreed. In any event it is more properly to be thought of as a legal point not a factual point. More significantly, the fact that this is the only point that is referred to as 'agreed' in the list of 10 issues (and it forms only part of point 4) undermines the claimants' case that all of the other issues were 'agreed' as well.

111. Point 6 sets out *'The UK note register did show Visage as redeeming its obligations BUT TO Manakin - that was misunderstood'.* Mr Firth submitted that it refers to the past tense rather than it still being misunderstood. We have noted that there was an issue as to an alteration of the loan note register from redeemed to transferred raised by the claimants in correspondence and in their opening statement. We were not taken to this point specifically in evidence and have no explanation as to what Mr White says he was referring to. Our view is that at its highest it may be indicative of an explanation having been accepted. It falls short of amounting to an agreed fact when considered in the context of the email as a whole.

112. Point 7 is an assertion. It refers to the claimants having third party confirmation. The language is of a party putting its case not of facts that have been agreed. Point 8 appears to simply be an explanation as to what happened to the proceeds.

113. Point 10 appears to run counter to the claimants' witnesses' evidence. It states that the case of *McLaughlin* is helpful and similar. As set out above, Mr Raj Sehgal's evidence was that they had conceded *McLaughlin* was not relevant. It accords with the defendants' evidence which was that the claimants had raised the case as relevant.

114. Mr White concludes the email by saying '*We trust that this agreed summary of our positive discussions at the ADR day is of assistance in your discussions'.* In our view this is another example of a description of the email as being intended to record an agreed summary of a discussion not an agreed summary of an agreement. We find

it difficult to read the email any other way. This was the way that the defendants' representatives read it and, as we shall come to explain, is a complete answer to why the defendants did not seek to correct anything in it. They read it, in our view quite naturally, as a record of positive discussions, not as a record of an agreement. As they did not disagree that the discussions on the matters listed had taken place, and as there was no assertion that anything other than point 4 had been agreed, there was nothing to correct.

115. The conclusion we have therefore reached in relation to this email is that it is a summary of discussions that the parties had at the ADR meeting. We take into consideration that this was an ADR meeting with the parties entering into the mediation with the intention of resolving the dispute. Mr Firth submitted, and the claimants' witnesses argued that they would not have agreed to finish the ADR meeting early if no agreement had been reached. However, it is highly implausible that if the parties had reached an agreement on facts that were to be summarised and used as the basis of settling the enquiry that there would be no reference in the email to such an agreement having been reached and to the summary being of facts agreed. An agreement that a recommendation was to be made that the enquiry be closed with no tax due would be a highly significant aspect of the agreement said to have been reached. This has not been mentioned either. We therefore conclude that this email is both consistent with the defendants' case and confirmatory of the evidence of their witnesses.

The response to Mr White's email

116. The only response received by Mr White was from Ms Colling in an email of 30 October 2017. She simply states, '*Thanks for letting me see this Brian Best wishes to you all in taking this case forward'.* The defendants' witnesses were cross examined by Mr Firth as to why they did not respond to Mr White's email, why they did not dispute the facts set out or Mr White's account that much progress had been made in factual understanding and that it was implausible that a summary of a discussion is a summary of one side's case. The defendants' evidence was that the summary was accurate as to what was discussed, the discussion did increase their understanding of the details of the underlying facts and to that extent was positive, but it didn't change anything.

117. Ms Harper said that the claimants wanted to make sure their case was put forward and the defendants' representatives agreed to do that. In re-examination she was asked what would be the point of putting forward a summary of facts that were not agreed. She stated that all enquiries have to consider both sides, it is not unusual to put forward a taxpayer's case. We accept this evidence. We have found that the email was a summary of the discussions and set out the claimants' case. There was no reason for the defendants to have responded or disputed anything in the email as it was regarded by them, and reasonably so, as the claimants setting out what had been discussed and putting their case forward.

The submission to the Solicitor's Office

118. On 7 November 2017 Ms Johnson sent two emails to Mr Peter Cull of the defendants' solicitor's office to which Mr Cull responded two days later. This was a short period after receipt of the summary of the discussions at the ADR meeting made by Mr White. We refer to these emails because taken together they are a relatively contemporaneous record of what the defendants understood Mr White's email of 27 October 2017 to convey. In our view the email chain is also pertinent as a series of internal documents that fall within the description in *Semetra* of *'a party's internal documents… Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see'.* We consider that this email chain assists as a *'means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned.'*

119. Ms Johnson's emails are set out below:

> *Hi Peter,*
>
> *You provided us with advice on the case below. After attending ADR with the agent on the 25 October 2017 they have asked us to consider the following case:*
>
> *James Albert McLaughlin vs HMRC*
>
> *Having read the case it would appear the situs of the loan notes was not in dispute (as ours is) and that a beneficiary was absolutely entitled to part of a trust fund. The case we have does not involve a trust.*
>
> *I believe the agent is arguing that Manakin became absolutely entitled to the loan notes and subsequently made the disposal. That the gain was not a gain on a disposal by Mr and Mrs Sehgal but the disposal of an none UK situs asset by a company (Manakin) domiciled in Jersey. That Manakin then paid Mr and Mrs Sehgal as owners and non-domicile individuals. Mr and Mrs Sehgal made no remittance to the UK therefore there should be no charge to CG tax.*
>
> *Could you advise if the case referenced above would change HMRC's original opinion as you offered below.*
>
> *Thanks Andrea*

120. Within 10 minutes of sending this email, Ms Johnson sent a further email in which she stated '*In addition to this, I have a copy of the issues the agent raised in the ADR. I have attached this for information'.* Mr White's email of 27 October was attached.

121. On 9 November Mr Cull replied to the email indicating that the *McLaughlin* case did not affect their opinion with reasons why. He also said *'As I understand it, the Department have not accepted the Agent's version of the facts set out in the enclosure to your email…'*

122. The email sets out Ms Johnson's view of the *McLaughlin* case, highlighting factual differences and sets out a summary of what the agent '*is arguing'.* The

subsequent email attached Mr White's summary which she described as a copy of the issues the agent raised at the ADR meeting. There is no suggestion in Ms Johnson's email that anything set out in Mr White's email had been agreed by the defendants as facts or that the defendants were recommending that the enquiry be settled on the basis of those facts and closed on the basis of no tax due.

123. In our view, this email chain gives some further contemporaneous support to the defendants' case. It records that the agreement reached at the ADR meeting was for a submission to be made regarding the relevance of the *McLaughlin* case, using the summary provided by Mr White in the form of the facts and arguments put forward by the claimants as discussed, explained and clarified during the course of the ADR meeting.

The submissions to various boards

124. After receiving the advice from the solicitor's office in Mr Cull's email of 9 November 2017, submissions were then made by the case officers to a number of internal boards: the Wealthy Case Management Board, the Customer Compliance Group Dispute Resolution Board and the Tax Administration and Litigation Advice team. These were submitted as part of the defendants' internal governance procedures.

125. Mr Firth in his submissions, and Mr White and Mr Raj Sehgal in their evidence raised what they said was the implausibility and pointlessness of putting forward a summary of disputed facts. This is a point to which we have already referred, but the defendants' answer was that gaining an understanding of the transaction and the basis of the claimants' case assists the defendants in resolving the dispute. It was said that all enquiries have to consider both sides and it is not unusual to put forward a taxpayer's case.

126. We think that there is real substance in the defendant's answer on this point. We consider it very likely that gaining an understanding of a taxpayer's arguments and the facts they rely on is routinely undertaken as part of the defendants' role when evaluating a taxpayer's transactions and determining the tax position. Indeed, we think that it is a fairly obvious course for the defendants to take. The defendants' evidence is therefore plausible in this regard. We do not accept Mr Firth's submissions that a submission based on facts not agreed would be pointless. As can be seen from the submissions made in this case, Mr White's own summary was used as the basis for summarising the claimants' position on the back of which the defendants determined how to proceed.

The defendants' letters of 23 July 2018, Mr White's email of 30 July 2018 and the claimants' letter of 16 August 2018

127. On 3 May 2018, the defendants wrote a holding letter indicating they were in the process of finalising their position. On 23 July 2018 two letters (one in respect of each claimant) were sent to Mr White setting out the defendants' views. The letters were sent

by Ms Harper and included a reference to the ADR meeting. They said that the points raised at the ADR meeting had been fully considered and gave an explanation as to why the defendants did not consider *McLaughlin* was relevant.

128. Mr White responded by email on 30 July 2018. A number of documents were attached to the email. We set out below relevant parts of the email:

> *'I refer to your letters of 23 July 2018 re the above which bear no correlation to the ADR we had on 25 October 2017. It appears that whoever wrote those letters did not attend, nor internalise what was discussed at the ADR and ignored the summary follow up email of 27/10/17.*
>
> *I am curious to know what has happened in 9 months that have elapsed. Specifically:*
>
> *1 we require copies of all file correspondence on this matter from the outset – we will need it for the bundle for First-tier Tribunal anyway- as we want to see if key evidence has actually been taken into account by whoever wrote the substantially delayed letter of 23 July 2018*
>
> *…*
>
> *6 we attach the evidence pack as HMRC seems to dismiss all of this evidence in the letter if 23 July 2018 – we can only assume that as the evidence was provided piecemeal and over many years the author of the letter has simply not seen the evidence pack. You also have the newspaper article where BOS said debt push downs were common.*
>
> *7 You have also not stated why ADR did not succeed and how matters have evolved from ADR through to this letter – they are a non-sequitur.'*

129. It is striking, in our view, that this email makes no reference to any facts having been agreed at the ADR meeting. The reference is to the discussion at the ADR meeting and the asserted failure to internalise what was discussed. On a generous interpretation that could be inferred to be a reference to a failure to internalise an agreement of the facts but in the context of the email as a whole that is not an inference that can reasonably be drawn. Mr White refers to wanting to see if the key evidence has been taken into account and HMRC seeming to dismiss all this evidence or not having seen it (the evidence being the evidence pack attached to the email). He asks why the ADR did not succeed. If the facts had been agreed it is implausible that there would not have been a direct reference to this. Instead he refers to the evidence not being taken into account. In our view this correspondence undermines the claimants' case.

130. The defendants wrote in response to Mr White's email on 16 August 2018. As to the ADR meeting point raised, they confirmed their position that Mr White's summary was a summary of discussions:

> '*I refer to your e-mail of 27 October 2017 which included a summary of our discussion at ADR. Whilst HMRC agree that the meeting was valuable in*

allowing both parties to present their views on the matter, after consideration of the further information provided the facts of the case remain unchanged.'

131. The final piece of correspondence to which we should refer is Mr White's letter of 17 September 2018 which was treated as the pre-action protocol letter in these proceedings. For the first time it deals in summary form with the issues pleaded in the grounds of review. This letter is the first occasion on which there was a reference to facts and legal issues being agreed at the ADR meeting and that the defendants' representatives had agreed to recommend that the enquiry be closed on the basis that no tax was due.

Conclusions

132. We find that the parties did not agree the relevant facts at the ADR meeting. The documentary evidence and our views on the oral evidence both confirm that the only agreement reached was that Mr White would provide a summary of the discussions which had taken place – essentially to set out what they had explained at the meeting constituted the claimants' case and for a submission to be made to the solicitor's office on the relevance of *McLaughlin*. The documentary evidence, even where it is created by Mr White, does not objectively support the claimants' view.

133. We should add that nothing that occurred at or after the end of the ADR meeting could properly be regarded as having given rise to any form of promise (short of a binding agreement) or other legitimate expectation that the defendants would only proceed in making the decisions by reference to the relevant facts. In particular we have in mind that part of the claimants' case to the effect that the defendants did not make any positive assertions that they did not accept what was said in the 27 October email until some time after it was sent. In our view, the drafting of that email did not call for any positive assertion by the defendants that its contents were not agreed as relevant facts. Any reasonable reader of it would have thought that it was simply a submission based on the claimants' case, as reflected in the discussions that had taken place. It was unfortunate that the defendants took some time to produce a substantive response to the letter but that does not of itself give the claimants any specific ground for complaint.

134. It also follows from the above conclusions that there is no basis for a finding that the decisions were irrational.

135. The application for judicial review is refused.

Signed on Original

MR JUSTICE TROWER

JUDGE PHYLLIS RAMSHAW

RELEASE DATE: 29 June 2021