[2022] UKUT 00088 (TCC)

Appeal number: UT/2021/00075

PROCEDURE – application to strike out – whether FTT wrong to conclude that appellants had no reasonable prospect of success – yes – whether to remit proceedings to a differently constituted tribunal – yes

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS **Appellants**

-and-

TASCA TANKERS LIMITED **Respondent**

TRIBUNAL: MR JUSTICE EDWIN JOHNSON
JUDGE ANDREW SCOTT

Sitting in public at Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL on 9 February 2022

Joshua Carey, counsel, instructed by The General Counsel and Solicitor for Her Majesty's Revenue and Customs for the Appellants

Tim Brown, counsel, instructed by Independent VAT Consultants Limited for the Respondent

Introduction

1. This is the hearing of an appeal against the refusal of Judge Brannan, in the First-tier Tribunal ("the FTT"), to strike out an appeal of the Respondent against a decision of the Appellants, dated 13th October 2016, to deny input tax of £214,386.38, on the basis that the Respondent knew or should have known that the relevant transactions were connected with the fraudulent evasion of VAT.

2. At the outset it is convenient, given the changing roles of the parties as appellant and respondent in the proceedings, to refer to the Appellants in this appeal as HMRC, and to refer to the Respondent in this appeal as Tasca.

3. The proceedings in the FTT are concerned with two decisions notified by HMRC to Tasca.

4. The first decision, dated 29th June 2016, was that Tasca had failed to hold sufficient evidence of dispatch to the Republic of Ireland to entitle it to a zero-rate on its supplies, rather than charging output tax at the standard rate, for VAT periods 03/15-03/16. This was extended by a further decision dated 23 August 2016 to include sales made in the VAT period 06/16.

5. The second decision was dated 13th October 2016 and related to Tasca's input tax for VAT periods 12/14-06/16. The input tax was denied on the basis that Tasca knew or should have known that its transactions were connected with the fraudulent evasion of VAT in accordance with the Kittel principle (*Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* C-439/04 and C-440/04 [2008] STC 1537). In other words, the second decision involved what is commonly known as an *"MTIC"* denial of input tax (we have added italics to quotations in this decision). The total amount of input tax involved in the second decision is, as we have said, £214,386.38.

6. On 22nd February 2017 Tasca filed notices of appeal to the FTT against both of these decisions. HMRC applied to strike out the appeal against the second of the above decisions. This application ("the Strike Out Application") was made, on 17th July 2019, pursuant to Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. There was no application to strike out the appeal against the first of the above decisions. Accordingly, the appeal to the FTT which was the subject of the Strike Out Application (the appeal against the second of the above decisions) will be referred to as "the Second Appeal".

7. Rule 8(3)(c) permits the FTT to strike out the whole or part of proceedings in the FTT if the FTT considers that there is no reasonable prospect of the appellant's case, or part of it, succeeding.

8. The Strike Out Application was heard on 7th December 2020. Both HMRC and Tasca were represented by counsel. By a decision ("the Decision") released on 29th January 2021 Judge Brannan ("the Judge") refused the Strike Out Application and declined to strike out the Second Appeal. The Judge also, by the Decision, refused an application by Tasca to adduce additional evidence.

9. The application of HMRC for permission to appeal against the Decision, so far as it refused the Strike Out Application, was refused by the Judge, but granted by the Upper Tribunal.

10. At the hearing of this appeal ("the Strike Out Appeal") the parties were represented by the same counsel as appeared at the hearing of the Strike Out Application in the FTT ("the FTT Hearing"). HMRC was represented by Joshua Carey. Tasca was represented by Tim Brown.

11. For convenience, the paragraphs of the Decision are referred to as [FTT1], and so on.

Factual background

12. What follows is only a very brief summary of the factual background to this case, sufficient to set the scene for the Strike Out Appeal and no more. The full factual background to the case can be found in the witness statements and documentary evidence filed in the proceedings in the FTT.

13. Tasca was incorporated in September 1994 and was registered for VAT in February 1995. Its main business was the manufacture, sale (new and second-hand) and repair of road tankers.

14. At the relevant time, Tasca had three directors, Alwyn Bowering, Thomas Patrick McDonnell, and Andrew Stokes. An additional individual, Shaun Harte, was described as the CEO of the Appellant and owned 25% of the shares. It appears that Mr Harte was not an employee of Tasca but provided management services to Tasca, and was listed as a creditor of Tasca. Mr Harte was solely in charge of the financial side of the business and the directors were solely involved in the manufacturing and repair side of the business. Tasca's accounts administrator was Vicki Wood.

15. In or around 2014 Tasca, in addition to its tanker business, commenced to trade in second-hand cars, which were largely purchased in Northern Ireland and then dispatched for sale to the Republic of Ireland. Tasca did not inform HMRC that it had commenced trading in second-hand cars. However, HMRC received mutual assistance requests from the Republic of Ireland's tax authorities, and this prompted HMRC to make a visit to the Appellant on 20 April 2016.

16. This second hand car business, which was effectively a sideline business for Tasca, was dealt with by Mr Harte, without oversight by the directors of Tasca. The actual transactions were dealt with by a contact of Mr. Harte and Mr Paul Donnelly. Mr. Paul Donnelly was not an employee of Tasca, but describes himself, in his evidence in these proceedings, as having previously been involved with his family business, Donnelly Motor Group, which is said to employ 700 people and to be the third largest motor retailer in Northern Ireland.

17. The case of HMRC is that these transactions were connected with the fraudulent evasion of VAT by various traders. By its relevant decision, now the subject of the Second Appeal, HMRC denied Tasca the relevant input tax on the basis that Tasca knew, or should have known that the relevant transactions were connected with the fraudulent evasion of VAT.

Procedural background

18. The procedural background is relevant to the arguments in the Strike Out Appeal, as it was in the FTT Hearing. The relevant procedural background is summarised in the Decision, and we adopt that summary.

19. On 3rd May 2018 the FTT issued directions ("the Directions") in respect of the appeals to the FTT. So far as material, the Directions provided as follows:

> *"3. That by no later than 5.00 p.m. on 26 June 2018 the Respondents [HMRC] shall file with the Tribunal all witness statements on which they intend to rely, without exhibits, and serve that same evidence, with exhibits, on the Appellant.*
>
> *4. That by no later than 5.00 p.m. two (2) months from the date of compliance with direction three (3) being the 26 August 2018, the Appellant shall file with the Tribunal all witness statements on which it intends to rely, without exhibits, and serve that same evidence, with exhibits, on the Respondents.*
>
> *5. That by no later than 5.00 p.m. one (1) month from the date of compliance with direction four (4), the Respondents shall file and serve any further evidence upon which they intend to rely.*
>
> *6. That to the extent that the Respondents do not seek to adduce any further evidence in compliance with direction five (5), they shall advise the Appellants by no later than the time for compliance with direction five (5).*
>
> *7. That the witness statements shall stand as evidence in chief of the witness subject to such further questions as the Tribunal may allow.*
>
> *8. That by no later than 5.00 p.m. one (1) month from the date of compliance with direction six (6), the Appellant shall specify by way of written document its position on the following issues:*
>
> *a. Whether the Appellant accepts that the transaction chains, as set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases on which the Respondents have denied input tax recovery, accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;*
>
> *b. Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain and, if not, why;*
>
> *c. In relation to any other witness statements served by the Respondents what, if any, are the matters of fact in dispute. …"*

20. On 25th June 2018, HMRC applied for an extension to the Directions in order to file their evidence. In compliance with the amended Direction 3, HMRC served their evidence on 10 August 2018.

21. In compliance with Direction 4 (as amended), Tasca served its evidence on 28th February 2019.

22. The Tribunal wrote to HMRC on 13th May 2019 noting that it had not received confirmation that HMRC had served further evidence pursuant to Direction 5. The letter gave HMRC seven days in which to respond.

23. It appears that HMRC did not respond to this letter, or notify Tasca that HMRC intended to call no further evidence. It follows that there was a failure on the part of HMRC to comply with Direction 6. One consequence of this was that Direction 8 was prevented from taking effect, because the relevant time limit in Direction 8, tied as it was to the date of compliance with Direction 6, never began to run.

The evidence in the Second Appeal

24. The Judge set out, in considerable detail, a summary of the evidence filed in the FTT in relation to the Second Appeal; see [FFT15-47]. It is not necessary to repeat that summary. Mr. Carey did not challenge the summary as being wrong or inaccurate.

25. HMRC filed the witness statements of four witnesses in the proceedings in the FTT, together with a considerable quantity of documents exhibited to the witness statements. All four witnesses are officers of HMRC. Three of the witness statements are relatively short. The fourth witness statement, made by Antony Booth, an officer with the Specialist Investigations Office of the HMRC, is lengthy, and runs to 35 pages and 275 paragraphs.

26. Tasca filed three witness statements in the proceedings in the FTT, each relatively short; one from Paul Donnelly, one from Shaun Harte, and one from Vicki Wood. All three witnesses say in their witness statements that, until the investigation of the second hand car transactions by HMRC came to their attention, they had no idea that the transactions might be connected with a VAT fraud.

27. In terms of the extent of the evidence before the Judge at the Hearing, both in respect of witness statements and documents, it is relevant to record what the Judge said in paragraph 16 of his decision (released on 20th April 2021) refusing permission to appeal against the Decision:

> *"In this case, Mr Carey in his submissions at the hearing conducted a whirlwind tour of the evidence, dipping into parts of the various witness statements and hearing bundle (which comprised over 1000 pages)."*

The grounds of the Strike Out Appeal

28. HMRC challenges the Decision (meaning the Decision so far as it refused the Strike Out Application) on the following three grounds:
    (1) The Judge reached a decision which was perverse.
    (2) In reaching his decision the Judge misapplied the law.
    (3) The Judge failed to give sufficient reasons for his decision.

Rule 8(3)(c)

29. Rule 8(3) provides as follows:

> *"8. Striking out a party's case*
>
> *...*
>
> *(3) The Tribunal may strike out the whole or a part of the proceedings if—*

(a) *the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;*

(b) *the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or*

(c) *the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."*

30. At [FTT70-75] the Judge summarised the tests which fall to be applied on an application to strike out pursuant to Rule 8(3)(c). Subject to one minor point, Mr. Carey accepted that the Judge had directed himself correctly in this part of the Decision.

31. It is convenient to repeat the Judge's citation from the decision of the Upper Tribunal (Henry Carr J and Judge Sinfield) in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC), where the Upper Tribunal provided the following guidance:

> *"Although the summary in Fairford Group Plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in AC Ward & Sons v Caitlin Five Limited [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.*
>
> *"i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91*
>
> *ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the 2 HMRC v Fairford Group [2015] STC 156 12 10 facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the*

case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

32. The Judge also cited the actual conclusion of the Upper Tribunal in that case, at [74], which was in the following terms.

"The issue concerning section 225 ITEPA 2003 gave rise to a short point of construction. The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants' evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

33. The Judge also made reference to the guidance on the determination of summary judgment applications given by Lord Hope in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16. We repeat the Judge's citation of what Lord Hope said, at [94] to [96]:

"94. ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say

with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

96. In Wenlock v Moloney [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and 14 12 documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

> *"... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*

Sellers LJ said, at p 1243C-D, that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed."

34. The Judge also cited the decision of the Upper Tribunal in *HMRC v Fairford Group* [2015] STC 156 (Simon J and Judge Bishopp). As the Judge explained, in [FTT73]:

> *"Fairford, like the present case, was what is called an MTIC appeal involving the application of the Kittel principle. However, in that case the taxpayer did not accept that there was a tax loss or that it resulted from fraudulent evasion and at least in one case did not accept that its transactions were connected to the fraudulent evasion of VAT. The FTT concluded that those matters had to be determined at a substantive hearing and refuse*[d] *the application to strike out the taxpayer's appeal."*

35. The Judge went on, in [FTT73], to explain the decision of the Upper Tribunal in *Fairford*:

> *"The Upper Tribunal upheld the FTT's decision. First, at [30], the Upper Tribunal rejected the argument advanced on behalf of the taxpayer that the strike out power in Rule 8(3)(c) did not arise where there was no positive case being advanced by the taxpayer and where, instead, the taxpayer was simply putting HMRC to proof i.e. the strike out power in Rule 8(3)(c) could only apply to cases where the appellant bore the burden of proof:*
>
> > *"... The FTT has the power to strike out a part of the proceedings if it concludes that there is no reasonable prospect of all or part of an appellant's case succeeding. A party's case is not confined to its positive case, nor to a form of pleading. Although Rule 8(3)(c) is in different terms, the parties 13 11 (rightly in our view) accepted that CPR Part 3.4, which applies to the formal statements of case which are served in civil proceedings, was a helpful source of guidance on the proper*

application of Rule 8(3)(c). CPR Part 3.4(2)(a) confers a power to strike out a statement of case, including a defence, even where the burden of proof is on the Claimant; and it would be surprising if it were otherwise. The Court's powers may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars."

36. The Judge also cited, at [FTT74], what was said by the Upper Tribunal in *Fairford* at [48], which was as follows:

> *"An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users."*

37. Mr. Carey's criticism of this section of the Decision was confined to [FTT73], where the Judge, in setting out his summary of the decision in *Fairford*, said as follows:

> *"The FTT concluded that those matters had to be determined at a substantive hearing and refuse*[d] *the application to strike out the taxpayer's appeal."*

38. Mr. Carey pointed out that, in *Fairford*, the FTT had not been invited to deal with the question of strike out in that case on the basis of a detailed analysis of each transaction in that case, but had instead been invited to deal with the question of strike out as a question of principle. We are not sure that this had the consequence that the Judge was wrong in his description of the *Fairford* case in the extract from [FTT73] which we have just cited. In any event, the point seems to us to be immaterial to what we have to decide.

39. Our only other observation on what was said about the jurisdiction under Rule 8(3)(c) in *Fairford* is that it seems to us that what is set out in Rule 8(3)(c) is essentially a summary judgment jurisdiction, the language of which reflects CPR 24.2, rather than CPR 3.4. We agree with the Upper Tribunal in *First De Sales* that, while the guidance in *Fairford* is helpful, the primary statement of the principles to be applied is to be found as set out by Lewison J (as he then was) in *Easyair Ltd*, at [15].

<u>The nature of the Strike Out Appeal</u>

40. Mr. Carey accepted, in his skeleton argument for this hearing, that the decision of the Judge to refuse the Strike Out Application was a case management decision, which set the bar high for the Strike Out Appeal. He very properly drew our attention to what was said by the Upper Tribunal (Norris J) in *Goldman Sachs International v HMRC* [2009] STC 763, at [23] and [24]:

> *"[23] First, I think the Upper Tribunal should exercise extreme caution in*

entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in Fattal v Walbrook Trustee (Jersey) Ltd [2008] EWCA Civ 427, [2008] All ER (D) 109 (May) not as establishing any novel proposition but as containing in [33] the following convenient statement from the judgment of Lawrence Collins LJ:

> *'... I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.'*

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

41. Mr. Carey also accepted that the Judge was exercising a discretion under rule 8(3)(c) in his determination of the Strike Out Application.

42. In oral submissions Mr. Carey did however qualify his position to a certain degree. He pointed out that in making a decision under Rule 8(3)(c), the FTT would, if it decided to strike out the relevant case, or part of the relevant case, in fact be making a final decision in the relevant proceedings, which was not easily seen as a case management decision or as the exercise of a discretion. Mr. Carey suggested that the present case might be one in which the Upper Tribunal could give guidance to the FTT as to how to approach appeals against decisions under Rule 8(3)(c).

43. We do not think that the present case, where we have not had the benefit of more than brief reference to this topic, is one where it is appropriate or necessary to try to give guidance of the sort referred to by Mr. Carey. Nor do we think it appropriate or necessary to attempt a classification of what qualifies as a case management decision. We accept that the Judge was exercising a discretionary jurisdiction under Rule 8(3)(c), and was making a decision capable of being described as a case management decision; albeit one which might be final in its effect. That said, the essential questions for us are whether the Judge went wrong as a matter of law in the decision which he made and, if so, whether that error vitiates the Decision such that it must be set aside.

Analysis of the Decision

44. In his grounds of appeal Mr. Carey concentrated upon [FTT77-83] which contain the Judge's essential reasoning in support of his decision to refuse the Strike Out Application.

45. Mr. Carey did however split out his argument between the three grounds of appeal identified above (perversity/misapplication of the law/insufficient reasons). In considering the grounds of appeal we have found it more convenient first to make our own analysis of the essential reasoning of the Judge, at [FTT77-83], and then to apply the results of that analysis to Mr. Carey's three grounds of appeal.

46. We should also make it clear, for the avoidance of any doubt, that while we are concentrating our analysis upon the essential reasoning of the Judge, at [FTT77-83], we bear in mind the entirety of the Decision in our analysis. Putting the matter more

simply, our analysis of [FTT77-83] is not a closed one, and does not ignore the remainder of the Decision.

47. It was common ground between the parties (as recorded at [FTT 80]) that in order to succeed in the Second Appeal, and establish its entitlement to deny the relevant input tax, HMRC would have to prove the following matters:
    (1) There had been a tax loss.
    (2) The tax loss was occasioned by fraud.
    (3) Tasca's transactions were connected to that fraudulent tax loss.
    (4) Tasca knew or should have known that its transactions were so connected.

48. It was also common ground between the parties that the burden was upon HMRC to prove these matters. We will refer to these matters, as they were referred to by the Judge, as Issue (1), and so on.

49. Mr. Carey's argument before the Judge, as we understood it, was that if one looked at all the evidence filed in the case, it was clear that Tasca had no real answer, either in terms of the evidence or in terms of argument, to HMRC's case on each of the four Issues. As such, so the argument of HMRC went, Tasca had no real prospect of a success in its pursuit of the Second Appeal, with the consequence that the Second Appeal should be struck out.

50. Mr. Carey's essential submission in support of his grounds of appeal was that in the Decision, and specifically in [FTT 77-83], the Judge simply failed to engage with this case.

51. Consideration of this submission requires an analysis of the Judge's reasoning, in [FTT 77-83].

52. The Judge commenced his reasoning, at [FTT 77], in the following terms:

> *"77. I accept that the evidence put forward by the Appellant is sparse. Since my decision is that this appeal should not, at this stage [be] struck out and therefore should go forward to a substantive hearing, I shall carefully restrict my comments on the evidence in order not to influence, in any way, the outcome of that hearing."*

53. The Judge then quoted again, at [FTT 78], the guidance given by Lewison J in *Easyair*, specifically at sub-paragraph vi) in [15].

54. The Judge then continued as follows, at [FTT 79]:

> *"79. In this case, because HMRC has failed to comply with Directions 5 and 6, with the result that the Appellant has not been called upon to comply with Direction 8, and therefore it is not clear on what basis the Appellant argues its appeal. I accept that the Appellant's Notice of Appeal seems to focus on the knowledge (or means of knowledge) of the Appellant, but frequently in this Tribunal the grounds of appeal, when an appeal is first lodged, are often general in nature. In any event, the Directions appear to envisage that any or all of the following issues could be involved in the appeal."*

55. At [FTT 80], the Judge set out the four Issues (as set out above), which HMRC would have to prove.

56. The Judge then came to the core of his reasoning, at [FTT 81-83]:

> *"81. It is possible that issues (1) and (2) remain in dispute. These are not matters on which the Appellant would normally be expected to produce evidence. As in Fairford, I do not think it is correct for me to take a decision on these two issues at this stage i.e. in a strike out application.*
>
> *82. As regards issue (3), since the evidence is that the Appellant bought directly from the alleged defaulting traders, it is unlikely that this will be in issue, but I express no further view on this point.*
>
> *83. As regards issue (4), the question of knowledge or means of knowledge in an MTIC context is one which requires this Tribunal carefully to weigh all the evidence and consider all the relevant circumstances. I think, therefore, that issue (4) is unlikely to be one which is suitable in most cases to be determined in summary proceedings and without the benefit of hearing all the evidence at a full hearing."*

57. It seems to us that there are two difficulties with the reasoning in [FTT 77-83].

58. First, in [FTT 79], the FTT appears to have treated the absence of a written document from Tasca, pursuant to Direction 8, as constituting an obstacle to the striking out of the Second Appeal. Mr. Brown explained that this had indeed been his case at the FTT Hearing. Mr. Brown put the same case to us. His argument was that the Strike Out Application fell to be refused at the outset because, in the absence of a written document pursuant to Direction 8, it was impossible for the Judge to take a view on the strength of Tasca's case.

59. We do not accept this argument. So far as the procedural position in relation to the Directions was concerned, at the time of the FTT Hearing, the position seems to us to have been as follows:

(1) HMRC was not in default of Direction 5. Direction 5 permitted HMRC to adduce further evidence. HMRC did not avail itself of that permission within the permitted time limit. HMRC might have applied for permission to adduce further evidence outside the time limit in Direction 5, had it wished to adduce further evidence, but no such application was made prior to or at the FTT Hearing.

(2) HMRC was in default of Direction 6. HMRC had not adduced any further evidence in compliance with Direction 5. By Direction 6 HMRC was required to confirm to Tasca that it was not seeking to adduce further evidence, by no later than the time for compliance with Direction 5. HMRC did not do this within the prescribed time limit.

(3) This non-compliance with Direction 6 had the consequence that the time limit in Direction 8 did not begin to run. This in turn meant that Tasca was not required to produce a written document on the matters specified in Direction 8.

60. The net result of this procedural position was that the Judge did not have, at the FTT Hearing, the benefit of a written document of Tasca, provided for by Direction 8. While this was an unhelpful position, and one which the Directions were intended to avoid, we cannot see that this position in any way prevented the Judge from dealing with the

Strike Out Application. If, at the FTT Hearing, Tasca had particular arguments which it wished to raise on any of the Issues, then it was incumbent upon Tasca to raise those arguments at the FTT Hearing. We cannot see that it was permissible for Tasca to sit on its hands in this respect, in response to the Strike Out Application, simply because it had not been required to produce a written document provided for by Direction 8.

61. Equally, if Tasca wished to adduce further evidence at the trial of the Second Appeal it was incumbent upon Tasca to explain what that evidence would be, and how it would affect the position, in terms of the evidence and the arguments in the Second Appeal. In fact, Tasca did make such an application, in the course of the FTT Hearing, which was refused by the Judge; see [FTT85-89].

62. In summary, the first difficulty which we identify, in terms of the reasoning in [FTT77-83], is that we cannot see that the absence of a written document provided for by Direction 8 prevented the Judge from dealing with and deciding the Strike Out Application.

63. The second difficulty relates to the Judge's reasoning at [FTT81-83]. We take these paragraphs in turn.

64. At [FTT81] the Judge stated that it was possible that Issues (1) and (2) remained in dispute. This was indeed correct, but if Issues (1) and (2) were in dispute, it was incumbent upon Tasca to say so, at the FTT Hearing, and to explain why they were in dispute. As the Judge observed, Issues (1) and (2) were not matters on which Tasca would normally be expected to produce evidence. In this case, as in other cases, one would expect the relevant evidence in respect of these two Issues to be under the control of HMRC, and outside the knowledge of Tasca.

65. The Judge went on to say that he did not think that it was correct to take a decision on Issues (1) and (2) at the stage of the Strike Out Application. It is however unclear why the Judge declined to make this decision. We cannot see that the decision in *Fairford* offered any support for the Judge's approach. If the Judge's concern was the possibility that Issues (1) and (2) remained in dispute, that was not a legitimate concern. We agree with Mr. Carey that, at the FTT Hearing, it was for Tasca to put its case in response to the Strike Out Application, and for the Judge to decide that case. It was for Tasca to identify whether Issues (1) and (2) were in issue and, if so, the basis upon which they were in issue. If Tasca had not done that, the Judge was not thereby prevented from dealing with Issues (1) and (2) in the context of the Strike Out Application. Rather, the Judge would be considering Issues (1) and (2), in the context of the Strike Out Application, without Tasca having declared its hand. Whether that situation favoured HMRC or Tasca would be a matter for the Judge to consider.

66. At [FTT82] the Judge appeared to acknowledge that it was unlikely that Issue (3) would be in issue. Whether or not the Judge was correct in this assessment, the point is the same as the one which we have made in relation to [FTT81]. If Issue (3) was in dispute, it was incumbent upon Tasca to say so, at the FTT Hearing, and to explain why Issue (3) was in dispute. As with Issues (1) and (2) it is unclear why the Judge declined to make a decision on Issue (3). If the Judge's concern was the possibility (which he acknowledged as unlikely) that Issue (3) remained in dispute, that was not a legitimate concern. It was for Tasca to identify whether Issue (3) was in issue and, if so, the basis

upon which it was in issue. If Tasca had not done that, the Judge was not thereby prevented from dealing with Issue (3) in the context of the Strike Out Application. The situation would be the same as existed in relation to Issues (1) and (2) in the context of the Strike Out Application.

67. Turning to [FTT83] the Judge commenced by acknowledging, in relation to Issue (4), that the question of knowledge or means of knowledge in an MTIC context was one which required the FTT carefully to weigh all the evidence and consider all the relevant circumstances. As a general statement this seems to us to be correct. Mr. Brown referred us to *Davis & Dann v HMRC* [2016] EWCA Civ 142 [2016] STC 1236. The case was concerned with an appeal against the decision of HMRC to reject a claim for the repayment of input VAT in relation to transactions which were connected with an MTIC fraud. The FTT upheld the decision of HMRC and refused the taxpayer's appeal against the decision to deny the claim to input VAT. The Upper Tribunal reversed the decision of the FTT, but were themselves reversed by the Court of Appeal. Central to the decision of the Court of Appeal was their finding that, on the question of what the taxpayer should have known (part of Issue (4) in the present case), the Upper Tribunal had over-compartmentalised the relevant factors, rather than considering the totality of the evidence. At [60] Arden LJ, as she then was, explained the correct approach in the following terms:

> *"I accept the substance of Mr Kinnear's submission. In my judgment, the UT's treatment of the respondents' repayment position provides a clear example of over compartmentalisation of the factors rather than a consideration of the totality of the evidence. The UT accepted Mr Scorey's submission, also made to us on this appeal, that the respondents' abnormally large repayment position was just a consequence of the Transactions ([2014] STC 39 at [50]). But that is to leave out of consideration the role of this factor as a factor which is capable of supporting knowledge to the no other reasonable explanation standard. The UT did not consider its relevance in this way and its failure to do so was an error of law. When a factor is considered in that way it may be that there is an explanation which means that the knowledge does not meet the required standard. At that stage, the factor, while relevant, ceases to be probative. The example which I have given is repeated in relation to the other factors which the UT considered. Moreover, although, in para [55] of its decision, the UT stated that the no other reasonable explanation standard was not met 'whether the factors were looked at individually or as a whole', it did not elucidate why that was so. I give that statement little weight in the light of the general tenor of the decision, which was to look at factors in isolation."*

68. The Judge then proceeded to make a second general statement, in the second sentence of [FTT83], which we repeat, for ease of reference:

> *"I think, therefore, that issue (4) is unlikely to be one which is suitable in most cases to be determined in summary proceedings and without the benefit of hearing all the evidence at a full hearing."*

69. We prefer to be cautious in expressing a view as to whether this statement is or is not correct as a general statement, even though we understood Mr. Carey not particularly to quarrel with this statement as a general statement. We adopt a cautious approach because, whether this statement should be taken to be correct as a general statement, it is only a general statement. It was expressed to apply *"in most cases"*. The statement

does not identify whether, in the present case and applying the *Easyair* principles, Issue (4) was or was not suitable for summary determination.

70. The Judge's reasoning concludes with the sentence in [FTT83] which we have just quoted. In [FTT84] the Judge states his decision to refuse the Strike Out Application. The Judge did not therefore proceed, following his general statements in [FTT84], to engage with Issue (4) and decide whether it was, in the present case, suitable for summary determination.

71. As with Issues (1), (2), and (3), and for reasons which are not apparent from the reasoning in [FTT83], the Judge failed to engage with the case of HMRC on Issue (4). The Judge provided a most helpful summary of the evidence, at [FTT15-47], which is not criticised (as a summary) in this appeal. The Judge also directed himself correctly as to the tests to apply on an application to strike out pursuant to Rule 8(3)(c), at [FTT70-75]. What seems to us to be missing from the Decision is engagement with the case of HMRC on the Strike Out Application.

72. It may be that the Judge concluded, from his decision that the question of knowledge or means of knowledge in an MTIC case requires a careful consideration of all the evidence and relevant circumstances of that case, that it necessarily followed that Issue (4) was unsuitable for summary determination in the present case. If however this was the Judge's reasoning, and we accept that we are speculating, we do not think that it can be supported. As Mr. Carey pointed out, if this was the correct approach, it would never be possible to exercise the power of summary determination in Rule 8(3)(c) in an MTIC case. We agree with Mr. Carey that this cannot be correct. It may be, where Issue (4) is concerned, that the evidential inquiry which is required is not one which lends itself easily to summary determination; see *Davis & Dann* above. This must however be a case sensitive question, depending upon the facts of the particular case in which summary determination is sought.

73. In summary, the second difficulty which we identify, in terms of the reasoning in [FTT77-83], is that the Judge failed to engage with HMRC's case on the Strike Out Application, on any of Issues (1) to (4). As we have said, the case of HMRC before the Judge, as we understood it, was that if one looked at all the evidence filed in the case, it was clear that Tasca had no real answer, either in terms of the evidence or in terms of argument, to HMRC's case on each of the four Issues. As such, so the argument of HMRC went, Tasca had no real prospect of a success in its pursuit of the Second Appeal, with the consequence that the Second Appeal should be struck out. The reasoning in [FTT77-83] does not engage with this case. Nor can we find any other part of the Decision where the Judge has engaged with this case.

74. It is not clear to us why this occurred. The Judge clearly decided that the case was not one in which he should exercise his power to strike out, because the Judge refused the Strike Out Application. We cannot however find, either in [FTT77-83] or elsewhere in the Decision, any explanation of how or why, on the facts and in the circumstances of this particular case, the Judge concluded that the case was not suitable for summary determination, and needed to go to a full trial.

75. We are conscious of the need, as an appellate tribunal, not to be over-rigorous in our approach to decisions of the FTT. First instance judges should not be expected or

required to deal with everything put before them at a hearing, by way of evidence and arguments. Nor should first instance judges be expected to set out their reasoning in laborious detail. In the present case however, and with due respect to the Judge, it seems to us that there is a critical gap in the reasoning of the Judge. The Judge has not explained how his reasoning in [FTT77-83] led him to the conclusion that the Strike Out Application should be refused.

76. It may be that the Judge considered that what he did say, in [FTT81-83], was sufficient to justify his decision to refuse the Strike Out Application. In our judgment what was said in [FTT81-83] was not sufficient to justify the Judge's decision.

77. We take account of the fact that the Judge did explain, in [FTT77], that he was restricting his comments on the evidence in order not to influence, in any way, the outcome of the trial of the Second Appeal. We accept that this was a sensible precaution, given that the Judge had decided to refuse the Strike Out Application. The reasoning which then followed did not however, as we read it, contain any explanation of why the evidence in this case rendered Issues (1) to (4) unsuitable for summary judgment.

78. Drawing together all of the above discussion, we reach the following conclusions, in terms of our analysis of the Decision.
    (1) There is a critical gap in the reasoning of the Judge in the Decision. The Judge does not explain, either in the discussion section of the Decision or elsewhere in the Decision, how his reasoning in [FTT77-83] led him to the conclusion that the Strike Out Application should be refused.
    (2) By reason of this gap, the reasoning in [FTT77-83], whether read in isolation or in the context of the remainder of the Decision, does not support the Judge's conclusion that the Strike Out Application should be refused.

79. There is one other point we should mention, before leaving our analysis. Our analysis considers matters as they stood at the time of the FTT Hearing, when the case was before the Judge. Since that date there have been further developments. First, Tasca has accepted that HMRC is able to establish its case on Issues (1) to (3), in this case, so that it is only Issue (4) which remains in dispute. Second, and of less potential importance in the case, HMRC has formally confirmed that it does not intend to call any further evidence pursuant to Direction 5. Whether that qualified as belated compliance with Direction 6, and whether that had the effect of triggering the time limit in Direction 8 are interesting procedural questions, which we do not need to decide, and do not decide.

80. What follows from the first of the above developments is that the issues in the case are now down to Issue (4); that is to say the question of knowledge (actual knowledge and the knowledge which Tasca should have had). We have thought it right to conduct our own analysis of the Decision by reference to matters as they stood before the Judge. It seems to us however that the subsequent reduction of the Issues does not have a material effect on our own analysis of the Decision. If the Judge had only been required to consider Issue (4), so that his reasoning in [FTT81-82] would not have been present in the Decision, our analysis would still hold good for the Judge's reasoning, and the critical gap in that reasoning, in relation to Issue (4).

81. With our analysis of the Decision in place, we turn to the individual grounds of appeal, which we can take fairly quickly.

Ground 1 - Perversity

82. We are invited to find that the Decision was perverse. This ground of appeal essentially boiled down however to the submission that the Judge had failed to engage with the case of HMRC on the Strike Out Application. For the reasons which we have already given, we accept this submission.

83. We do not regard it is necessary or appropriate to label the Decision as perverse, not least because we were not left entirely sure, following the submissions in the Strike Out Appeal, either of the legal basis for characterising a decision as perverse or of the legal consequences of characterising a decision as perverse.

84. Applying our own analysis of the Decision we do accept that the Judge went wrong in law in the Decision. As we have explained, we consider that there is a critical gap in the reasoning of the Judge in the Decision. By reason of this gap, we also consider that the reasoning of the Judge in [FTT77-83] does not support the Judge's conclusion that the Strike Out Application should be refused. If the first ground of appeal is understood as a complaint that the Judge went wrong in law in the Decision in these ways, we accept the first ground of appeal.

85. On this basis we accept, and decide that the making of the Decision did involve errors on points of law, within the meaning of Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 ("the Act"). We also consider that this has the consequence that the Decision, so far as it refused the Strike Out Application, falls to be set aside pursuant to Section 12(2)(a) of the Act. Given the errors of law which we have identified, we do not think that the Decision, so far as it refused the Strike Out Application, can stand.

86. Before leaving this ground of appeal we should mention, in deference to Mr Carey's arguments, that we were provided with submissions, both written and oral, on the persuasive and evidential burdens in the present case. In this context we were referred to Phipson on Evidence (20th Edition), at [169]-[170], and to case law. We do not think that it is necessary to deal with these submissions, because they are not relevant to our consideration of the Decision. Arguments about the persuasive and evidential burdens in the present case form part of the consideration of the actual case advanced by HMRC in support of the Strike Out Application. They do not seem to us to be relevant to the question of whether the Judge actually engaged with that case.

Ground 2 – Misapplication of the law

87. The second ground of appeal also boiled down to a submission that the Judge had failed to engage with the case of HMRC on the Strike Out Application. We understood Mr. Carey to accept that the Judge had directed himself correctly, as to the tests to be applied on an application under Rule 8(3)(c). The essential complaint was that the Judge had failed to apply those tests to the evidence before him.

88. It follows from our own analysis of the Decision that we accept that the Judge did misapply the law. More specifically, we accept that the Judge did not apply the relevant legal tests, which he had correctly identified, to the evidence before him on the Strike Out Application. On this basis we accept the second ground of appeal. The

consequence of this is that the Judge did make errors of law, for the reasons which we have already explained, and the Decision, so far as it refused the Strike Out Application, falls to be set aside.

89. Mr. Carey pursued this ground of appeal further, in the sense that he sought to explain why, on the evidence in this case, it should have been apparent to the Judge that Tasca had no realistic prospect of a successful defence on any of the four matters (the Issues) which HMRC would have to establish. In particular, Mr. Carey argued, in relation to Issue (4), that there were 13 factors raised in the evidence which rendered inevitable a finding that Tasca should have had, even if it did not actually have, the required knowledge to establish HMRC's case on Issue (4). It is not however necessary or appropriate for us to engage with this part of Mr. Carey's argument, in deciding on this or the other grounds of appeal. The 13 factors become relevant at the point when there is actual engagement with HMRC's case in support of the Strike Out Application. For the reasons which we have given, we do not consider that this has yet happened.

Ground 3 – Failure to give reasons

90. Mr. Carey submitted that while the Judge was not required to set out, as Mr. Carey put it in his skeleton argument, *"the entire interstices of the evidence or analyse every nuance between the parties"*, the Decision should have made it clear why the Judge considered that it was inappropriate to engage with the evidence, even to a limited degree, in order to assess whether the Second Appeal had a reasonable prospect of success for the Second Appeal. It was submitted by Mr. Carey that the Decision ought to have shown, *"at a high level"*, what some of the factual differences were which permitted the conclusion that the Second Appeal was only capable of resolution after trial.

91. In support of this ground of appeal Mr. Carey cited the decision of the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 W.L.R. 377. *Flannery* was a case which involved a claim in professional negligence made by the plaintiffs against the defendant firm of surveyors. The defendants carried out a survey of a flat for the plaintiffs. The plaintiffs subsequently purchased the flat in reliance upon the survey. The complaint was that the defendants had negligently failed to detect structural movement which affected the flat, and caused a subsequent purchaser to withdraw from a purchase of the flat. The central issue in the case, on which expert evidence was called, was whether the flat had been or was in fact suffering from structural movement caused by foundation subsidence, as opposed to cracking caused by thermal movement. The judge at first instance delivered a reserved judgment, of which only a small part was devoted to the expert evidence. The judge concluded that the expert evidence of the defendants was to be preferred, and that the flat had not suffered from structural movement. Accordingly, the claim in negligence was dismissed.

92. The plaintiffs appealed, arguing that the judge had, in reality, given no reasons for preferring the defendants' expert evidence over the plaintiff's expert evidence. As such, so it was contended, the judge's decision to prefer the defendants' expert evidence was free-standing, unsupported by reasons. The appeal was allowed. The judgment of the Court of Appeal was given by Henry LJ. After identifying the general rule that a professional judge owes a duty to give reasons, Henry LJ set out the following comments on the duty to given reasons, at 381G-382C:

"(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons H concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

(3) The extent of the duty, or rather the reach of what is required to A fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, " the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the Q issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

93. The defendants argued in the Court of Appeal that, for various reasons, the judge could not have done more than state a simple preference for the expert conclusions of one side over the other. The case was not one, so it was argued, requiring a statement of reasons behind the preference. This argument was not accepted. Henry LJ identified the problems with this argument, and the consequences of these problems, in the following terms, at 382H-382C.

"As we have already indicated, in a dispute over, say, who hit the first blow, that approach and such "reasons" expressed in an (unreasoned) preference may well be sufficient. But that is not the case.

There seem to us to be four things wrong with the respondents' analysis. First, we do not know whether the assumed thought process was the judge's actual

thought process. Second, on what the judge said we do not know why he preferred the defendants' experts, nor whether that was for good reason or bad. We do not know because reasons were not given. Third, if the judge had the difficulty in choosing between the two accounts assumed by Mr. McPherson, he must have been at least close to the situation where the cause of the damage could not be resolved: see Rhesa Shipping Co. S.A. v. Edmunds [1985] 1 W.L.R. 948, 955-956. But if this was his difficulty he should have said so. Fourth, why did the defendants' experts' performance in the witness box tip the scales? The judgment does not tell us.

Referring back to the passage quoted from Bingham L.J. in Eckersley v. Binnie, 18 Con.L.R. 1, 77-78, it seems to us that the judge's preference for the defendants' expert, which was decisive, should have enabled him to give his reasons in the form of the "coherent reasoned rebuttal" therein referred to.

Accordingly, in our judgment, this judge was under a duty to give reasons and did not do so. Without such reasons, his judgment is not transparent, and we cannot know whether the judge had adequate or inadequate reasons for the conclusion he reached."

94. In the result the Court of Appeal decided that they had no option but to order a new trial.

95. As is apparent from *Flannery*, and as one would expect, the extent of the duty to give reasons is case sensitive. What is however clear is that judges are under a duty to give reasons for their decisions, so that the parties can understand why they have won or lost, and so that an appeal court called upon to consider the relevant decision can understand the basis on which the decision was reached.

96. In the present case there was, for the reasons which we have already explained, a critical gap in the reasoning of the Judge. The Judge did not explain how the reasoning set out in [FTT77-83] caused the Judge to conclude that the Strike Out Application should be refused. Such reasoning cannot be found in [FTT77-83] or elsewhere in the Decision. This was, in turn, the consequence of the Judge's failure to engage with HMRC's case on the Strike Out Application.

97. We do not regard it as necessary or appropriate to go into the question of how much the Judge would have needed to say in order to fill this critical gap in his reasoning. Conceivably, the Judge might have given his reasons quite shortly, bearing in mind what he said in [FTT77]. We agree with Mr. Carey that it was not necessary or appropriate to go into the evidence in detail. Such a process was not appropriate to an application under Rule 8(3)(c) and, if such a process was required, that might have been a good reason for concluding that the case was unsuitable for summary judgment. This is however speculation on our part. The relevant point is that the required reasoning, whether it should have been short or long, is missing from the Decision.

98. We therefore accept the submission of Mr. Carey that, applying the guidance given in *Flannery*, the present case is one where the Judge, with due respect, failed to give adequate reasons for his decision to refuse the Strike Out Application. We therefore accept the third ground of appeal. The consequence of this is that the Judge did make an error of law. It seems to us that the failure to give reasons must have the consequence that the Decision, so far as it refused the Strike Out Application, falls to be set aside.

Given the critical gap in the reasoning, we do not see how the Decision, so far as it refused the Strike Out Application, can stand.

Should the Decision be set aside?

99. For the reasons which we have given we conclude that the Judge made errors of law in the Decision which have the consequence that the Decision cannot stand. Accordingly, and in the exercise of our jurisdiction under Section 12(2)(a) of the Act, we conclude that the Decision should be set aside.

Remission or re-making of the Decision?

100. Following our decision to set aside the Decision, we are required to decide, pursuant to Section 12(2)(b) of the Act, whether we should remit the case to the FTT with directions for its reconsideration, or re-make the Decision for ourselves.

101. We raised this question (remission or re-making) with counsel, on a hypothetical basis, at the hearing of the appeal. The question was of course hypothetical because we had not then made our decision on whether the Decision should be set aside.

102. On the same hypothetical basis Mr. Carey submitted that we could and should re-make the Decision for ourselves, and decide the Strike Out Application. If, contrary to that submission, we decided to remit the case, Mr. Carey contended that we should remit the case for reconsideration of the Strike Out Application before a different judge of the FTT.

103. On the same hypothetical basis Mr. Brown submitted that we were not in a position to re-make the Decision for ourselves, given the quantity of material which required to be considered in the Strike Out Application. As such, Mr. Brown submitted that remission was the right course, and that there was no reason why the case should not return to the Judge for reconsideration.

104. These submissions were made without reference to any guidance in the authorities. Subsequent to the hearing of the appeal however, and at our request, Mr. Carey and Mr. Brown helpfully provided us with the reports of three cases in which questions relating to remission were considered.

105. Starting with the question of whether we should remit the case or re-make the Decision for ourselves, two of the cases to which we were referred were principally concerned with the question of whether remission should be to the same decision-making body or a different decision-making body. In the third case however the question of whether there should be remission or re-making was addressed in more detail. The case in question is the decision of the Upper Tribunal in *Synectiv Limited v HMRC* [2017] UKUT 99 (TCC) (Mrs Justice Whipple and Judge Roger Berner). In this case the Upper Tribunal allowed the appeal of the taxpayer against the dismissal, by the FTT, of the taxpayer's appeal against the denial by HMRC of a claim for the deduction of input tax, on the basis of a finding that the taxpayer should have known that the relevant transactions were connected with the fraudulent evasion of VAT. The case involved transactions in mobile phones in circumstances involving MTIC fraud.

106. Having decided to set aside part of the decision of the FTT, on the question of what the taxpayer should have known in that case, the Upper Tribunal then turned to the question

of whether they should remit the case or re-make the decision. The Upper Tribunal identified the essential question to be answered in this context in the following terms, at [46]:

> *"46. We have considered carefully, with the benefit of the parties' submissions, whether we are ourselves in a position to re-make the decision we have set aside. There are obvious disadvantages in terms of cost and further delay in remitting the case, but the real question is whether we are satisfied that it would be in the interests of justice for us to re-make the decision or whether justice would better be served by remitting the case."*

107. It is important to note that, in contrast to the present case, *Synectiv* was a case where the Upper Tribunal was setting aside part of a decision of the FTT, where that decision had been made after a full trial of the taxpayer's appeal to the FTT, with oral evidence and with the trial occupying some 9 days in all, with written closing submissions. In these circumstances it is perhaps not surprising that the Upper Tribunal did not consider that they were able to re-make the decision of the FTT. As the Upper Tribunal explained, at [47] and [48].

> *"47. It was urged upon us by Mr Farrell that the question to be determined required objective consideration of the circumstances of the various transactions as to which there was no material dispute as to the primary facts. The question was one of inference, which this Tribunal was equally placed to address as the FTT, especially if, as Mr Farrell submitted should in that event be the case, the matter was referred back not to the original FTT but to a new tribunal.*
>
> *48. We regret that we cannot agree with Mr Farrell. We accept that the question to be addressed is an objective one, but it is nonetheless one that depends on an evaluation of the evidence, an important part of which was given orally, and which we have not heard. The credibility of the evidence of Mr Chandoo was, as the FTT itself acknowledged at [134], a necessary element of the required determination. A review of the closing submissions made by both parties shows that both of them seek support for aspects of their respective cases, in particular the issue whether the trading environment was, or the trades themselves were, "too good to be true", from the evidence given by the witnesses, in particular Mr Chandoo and Mr Taylor. We do not consider a proper evaluation of that evidence, or the submissions which are based on it, is possible without having heard the evidence."*

108. In the present case we are not setting aside a decision made following a trial of the Second Appeal, but only a decision made on an interim application, at a hearing lasting less than a day. On this basis Mr. Carey submitted that we were well able to consider the Strike Out Application for ourselves.

109. The problem with this submission was, and remains that the material before the Judge at the FTT Hearing was extensive. In his decision refusing permission to appeal the Judge referred to a hearing bundle which he described as comprising over 1000 pages, including all the witness statements filed in the Second Appeal, and their exhibits. We do not consider that we are in any position to give a decision on this material, which we were not required to master, and did not need to master for the purposes of hearing the Strike Out Appeal.

110. This difficulty is not avoided by the fact that it is now only Issue (4) which is in dispute between the parties. As we understand the position, and as the Judge correctly anticipated in the Decision, the real issue in the present case is and, it would appear, always has been Issue (4). We would not therefore expect any great reduction in the material required to be considered in the Strike Out Application, simply because Issues (1), (2), and (3) have now gone.

111. When we pointed out this difficulty to Mr. Carey, his response was that we could rely on the Judge's summary of the evidence in the case, at [FTT 36-47], and did not need to delve further into the evidence in the case, either in the witness statements or the documents. We do not regard this as a viable way to proceed. The summary of evidence is, as we have already observed, a very helpful summary. It was however clearly not intended as, and is not a statement of all the evidence which would need to be considered on a substantive hearing of the Strike Out Application. Indeed, this was clear from Mr. Carey's own submissions, where they extended into the substance of the Strike Out Application. As we have already recorded, Mr. Carey explained that, in relation to Issue (4), HMRC relied upon 13 factors from which, so he contended, one could safely conclude that Tasca had or should have had the required knowledge to justify the denial of the relevant input tax. We do not know what all of those 13 factors are, nor are they outlined either in the Decision, nor were they itemised in the submissions of Mr. Carey. We say none of this in criticism of the Decision or Mr. Carey's submissions. Our point is that reference to these 13 factors seems to us to bring out the fact that we, in this Tribunal, are not in a position to re-make the Decision, so far as the Decision refused the Strike Out Application.

112. We have, as in *Synectiv*, considered carefully, with the benefit of the submissions of the parties, whether we are in a position to re-make the decision (which we have set aside) to refuse the Strike Out Application. As in *Synectiv* we can see the disadvantages of cost and further delay, if the case is remitted. We are however satisfied that it would not be in the interests of justice for us to attempt to re-make the Decision. Indeed, and as we have explained, we do not consider that we are in any position to do so. We therefore conclude that the correct course is for us to remit the case (here meaning the Strike Out Application) to the FTT, for re-consideration by the FTT.

113. Having decided to remit the case under subsection (2)(b)(i) of Section 12 of the Act, we must consider subsection (3) of that section, which is in these terms:

> *"(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—*
>
> *(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;*
>
> *(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal."*

114. Nothing more is said in that section about the principle governing the exercise of the power conferred by that subsection. However, the Court of Appeal has considered this issue in *HCA International Ltd v Competition and Markets Authority* [2015] EWCA Civ 492.

115. That case concerned an investigation by the Competition and Markets Authority (CMA) into the supply of privately funded healthcare services. The applicant applied under Section 179(1) of the Enterprise Act 2002 (the 2002 Act) to the Competition Appeal Tribunal (CAT) for a review of decisions made by the inquiry group of the CMA which had conducted the investigation. As the Court of Appeal noted at [44] of its decision, where the CAT quashes the whole or part of a decision, Section 179(5)(b) of the 2002 Act confers a power on the CAT to refer the matter back to the original decision-maker for reconsideration. The reference to the original decision-maker was, however, a reference to the CMA itself, and, accordingly, there was, despite the language used, no presumption in the section that the decision had to be referred back to the same inquiry group within the CMA.

116. The Court of Appeal considered an appeal against a refusal by the CMA to refer decisions that it had quashed to a different inquiry group. In his judgment (with which the other members of the Court of Appeal agreed) Vos LJ (as he then was) noted at [66] that, in cases where a decision is quashed, the relevant principle for remission was unlikely to differ as between remission to an administrative body and remission to a tribunal. As to that principle, Vos LJ said this at [68] to [71]:

> *"68 The principle as it seems to me must be that remission will be made to the same decision-maker unless that would cause reasonably perceived unfairness to the affected parties or would damage public confidence in the decision-making process. The basis on which the court will approach these two interlocking concepts of "reasonably perceived unfairness to the affected parties" and "damage to the public confidence in the decision making process" may depend heavily on the circumstances of the remission.*
>
> *69 A variety of factors will undoubtedly be relevant to the application of these principles. I would not want to limit those factors by setting out anything that could be regarded as an exhaustive list as the Employment Appeal Tribunal seems to have attempted to do in the Sinclair Roche case. There will be many different situations which cannot be predicted from a single case.*
>
> *70 It is, however, always the case that the presence of actual bias, apparent bias or confirmation bias would make remission to the original decision-maker undesirable, because any such bias would amount both to reasonably perceived unfairness to an affected party and potentially serious damage to public confidence in the decision-making process.*
>
> *71 It is important also to understand the kind of unfairness that is relevant to the question of whether the decision should be remitted to the original decision-maker. The unfairness concerned is such as contravenes the public law duty of fairness, not some abstract concept of unfairness based on a colloquial usage of that word. It is well-established that what fairness requires will vary with the factual circumstances ..."*

117. Although directed at a different statutory provision, we consider that this authority is binding on this Tribunal. As we note above, the Court of Appeal considered that a power impliedly existed in Section 179 of the 2002 Act to refer a decision back to a different decision-maker. Section 12(3) of the Act contains an explicit power to the

same effect. It is also clear from [66] of its judgment that the Court of Appeal was intending to lay down a principle of general application.

118. Applying this principle to this case, we consider that remitting the case to the Judge could reasonably be perceived to be unfair to HMRC. In dealing with the application for permission to appeal against his decision, the Judge reaffirmed his original decision in the clearest of terms. There is nothing necessarily surprising in that but the manner of his so doing does, in our view, create a real risk that the Judge *could* be perceived as having already made up his mind about the merits of the strike-out application. In particular, we note that in refusing the application for permission to appeal, the Judge referred at [16] of his decision to:

    (1) how Mr Carey had "conducted a whirlwind tour of the evidence";

    (2) how this was "exactly the sort of "mini-trial" of which Lord Hope and Lewison J disapproved" [our emphasis]; and

    (3) how the current case was "not the "simpler" type of case which Lord Hope envisaged, still less is it a simple point of law or construction of the kind referred to by Lewison J in Easyair Ltd".

119. We would wish to stress that we do not doubt at all the professionalism of a very experienced judge. The issue here is simply one of reasonable perception rather than reality. But we do consider that this factor outweighs any advantages from remitting the case to a judge already familiar with it.

120. We therefore conclude that the case should be remitted to the FTT, to be reconsidered by a different judge of the FTT to the Judge, such different judge to be chosen by the President of the Tax Chamber of the FTT.

Our decision

121. For the reasons which we have given:
    (1) We allow the Strike Out Appeal.
    (2) We set aside the Decision, so far as the Decision refused the Strike Out Application.
    (3) We remit the case (here meaning the Strike Out Application) to the FTT, to be reconsidered by a different judge of the FTT to the Judge, such different judge to be chosen by the President of the Tax Chamber of the FTT.

122. Subject to one exception, we do not regard it as necessary for us to give any further directions, in this Tribunal, for the reconsideration of the Strike Out Application. We assume that the Strike Out Application will simply need to be listed before a different judge in the FTT, with an appropriate time estimate.

123. The exception is that it does seem to us to be fair that both parties should be limited, at the reconsideration of the Strike Out Application, to the evidence upon which they relied at the FTT Hearing (the hearing of the Strike Out Application), unless permission is obtained from the FTT to adduce further evidence for the reconsideration of the Strike Out Application. We do not consider it right to shut the parties out completely from adducing further evidence, assuming that they should wish to do so, but the starting position will be that such further evidence is not permitted unless the FTT can be

persuaded to grant permission for such further evidence. We therefore include a direction to this effect in our decision.

Signed on original

MR JUSTICE EDWIN JOHNSON
JUDGE ANDREW SCOTT

RELEASE DATE: 18 March 2022