UT Neutral citation number: **[2026] UKUT 00130 (TCC)**

UT (Tax & Chancery) Case Number: UT/2024/000109

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4

Heard on: 16 December 2025
Judgment date: 19 March 2026

PROCEDURE – case management decision - directions requiring additional evidence from witnesses and further and better particulars - witness summonses of its own initiative – FTT's jurisdiction to make the directions – proper exercise of case management discretion – appeal allowed

Before

JUDGE RUPERT JONES
JUDGE NICHOLAS PAINES KC

Between

L ROWLAND & CO (RETAIL) LIMITED
("Rowlands")

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Jonathan Bremner KC instructed by Fieldfisher LLP

For the Respondents: Adam Tolley KC and Colm Kelly, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This appeal is against a case management decision of the First-tier Tribunal ("FTT") dated 6 June 2024 ("the Decision") relating to a substantive appeal (Appeal reference: TC/2022/12708) by the Appellant (L Rowland & Co (Retail) Ltd). Amongst other matters addressed in its Decision, the FTT directed that ("the Directions"):
    i) each party name five locum pharmacists as witnesses so as to form a sample of ten additional witnesses whose evidence would be adduced in the substantive appeal, and if the Appellant advised that witness summonses were required, then the Tribunal would issue witness summonses and, if no witness statements were provided, their evidence in chief would be elicited at a preliminary hearing; and
    ii) thereafter HMRC were required to provide further and better particulars of their case on a central issue in the substantive litigation - whether a relationship of employment existed between each locum pharmacist and the Appellant in all the relevant circumstances.

2. The full terms of the Directions are at [25] and [26] below.

3. The Appellant (or "Rowlands"), was granted permission to appeal the Decision to the Upper Tribunal ("UT") on two grounds of appeal that the FTT erred in law in making the Directions because:

    (1) The FTT had no jurisdiction to require a party to call evidence from a particular witness ("Ground 1"). It is argued that the Decision contravenes the principle of party autonomy.
    (2) Even if the FTT had jurisdiction to make such Directions, the Directions the FTT issued are vitiated by errors of law in the exercise of that discretion. As a result, the FTT Decision is contrary to the overriding objective and outside the boundaries of any reasonable case management decision ("Ground 2").

4. HMRC submit that the FTT made no material errors of law in making the Decision or Directions and the appeal should be dismissed.

5. We are very grateful to Mr Bremner KC who appeared for the Appellant and Mr Tolley KC and Mr Kelly who appeared for HMRC.

Background

6. References in square brackets [] are to paragraphs in the Decision unless otherwise stated.

7. The Appellant's substantive appeal to the FTT challenges decisions of HMRC to issue it: (1) assessments under Regulation 80, Income Tax (Pay As You Earn) Regulations 2003 (for income tax) for 2015/16 ("Regulation 80 Determination"); and Section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 (for National Insurance Contributions ("NIC")) ("Section 8 Decision"); (2) both a Regulation 80 Determination and a Section 8 Decision for 2016/17; and (3) a Regulation 80

Determination for 2017/18. Some £16 million is in dispute in the years 2015/16 to 2017/18 ("the Relevant Period") alone (with a further £12 million at issue in subsequent tax years which are standing behind).

8. The appeal concerns the Appellant's engagement of approximately 1,400 locum pharmacists in the Relevant Period. The issue in the litigation is whether locum pharmacists ("Locums") engaged by Rowlands were self-employed for tax purposes (as Rowlands contends) or whether they were employees (as HMRC contends) (see [2]).

9. A Regulation 80 Determination is required (inter alia) to be made by HMRC *"to the best of their judgment"* (regulation 80(2) Income Tax (Pay As You Earn) Regulations 2003). A Section 8 Decision is required (inter alia) to be made by an officer *"to the best of his information and belief"* (regulation 3(1)(a) of The Social Security Contributions (Decisions and Appeals) Regulations 1999).

10. In the Relevant Period, HMRC had a section in its Employment Status Manual dedicated to the employment status for tax of Locums (ESM4270 – Particular occupations: locum pharmacists) (the "Guidance"). Rowlands submits that it complied with that Guidance and expected the Locums to be treated as self-employed for tax purposes (under the Guidance and applying general tax law principles). The Guidance stated:

> *"Where the locum is:*
>
> - *engaged on a sessional or daily basis, and*
> - *performs only the statutory requirements of a pharmacist's job, which is essentially dispensing and supervision of the sale of `pharmacy only' medicines, and advising on medicines for the treatment of common ailments*
>
> *the engagement is likely to amount to self-employment."*

11. The Guidance was withdrawn by HMRC with effect from 30 June 2023. In its substantive appeal to the FTT, Rowlands argues that the Locums are to be treated as self-employed for tax purposes as a matter of law.

12. In their Statement of Case ("RSOC") replying to the Appellant's grounds of appeal ("GoA"), HMRC indicated that they had chosen to structure their pleading by reference to the three-stage test set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*Ready Mixed Concrete*" or "*RMC*") (RSOC/69).

13. The *"third stage"* of the *RMC* test ("RMC3") is a multifactorial enquiry into all relevant circumstances to determine whether a relationship of employment exists. It is to be addressed following the enquiry into mutuality of obligation between the Appellant and Locums (stage 1 of *RMC*) and the degree of control the Appellant was entitled to exercise in its engagement of the Locums (stage 2 of *RMC*). Stage 3 is an essential part of the enquiry into whether a relationship of employment exists and, particularly following the judgment of the Supreme Court in *Professional Game Match Officials Ltd v HMRC* [2024] UKSC 29, [2024] STC 1682 (delivered after the Decision), is one of the key sub-issues in the substantive litigation.

14. HMRC set out their case on the first two limbs of the *RMC* test (mutuality of obligation

and control) submitting that the engagement of Locums by the Appellant satisfies both limbs and is consistent with employment. However, HMRC's position at RSOC/105 was that *"HMRC cannot presently plead a detailed case on the third stage of the Ready Mixed Concrete test"*. Rather, HMRC purported to *"reserve the right to seek permission to amend the GoA* (sic: this is presumably intended to refer to HMRC's Statement of Case) *following disclosure (including any specific disclosure that is required) and/or service of the Appellant's witness statements"* (RSOC/105).

The FTT Decision

15. At a case management hearing ("CMH") on 14 May 2024, the FTT had before it a number of applications from both parties made on and dated 25 April 2024. There were two applications relevant to this appeal. The first was an application by the Appellant for HMRC to provide further and better particulars of their case on RMC3.

16. The second was HMRC's application for a direction for the adoption of a sample case approach to the evidence such that (inter alia):

> *"Each party will select 6 Locum Pharmacists, to create a total of 12, all of whom will then be called by the Appellant as witnesses of fact with suitable directions as to the service of further witness statements to be agreed by the parties and notified to the Tribunal within a further 14 days after the agreement of the representative sample."* [Emphasis added]

17. We were provided with a transcript of the CMH before the FTT. During the hearing the FTT gave an oral decision on HMRC's application for additional witnesses and communicated its decision at the CMH (Transcript/73/19). The FTT stated the following (Transcript/74/9-24):

> "On the additional witness statements, I am actually going rule 16 at this point because the Tribunal can of its own volition order witness statements. In that context, rather than ordering the witness statements to be from one side or the other it is the Tribunal requesting those witness statements in this context under rule 16, on the grounds that, doing this for the benefit of the panel, I think at that point it should be the Tribunal requesting them rather than specifically one side or the other. I also think that might be helpful to the locums if it is clearer to them that it is the panel requesting their evidence rather than specifically one or the other party requesting it."

18. There was then a discussion about that decision: see (Transcript/73/20 – 79/13). The Appellant requested written reasons for the oral decision.

19. Following the conclusion of the hearing the FTT produced its written Decision on 6 June 2024 which included the Directions and reasons in support. It is the written Decision, and not the oral ruling, that is the subject of the appeal to the UT.

20. The material background to the substantive appeal includes the following. During the inquiry stage, HMRC had proposed to interview and obtain documents from some of the Locums. In response, the Appellant indicated it would bring judicial review proceedings, including an application for an interim injunction, on the basis that (in summary) HMRC's proposed approach was unlawful and an abuse of power. Although HMRC did not accept that the Appellant was right about this, in the event HMRC did not proceed with any such interviewing or document-gathering exercises in respect of the Locums. The relevance of this for present purposes is that the case management of the appeal had to be undertaken on the basis that HMRC had not at the inquiry stage

obtained such material. HMRC submit that it was for this reason that they were (and remain) unable to plead individualised particulars of their case on RMC3 in respect of specific Locums[1]. In addition, prior to the CMH the parties had attempted to reach a consensus whereby the Appellant would agree to call a sample of Locums as its witnesses in the appeal, but after initially appearing willing, the Appellant did not consent to such.

21. A dispute therefore arose in relation to both of the applications at the CMH, namely whether the FTT could reach any meaningful conclusion as to the employment status of the 1,400 Locums in circumstances where the Appellant had served witness statements from only two such persons. It is (and was at the time of the CMH) an important premise of HMRC's position that the determination of employment status involves an individualised assessment.

22. As the FTT Decision recorded at [4], *"HMRC did not dispute that they would provide a more detailed case on this point but applied for additional locum pharmacist witnesses to be called, to provide their witness statements before HMRC provided such detailed case."*

23. The FTT addressed this issue and gave reasons at [14]-[17]

"14. Fairly obviously, it will not be practical for the Tribunal to decide the employment status of each of the locum pharmacists engaged by the appellants over the years on an individual basis. However, the witness statements provided by the appellant have been given by two locum pharmacists and six employees of the appellant. The appellant's own correspondence refers to the "wide variety of backgrounds, circumstances and working patterns of locums" (email of 21 July 2023).

15. Given the task that will be before the panel at the substantive hearing, and considering the case law as to how that task is to be approached, I do not consider that it is sufficient only two locum pharmacists to be called in circumstances where the appellant agrees that their engagements are of a "wide variety". Whilst it is for the appellant to decide how to discharge their evidential burden, the complexity of the issues here is such that I do not consider that the panel would be able to deal with the case fairly and justly with such limited locum evidence in accordance with Rule 2.

16. The Tribunal can require that a specific person provide documents and information to the Tribunal (Rule 5(2)(d)[2] and Rule 16 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). The Tribunal Rules also require that parties assist the Tribunal to further the overriding objective (Rule 2(4)).

17. At this stage, no specific potential witnesses have been agreed, although HMRC have apparently identified six potential locum witnesses. The Tribunal therefore cannot issue witness summons under Rule 16 at this stage."

The disputed Directions

24. By its Decision, the FTT made the two Directions which are the subject of challenge.

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1 In an attempt to assist the UT, HMRC have produced two "Example Statements of Case" in relation to each of Mr Munday [**SB/48**] and Ms Cohen [**SB/40**] – subject to the premises articulated at ⁋⁋ 6-8 of each such document.

2 This should read Rule 5(3)(d).

25. First, it directed the provision of ten additional locums as witnesses, a procedure close to that which HMRC had sought, ruling at [18]-[19] that:

> "DIRECTION
> 18. The parties are therefore each DIRECTED TO provide the Tribunal with details of five further locum witnesses (that is, a total of ten locum witnesses), so that the total number of locum witnesses at the hearing shall be twelve including the two who have already provided witness statements. This information shall be provided within eight weeks of the date of this decision. The appellant should advise whether or not witness summons will be required under Rule 16 in respect of these additional witnesses; the Tribunal will issue such summons if necessary. [Emphasis added.]
>
> 19. It would assist the Tribunal if each of these further ten locum witnesses would provide a witness statement, such statement to be provided within twelve weeks after the date of this decision. If a witness is not prepared to provide a witness statement voluntarily, the Tribunal will list one or more preliminary hearings for such witnesses to be examined in chief (noting the Tribunal powers in Rule 15 and Rule 16)."

26. Second, the FTT further directed that HMRC would be required to *"provide further and better particulars of their case in respect of the third stage of the Ready Mixed Concrete test within twenty eight days of the date on which all of the witness evidence directed above is available to HMRC"* [20]. It stated at [20]-[21]:

> *"Timing of further and better particulars*
> 20. Given the overriding objective, and noting that HMRC contend that they are only able to provide a generic case in respect of the third stage of the Ready Mixed Concrete test before the additional witness evidence is available, I DIRECT THAT HMRC provide further and better particulars of their case in respect of the third stage of the Ready Mixed Concrete test within twenty eight days of the date on which all of the witness evidence directed above is available to HMRC. That date will obviously depend on whether or not the witnesses provide statements or are required to attend a preliminary hearing to give evidence in chief.
>
> 21. On balance, I do not consider that there is anything to be achieved by requiring a generic case to be provided, as it would then seem inevitable that an application would be made to amend that case after the witness evidence is provided. The generic case is unlikely to provide any significant assistance in formulating witness evidence; the test and case law in respect of that test is well known."

27. Thus, the FTT directed that additional witness evidence must be made available before HMRC were required to provide any particulars of their case on *RMC* Stage 3. There were already eight witnesses on behalf of Rowlands giving evidence relevant to the determination of the employment status issue, but only two were Locums. The effect of the Decision was that there should be a 500% increase of the Locum subset (from two to twelve) before any prior clarification of HMRC's case on RMC3.

28. In summary, the FTT:

    (1) decided that it was not sufficient for there to be evidence from only two Locums;

    (2) gave directions for a process which the parties would identify ten further relevant Locums;

    (3) enabled the Appellant, if it wished to do so, to prepare witness statements and call those Locums as its witnesses;

(4) but, if the Appellant did not wish to do so, the FTT would issue witness summonses to require the ten Locums in question to appear at one or more preliminary hearings to be examined in chief by the FTT;

(5) considered that there was no useful purpose to be served in requiring HMRC to give generic particulars of their case in respect of the RMC3 analysis; and

(6) directed that HMRC should give specific particulars of that case once the evidence in chief of all of the additional Locums was available to HMRC.

The appeal to the UT

29. The Appellant applied to the FTT for permission to appeal against the Decision on the grounds that (1) "the Tribunal has no power to make directions requiring a party to call a witness that it does not wish to call", with the consequence that the directions were outside the FTT's jurisdiction; and (2) that "the procedure which the tribunal has imposed is contrary to the fair and just disposal of the proceedings and is contrary to the over-riding objective". In support of ground (2) it was argued that Rowlands had a right to be informed of the case it must meet and that HMRC's pleaded case would necessarily affect the decisions that Rowlands must take as to what witness evidence to call. It was also argued that the Decision was unclear as to which party the additional witnesses would be giving evidence for.

30. Permission was refused by the FTT judge. In response to ground (1) the judge did not advert to Rowlands' characterisation of the Decision but referred to the tribunal's power under Rule 5(3)(d) to require a party to provide documents and information. Mr Bremner relies on this as supporting his argument that the FTT intended to require Rowlands to call the witnesses.

31. In response to ground 2 the tribunal referred to paragraphs 15 and 21 of the Decision, which we have set out above.

32. Permission to appeal in respect of both grounds set out in the application was given by Upper Tribunal Judge Brannan.

33. In their respondents' notice HMRC took issue with Rowlands' interpretation of the Decision, submitting that the decision envisaged the use of the FTT's power to issue witness summonses of its own initiative. In reply, Rowlands argued that even if, contrary to their primary case, the tribunal purported to require the attendance of the witnesses as witnesses of the tribunal, the direction was still erroneous in law since "it is for the parties to decide what evidence to call to discharge their burden of proof" (paragraph 5); paragraphs 7 to 9 of Rowlands' reply went on to say that the conclusion that the case could not be decided fairly and justly on the basis of evidence from two Locums was erroneous in law, relying on dicta in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 to the effect that the employment relationship was contractual in nature and to be judged by reference to circumstances known to both parties to the contract.

34. In response to this, HMRC wrote to Rowlands arguing that paragraphs 5 and 7 to 9 raised new grounds of appeal for which permission had not been sought and asked whether Rowlands would be seeking permission to raise these grounds. Rowlands then made an application to the Upper Tribunal seeking a direction that the points raised in those paragraphs were within the ambit of the existing permitted grounds of appeal, or alternatively permission to amend the GoA to include them.

35. We decided to hear all the arguments *de bene esse* and to give a decision on the application within this decision. Our decision on the application is to allow the arguments to be raised. There was no prejudice in so doing because both parties were able to address the arguments in substance and they were pure points of law. We have decided that the argument in paragraph 5 of the reply succeeds.

The Law

FTT Procedural Rules

36. The FTT considered at [15]-[16] that its power to direct the parties to provide the information identified in [18]-[19] derived from Rules 2, 5(3)(d)[3] and 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) 2009 (SI 2009/273) (the "FTT Rules").

37. Those provisions read as follows:

> **Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.
>
> **Case management powers**
>
> 5. – …
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …

[3] There is a typographical error in [16], which erroneously refers to rule 5(2)(d); there is no such rule.

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

…

Summoning or citation of witnesses and orders to answer questions or produce documents

16.—(1) On the application of a party or on its own initiative, the Tribunal may—

(a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

…

(4) A person who receives a summons, citation or order may apply to the Upper Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued.

…

(emphasis supplied)

38. Rule 15(1) also provides relevantly:

Evidence and submissions

15.—(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or

(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

…

Case-law

39. It is helpful to set out some case-law on three matters: the approach to be taken on appeal from case management decisions, the freedom of parties to litigation to decide for themselves which witnesses to call, and the approach to issuing witness summonses of the tribunal's own initiative. That third body of case-law arises in the Upper Tribunal but is relevant to the approach to be taken in the FTT as well.

Approach to appeals against case management decisions

40. The first ground of appeal concerns the FTT's jurisdiction and the interpretation of the FTT Rules, and gives rise to a question of statutory construction. The substance of this point is addressed below, in relation to Ground 1. In relation to the second ground of appeal, by which the Appellant seeks to challenge the exercise of the FTT's discretion as a matter of case management, a very different approach applies.

41. In *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC), [2010] STC 763, the Upper Tribunal stated at [23] that it "*should exercise extreme caution in entertaining appeals on case management issues*" and observed at [24] that the general principle limiting appeals against case management decisions "*applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system*".

42. The underlying principles were collated and summarised in *HMRC v BPP Holdings Ltd* [2017] UKSC 55, [2017] 1 WLR 2945 ("*BPP Holdings*"), at [33]:

> "In the words of Lawrence Collins LJ in *Fattal v Walbrook Trustee (Jersey) Ltd* [2008] EWCA Civ 427, [2008] All ER (D) 109 (May), at [33]:
>
> > "[A]n 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."
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that it is unjustifiable."

43. More generally, the UT should adopt what has been termed a "*benevolent reading*" approach to the interpretation of FTT decisions: *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016 ("*Greenberg*"), [57]-[58]. In summary: such decisions must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical; what is out of sight in the language of the decision is not to be presumed to be out of mind; and where a tribunal has correctly stated legal principles, one should be slow to conclude that they have not been applied. Although the Court of Appeal's decision in *Greenberg* related to appeals from employment tribunals, the same approach has been held to apply to appeals from the FTT: *Exchequer Solutions Ltd v HMRC* [2024] UKUT 25 (TCC), [2024] STC 271, [63].

<u>Case law on party autonomy and the power to decide which witnesses to call</u>

44. In *QX v Secretary of State for the Home Department* [2022] EWCA Civ 1541, [2023] KB 472 the Court of Appeal made clear that in adversarial litigation there is no power for a party to be required to call as a witness a person whom that party does not wish to call. In that case, the Judge had ordered that (see [131]):

> *"The Defendant shall file and serve a witness statement from a person able to speak to the national security case. The maker of the statement should be available for cross-examination at the final hearing of the Claimant's review."*

45. The Court of Appeal overturned that order. Coulson LJ (with whom Laing and Nugee LJJ agreed), held at [133] that:

> *"The starting proposition must be this: in civil litigation, a court has no general*

power to order one party to call, as a witness on the substantive issues, a person whom that party does not wish to call. Party autonomy is paramount: see Zuckerman on Civil Procedure: Principles of Practice, 4th Edn., at 11.11. As Professor Zuckerman goes on to note at 11.12: "parties to a dispute are autonomous in procedure. They are free to choose whether to litigate, what to litigate and what evidence to call in support of their respective allegations". They are free to choose which evidence to include and which evidence to leave out. That is a decision with which the court cannot interfere, even if the evidence in question is regarded as significant: see Zuckerman at [11.15]."

46. As Coulson LJ went on to note at [135]:

> *"Thus, if a party to civil litigation does not wish to call X, the court cannot compel that party to do otherwise. That may have adverse consequences for the party in question, but that is a risk it has chosen to run in adversarial litigation."*

The Judge's order was thus *"contrary to general principle"* (see [140]).

47. The position where a party wishes evidence to be adduced from a witness that another party is not calling was explained by Coulson LJ as follows at [136]:

> *"If the other side considers that the evidence of X is crucial, it can issue a witness summons under CPR Part 34 and call X itself. Of course, that is not always a safe course because, in civil litigation, the party calling X cannot cross-examine him or her; his evidence would have to be adduced by way of examination-in-chief in the conventional way. It is for that reason that a party in a similar position to QX in this case does not regularly use Part 34 and will instead submit that, without the evidence of X, the other side's case must fail."*

48. This, of course, was not the position here: HMRC did not apply for witness summonses.

49. Different considerations also apply where a party has provided a witness statement from a particular individual but does not wish to tender him for cross-examination. Thus, as Coulson LJ further noted at [137]:

> *"An entirely different situation arises if a party has provided a witness statement from X but does not wish to tender him or her for cross-examination. In those circumstances, if the court considers that the evidence of X is important and cannot be dealt with satisfactorily other than by way of oral evidence, then (even in judicial review proceedings) the court will order that witness to be tendered for cross-examination: see R(PG) v London Borough of Ealing and Ors [2002] EWHC 250 (Admin) at [20]. That is, of course, a very different thing from ordering X to provide a witness statement in the first place."*

Case law on the UT issuing witness summonses of its own initiative

50. The UT may issue a witness summons on application by a party (and if granted, the witness would give evidence on behalf of that party), but it has the power to issue witness summonses of its own initiative (summoning witnesses on behalf of the Tribunal rather than either party). This is empowered pursuant to Rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (the "UT Rules") which is worded identically to Rule 16 of the FTT Rules. The following UT decisions

have made reference to both 'party applied' and 'own initiative' summonses which might be issued by the Tribunal:

(1) *Banque Havilland SA & others v FCA* [2024] UKUT 115 (TCC) ("*Banque Havilland 1*") [4], [115], where Judge Herrington concluded that the UT had the power to call a witness of its own volition "*without the consent of the parties*" (noting the significant plural), although he ultimately concluded on the facts that the power should not be exercised: [120]-[128].

(2) *Barclays plc & another v FCA* [2024] UKUT 214 (TCC) ("*Barclays*"), [43]-[48], where Judges Rupert Jones and Jonathan Cannan stated that the UT "*clearly has a discretion whether to issue a witness summons*" and that each case must be considered on its own merits. A potentially important factor will be whether the summons would be "*unfair and oppressive*".

(3) *Staley v FCA* [2024] UKUT 394 (TCC) ("*Staley*"), [36]-[38], where Judge Herrington reiterated the principles, including (referring to *Barclays*) that each case turns on its own facts and merits.

(4) *Banque Havilland & others v FCA* [2025] UKUT 197 (TCC) ("*Banque Havilland 2*"), where Judge Cannan summarised the applicable principles at [18]. He added, at [19], that where there is an objection to the summonsing of a witness, the relevant question is whether it would in all the circumstances be unfair and oppressive to require the witness to give evidence.

GROUND 1 – JURISDICTION TO MAKE THE DIRECTIONS

"The FTT had no jurisdiction to require a party to call evidence from a particular witness ("Ground 1"). It is argued that the Decision contravenes the principle of party autonomy."

The Appellant's submissions

51. Mr Bremner KC contended that the FTT had no power to require Rowlands to call further locum pharmacists as its witnesses: the Directions at [18-19] were directions which the FTT had no jurisdiction to make, and which were therefore erroneous in law.

52. He observed that the FTT had purported to make its Direction pursuant to rule 5 and rule 16 of the FTT Rules [16]. Similarly, in its refusal of permission to appeal Decision, the FTT purported to distinguish *QX* on the basis that *"The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 at Rule 5(2)(d) [sic] provide the Tribunal with the power to require a party or another person to provide documents and information"*.

53. Rule 5(1) specifies that *"Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure"*. Rule 5(3)(d) specifies that, in particular, and without restricting the general power at rule 5(1), the Tribunal may by direction: *"permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party"*.

[4] This is the only one of this line of cases which could in theory have been cited to the FTT, the UT's decision having been published on 8 May 2024 (the FTT hearing was on 14 May 2024).

54. Mr Bremner argued that, on its very terms, Rule 5(3)(d) does not confer jurisdiction on the FTT to require an Appellant to call a particular individual as a witness or to require that individual to provide a witness statement. What may be required is the provision of *"documents, information or submissions"*: that is an entirely different matter from requiring a party to call a particular individual as its witness. Neither Rule 5(3)(d) nor the general power vested in the FTT to regulate its own procedure undermine the fundamental principle of party autonomy. This, he said, is recognised by the FTT's own Practice Statement on Witness Summonses (*"Practice Statement for the First-Tier Tribunal (Tax Chamber): Witness Summonses and Orders to Produce Documents"* of 14 June 2022) at para 17, which records (correctly) that: *"The Tribunal has no power to require a summoned witness to prepare and serve a witness statement"*.

55. He contended that, just as the High Court has power under CPR r 32.1 to *"control the evidence"* by giving directions as to (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court, those powers do not permit the Court to require a party to call a particular individual as its witness (as can be seen from *QX*).

56. Mr Bremner submitted that FTT Rule 16 did not validate the Direction that was made in this case. The FTT has power to issue a witness summons on the application of a party or on its own initiative. But that is an entirely different matter to requiring a party to call a particular individual to give evidence as the witness of that party. Indeed, if a power of this nature could enable such requirements to be imposed, *QX* would have been decided differently. The High Court has power to summons witnesses (CPR r 34.2(1)). That power may be exercised by the High Court on application, or of its own initiative (CPR r 3.3(1)). However, as *QX* makes clear, the power to issue a witness summons does not give the power to require a party to call an individual to give evidence as its witness.

57. In short, he submitted, neither FTT Rule 5 nor Rule 16 (nor any other power vested in the FTT) entitles the FTT to require a party to call a particular individual to give evidence as its witness. Yet that is what the FTT did in this case. This was an error of law.

The nature of the directions in this case

58. Mr Bremner noted that HMRC had sought to defend the Directions issued by the FTT on the basis that the FTT did not in fact direct Rowlands to call additional witnesses. HMRC had not sought to argue in its Response that a direction requiring Rowlands to call individuals as its witnesses is within the FTT's jurisdiction.

59. He submitted that HMRC's attempt to defend the FTT's Decision on this basis was ill-founded: HMRC had misinterpreted the effect of the Decision. On any reasonable interpretation of the FTT's Directions it was Rowlands (the Appellant) that was being required to call ten additional witnesses (or, on any view, at least five additional witnesses).

60. Under the Directions at [18]-[19]:
    (1) It is the Appellant (Rowlands) which is (expressly at [18]) required to advise

whether or not witness summonses will be required under Rule 16 in respect of these additional witnesses. That is consistent only with the witnesses being witnesses called on behalf of Rowlands.

(2) The FTT has directed a procedure whereby the witnesses are to be *"examined in chief"*. However, the FTT has directed no procedure whereby those witnesses would be appearing as witnesses of the FTT or for HMRC to obtain statements from those witnesses. This is consistent only with Rowlands being required to call these individuals as its witnesses. Further, if the FTT were to be examining these witnesses itself, that would only reinforce the inappropriate nature of the directions in this case (see Ground 2).

61. Further, he found it noteworthy that, in its Decision refusing permission to appeal, the FTT did not say in response to Ground 1 (that the *"Tribunal has no power to make directions requiring a party to call a witness that it does not wish to call"*); that no such direction had been made. Instead, the FTT reasoned as follows:

> *"3. The Applicant appeals on two grounds:*
> *(1) Firstly, that the "Tribunal has no power to make directions requiring a party to call a witness that it does not wish to call".*
> *(a) the Applicant cites case law in respect of the Civil Procedure Rules but has apparently overlooked the fact that, as set out in paragraph 16 of the Decision, The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 at Rule 5(2)(d) [sic] provide the Tribunal with the power to require a party or another person to provide documents and information".*

62. Thus, Mr Bremner contends, the FTT did not say that it had not required Rowlands to call particular individuals as its witnesses. Rather, the FTT was of the view that that was what it was requiring Rowlands to do, but that such a direction was justified by rule 5(3)(d). However, rule 5(3)(d) does not justify the Direction that the FTT made.

63. Alternatively he submitted that, even if HMRC were correct in their interpretation of the Decision (that Rowlands is <u>not</u> being required to call additional witnesses) and the FTT had (silently) purported to require the attendance of these individuals to give evidence as witnesses <u>of the FTT</u>, such a direction would still be erroneous in law.

64. Mr Bremner argued that in adversarial proceedings such as these, it is for the parties to decide what evidence to call to discharge their burden of proof. Further, even if (which is not accepted) the FTT has the power to decide to call a witness for itself in a case such as this, such a power should be exercised only in the rarest of cases. As explained under Ground 2, there is no basis for the FTT to have made such a direction in this case. On the contrary, the Decision is contrary to the cards on the table approach to litigation and will create severe logistical problems.

65. He noted that in *Banque Havilland 1* this Tribunal decided, in the context of the exercise of its financial services jurisdiction, that it did have power to call a person to give evidence as a witness of the Tribunal. However, he argued, the nature of the FTT's role in tax litigation is different from that of the Upper Tribunal in financial services cases. In *Banque Havilland* Judge Herrington emphasised that he was dealing with *"regulatory proceedings"* [107], referring to authority (*Frensham v FCA* [2021] UKUT 222 (TCC) at [88]-[89], which he quoted at [107]) that *"regulatory proceedings of this*

kind do have important differences from the usual adversarial processes of civil litigation" and that:

> *"It will be sometimes necessary for the Tribunal to perform a more inquisitorial role. That follows from the fact that the Tribunal is part of the regulatory process and in many respects stands in the shoes of the Authority when considering the subject matter of references."*

In contrast, as the Upper Tribunal emphasised in *Frensham* at [89], *"In relation to a non-disciplinary reference, the powers of the Tribunal are more limited"* (being *"very similar in character to judicial review proceedings"*).

66. Mr Bremner submitted that in tax litigation, in contrast to financial services litigation, there is no question of the FTT *"stand[ing] in the shoes of"* HMRC. Rather, the nature of the proceedings is adversarial. This has long been the accepted position in the FTT (Tax Chamber). For example, in *Jumbogate Ltd v HMRC* [2015] UKFTT 64 (TCC), Judge Berner noted (in a decision on the papers, quoted at [17]):

> "4. […] It is not open to an appellant simply to take no part in the proceedings, and to expect the tribunal to undertake its own analysis. That, in effect, is expecting the tribunal to stand in the shoes of the appellant and to make out a case for the appellant before making a determination as between that case and the case put forward by the Respondents.
>
> 5. That is not the nature of these proceedings, which are of their nature adversarial. The tribunal's jurisdiction is to determine the appeal brought by the Appellant against the determination issued by the Respondents under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003. That is an adjudication of a dispute between two parties. In the absence of a case put by a party, the tribunal does not, and cannot, carry out its own investigation or any independent legal analysis in the way that a legal representative would do for a party."

67. He also relied on *HMRC v C Jenkin & Son Ltd* [2017] UKUT 239 (TC), where the Upper Tribunal held at [36] that:

> "We are persuaded of the correctness of the view of Carnwath J in *Elias Gale* (at p.76d) where he observed that the rules that govern appeals envisage an adversarial procedure, with the running made by the two parties (a view that he has maintained in the Supreme Court – see *Volkswagen Financial Services (UK) Ltd v HMRC* [2017] UKSC 26 at [7]). They do not provide for the tribunal to raise or investigate issues of its own motion".

68. Mr Bremner argued that while it may, for example, be appropriate for the FTT in tax litigation to ask its own questions of a witness called by a party or to assist a litigant in person, that is a world away from the Directions that the FTT has made in this case. Those Directions turn upside down the decisions that the parties have made as to the evidence that should be called. Even if (which is not accepted) an inquisitorial approach could be appropriate in this case, such an approach does not and cannot entitle a FTT of its own motion massively to expand the evidential scope of an appeal.

HMRC's submissions

69. Mr Tolley KC and Mr Kelly, for HMRC, submitted that the FTT did not exceed its jurisdiction in making the Directions; rather than directing Rowlands to call the witnesses, it was envisaging that the Tribunal would call them itself if Rowlands chose

not to do so. We accept these submissions and adopt them within our reasoning set out below.

Discussion and Analysis

What did the FTT direct?

70. There is a dispute as to the nature of the Direction made by the FTT at [18] of the Decision. We are satisfied that HMRC's interpretation of the Direction is correct and the FTT did not require the Appellant to call the additional Locum witnesses, nor that the witnesses be summonsed on its behalf as its witnesses. Rather, on a fair reading of the Direction, the FTT directed that if the Appellant chose not to call these witnesses voluntarily on its own behalf, the FTT would issue witness summonses of its own initiative, calling them as the FTT's witnesses.

71. In coming to this conclusion we take into account the nature of the applications made to the FTT. Neither party had applied to the FTT for witness summonses to call any person as a witness on their behalf. Indeed, this is unsurprising when HMRC was not applying for additional Locums to be witnesses on their own behalf but for the Appellant to call them. The nature of HMRC's application dated 24 April 2024 is recorded above at paragraph 16.

72. It is unclear whether the FTT's oral direction made at the hearing on 14 May 2024 was for the production of witness statements or witness summonses – on a literal reading of the passage at transcript page 74 identified at paragraph 17 above, the FTT repeatedly refers to requesting witness statements rather than issuing witness summonses. Furthermore, a fair reading of pages 73-79 of the transcript suggests the original proposal by the FTT was that it was requiring or requesting the production of witness statements. In any event, the passage of the transcript set out above indicates that the oral direction was made of the FTT's own volition rather than at the request of either party – i.e. the direction was to be made of its own initiative and that the witness statements were not to be produced on behalf of either party.

73. Mr Bremner's complaint may have had some force if the written direction had been in terms requiring witness statements. Rule 16 does not permit a witness summons to be issued in terms which require production of a witness statement (as the FTT Practice Direction also makes clear). It is a matter for a summonsed witness whether they wish to volunteer a statement in advance of giving evidence. The FTT recognised this at [19]. A summons issued under Rule 16 can only require attendance at a hearing and the answering of questions.

74. Rule 5(3)(d) cannot permit the FTT to compel a party to call as their witness to give oral evidence a person that they do not wish to call – this is addressed by Rule 16 and the principle in *QX*. In those circumstances it is unlikely the rule would nevertheless empower the FTT to compel a party to produce written evidence (such as a witness statement) from such a witness.

75. While Rule 5(3)(d) does empower the FTT to 'require a party or another person to provide documents, information or submissions', it does not refer to 'evidence'[5]. Rule 5(3)(d) and the title and body of Rule 16 only refer to the production of 'documents'. This is in contrast to Rule 15 which refers to 'evidence'. But Rule 15 was rightly not relied on in this case; it does not empower the FTT to direct that evidence should come from a particular witness.

76. In any event, it is the Directions made in writing on 4 June 2024 that are the subject of this appeal.

77. We accept that there is some ambiguity to the final sentences in [18] "*The appellant should advise whether or not witness summons will be required under Rule 16 in respect of these additional witnesses; the Tribunal will issue such summons if necessary*". On one view this may read as the FTT stating it will issue witnesses summonses on behalf of the Appellant if the witnesses will not volunteer to give evidence.

78. Nonetheless, we do not accept that the FTT was directing that the additional witnesses be summonsed as witnesses on behalf of the Appellant. Rather we are satisfied that the FTT was directing that the additional witnesses would be summonsed of its own initiative as its own witnesses.

79. As above, the Appellant had not applied to summons the additional witnesses itself and the Appellant objected to the process and hence to calling any further witnesses. Nor had HMRC applied for witness summonses to call them as their own witnesses. The FTT did not require the Appellant to advise whether it would be applying for witness summonses but whether summonses 'will be required'. Furthermore, the words stating that the FTT would issue summonses 'if necessary' rather than 'on application' suggest the Direction was proposing that the FTT would summons the additional witnesses of its own initiative if the Appellant would not volunteer them.

80. We are fortified in this view by the judge's references during the hearing on 14 May 2024, as recorded in the transcript excerpt set out at paragraph 17 above, to "the panel requesting" the evidence. The written Direction recognises that the Tribunal could only summons witnesses to give oral evidence, rather than to produce a witness statement, but does not suggest any change of view on whether the witnesses would be the Tribunal's or a party's.

81. Our interpretation is also consistent with the Direction at [19] that a preliminary hearing would be necessary for evidence (in-chief) to be elicited if witness statements were not produced. This would be less likely to be the procedure if a witness were to be summonsed on behalf of a party because the elicitation of all of their evidence, both evidence in chief and cross examination, might be expected to take place within the substantive hearing itself. Thereafter it was presumably anticipated that both parties would be able to cross examine the witnesses at the substantive hearing of the appeal.

[5] In contrast, Rule 5(3)(d) of the UT Rules does include 'evidence': "(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;" but it would be contrary to the rule in *QX* for the Tribunal to direct a party to adduce the evidence of a witness other than the party itself.

82. We therefore conclude that the Direction at [18] was that the FTT would summons the additional witnesses of its own initiative, as its own witnesses, if the Appellant would not volunteer them.

Did the FTT have jurisdiction to make the directions it did?

83. As the FTT correctly identified at [16], its power to direct the parties to provide the information identified in [18], the names of Locums as potential additional witnesses, derived from FTT Rule 5(3)(d)[6] and the power to issues summons witnesses of its own initiative derived from the FTT Rule 16. Those provisions are set out above.

84. Rule 5(3)(d) permits the FTT to direct that the parties provide information, which could include provision of the names of Locums as potential witnesses.

85. Rule 16 on its face gives the FTT the jurisdiction to call witnesses ("*... require any person to attend as a witness ...*") and to examine them in chief ("*order any person to answer any questions ... which relate to any issue in the proceedings*"). The power to grant a witness summons on the application of a party clearly contemplates the summonsed witness being called by the applying party. It follows that where the Tribunal issues a summons of its own initiative, the rule contemplates the Tribunal calling the summonsed witness.

86. In arguing that the FTT lacks the jurisdiction to call witnesses itself, the Appellant's submissions begin from the premise that proceedings before the FTT are adversarial, not inquisitorial. Mr Tolley KC made two points in respect of this submission with which we agree. First, this is the wrong approach to determining whether the FTT has the jurisdiction to call witnesses. Secondly, it is in any event an incomplete statement of the position in law.

87. As to the first point, the FTT is a creature of statute and its powers derive from a statutory instrument – the Rules, themselves made pursuant to section 22 and Schedule 5 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). Specifically, paragraph 6 of Schedule 5 TCEA 2007 provides that rules may make provision about the circumstances in which the FTT, or the UT, may exercise its powers of its own initiative. Paragraph 10 of Schedule 5 TCEA 2007 provides for rules about evidence, witnesses and attendance.

88. The starting point in the construction of any statute, or rules of procedure, is the language of the statute itself, interpreted in light of its purpose: *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690, at [14]. That is the nature of the exercise to be undertaken when determining the scope of the FTT's jurisdiction, rather than a more nebulous debate as to whether the nature of proceedings in the FTT is "adversarial" or "inquisitorial".

89. In determining whether to exercise the procedural discretion to call witnesses of its own initiative, it may be relevant for the FTT to consider whether and (if so) the extent to which it would be acting contrary to the wishes of both parties (or, albeit substantially less material, one party), but this factor cannot possibly be relevant to the question whether the relevant power exists in the first place. The applicable statutory provisions determine that question.

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[6]. There is a typographical error in [16], which erroneously refers to rule 5(2)(d); there is no such rule and it must mean 5(3)(d).

90. As indicated in the four financial services authorities set out above, the UT also has the power to call witnesses of its own initiative, pursuant to Rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (the "UT Rules").

91. The wording of Rule 16 of the UT Rules is materially identical to Rule 16 of the FTT Rules[7]. They both make the 'own initiative' power to issue witness summonses explicit. It follows, as a straightforward point of statutory construction, that those same clear words must also establish the FTT's jurisdiction to summon and call witnesses of its own initiative. There is no good reason why Rule 16 of the FTT Rules should be interpreted differently from, and more restrictively than, Rule 16 of the UT Rules. The UT's financial services jurisdiction to determine references often includes a full fact finding role as the FTT's jurisdiction does in tax appeals. The nuanced scope of the UT's jurisdiction in financial services references has no bearing on this interpretation.

92. In addition, the jurisdiction conferred by Rule 16 of the FTT Rules (in the same way as Rule 16 of the UT Rules) does not differ depending on whether the summons is issued following an application by a party or on the tribunal's own initiative. Put another way, the tribunal's power to summon and call witnesses itself is not inherently more restricted than a party's ability to achieve the same outcome by an application.

93. The Appellant sought to distinguish *Banque Havilland 1* on the basis that it is confined to the UT's jurisdiction in financial services cases. We reject this argument:

    (1) The reference in *Banque Havilland 1* (at [107]) to "*regulatory proceedings*" was in the context of dealing with submissions about the 'non-impeachment principle' (namely, a party cannot seek to impeach the credit of its own witness): see [100]-[106]. There was no suggestion that the power to summons witnesses of the Tribunal's own initiative arose only because of the regulatory nature of the proceedings.

    (2) None of the UT cases following *Banque Havilland 1* (*viz. Barclays, Staley* or *Banque Havilland 2*) suggests that there is any such limiting principle.

    (3) Returning to *Banque Havilland 1*, the UT went on to consider, at [109], "*the question as to how and in what circumstances the Tribunal should exercise its power to call a witness on its own initiative*." In that context, extensive reference was made, at [111]-[114], to *Kesse v Home Secretary* [2001] EWCA Civ 177 ("*Kesse*") in the context of an appeal to the Immigration Appeal Tribunal (under the formerly applicable Immigration Appeals (Procedure) Rules 1984).

    (4) At [115] in *Banque Havilland 1*, Judge Herrington specifically referred to the Court of Appeal's observations in *Kesse*, notwithstanding that the proceedings in issue in that case were not "regulatory" in character. Ultimately, the UT had specifically in mind, at [115], the "*clear words of Rule 16 of the* [UT] *Rules*" in concluding that the UT did have the power where necessary to call a witness of its own initiative.

94. As to the second point and the adversarial nature of proceedings in the FTT, the FTT's procedural approach was considered in *BPP Holdings*, where the Supreme Court stated at [23], while recognising that in matters of procedural jurisprudence the tribunals should pay close regard to the approach of the courts, that the procedural approach of

[7] The only difference being the references to "the Upper Tribunal" rather than "the Tribunal".

the tribunals may be different: "*... the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue*".

95. While the FTT's jurisdiction in determining tax appeals is generally adversarial, there are times when it is just, fair and proportionate to adopt a more inquisitorial approach. In *Volkswagen Financial Services (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 26, at [7] Lord Carnwath observed that:

> "One of the strengths of the new tribunal system is the flexibility of its procedures, which need to be and can be adapted to a wide range of types of case and of litigant. In some areas, particularly those involving litigants in person, a more inquisitorial role may be appropriate."

96. The flexibility of the FTT's procedures is enshrined in Rule 2(1), the overriding duty of justice and fairness, Rule 2(4) provides for the duty of the parties to cooperate with the FTT and Rule 5(1) provides that: "Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure." The FTT is familiar with adjusting its approach in practice.

97. Therefore, while there is an inquisitorial nature to some appeals before the FTT (Tax Chamber), the extent of the duty varies greatly between unrepresented litigants who may be unsophisticated, unfamiliar with tax or live with disabilities as opposed to global corporate litigants who are represented by large and expert legal teams. The extent of the duty all depends on the facts of any case and fairness is key. How much of an inquisitorial role the FTT should adopt is therefore also a matter of discretion and thus the threshold for interference by an appellate court or tribunal is high.

98. Another factor supporting the FTT adopting a more inquisitorial approach may arise from the well-established 'venerable principle of tax law', *viz.* "*there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest*": *HMRC v Tower MCashback LLP 1 and another* [2011] UKSC 19, [2011] 2 AC 457, [15]. In *Exchequer Solutions Ltd v HMRC* [2022] UKFTT 181 (TC), at [22]-[29], Judge Vos treated this principle as a factor to be taken into account in relation to the exercise of a procedural discretion (in that case, whether to grant permission to amend), albeit not decisive or supplanting an approach which is procedurally fair and in accordance with the overriding objective.

99. In the present case, we will consider in Ground 2 whether the FTT exercised its discretion properly notwithstanding that a relevant factor is taking steps to ensure that the tribunal has available to it the evidence necessary to determine the appeal fairly and justly.

100. In any event Ground 1 should be dismissed. The FTT made no material error of law on jurisdiction – it had the jurisdiction to make the Directions, as properly understood, that it made at [18] and [19] of the Decision. Whether, in doing so, it properly exercised its discretion is the subject of Ground 2.

GROUND 2 – DISCRETION TO MAKE THE DIRECTIONS

"The Decision undermines the fair and just disposal of the proceedings and is contrary to the overriding objective" ("Ground 2").

HMRC's argument

101. Mr Tolley KC, for HMRC, submitted that the FTT made no error of law in exercising its discretion to make the Directions (at [18] and [20]).

102. He argued that the essentially decisive point is that Ground 2 involves an unsound attempt to challenge a discretionary case management decision. He contended that the Appellant sought to present its complaints as though they involved errors of law or principle. Yet the Appellant's complaints fell well short of what would be required for the UT to interfere with a case management decision of the FTT.

103. He rejected each of the legal "principles" said by the Appellant to give rise to an error of law in the exercise of its discretion. He summarised the Appellant's contentions as follows:

    (1) The Directions are "*contrary to the cards on the table approach*".

    (2) HMRC have been permitted to call and cross-examine their own witnesses.

    (3) HMRC have been permitted to conduct a "*fishing expedition*".

    (4) There will be "*unnecessary delay and expense*".

    (5) There will be "*practical difficulties*" and the FTT was "*inappropriately being required to 'enter the arena'*".

104. Mr Tolley addressed each of these contentions in turn.

105. By way of overview, he submitted that in so far as these matters were raised in the FTT, they were considered by the Judge and, in so far as they were not, there is no conceivable basis for a complaint on appeal about the exercise of an evaluative judgment or discretion by way of case management.

Alleged breach of the 'cards on the table' approach

106. He argued that the short answer to this complaint of an error of law is that there is no question of any 'ambush' by HMRC; nor does the FTT Decision involve any other interference with principles of natural justice. The Appellant is well aware of the issues which arise in the appeal; the question is merely one of timing of the provision by HMRC of particulars of their case on the third stage of *RMC*. It is (obviously) neither sensible nor possible for HMRC to be ordered to give further and better particulars in relation to every single Locum. There was no worthwhile purpose to be served in ordering HMRC to produce a generic statement of case in relation to this topic. The FTT was well aware of these matters and so stated at [14]-[17] and [20]-[21].

107. Mr Tolley contended that the Appellant appears now to acknowledge that the application of the third stage of the *RMC* test requires an individual by individual approach, depending on the detailed facts of her or his case. Although this point was disputed by the Appellant at the CMH, the concession is obviously correct. In addressing the "*circumstance[s]… which [are] known, or could be reasonably be supposed to be known, to both parties*" (i.e. each individual Locum and the Appellant), in accordance with the approach stated in *HMRC v Atholl House Productions Ltd* [2022] ICR 1059, at [123], one needs to know the factual position in relation to the individual Locum in question. Mr Munday and Ms Cohen (the two Locums produced as witnesses by the Appellant), quite properly, give evidence only as to their specific circumstances. It is difficult to follow how, on the Appellant's case, any of its other witnesses is

supposed to be in a position to give evidence about the knowledge of any particular Locum. The FTT agreed with this point at [12]-[15].

108. He submitted that it was material in this context that the Locums were engaged by the Appellant on an assignment-by-assignment basis. It follows that, unlike a case in which there is only one relevant contract to consider, the relevant knowledge for the purpose of the application of the employment status test will, in the case of each Locum, incrementally increase from one assignment to the next. For example, in relation to a Locum who carries out 100 assignments over any period, the nature and extent of the parties' relevant knowledge will be materially different at the time of the 99th assignment from what it would have been at the time of first assignment.

109. He highlighted that in RSOC/105, HMRC have explained that they are unable presently to plead "*a <u>detailed</u> case*" (emphasis added). HMRC go on to explain why that is so – it is the fault of the Appellant who "*has frustrated HMRC's attempts to interview any of the Locum Pharmacists by threatening judicial review proceedings if HMRC were to do so*". HMRC specifically flagged that they reserved the right to seek permission to amend the statement of case following disclosure and/or service of the Appellant's witness statements. The Appellant now purports to complain of the consequences of its own actions. In any event, the FTT had to – and rightly did - proceed on the premise that HMRC did not in fact have available to it the materials that might have been obtained if not for the Appellant's threat to apply for an injunction. The Appellant did not then and does not now suggest that HMRC had those materials.

110. Mr Tolley submitted that it was incorrect for the Appellant to claim that "*HMRC has provided no details as to what its case is in relation to Stage 3 of the RMC test: Rowlands has simply been left to guess*". HMRC have addressed financial risk, the degree and extent of mutuality of obligation and the relative intensity of control, in so far as they are able, at paragraphs 107 to 109 of RSOC. Unless and until more information is provided by further witnesses, HMRC cannot particularise their case any further.

111. Illustrating that point, and in an attempt to assist the UT, HMRC had (without prejudice to their position that this was not required) prepared two 'example' statements of case, which incorporate HMRC's consolidated statement of case and address respectively the circumstances of Mr Munday and Ms Cohen in the context of the third stage of the *RMC* test. The Appellant purports to complain that these example statements of case "*simply recite certain facts drawn from the witness statement of each individual*". To this HMRC rhetorically respond, 'of course they do'; Mr Tolley argues that HMRC cannot do more. The Appellant has prevented that information being provided to HMRC during the inquiry stage; it will therefore have to emerge by way of the application of the FTT's procedures, and in particular from further witness evidence and disclosure. Neither tribunals nor courts make procedural orders that they know cannot be complied with.

112. Mr Tolley submitted that the Appellant also overstates its complaint in at least the following respects:

    (1) First, the Appellant states that it cannot know what evidence will be needed to address the third stage of the *RMC* test and which Locums to propose as witnesses. However, the Appellant knows perfectly well what matters are relevant to the third stage of the test i.e. the circumstances known, or which may reasonably be supposed to be known, to both parties. The factors which are

commonly relevant have been identified in any number of authorities and the Appellant has already addressed them in its grounds of appeal, in particular items (4) to (9) in paragraph 15 of the GoA. It has sought to address them in relation to the circumstances of each of Mr Munday and Ms Cohen. The Appellant also knows what approach to follow in identifying further witnesses i.e. those whose selection will achieve a sufficiently representative sample so that "*The parties will then use the determinations to agree the employment status of the remainder of the Locum Pharmacists*" (HMRC's application for directions).

(2) Secondly, the Appellant describes the sequencing of evidence as following pleadings as "*fundamental rules of procedure which are vital for the fair and just disposal of the proceedings*". In response Mr Tolley observed that it is a common feature of fairly conducted proceedings that pleadings may be amended (and re-amended) following the exchange of evidence, provided that the timing does not cause disruption to a trial.

(3) Thirdly, it is said that, although it is accepted that the FTT could not decide the employment status of every Locum, "*it does not follow that any sampling-type exercise was required, ...*". However, without a sampling approach, the Appellant must have in mind that the FTT should consider the circumstances of each and every Locum.

(4) Fourthly, it is contended by the Appellant at that it was "*impossible*" for the FTT to conclude that further Locum evidence was needed or that a sampling exercise was appropriate. This was an unreasonable submission.

Alleged "permission to call and cross-examine own witnesses"

113. Mr Tolley argued that this alleged error seems to amount to little more than a repetition of Ground 1. On the premise (contrary to Ground 1) that the FTT did not order the Appellant to call witnesses, but instead directed that the Appellant *could* call further witnesses and otherwise the Tribunal would do so, the complaint simply falls away. The contention that there was "*nothing to prevent*" HMRC from calling evidence from Locums seems to have overlooked the Appellant's threat to seek an interim injunction against HMRC's previous attempts to interview Locums, on the basis that it would amount to an abuse of power.

Alleged "fishing expedition"

114. He submitted that this alleged error formed only a minor part of the Appellant's submissions in the FTT. The allegation is obviously incorrect and was not accepted by the FTT. It appears that the Appellant, having succeeded by threats of litigation in deterring HMRC from interviewing Locums at the inquiry stage, now wishes to take advantage of that position to prevent the FTT from hearing any further Locum evidence than that which the Appellant wishes to provide. HMRC made clear, and continue to do so, that they do not wish to countenance an outcome whereby the product of significant Tribunal resource, and party time and cost, is a decision in two individual Locum cases, incapable of being usefully applied across the Locum population as a whole.

Alleged "unnecessary delay and expense"

115. Mr Tolley contended that this point self-evidently involves no error of law. Indeed, it is ironic that if the Directions had been complied with, and the Appellant had chosen to

cooperate, the evidence and particulars would all have been produced by September 2024. It seems odd that a significantly longer delay in the pursuit of the appeal, and its concomitant expense, is somehow more acceptable to the Appellant.

116. HMRC acknowledge that consideration of the evidence of additional witnesses will result in a longer hearing. Their estimate of the additional hearing time required, if the preliminary hearing envisaged in the Direction at [20] is necessary, is a week (on the basis of a half-day per additional Locum witness). However, the alternative is the unacceptably high risk of an ineffective outcome.

117. As the FTT stated, it will not be "*sufficient only [for] two locum pharmacists to be called in circumstances where the appellant agrees that their engagements are of a 'wide variety'*", as the FTT would not be "*able to deal with the case fairly and justly with such limited locum evidence…*" [15]. The Appellant's own position, recorded accurately in [14], was that the Locums have a "*wide variety of backgrounds, circumstances and working patterns*". The most that the Appellant can now argue by way of qualification is that "*There is no reason…to consider that the two locums who have been called to give evidence are (somehow) unrepresentative*". On HMRC's case, there is every reason so to consider, for neither Mr Munday nor Ms Cohen can comment on the circumstances of any other Locum, and none of the Appellant's other witnesses gives any evidence about the circumstances of any other Locum.

118. Mr Tolley rejected the Appellant's contention that there is "*a complete lack of clarity*" as to how the additional Locum witnesses would be treated. He submitted that there was not; the alleged practical difficulties are addressed below.

Alleged "practical difficulties" and "entering the arena"

119. Mr Tolley submitted that this does not give rise to any error of law and the Directions at [18]-[21] give rise to no practical difficulty.

120. Turning to the Direction at [18], if the Appellant called the additional Locum witnesses, the appeal would proceed conventionally. If, as appears likely to be the case, the Appellant will not do so, the FTT will summons the witnesses of its own initiative and examine the witnesses in chief at a preliminary hearing (see [19]). The relevant subject-matter (employment status) will be familiar to the FTT. The Judge will also be able to refer to the statements of Mr Munday and Ms Cohen as a form of precedent.

121. Once this exercise is complete, as per the Direction at [20], HMRC will give particulars of their case in respect of each of the additional Locums and the appeal will continue along orthodox lines. As to cross-examination of the additional Locums witnesses, one would expect such matters to be considered by the FTT at the final hearing. In principle, HMRC should be able to cross-examine the Locums in the usual way. If the Appellant sought permission to cross-examine, the FTT would have to deal with that application in light of the material procedural history.

122. None of this, he submitted, involves the transformation of the appeal into a form of inquisitorial exercise. Nor would it involve the FTT unduly 'entering the arena' (contrary to the Appellant's argument). The fundamental character of the proceedings will be unchanged:

(1) The proceedings will remain an appeal initiated by the Appellant.

(2) The FTT will continue, in the usual way, to determine the issues in dispute on the basis of the evidence and the submissions made by the parties.

(3) Subject (in the usual way) to any contested application for disclosure, the parties will continue to determine the documents on which they wish to rely.

(4) Applying the FTT's Direction at [18], it will remain the parties who determine the identity of the additional Locum witnesses who will be called.

Discussion and Analysis

123. We are conscious that we should proceed with caution before interfering with the FTT's exercise of discretion in making a case management decision. We can only do so if the high threshold set out at [33] of *BPP Holdings* is met. This includes application of incorrect principles in the exercise of the FTT's discretion.

124. We understand why the FTT was persuaded to make the two Directions that it did: the first provided at [18]-[19] of the Decision regarding the calling of additional witnesses; and the second at [20]-[21] regarding further and better particulars of HMRC's statement of case.

125. There was a background to the appeal in which the Appellant had refused to give HMRC access to Locums as witnesses and then indicated it would judicially review any approach to them by HMRC (as the FTT recorded at [6]). Thus HMRC argue they were prevented from investigating what the Locums might say, whether they had relevant evidence to give, and whether they would wish to call them as their own witnesses if their evidence was favourable to HMRC.

126. Thereafter it appears that the Appellant had initially consented to a collaborative approach by which it would agree with HMRC for a sample of Locums to be called as its witnesses at the substantive hearing of its appeal, but then changed its mind and opposed such a procedure.

127. We can also understand, for the reasons it explained at [14]-[17], why the FTT considered it would be just and fair in determining the appeal (see Rule 2(1)) to hear from a greater sample of Locum witnesses, given the potentially wide range of circumstances and fact patterns that the Appellant conceded applied to its engagement of around 1,400 Locums.

128. The FTT had the power to control the scope of the evidence it was to admit and hear so as to enable a just and fair hearing and determination of the appeal (see Rule 15). We appreciate that it was attempting to bring about cooperation between the parties and the FTT in determining the appeal (see Rule 2(4)(b)) given that they had not been able to agree whether or how to provide a sample of Locums that they could agree was representative for the purpose of determining the appeal.

129. The FTT was attempting to arrive at a procedure by which it received what it hoped would be a fair and representative sample of evidence to decide the appeal. While the FTT could not be sure that the sample would be fair or representative, delegating the choice of the sample to the parties meant that the FTT was not attempting to fashion its own evidential pool but merely to break through an impasse between the parties about the sample. It was entitled to agree with HMRC about the size of the sample. The FTT was intending to avoid descending into the arena by making the Directions – there was a dispute between the parties about the necessity for or scope of the sample of Locums to be provided which the FTT wished to determine in order to ensure a fair hearing in the absence of consensus.

130. Nonetheless, paying real respect to these factors and a first instance tribunal which was experienced and well-equipped with the powers to manage its own proceedings, we have reluctantly come to the conclusion that the FTT did err in law in exercising its discretion to make the Directions that it did.

131. The exercise of its discretion so as to make the Directions set out at [18]-[21] was wrong in principle for the reasons we now address.

Directions at [18]-[19] regarding additional witness evidence

132. The exercise of the discretion to make the additional witnesses Direction was wrong in principle essentially for the reason that the Appellant advanced in relation to the first ground on jurisdiction – that it contravened party autonomy in the context of this case.

133. We consider that the Directions at [18]-[19] did offend the principle of party autonomy as explained in *QX* (which applies equally to adversarial proceedings before the FTT) as to which witnesses they chose to call to give evidence (the witnesses either cooperating voluntarily or being compelled through the party applying for a witness summons). Although the FTT was not selecting the identity of the witnesses to be compelled, whose identity was to be provided by the parties, it was not merely deciding the scope of the evidence it required to determine the appeals but encroaching upon the tactical and strategic choices that well represented parties were entitled to make as to which evidence they wished to present at the hearing of the appeal.

134. This reasoning applies even though we have found it to be a Direction for a witness summons of the FTT's own initiative, in the same way it would have offended the principle of party autonomy if the FTT had made a Direction requiring the Appellant to call witnesses on its behalf whom it did not wish to call.

135. The Direction required Rowlands to name five Locums who would in consequence become witnesses in the proceedings. The fact that Rowlands was given the option to call them rather than being required to call them does not alter the fact that this amounted to forcing Rowlands to cause evidence to be adduced from individuals from whom it did not wish evidence to be adduced.

136. As regards the witnesses to be named by HMRC, the Direction departed from the normal position described by Coulson LJ in *QX* (see [45] to [47] above). It gives rise to problems similar to those found by Judge Herrington in the case of the Financial Conduct Authority's application for the Upper Tribunal to call a "neutral" witness – a witness called by the Tribunal whom both parties can cross-examine – as occurred in *Banque Havilland 1*, a UT decision not placed before the FTT. This decision makes it clear that any power for a Tribunal to call a witness of its own initiative (i.e. as a witness of the Tribunal) *"is a power that should be used very sparingly"*. The UT made that observation under reference to Court of Appeal authority that the Tribunal *"should in general hesitate and hesitate long before"* taking evidence against the wishes of the parties (see the passage quoted at [114]).

137. We do not accept that the previous history of the Appellant indicating it would pursue judicial review proceedings provided a good reason why HMRC did not apply to summons the Locums as their own witnesses if it was considered they had relevant (and supportive) evidence to give. Likewise, if HMRC considered it lawful to interview

Locums as witnesses they could have sought to resist any judicial review if it did eventuate.

138. At all times HMRC were entitled to make the applications for summonses in respect of whichever Locums they considered could give relevant evidence but would be in the position described by Judge Herrington in *Banque Havilland 1* at [100] to [104].

139. The reasons given by Judge Herrington for refusing the FCA's application at [121] to [128] of *Banque Havilland 1* seem to us to apply in the present case. First, the witnesses would need to be examined in chief by the FTT, requiring the Tribunal to formulate the questions to be asked in chief and risking bringing it "into the arena". Secondly, an important reason for rejecting the application was, as set out at [123], that *"this is not a case where the Tribunal is truly acting on its own initiative"*. In that case, what was at stake was an application by the FCA for the UT to summons a witness who the FCA *"believes can assist its case in some respects, but who it also believes will give evidence that might undermine the Authority's case"*. By summonsing the witness rather than leaving it to the Authority to summons him, the UT decided it would be enabling the FCA to circumvent the "non-impeachment principle" described by the Tribunal at [100] to [104].

140. The effect in the present case of making the additional witnesses Direction was to enable HMRC to secure the attendance of witnesses from whom they alone wished evidence to be adduced in circumstance in which they might nevertheless cross-examine them. This was in our view contrary to principle.

141. While the FTT, just like the UT, does have the power under Rule 16(1) to issue summonses to call witnesses of its own initiative (as witnesses of the tribunal rather than as a witness of a party) – we agree that it should be exercised very sparingly as Judge Herrington said. In adversarial proceedings such as these, the discretion should not have been exercised to fill in perceived gaps in the evidence where both parties had the ability to make clear and well-informed choices as to the scope of the evidence they wished to call. What is just and fair needs to be considered in light of the issues in dispute and whether the parties had the opportunity to apply for witness summonses if they so chose.

142. In this case it was wrong in principle to exercise the discretion in the face of party autonomy: the parties' choices as to which witnesses they wished to call and whether they would be able to cross-examine them. As stated above, the rule against non-impeachment means that it would be difficult for HMRC to call or summons any Locums as their own witnesses and then impugn or impeach their credibility or reliability.

143. The FTT, in making the additional witnesses Direction, was therefore going beyond being the neutral arbiter in adversarial proceedings, even though it was doing so on the basis of attempting to define the scope of the evidence it considered it needed to fairly determine the appeal. On the facts of this case, the FTT could not properly rely on preferring to adopt a more inquisitorial or investigative role.

144. A more inquisitorial approach by the FTT may sometimes be appropriate to dispose fairly of an appeal, particularly one with litigants in person. There may be cases before the FTT where the parties are unrepresented and the scope of factual or legal issues in dispute is unclear and the FTT may need to be more proactive or inquisitorial in order to elicit relevant evidence to enable a fair and just determination of the appeal. There may be cases where potentially relevant witnesses are not identified by either party or

the relevance of some evidence is not immediately apparent but where it is or becomes relevant to issues, either disputed, or necessary to be provided, For example, there may be justification for the FTT issuing own initiative witness summonses: where a witness with potentially highly relevant evidence to give has not been identified by the parties but only by the FTT; or where there is evidence that is not obviously supportive of one party or the other but whose evidence is necessary to be elicited; or where the witness is not objected to being called by either party but neither wishes to call them as their own witness; or where a litigant in person has not been able to identify an obviously important issue or witness for the determination of an appeal.

145. In such cases the FTT may decide that it is just and fair to summons witnesses of its own initiative, having thought carefully before doing so, including considering the potential prejudice to either party. The FTT may also take into account the "venerable principle" to identify the correct tax to be collected – which may give the FTT scope to identify legal or evidential points not raised. However, the issues unidentified are more likely to be questions of law and not ones of evidence or facts that the parties may not have pleaded or identified. At all times, the parties must have the opportunity to make submissions on issues identified by the tribunal that have not been identified or raised by the parties.

146. However, this was not a case of that sort. The substantive appeal before the FTT is complex, high value, with sophisticated and well represented parties. The FTT was considering adversarial proceedings more akin to a commercial case. The two parties were well able to identify witnesses and decide whether or not they wished to call witnesses after receiving, legal (including strategic and tactical) advice. HMRC were in a position to invoke the various mechanisms in the FTT Rules for obtaining information and disclosure from the Appellant, and we have seen indications that that has been done. If potential witnesses would not cooperate with either party then the parties could apply for a witness summons.

147. The parties were both free to call what evidence they wanted with the usual consequence that if they did not call relevant evidence, the opposing party could draw attention to the failure and invite the FTT to draw inferences or take other action.

148. For example, in this case, if the Appellant chose not to call any further witnesses additional to the two Locums selected, then it would be open to HMRC to argue that the Appellant's case had only established the position in relation to two Locums, proving nothing about the employment status of the other 1,398 Locums. In that situation, if the FTT were to agree after hearing argument that two Locums are not a representative sample, and in the absence of the Appellant agreeing to provide a representative sample of witnesses, then the Appellant might be at risk of its appeal being dismissed in relation to the vast majority of HMRC's assessments, whether or not the appeal was successful in relation to the assessments in respect of the two Locum witnesses. However, none of this is for the UT to decide on this appeal.

149. It follows that, in an appeal such as this with two well represented sophisticated parties operating in an adversarial environment, where the potential witnesses were readily identifiable and summonable if they would not volunteer to cooperate, it was a matter for parties in their autonomy to control the evidence they sought to provide. It was wrong in principle for the FTT to direct that additional evidence to be heard of its own initiative.

150. In summary, therefore the Direction wrongly enabled the calling of witnesses that the

Appellant did not wish to call but HMRC wished to cross-examine. The Direction at [18] required each of the Appellant and HMRC to name *"five further locum witnesses"*. However, it is the Appellant which was required by the FTT to *"advise whether or not witness summonses will be required"* in respect of all additional witnesses [18]. Evidently, therefore, it was the Appellant who was envisaged as calling all 10 further locum witnesses in the first place – under the knowledge that if it would not do so, the FTT would summons them.

151. The FTT's Directions evidently invited the Appellant to call as witnesses individuals whom HMRC wished to give oral evidence so as to cross examine them. It was also unknown if the additional witness Direction would produce a representative sample of evidence but in effect it required the calling of witnesses that neither party wishes to produce as their own witnesses. This underlines the erosion of the principle of party autonomy. Even though the FTT might in principle require these additional Locums to give evidence of its own initiative, it was inappropriate to invite an Appellant to call a witness that a Respondent wished to give evidence. Rather, the appropriate course, where the Appellant would not volunteer the witness as their own, was for HMRC to invite the Locums it wished to volunteer to be their witness or, if they would not cooperate, apply for a witness summons under rule 16 (in either case the witness would be HMRC's witness).

152. Mr Bremner makes a further justified criticism of the Direction, underlined by the fact that the FTT's own Practice Statement on Witness Summonses ("Practice Statement for the First-Tier Tribunal (Tax Chamber): Witness Summonses and Orders to Produce Documents" of 14 June 2022) recognises that (para 6): *"In order for a witness summons to be issued, the Tribunal must be satisfied that the evidence sought to be obtained is relevant to the issues in the proceedings. The Tribunal will assess the relevance of the evidence by reference to the stated cases of the parties."*

153. Under the FTT's Practice Statement, therefore, the need for the summons would be considered by reference to HMRC's pleaded case. In the present case, there was no pleaded case from HMRC on RMC3, the relevant issue, so such an application by HMRC is not presently justified. The Direction implies that witness summonses would if necessary be issued in respect of witnesses named by the parties, without regard to the relevance of their evidence to any pleaded assertion. We address HMRC's absence of pleaded assertion on RMC3 in further detail below.

154. For the reasons set out above we consider that the FTT erred in law in making this Direction.

The further and better particulars direction at [20]-[21]

155. The FTT also erred in principle in the exercise of its discretion to make the Further and Better Particulars Direction at [20]-[21], notwithstanding it had jurisdiction and was empowered to make such a Direction. The Direction was to the effect that HMRC only develop its pleading on RMC3 after the additional witnesses had provided a witness statement or given evidence in chief at a preliminary hearing.

156. As noted above, HMRC's position in its Statement of Case at RSOC/105 was that

"HMRC cannot presently plead a detailed case on the third stage of the Ready Mixed Concrete test". Rather, HMRC purported to *"reserve[e] the right to seek permission to amend the (RSOC) following disclosure (including any specific disclosure that is required) and/or service of the Appellant's witness statements"* (RSOC/105).

157. The Appellant in its GoA had set out its case on RMC1-3 with particularity, for example at GoA/15 it summarised nine factors[8] in support of self-employment in respect of all Locums. Factors (1)-(3) addressed RMC1 and RMC2 and factors (4)-(9) addressed additional factors that applied to RMC3 (as detailed at GoA/35-66).

158. At [21] the FTT held that:

> "On balance, I do not consider that there is anything to be achieved by requiring a generic case to be provided [by HMRC], as it would then seem inevitable that an application would be made to amend that case after the witness evidence is provided. The generic case is unlikely to provide any significant assistance in formulating witness evidence; the test and case law in respect of that test is well known."

159. We consider that this reasoning is in error.

160. First, it wrongly reverses the order of events provided by the FTT Rules: following the filing of the Appellant's notice and grounds of appeal, HMRC's statement of case is to set out its position in relation to the case (see Rule 25(2)) and thereafter, in a standard or complex case, the parties are to file their lists of documents setting out what they intend to rely on or produce at the hearing; the Appellant is entitled to know the case that it must meet, set out in HMRC's statement of case, before deciding what witnesses to produce or call.

161. The FTT's Direction, rather than enabling the parties to adduce evidence to advance their pleaded case or rebut the other party's pleaded case, has in effect turned the giving of evidence into a means of informing HMRC about the underlying facts before they complete their pleadings and finalise their case.

162. HMRC's pleaded case would necessarily affect the decisions that the Appellant would take as to what witness evidence to call in support of its appeal. As in most litigation, the disclosure and the evidence lodged by parties respond to the issues raised in the pleadings. There are express rules of procedure in the FTT Rules which are essential for the fair and just disposal of the proceedings. Those rules have, however, been inverted by the FTT in this case.

163. Under rule 25(2) of the FTT Rules:

> "A statement of case must –

[8] "(1) There is no obligation on the Appellant to offer work or on Locums to accept any work offered:
(2) The level of control by the Appellant over the Locums' activities;
(3) The Locums' right to provide a substitute;
(4) Other activities performed by Locums;
(5) Pay and benefits;
(6) The level of integration of Locums into the Appellant's organisation;
(7) Facilities and equipment;
(8) Financial risk and taxation;
(9) The intention of the parties; and
(10) Conclusion."

(a) in an appeal state the legislative provision under which the decision under appeal was made; and
(b) set out the respondent's position in relation to the case."

164. The purpose of rule 25(2) was explained by Judge Mosedale in *Citibank NA v HMRC* [2014] UKFTT 1063 (TC) at [11] as follows:

> "Litigation by ambush is not fair or just: a party must be given time to properly prepare to meet the case against it. For this reason, the Tribunal's rules at Rule 25(2)(b) require the Statement of Case to: 'set out the respondent's position in relation to the case'."

165. Further, as Judge Mosedale noted at [12]:

> "The appellant is entitled to have the respondent's case set out in its statement of case and it is no answer for the respondents to say (at this point in time) that they will rely on their (yet to be served) witness statements to remedy any defects in the statement of case."

166. The critical importance of a statement of case in enabling the taxpayer to know the case it is required to meet is both obvious and longstanding, indeed pre-dating the 2009 Tribunal Rules. For example, in *GUS Merchandise Corp Ltd v CCE* [1992] STC 776 Rose J held at 780 that:

> *"*The whole purpose of the statements of case and the list of documents, submitted [Counsel for the taxpayer] was to enable the company to know the way in which the commissioners put their case. That is undoubtedly right."

167. In particular, it is not sufficient for HMRC simply to require an appellant to prove the matters in dispute. As the Upper Tribunal held in *Kingston Maurward College v HMRC* [2023] UKUT 69 (TCC) at [8]-[13], approving the approach of Judge Mosedale in *Allpay Ltd v HMRC* [2018] UKFTT 273 (TC):

(1) *"*The Tribunal's rules require HMRC to set out its position in respect of a case; what that means is that HMRC should explain its position in sufficient detail to enable the appellant to properly prepare its case for hearing. Anything less may lead to injustice".

(2) It was not the case that "HMRC did not have to plead anything as [the] burden of proof was on the appellant". This was because:

> "If the person with the burden of proof was required to prove everything, even those matters which the other party had not clearly disputed, then preparation for, and hearings of, appeals would be much longer and a great deal of time and money would be wasted. Moreover, trial by ambush is not justice: each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must therefore state in advance in summary terms what is in dispute and why."

Thus:

> "it is not procedurally fair for the party without the burden of proof to do no more than say the other party must prove every part of their case. Both parties should set out the key parts of their legal and factual case in advance."

168. A similar point was recently reiterated by Judge Brooks in *Burton Skip Hire Ltd v HMRC* [2025] UKFTT 1113 (TC) at [48]:

> "[48] Essentially all the compelling reasons advanced by [Counsel for the taxpayer] concern the fairness of proceedings. Something recognised by HMRC in their guidance ARTG8395 – First-tier and Upper Tribunals: preparing for the tribunal:

preparation of statement of case which states:

> 'The purpose of the statement of case is also to tell the customer what HMRC's case is. So it needs to be comprehensive as the customer will rely on it to prepare their case for the tribunal, including the list of documents. If it is not, HMRC may be depriving the customer of a fair opportunity to assemble evidence in support of their appeal.'"

169. The critical importance of the pleading of HMRC's statement of case has recently been reemphasised by Judge Redston in *BCG Services Holdings LLP v HMRC* [2025] UKFTT 700 (TC) referring to *Kingston Maurward College* at [63].

170. The function of statements of case was summarised by Lewison LJ in *The Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4301 at [20]:

> "The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning."

171. The particular level of detail within HMRC's statement of case which will enable an appellant to properly advance an appeal will depend on the circumstances of the particular appeal. HMRC may request further and better particulars or make applications for disclosure if a taxpayer's grounds of appeal are such that they are difficult or impossible to respond to within their statement of case. Nonetheless HMRC will always know the reasons why they made a decision which is under challenge in the appeal and this may be the starting point for their statement of case.

172. In the present case the following matters reinforce the importance of HMRC properly setting out its case:
    (1) RMC3 requires a multifactorial enquiry into all the relevant circumstances in order to enable a value judgment to be made as to whether the individual in question is employed or self-employed. Plainly that enquiry depends upon the detailed facts of the case at hand.
    (2) HMRC had provided no details as to what its case is in relation to RMC3: the Appellant could not be fully aware of HMRC's case.
    (3) The lack of pleading from HMRC on RMC3 is particularly significant as, following *PGMOL*, Stage 1 (mutuality of obligation) and Stage 2 (control) are not to be focused upon *"unduly"* [30]. Rather, *"real significance"* needs to be given to *"the totality of the provisions"*. Stage 3 is thus paramount.

173. The Appellant has set out a series of facts and matters in its GoA upon which it relies in support of its submission that the Locums are not employees. In its statement of case, HMRC has engaged only with the questions of mutuality of obligation and control. The case it has set out on those issues relates only to the Locum Services Agreement, a contract which is common to all of the Locums in this case. HMRC has not set out any case in relation to the other matters relied upon by Rowlands at Stage 3, nor indicated whether there are other matters upon which HMRC relies in support of its case at Stage 3.

174. The Regulation 80 Determinations and Section 8 Decisions were addressed to Rowlands. Rowlands is the Appellant in these proceedings (not the individual

Locums). Rowlands has already, notwithstanding the gap in HMRC's Statement of Case, provided relevant evidence in support of its appeal, providing evidence from eight witnesses. It has chosen to rely on that evidence to support the points which it has articulated in its Grounds of Appeal and Reply. These witnesses speak from a variety of perspectives (Locums, employed pharmacists, individuals with senior roles within Rowlands' business etc). Whether this evidence is satisfactory to establish its case on the appeal is a matter for the trial.

175. Second, HMRC ought to know what their case is. HMRC has issued assessments to the best of their judgement concluding that all the Locums engaged by the Appellant were its employees at the relevant time. HMRC must know what facts and matters they relied upon so as to consider all the Locums to be employees. Further, HMRC's then-applicable Guidance indicated that at least in some circumstances Locums would be likely to be self-employed. HMRC must therefore have known (a) whether they had applied that Guidance in this case; and (b) what facts and matters they had relied upon in concluding that the Locums are employed. The Appellant is entitled to be told HMRC's position in support of the assessments by way of formal pleading before filing further evidence.

176. Therefore, we do not agree with HMRC or the FTT's appraisal at [21], that HMRC could not be expected to reply to these matters in their RSOC or that a generic statement of case would be of no assistance in formulating the witness evidence. In their statement of case, HMRC could reasonably be expected to reply to each of the nine factors relied upon by the Appellant in the GoA even if only in broad terms, notwithstanding the varying fact patterns of 1,400 Locums. RMC3 requires consideration of all relevant circumstances and HMRC must have come to the view, when issuing the best judgment assessments and taking into account all relevant circumstances, that all 1,400 Locums were to be treated as employees. HMRC would have known why they issued the best judgment assessments and determinations based on all the relevant circumstances of the Appellant's engagement of the Locums.

177. The nine factors at GoA/15 were all factors that HMRC could reasonably be expected to respond to in broad terms even if HMRC were not able to descend into great detail on individual factors or were only able to provide particulars of their case that took account of different fact patterns for different categories of Locums. In any event, HMRC must have been able to set out all the relevant circumstances they relied on as pointing towards the Locums being employed and they should reasonably have done so in their pleading – even if they sought to make amendments or provide or request further and better particulars after evidence had been served.

178. The FTT Direction at [20]-[21] permitted HMRC to await the taking of the further evidence it had Directed at [18] before requiring HMRC to plead its case in any substance on RMC3, rather than HMRC provide their pleading before considering the requirement for any further evidence. In doing so, the FTT failed properly to consider the requirement for the parties to plead their cases at the outset of proceedings.

179. In this case HMRC had chosen not to plead any case on RMC3 in their RSOC in response to the Appellant's GOA. The FTT's Direction as to HMRC only providing further and better particulars on RMC3 after hearing evidence in chief from the additional Locums is contrary to the approach to litigation anticipated by the Rules.

The Appellant has a right to be informed of the case it must meet in reply to its appeal, i.e. HMRC's case, even though the burden was on it to prove that the assessments and determinations were wrong and the Locums were self-employed.

180. Third, the Direction was wrong in principle to require the Appellant to provide yet further witness statements, or for the FTT to witness summons ten additional witnesses and take evidence in chief from them, before HMRC provided a statement of case setting out their position on RMC3. In particular:
   (1) Absent a proper pleading from HMRC, it is difficult for the FTT properly to form any view as to what issues need to be resolved at RMC3. The FTT could not know, precisely because HMRC had not identified what (if any) issues are in dispute, what evidence would be needed to address those issues.
   (2) Absent a proper pleading from HMRC, the Appellant could not form a view as to which Locums should be selected to give evidence or whether any sample of five witnesses is representative in relation to the issues which HMRC will seek to argue.
   (3) It is wrong in principle for HMRC to be entitled to be provided with this evidence first before deciding which case they wish to plead. HMRC has issued very high value assessments to Rowlands. HMRC must know the basis for issuing those assessments particularly given that those assessments are required to be made to the best of HMRC's judgment (in the case of the Regulation 80 Determinations) and to the best of the officer's information and belief (in the case of the Section 8 Decisions). They must know the broad outline of their case from the outset. HMRC are not entitled to use the tribunal litigation process to discover what their case will be.

181. The FTT stated at [14] that: *"Fairly obviously, it will not be practical for the Tribunal to decide the employment status of each of the locum pharmacists engaged by the appellant over the years on an individual basis"*.

182. However, it is in dispute whether any sampling-type exercise was required, still less that that sampling exercise should be done before HMRC had pleaded its case. There would only be a need for additional evidence if the points put in issue by HMRC called for such evidence. Further, it is impossible for any sample to be identified as a representative sample in the absence of any pleaded case from HMRC.

183. The FTT held at [15] that: *"Given the task that will be before the panel at the substantive hearing, and considering the case law as to how that task is to be approached, I do not consider that it is sufficient only two locum pharmacists to be called in circumstances where the appellant agrees that their engagements are of a "wide variety"."* Given that HMRC had not pleaded any case on RMC3, it was premature for the FTT properly to conclude either that further Locum evidence might be needed or that some type of sampling exercise was appropriate:
   (1) The FTT could only form a view as to the evidence that was likely to be required once the points at issue had been identified by HMRC. Given HMRC's decision not to plead a case on RMC3, no such identification of the issues had been carried out by HMRC.
   (2) Again, even if some further evidence is required, it is impossible to know what that evidence should be before HMRC had pleaded their case.
   (3) Later in [15] the FTT observed that:

> *"*Whilst it is for the appellant to decide how to discharge their evidential burden, the complexity of the issues here is such that I do not consider that the panel would be able to deal with the case fairly and justly with such limited locum evidence in accordance with Rule 2."

However, the points identified by HMRC in relation to RMC1 and RMC2 are points on the Locum Services Agreement. None depend on the individual circumstances of particular Locums. And no case has been identified by HMRC in relation to RMC3.

184. Fourth, HMRC's failure to plead any more detailed case is inconsistent with the fact that HMRC have set out in other correspondence that there are aspects of the appeal that they do not intend to resist.[9] There is no good reason why those concessions cannot (and should not) be reflected by HMRC in their pleaded case: doing so would obviously help to identify the issues between the parties and assist in clarifying the evidence that is required. Indeed, as a matter of law, HMRC must have given consideration to all relevant factors, in particular those set out under Stage 3 of the *RMC* test, in reaching their position as to whether the employment status of Locums can be determined by day count amongst other factors.

185. The FTT's exercise of discretion in making this Direction was therefore in error. The FTT did not take into account the need for HMRC to set out their case so that the issues between the parties could be identified. It is compounded by the error in relation to the additional witness Direction. The Appellant being invited to lead additional evidence, or directing a preliminary hearing to take evidence from witnesses that the FTT called, in the absence of notice of HMRC's case on Stage 3 *RMC* reverses the fair procedure.

186. Finally, Mr Bremner further argues, to the extent that the FTT concluded that the case could not be decided fairly and justly on the basis of evidence given by two Locums [14] and [15] such a conclusion was erroneous in law. He submits that:

(1) As the Court of Appeal made clear in *RCC v Atholl House Productions Limited* [2022] EWCA Civ 501, [2022] ICR 1059 at [123] the correct approach is contractual in nature: the intention of the parties *"is to be judged by the contract and the circumstances in which it was made"*; and the relevant circumstances are *"facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties"*.

(2) In the present case, each of the locums entered into the Locum Services Agreement. The employees of Rowlands who have been called to give evidence are just as capable of speaking to *"the facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties"* (the relevant matter identified by the Court of Appeal in *Atholl House*) as any locums. Further, an important part of those facts and circumstances is the existence of, and reliance by Rowlands on, HMRC's

[9] HMRC wrote to the FTT on 11 April 2024, notifying the FTT that:
"1. It does not intend to resist the Appellant's appeal insofar as it relates to the Regulation 80 determination for the year 2015/16. This was communicated to the Appellants on 27 February 2024.
2. As notified to the Appellants on 7 August 2023, HMRC does not intend to resist the appeal insofar as it relates to amounts of Tax or NIC charged in determinations and decisions relating to locum pharmacists who worked for 40 days or fewer in a tax year for the Appellant, or who worked for more than 40 days but no more than 115 days in a tax year for the Appellant but in respect of which work for the Appellant comprises less than 50% of their total asserted self-employment income."

guidance in relation to the utilisation of locum pharmacists, previously available at ESM4270, and in force at the time of the assessments under appeal in this matter, but now discontinued.

(3) These appeals concern the tax status of over 1,400 Locums. It is not practically possible for every one of those Locums to be interviewed, or for every one of those Locums to give evidence in these proceedings. It is noteworthy that the FTT failed to address the fact that four of the witnesses are senior members of Rowlands' business and speak to the interaction with Rowlands from the perspective of the business: their evidence is of general application across the Locum body. The size of the Locum population underscores the importance of proper pleading by HMRC so that the evidential disputes can be identified. Nothing in HMRC's pleaded case suggests that evidence from more Locums will be of assistance. There is no reason, on the basis of HMRC's pleaded case, to consider that the two locums who have been called to give evidence are (somehow) unrepresentative. Nor can there be any assurance that the 10 additional witnesses that the FTT has required to be called will be any more representative than the two who have already given witness statements (given the absence of any pleading from HMRC on Stage 3 of the *RMC* test).

187. It is not appropriate for the UT to decide the merits of any of these points – these are matters for the FTT to determine, if necessary, in due course.

188. For the reasons set out above we consider that the FTT erred in law in making the Further and Better Particulars Direction.

Conclusion on the appeal

189. For the reasons set out above, we have allowed the appeal on Ground 2 and have found there to be material errors of law in respect of both Directions at [18]-[19] and [20]-[21] of the Decision. We therefore set aside those Directions.

Remaking the Directions

The appropriate Directions

190. In light of our decision to set aside the FTT's Directions at [18]-[21] regarding the provision of additional witnesses and further and better particulars, we consider the just and fair course is to remake the disputed parts of the case management decision. Remitting those two case management decisions to the FTT is unnecessary in light of our decision on the principles to be applied and would only cause further unnecessary delay.

191. We therefore dismiss HMRC's application for additional witnesses to be identified and called in the terms it sought in its application of April 2024.

192. We grant the Appellant's application for HMRC to provide further and better particulars of HMRC's case on RMC3. We direct HMRC to provide further and better particulars of their case on RMC3. We further direct that each party may file and serve further or additional evidence after HMRC have first provided their further and better particulars. Our directions are specified below. They fulfil the requirement for the

Appellant to be able to know the case that it has to meet and to be able to make decisions as to whether it chooses to call any further evidence in light of the case advanced by HMRC. If HMRC consider that they need further information from Rowlands, it is for them to make any appropriate application in accordance with the Rules.

193. As already noted, it is essential in any litigation that a party should know the case that it has to meet. HMRC's pleadings do not currently plead any real case on the third stage of the *Ready Mixed Concrete* test, notwithstanding that the assessments were required to be made to best judgement/best of HMRC's information and belief, and HMRC evidently wish to defend the appeal on the basis that RMC3 points towards the Locums' employment.

194. Thus WE DIRECT:

(1) HMRC are to provide further and better particulars of their case on RMC3 within 28 days of the handing down of this decision;
(2) the Appellant, if so advised, is to file any reply to those further and better particulars within 28 days after (1);
(3) the Appellant is to file any further documentary and/or witness evidence in response to HMRC's further and better particulars within 42 days after (1);
(4) HMRC are to file any further documentary and / or witness evidence in reply within 42 days after (3);
(5) If either party seeks to call witnesses who will not voluntarily provide a statement or otherwise cooperate in the provision of relevant evidence, they should apply for witness summonses for those witnesses at the same time as filing the evidence stipulated in (3) and (4);
(6) Provision should also be made for the substantive FTT hearing of the appeal to be listed before the FTT – the parties are to provide an updated time estimate and availability for hearing, indicating which witnesses are required for cross examination 14 days after the evidence directed in (4). This should ensure the efficient progression of the appeal, in accordance with the overriding objective.

195. The parties are encouraged to cooperate, particularly once the pleadings in (1) and (2) have been filed and served. To the extent that any sample of evidence is required or desirable, the parties should only apply to the FTT for the resolution of any dispute if they have demonstrated a concerted attempt to agree the position.

196. We received no objection to the case being remitted to the same FTT judge with the directions as made above. The FTT may make additional case management directions and preserve any existing directions already made by it which have not been set aside or addressed above. The FTT should also address any further or consequential matters in dispute. The parties have liberty to apply to the FTT to vary these directions as if they had been made by the FTT.

UPPER TRIBUNAL JUDGES

JUDGE RUPERT JONES

JUDGE NICHOLAS PAINES KC

RELEASE DATE: 19 March 2026