

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Neutral Citation Number: [2026] UKUT 00439 (TCC)

Applicant: MSD Wholesale Limited	**Tribunal Ref: UT-2026-000061**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE FOLLOWING HEARING ON 8 OCTOBER 2026

JUDGE JEANETTE ZAMAN

1. The applicant, MSD Wholesale Limited ("MSD"), applies to the Upper Tribunal (Tax and Chancery Chamber) for permission to appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) ("FTT") released on 20 February 2026 (TC/2016/04645). MSD applied to the FTT for permission to appeal against the Decision on six grounds. The FTT refused permission on all grounds (the "FTT PTA Decision"). MSD applied to the Upper Tribunal for permission to appeal, within the applicable time limit (the "Application") and the hearing of that application was held on 8 October 2026.

2. Both parties submitted written skeleton arguments ahead of the hearing. MSD's skeleton had been drafted by Ben Walker-Nolan, who had appeared for MSD before the FTT. Mr Walker-Nolan was not able to attend the permission hearing due to another trial and William Frain-Bell KC appeared for MSD. Mr Frain-Bell relied on Mr Walker-Nolan's skeleton and made additional submissions. Joanna Vicary, who had appeared for HMRC before the FTT, provided a skeleton for HMRC, attended the permission hearing and made oral submissions on Ground 1.

3. References below in the form FTT[x] are to paragraphs of the Decision.

WHEN DOES AN APPEAL LIE TO THE UPPER TRIBUNAL?

4. Pursuant to s11(1) Tribunals Courts and Enforcement Act 2007 an appeal to the Upper Tribunal may only be made on a point of law. An application for permission to appeal must demonstrate that it is arguable that the FTT made an error of law in reaching its decision which was material to that decision. "Arguable" means an argument that carries a realistic as opposed to fanciful prospect of success.

THE APPLICATION

5. The Application seeks permission to appeal on six grounds:

(1) the FTT made an error of law in refusing to grant MSD's application for an adjournment;

(2) in dismissing the appeal against the VAT Assessment, the FTT made findings based upon a mistaken factual premise and failed to take into account relevant evidence;

(3) in dismissing the appeal against the First Duty Assessment the FTT misapplied the test established in *Pegasus Birds* and failed to undertake the second stage of the statutory enquiry;

(4) in dismissing the appeal against the Second Duty Assessment, the FTT misapplied the test in *Pegasus Birds* and took account of matters irrelevant to the assessment actually made;

(5) the FTT made an error of law in concluding that MSD was the holder of the goods subject to the Third Duty Assessment; and

(6) the FTT made an error of law in concluding that the AWRS Refusal Decision was one that a reasonable officer could reach.

6. MSD's skeleton addressed each of these grounds of appeal separately. At the hearing, Mr Frain-Bell focused in particular on Ground 1, and his submission that the consequences (and unfairness) of the FTT's refusal to adjourn could be seen from the FTT's decision in relation to the VAT Assessment that MSD had not adduced sufficient evidence to meet its burden, a conclusion which was the subject of Ground 2. Mr Frain-Bell then briefly addressed Grounds 3 and 4 together and Grounds 5 and 6 together.

7. In making my decision I have taken account of all of the submissions made for MSD, both written and oral.

8. I have decided to REFUSE permission to appeal.

Ground 1

9. MSD's first ground of appeal is that the FTT made an error of law in refusing to grant MSD's application for an adjournment.

10. The FTT set out its decision on this issue at Appendix I of the Decision.

11. Mr Walker-Nolan submitted that it is at least arguable that the FTT erred in law in concluding that it was fair to proceed with the hearing and that the refusal of the application resulted in injustice and imbalance. He relied on the factual context which included the following:

(1) Rainer Hughes had acted for MSD over a lengthy period in the underlying appeals. The hearing was listed for 2 to 10 December 2025.

(2) On 20 October 2025 Rainer Hughes informed HMRC that they were no longer acting for MSD and they said that they had not done so for two years. In fact, there had been correspondence between HMRC and Rainer Hughes on 31 July 2024. HMRC informed MSD of what they had been told by Rainer Hughes on 22 October 2025.

(3) On 5 November 2025 Mrs Deol of MSD wrote to HMRC and explained that MSD was seeking new representation.

(4) MSD's new solicitors, William Sturges LLP, came on record on 18 November 2025 and received a copy of the hearing bundle and core bundle on 20 November 2025 (the hearing bundle being 9,181 pages).

(5) Instructions to counsel were confirmed on 21 November 2025 and a skeleton argument was filed and served on 27 November 2025.

12. MSD applied to the FTT for an adjournment at 19.08 on 26 November 2025.

13. Mr Walker-Nolan submitted that MSD's new solicitors had little more than one working week to prepare for a nine-day hearing involving five consolidated appeals across three areas of law and agreed hearing bundles exceeding 9,000 pages. He submitted that the FTT erred in the following respects:

(1) The FTT misstated the facts of *Manchester Property Development Holdings v Kuit Steinart Levy LLP* [2025] EWHC 35 (Comm) ("*Manchester Property*") and thereby understated the force of the comparison with the preparation time available. The preparation time available to MSD was strikingly similar to the preparation period found to be insufficient in *Manchester Property*.

(2) The FTT erred in attributing MSD's predicament to its failure to "keep tabs" on Rainer Hughes. That finding depended on an assumption that if MSD had contacted Rainer Hughes between October 2024 and October 2025 they would have disclosed they were no longer prepared to act, whereas he submitted the evidence did not support that assumption.

(3) The FTT misdirected itself by focusing on fault rather than fairness. The governing principle identified by the Court of Appeal in *Bilta (UK) Ltd & Others v Tradition Financial Services Ltd* [2021] EWCA Civ 221 ("*Bilta*") was whether proceeding with the hearing would be fair in all the circumstances and whether refusing the adjournment would result in unfairness or injustice.

(4) The FTT failed to address material factors bearing on prejudice. The FTT did not record or weigh MSD's concession that it would not oppose an application by HMRC for their costs. Nor did it take into account HMRC's statutory discretion to revoke or vary MSD's temporary AWRS approval.

(5) The additional day and modifications to the timetable which were given by the FTT could not remedy the anterior prejudice before the hearing began.

14. In his oral submissions, Mr Frain-Bell referred in particular to the FTT's statement at [21] of Appendix I that this was "finely balanced", and relied on the relevant principles as set out in *Bilta*. He submitted that the FTT had reached the wrong decision and as a result the resulting hearing was unfair, and that it is important to have regard to where the parties were at the start of the hearing, even if there had been failings in the run-up to that date. He relied in particular on (i) the matters set out by Mr Walker-Nolan in relation to the reduced time to prepare for the case; and (ii) Mrs Deol's evidence in her witness statement (produced in support of the application to adjourn) that based on the review carried out (by William Sturges and Mr Walker-Nolan) the claim had not been properly prepared by Rainer Hughes, particularly in relation to the limited amount of witness evidence that had been produced, identifying four individuals from whom evidence had not been adduced. Mr Walker-Nolan's skeleton argument for the application for adjournment had stated that if the hearing were adjourned, MSD would seek permission to serve further evidence of fact. Mr Frain-Bell submitted that the need for further evidence could clearly be seen from the Decision, in particular in relation to the conclusions which formed the basis of Ground 2.

15. In considering the submissions made on this ground of appeal I have been mindful throughout that all I am required to decide is whether it is arguable that the FTT made an error of law that was material to its decision. However, in the context of a ground of appeal in relation to a case management decision, it is well established that the Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT.

16. The FTT stated that both parties agreed that the relevant law in relation to applications to adjourn is as set out in *Bilta* in which Nugee LJ observed that the guiding principle is "whether if the trial goes ahead it will be fair in all the circumstances" and the assessment of what is fair is a fact-sensitive one. Nugee LJ also set out that if refusing an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted. The FTT then continued:

> "14. For MSD, Mr Walker-Nolan contended that as a matter of fairness, given the appeal is factually and legally complex, encompassing lengthy periods (from 2014 to 2023), with a hearing bundle in excess of 9,000 pages and three component appeals, the hearing should be adjourned and re-listed. He noted that MSD had not been given any notice of its previous solicitors ceasing to act and by failing to notify it, or indeed the Tribunal, they had acted unprofessionally.
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> 15. As such, he said, the new legal team did not have sufficient time to properly prepare and faced a situation similar to that the High Court proceedings in *Manchester Property Development Holdings v Kuit Steinart Levy LLP* [2025] EWCA 35 (Comm) in which leading counsel for the defendant was taken ill and his instructing solicitors informed the day before the trial. Although two junior counsel had also been instructed, and were therefore familiar with the case, they did not have adequate time to properly prepare cross-examination and submissions. In that case, Dame Clare Moulder DBE granted the adjournment, concluding that the prejudice to the defendant in refusing an adjournment outweighed the other factors.
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> 16. Mr Walker-Nolan also observed that the delays in the appeal were not the fault of either party, that the appeal had previously been stayed and that this was the first application for an adjournment.
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> 17. He also emphasised that MSD had taken reasonable and prompt action by indicating, by 7 November 2025, that it intended to instruct new solicitors, and whose instructions were confirmed by 18 November 2025 and had instructed counsel by 21 November 2025. MSD's instructions to its new legal representatives were not, he said, limited to the Application but also to represent it and prepare for a hearing in the event the Application did not succeed.
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> 18. Ms Vicary, for HMRC, contended that it was trite that keeping of hearing dates was important (see eg *Quah-Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm)).
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> 19. She also submitted that the situation in which MSD found itself was the result of the failure of Mrs Deol to keep in contact with her former solicitors between October 2024 and October 2025 in what was accepted as a "business critical" matter and compared such "cursory contact" in this case with that of the appellant in *Shafique Uddin v HMRC* [2023] UK UT 99 (TCC) …

> 20. Ms Vicary also contended that HMRC would suffer significant prejudice if the hearing was postponed. In particular she referred to the continuation of MSD with its temporary approval to be able to trade in wholesale alcohol (where there was potentially £2.7m of duty outstanding); that HMRC were reluctant to impose on Mr Surinder Singh, the HMRC officer who had made the Duty Assessments, as he had retired and had made himself available to give evidence but might not be available again; that the hearing was not likely to be re-listed for over a year with the inevitable effect that would have on memories of events which took place, in some cases, more than ten years ago; and that HMRC would have to divert significant resources to continue defending an appeal which it was entitled consider would have been heard. There was, she said, also prejudice to other taxpayers as HMRC's and the Tribunal's resources would have to be diverted to deal with this appeal.
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> 21. As Ms Vicary accepted, the question of whether to postpone the hearing was finely balanced. We agreed, and it took longer for us to reach a conclusion on the issue than we had anticipated.
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> 22. Although we accept that MSD's new solicitors and counsel were not in an ideal position with regard to preparation, we note that they did have more time to prepare for this hearing than the single day that the junior counsel had in the *Manchester Property* case. We have also taken into account that those relatively late instructions were caused by the failure by Mrs Deol, who was aware of the difficulties in relation to her former solicitors in June or July 2025, to "keep tabs on the adviser and make sure that matters were on track". Had she taken more than a cursory interest, as Ms Vicary described it, in MSD's appeal it would seem likely that she would have taken action to instruct alternative solicitors and counsel much sooner than she did.
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> 23. Therefore, having regard to all the circumstances, especially that it was possible to adjust the hearing timetable and include an additional day for closing submissions, thereby extending the preparation time for MSD's legal team, we concluded that a postponement was not necessary for the hearing in this appeal to be fair."

17. I start by recognising that the FTT applied the correct principles as set out in *Bilta* and the overriding objective in rule 2 of the FTT Rules.

18. During the permission hearing I was, at my request, sent the application which was made to the FTT for the hearing to be adjourned (including attachments), HMRC's objections thereto and Mr Walker-Nolan's subsequent skeleton argument in support of that application. I was taken to parts of those documents during the permission hearing and have subsequently read them in their entirety.

19. In considering whether it is arguable that the FTT made an error of law in refusing to adjourn the hearing, I start by looking at the application which was actually made by MSD. This was particularly relevant to Mr Frain-Bell's submissions.

20. The application for adjournment was made by email by William Sturges on behalf of MSD to the FTT on 26 November 2025 and stated:

> "We hereby apply for the following for the reasons set out in the attached witness statement (with accompanying exhibit) of Raminder Kaur Deol, the director of the Appellant:
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> 1. An adjournment of the Hearing;
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> 2. In the event the adjournment is granted, permission to rely on further witness evidence in support of the appeal."

21. Mrs Deol's second witness statement was made in support of the application to adjourn the hearing and was attached. It addresses the Background (including Mrs Deol's directorship of MSD), the position with Rainer Hughes (who had previously acted for family companies, but the relationship became strained in January 2025 at which time they were disinstructed on a separate matter and the circumstances in which she became aware Rainer Hughes were no longer acting on this appeal), her surprise and the desperate position MSD then found itself in, with reference to MSD instructing William Sturges. That witness statement then included:

> **"Files**
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> 12. Whilst WS subsequently confirmed their willingness to assist MSD and have now (very recently) come on record in the present proceedings, I have been unable to retrieve the relevant files from RH despite numerous requests for copies of the same. Whilst RH did send a purported link to the files, it proved impossible for me to forward this to WS via WeTransfer. Further, MSD previously provided three boxes of original documents to RH on 12 June 2023 with a view to RH copying/submitting these as evidence in our appeal to the Tribunal. On 24 November 2025 we were instructed by RH to collect the documents. However, they had only located one box out of the three that had been delivered to them.
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> 13. The inability of MSD to provide WS with the complete RH files has left WS and MSD's appointed counsel in a very unfavourable position; they have had to prepare last minute for a seven day appeal hearing based only on a handful of the relevant documents. Further, it was not until (Thursday) 20 November 2025 that HMRC provided to WS the bundle for the Hearing. This runs to some 9181 pages; and this does not include the separate authorities bundle. It will be impossible for MSD's legal team to properly absorb, process and advise on so many documents in such a short space of time and, in turn, to properly advance MSD's appeal at the Hearing. I understand that counsel for MSD has agreed to accept delivery of late instructions on the basis that there is insufficient time for any competent counsel to adequately prepare. I should point out that, notwithstanding what I otherwise state in this paragraph, MSD intends to file and serve its skeleton argument by the 27 November 2025 deadline as provided for by paragraph 2 of the directions order of Judge Brooks dated 13 November 2025; and as regards paragraph 1 of the directions order, I would refer the Tribunal to the letter from WS to the Tribunal dated 18 November 2025, a copy of which is at page 13.
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> ***KATIB* ARGUMENTS**
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> …
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> 15. In any event, based on the review carried out thus far by my legal team, and without waiving privilege, it appears to be the position that the claim has not been properly prepared by RH, particularly in relation to the limited amount of witness evidence that has been produced in support of the appeal. If follows that an adjournment of the Hearing will allow time for further witness evidence to be produced to better assist the Tribunal in determining the appeal (subject to the Tribunal's permission). In this regard, MSD would want to rely on witness statements from the following individuals in particular:
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> 15.1 Surjit Singh Deol, my husband (former buyer);
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> 15.2 Daniel Andrews (manager);
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> 15.3 Paul Vitten (forklift driver);
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> 15.4 Nicola Dalby (bookkeeper)."

22. HMRC filed its objection on 28 November 2025. That objection referred to MSD as having made a Postponement Application and an Evidence Application (describing the latter as being made "if" the hearing was postponed).

23. On 1 December 2025 William Sturges emailed MSD's skeleton for the application of 2 December 2025 to the FTT. At [1] the skeleton states that it is filed and served to provide the FTT and HMRC with an indication of the oral submissions to be advanced in support of MSD's application to adjourn the hearing. That skeleton includes a Chronology, addressing the position with Rainer Hughes, William Sturges having come on record on 18 November and counsel's instructions being confirmed on 21 November, and then says:

> "10. The Appellant's new legal team has collectively made genuine and determined efforts to be trial ready for the 2 Dec and to comply with the direction of Judge Brooks by serving a meaningful Skeleton Argument by 27 Nov 2025.
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> 11. Notwithstanding those efforts the position is that there has simply been insufficient time to read over 9,000 pages of detailed and dense documentation and to properly prepare and present this complex appeal.
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> 12. In a pragmatic attempt to carve out additional preparation time on the hoof, A's new legal team have proposed modifications to the trial timetable which would permit more work to occur in trial by curtailing cross examination time and pushing witness back to enable use of the cleared time for preparation. While Rs have been good enough to indicate some of those proposals are agreeable, the reality is those modifications are straws in the wind and are a wholly inadequate substitute for proper and full preparation.
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> 13. This is the basis for A's application for an adjournment."

24. The submissions in that skeleton were then based on fairness (referring the appeal being factually and legally complex with a hearing bundle of over 9,000 pages and the new legal team not having had sufficient time to prepare properly), proportionality (unfairness to MSD which cannot be remedied by anything short of adjournment, referring also to its request for costs information from HMRC to address fully and fairly HMRC's wasted costs) and delay.

25. The skeleton then concluded:

> "15. If the Court does not allow the application, A's representatives will proceed as best they can to present A's appeals. However, it is respectfully submitted that the fairer and preferable option is to permit an adjournment.
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> **Further Evidence**
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> 16. Should the Hearing be adjourned, A seeks permission to serve further evidence of fact. Were the Hearing to be adjourned, A would not object to conditional permission with a provision for liberty that Rs should raise any objection to the further evidence (should they wish to do so) once served with the further evidence proposed."

26. I consider it is clear that the application for adjournment was made on the basis of lack of preparation time for MSD's new advisers, ie for them to read into the appeal, become familiar with the hearing bundle and prepare cross-examination of HMRC's witnesses. Whilst Mrs Deol's witness statement did refer to what were said to be deficiencies in the earlier preparation for the appeal by Rainer Hughes, and the skeleton for the adjournment application referred to MSD seeking permission to serve further evidence, that submission was being made on the basis that such an application to adduce new evidence would be made in the event that the adjournment application was granted. (Although the separation is not as clearly apparent from Mrs Deol's witness statement, it is clear from the skeleton and Ms Vicary confirmed that

the position in the skeleton (which was reflected in the grounds of appeal filed with the Upper Tribunal and MSD's skeleton for the permission hearing) was then taken by Mr Walker-Nolan in his oral submissions before the FTT.)

27. It was not therefore the case that MSD had made its application to the FTT on the basis that an adjournment was sought to enable MSD to obtain evidence from further witnesses of fact. In this situation, where the application was not made on this basis, it is not arguable that the FTT erred by failing to take account of any inadequacies of Rainer Hughes in preparing for the appeals or what was submitted to be the lack of witness evidence.

28. Instead, the decision which the FTT was being asked to make was based upon MSD having to instruct new advisers relatively late in the day (and this is the basis upon which Mr Walker-Nolan, who had prepared the adjournment application and made oral submissions to the FTT, had prepared his skeleton for the permission hearing).

29. Mr Frain-Bell submitted that the FTT Decision on the VAT Assessment (which is the subject of Ground 2) reveals the unfairness of the refusal to adjourn. He submitted that it was clear from Mrs Deol's second witness statement that there were witnesses who would be able to give evidence on payments and how the business worked. The additional time which was allowed by the FTT may have assisted MSD's new legal team to go through the hearing bundle, but this is different from having the actual material to present to the FTT to avoid being found to have adduced insufficient evidence.

30. This submission does not disclose an arguable error of law. Even if the FTT had granted the adjournment, any application for additional evidence to be admitted may not have been successful; such evidence may not have had a significant influence on the matters in issue; and it is relevant to note that, as Ms Vicary pointed out, Mr Deol had attended the hearing before the FTT and no application was made at that hearing for him to be permitted to give evidence. The position in which MSD found itself in this respect is no different to the position of an appellant which has retained the same advisers throughout but it becomes apparent (perhaps as a result of newly instructed counsel preparing the skeleton) in the immediate run-up to a hearing that factual issues have been overlooked. In that situation, it cannot be said to be unfair to conclude that the appellant should generally bear the consequences of its advisers' failings.

31. In his skeleton, Mr Walker-Nolan relied on what he submitted were five ways in which the FTT erred.

Reference to Manchester Property

32. The FTT PTA Decision accepted (as it had to) that the reference to there being a single day for preparation in *Manchester Property* was incorrect. However, the question of whether to grant an adjournment is fact-sensitive to the appeal in issue, and I am not persuaded that of itself an inaccuracy in a comparison with the situation in another case is arguably material.

Failure to "keep tabs" on Rainer Hughes

33. The FTT referred at [22] of Appendix I to taking into account that the relatively late instructions were caused by Mrs Deol not keeping tabs on Rainer Hughes. In that same sentence the FTT referred to the fact that Mrs Deol was aware of the difficulties in relation to Rainer Hughes in June or July 2025. The FTT did not find that Rainer Hughes would have given clear or accurate responses. Rather, the tenor is that the potential problems would have become apparent to Mrs Deol at an earlier stage if she had taken action.

34. To the extent that the FTT was taking into account the conduct or fault of MSD, I consider this further in the context of the next submission.

Fault and fairness

35. As noted above, the FTT did take into account Mrs Deol's failure to keep tabs on Rainer Hughes, and surmised that if she had taken more than a cursory interest in MSD's appeal then she would have taken action to instruct alternative solicitors and counsel much sooner.

36. The FTT was therefore taking account of fault; and this is essentially acknowledged in the FTT PTA Refusal where, at [4], the FTT stated:

> "4 ...(1) Although it did, in error, refer to there being a "single day" to prepare in Manchester Property Development Holdings v Kuit Steinart Levy LLP [2025] EWHC 35 (Comm), having carefully considered the circumstances, the evidence of Mrs Deol confirming she had not been in touch with her former solicitors since October 2024 (see paragraph 6 of Appendix 1 to the Decision) and the decision of the Upper Tribunal in Shafique Uddin v HMRC [2023] UKUT 99 (TCC), the Tribunal, which adjusted the hearing timetable and included an additional day for closing submissions (see paragraph 23 of Appendix 1 to the Decision), reached a conclusion it was entitled to reach and, as such, did not make an error of law in its decision to refuse the adjournment and proceed with the hearing."

37. However, I am not persuaded that the FTT misdirected itself. Not only had the FTT correctly cited the relevant principles in *Bilta*, but those principles include that the issue is "whether if the trial goes ahead it will be fair in all the circumstances"; the assessment of all the circumstances may include a variety of matters, and it is not arguable that the FTT erred by taking account of the role played by MSD in contributing to, or failing to take action which may have prevented, the situation in which it found itself. The FTT had also referred to Ms Vicary's submissions for HMRC which went to the question of the fairness to HMRC of postponing the hearing, in particular the availability of Officer Singh to give evidence given that he had already retired from HMRC, and the FTT's conclusion at [23] was expressed as being that a postponement was not necessary for the hearing to be fair.

38. The concept of fairness was central to the issue identified by the FTT and which it subsequently answered.

Factors bearing on prejudice

39. Mr Walker-Nolan submitted that the FTT failed to address material factors bearing on prejudice. However, the FTT is not required to set out every submission made and it is not arguable that the FTT erred in omitting to do so.

40. The matters identified in the skeleton both relate to ways in which the potential prejudice to HMRC of granting an adjournment could have been mitigated. The costs position had been referred to in the skeleton for the adjournment application (at [14(b)(iv)]). However, and as noted above, the aspect of the prejudice to HMRC on which the FTT focused in its summary of HMRC's submissions was the potential absence of HMRC's witness, Officer Singh, from any future hearing. That could not be mitigated by MSD's concessions.

Adjustments to timetable could not remedy anterior prejudice

41. Mr Walker-Nolan submitted that MSD was not seeking additional time within the hearing timetable, as the problem was the lack of sufficient time for preparation before the hearing started.

42. The FTT was clearly well aware of the issues faced by MSD's new advisers; the relevant dates were set out in the application and skeleton, the FTT had a copy of the hearing bundle and would have appreciated the volume of that material and the matters in issue. The FTT heard submissions from both parties, and had identified the applicable principles as set out in *Bilta*.

43. I agree with Mr Frain-Bell that this additional time during the hearing window could not assist with matters such as any earlier inadequacy in the preparation of the case, notably insufficient witness evidence of fact.

44. The FTT decided that the question of whether to grant the adjournment was finely balanced. However, taking account of all the submissions made by Mr Frain-Bell and Mr Walker-Nolan, I am not persuaded that it is arguable that refusing the adjournment application made the resulting trial unfair, or that it is arguable that the FTT made a decision which no reasonable tribunal could have reached. Accordingly, I am not persuaded that it is arguable that the FTT made an error of law which was material to its decision in refusing to grant the adjournment application. This is notwithstanding the fact that the FTT erred in its description of the facts in *Manchester Property*.

45. Permission to appeal on this ground is refused.

Ground 2

46. The second ground of appeal is that in dismissing the appeal against the VAT Assessment, the FTT made findings based upon a mistaken factual premise and failed to take into account relevant evidence.

47. Mr Walker-Nolan submitted that:

(1) At FTT[137] to [138] the FTT treated as material MSD's failure to explain how Gujarr, Euro Choice and Simon Lloyd had made supplies to MSD after they had each been de-registered for VAT, but the evidence recorded by the FTT showed the relevant supplies all preceded the deregistration of the supplier. The VAT Assessment was not made on the basis that no supplies had occurred, but on the basis that MSD had failed to provide sufficient evidence of payment of consideration. In treating MSD's failure to explain how these supplies had been made as a factor supporting the VAT Assessment, he submitted that the FTT relied upon a separate issue that MSD had not been required to address and which formed no part of HMRC's pleaded case.

(2) The FTT failed to consider or refer to evidence central to the issue of payment, including MSD's turnover exceeding £3.9m to £4.4m during the relevant periods; evidence that a very substantial proportion of MSD's business was conducted in cash; the fact that the supplies were accepted as genuine (and formed the basis of excise duty assessments); and the scale and duration of trading with Gujarr and Euro Choice, from which payment could reasonably be inferred.

48. I am not persuaded that this ground of appeal identifies an arguable error of law that was material to the FTT Decision.

49. The FTT concluded at FTT[142] that MSD had not adduced sufficient evidence to establish consideration was paid for the supplies in question. This conclusion is a finding or evaluation of fact by the fact-finding tribunal, and appellate courts and tribunals have been repeatedly warned not to interfere with such findings or evaluations unless compelled to do so, ie unless the appellate court or tribunal is satisfied that the fact-finding tribunal was plainly wrong. The question is whether the decision reached is one that no reasonable tribunal could have reached. Furthermore, it is well-established that "An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it" (Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464 at [2(iii)]).

50. The FTT's discussion of whether there was sufficient evidence that consideration was paid by MSD to its suppliers is set out at FTT[134] to [142]. The FTT had correctly identified

the issue and that it was for MSD to establish that consideration was paid to its suppliers for the goods invoiced (FTT[134]).

51. This section of the Decision does not exist in isolation:

(1) The FTT had addressed MSD's finances at FTT[15] to [36]. The FTT had set out a summary of MSD's accounts for the years ended 31 March 2016 to 31 March 2020 at Appendix III, and those tables set out its level of turnover in each of the years.

(2) The FTT made findings of fact in relation to the VAT Assessment at FTT[44] to [52]. These included at FTT[47] that Mr Deol told HMRC on 18 September 2015 that goods were purchased in cash from Simon Lloyd and Gujarr, and that although not reconcilable to specific invoices, the records did show the value of goods purchased from Gujarr, Euro Choice and Simon Lloyd (£1,554,627, £1,684,258.60 and £602,346 respectively) and that "Such payments are recorded as predominantly being made by cash". The FTT then referred to this particular paragraph at FTT[135] when summarising the evidence relied upon by MSD.

(3) The FTT was well aware that the supplies in question had been the subject of excise duty assessments. Those assessments were part of the same appeal to the FTT, and at FTT[53] the FTT stated "The First Duty Assessment concerns the same supplies as the VAT Assessment".

52. The FTT did refer to the timing of the supplies by both Gujarr and Euro Choice. I agree that the FTT made a mistake as to the relevant chronology (at FTT[137] and [138]). However, I do not accept the submission that it is arguable that the FTT had treated this chronology as material to its consideration or that this error was material to its decision. Looking at the FTT's reasons for finding that MSD had not met its burden, they included:

(1) "Other than the Sage-type spreadsheets and payment acknowledgements/receipts, there is little, if any, evidence to support and/or explain how such cash payments were made, no record of any cash movements or indeed how or why MSD came to have such large amounts of cash to make the payments given the cash shown in its accounts during the periods in question. There is no audit trail or reconciliation of amounts paid to invoices. There was also no recording of income or expenditure in a cash book and no receipts were kept" (FTT[136]).

(2) MSD had not explained why, having instructed DDEL to undertake due diligence on Gujarr, it contended it made cash payments of £40,000 to £80,000 to Gujarr when it is clear from the due diligence report that Gujarr does not accept payment in cash over £11,000 (FTT[137]).

(3) The FTT was unable to accept the accuracy or reliability of Mr Deol's untested assertions made to HMRC officers as he did not give evidence (FTT[139]).

(4) The Sage-type spreadsheet had been compiled by MSD itself (FTT[140]).

(5) The payment acknowledgements and receipts were therefore the only corroborating evidence of consideration being paid for purchases from Gujarr and Euro Choice (supporting 50% and 38% of those purchases respectively), and there was no such evidence in support of supplies from Simon Lloyd.

53. The FTT demonstrated that it had evaluated the evidence before it and reached its conclusion on the relevant issue. Notwithstanding the mistake as to the chronology, I am not satisfied that it is arguable that the FTT's conclusion was plainly wrong. Accordingly, I am not persuaded that it is arguable that the FTT made an error of law.

54. Permission to appeal on this ground is refused.

Ground 3

55. The third ground of appeal is that in dismissing the appeal against the First Duty Assessment the FTT misapplied the test established in *Pegasus Birds* and failed to undertake the second stage of the statutory enquiry.

56. Mr Walker-Nolan submitted that the essential error was that the FTT treated the date on which Officer Singh formed the opinion that an assessment could be issued as determinative and failed separately to determine when the last item of evidence of sufficient weight came to the knowledge of HMRC, as required by *Pegasus Birds*. He submitted that the FTT conflated the subjective opinion of Officer Singh (ie Stage 1) with the objective determination of when sufficient evidence was communicated to the Commissioners (ie Stage 2).

57. Mr Walker-Nolan submitted that it was at least arguable that, if the FTT had correctly applied Stage 2, it would have found the evidence considered by Officer Singh sufficient to issue the assessment had been communicated to the Commissioners by at least 25 October 2015 (ie more than a year before the First Duty Assessment was made). Officer Alabi had the 53 invoices used to prepare the VAT Assessment by that date, the spreadsheet emailed by Officer Alabi simply summarised information already held by other officers of HMRC before 26 October 2015 and Officer Singh had not purported to identify any information derived from his further visits to MSD in December 2015 and January 2016.

58. I am not persuaded that this ground of appeal identifies an arguable error of law.

59. Section 12(4)(b) Finance Act 1994 requires an assessment to be made within one year of the date on which evidence of facts sufficient, in the opinion of the Commissioners, to justify the making of the assessment comes to their knowledge. The FTT then correctly set out the relevant legal principles in Appendix II (at [12] to [16]). The FTT cited not only *Pegasus Birds*, but also the subsequent decisions in *Lithuanian Beer* and *DCM (Optical Holdings).* In this situation an appellate tribunal should be slow to conclude that those principles have not been properly applied (*DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [58]).

60. In its consideration of whether the First Duty Assessment was made in time, the FTT referred to Mr Walker-Nolan's submission that HMRC had knowledge of the facts required by 25 October 2015. The FTT referred to the language of s12(4)(b) and stated that the time limit begins on the day on which evidence of facts "sufficient in the opinion of the Commissioners" to justify the assessment comes to their knowledge and that the person whose opinion is relevant is, here, Officer Singh. The FTT was well aware of not only the relevant law and the case being put by HMRC but also the challenge being made by MSD on the basis of HMRC as a whole having the relevant knowledge.

61. In its findings of fact the FTT set out the investigations undertaken by Officer Singh, including:

> (1) calling Mr Deol on 1 November 2015 to arrange a visit, requesting further information (invoices) from Officer Alabi on 6 November 2015 (having received a copy of the tax schedule of supplies attached to the tax loss letter on 4 November 2015) (FTT[54]);
>
> (2) Officer Singh made a pre-arranged visit to MSD on 14 December 2015, explaining at the visit that the purpose was to make further enquiries in relation to the supply chains identified by Officer Alabi (FTT[55]);
>
> (3) he was told on 1 December 2015 that the invoices he wanted had been scanned onto HMRC's EF system (FTT[54]);

(4) Officer Singh received more information from Officer Alabi on 18 December 2015 (FTT[56]);

(5) on 6 January 2016 Officer Singh updated Officer Alabi by email and informed her of some anomalies which may need to be addressed;

(6) Officer Singh made another visit to MSD on 11 January 2016 (FTT[57]);

(7) Officer Singh sent a summary of his findings to Officer Alabi on 4 February 2016. That email referred to his email of 6 January 2016 and requested further information; and

(8) Officer Alabi sent further information on 11 March 2016 (FTT[58]).

62. Officer Singh's evidence was that it was not until 11 March 2016, after he had received all the invoices from Officer Alabi and completed his enquiries into MSD's supply chains that he had sufficient evidence to issue the First Duty Assessment. The FTT described Officer Singh's evidence as quite defensive at times, but that he was on the whole a straightforward and credible witness (FTT[8(2)]).

63. The FTT addressed the knowledge of Officer Singh throughout, and not only referred to the further enquiries he undertook but also his evidence that he did not consider that the evidence available to him was sufficient to issue an assessment until he had completed his enquiries into MSD's supply chains, ie by 11 March 2016 (and the FTT also considered that it was arguable that a later date could have applied). Whilst the FTT did not make an express finding as to when the last piece of evidence of sufficient weight to justify the assessment came to the knowledge of Officer Singh, I am not persuaded that it is arguable that this was necessary on the facts here where the FTT accepted Officer Singh's evidence as above.

64. It is not arguable that there was an error of law in the Decision and permission to appeal on this ground is refused.

Ground 4

65. The fourth ground of appeal is that in dismissing the appeal against the Second Duty Assessment, the FTT misapplied the test in *Pegasus Birds* and took account of matters irrelevant to the assessment actually made. Mr Walker-Nolan submits that as in Ground 3 the FTT had conflated the two stages of the *Pegasus Birds* enquiry and also treated investigations into transactions ultimately excluded from the assessment as relevant to whether the assessment could be issued.

66. The Second Duty Assessment was issued on 26 September 2018 (and related only to supplies from Barge, Meadowhall and Wentworth). Mr Walker-Nolan's challenge is essentially based on HMRC having been in possession of the underlying factual information by 25 September 2017 as a VAT assessment (subsequently withdrawn) was issued in relation to the same supplies on 16 August 2017.

67. As with Ground 3, MSD's submissions focus on HMRC as a whole having been in possession of the information which was subsequently used by Officer Singh, whereas it is the knowledge and opinion of Officer Singh which is relevant. On the basis of the facts as found by the FTT, and the FTT's conclusions at FTT[162] to [163], it is not arguable that the FTT erred in its conclusion that HMRC had met its burden. This is particularly the case given that Mr Walker-Nolan's skeleton states at [38(iv)] that "it is at least arguable that [the FTT] would have concluded that Officer Singh had all evidence reasonably required to justify the Second Duty Assessment by no later than 9 January 2018"; that is a date within 12 months of the issue of the assessment.

68. Further it is not accurate to state that the FTT had concluded that Officer Singh was entitled to defer forming the requisite opinion pending information relating to transactions that

were not ultimately assessed. The FTT did refer to Officer Singh's enquiries in relation to Drinks Stop and Paragon. However, Officer Singh's conclusions and the FTT's findings and conclusions were expressed by reference to the supplies from Barge, Meadowhall and Wentworth, which did form part of the assessment actually issued.

69. It is not arguable that there was an error of law in the Decision and permission to appeal on this ground is refused.

Ground 5

70. The fifth ground of appeal is that the FTT made an error of law in concluding that MSD was the holder of the goods subject to the Third Duty Assessment.

71. Mr Walker-Nolan submitted that the FTT had misunderstood a material fact and omitted from its consideration evidence material to the attribution of possession, submitting that at FTT[85] the FTT appeared to have found that HMRC had seized all the alcohol at the premises (in contrast to the evidence of Officers Cooper and Robinson that the 28 pallets seized were a fraction of the alcohol present); and that Mr Andrews, despite accepting that the seized alcohol belonged to MSD, had been unable to produce paperwork for the seized goods. Mr Walker-Nolan submitted these matters were material as the combination of shared occupation, selective seizure of only some of the stock, and absence of documentary attribution materially weakened the inference that MSD was the holder of the goods seized and the FTT's reasons do not demonstrate that it considered those matters.

72. The FTT referred to 28 pallets as having been seized at FTT[85].

> "85. Mr Andrews was advised by Officer Cooper that, given the commercial quantities of alcohol present, all the goods within the unit would be seized by HMRC as there was no paperwork and/or insufficient evidence to verify that UK Excise Duty had been paid. In all, 28 pallets were seized. That seizure was not challenged and the goods were therefore condemned as forfeit."

73. I accept that the language used in this paragraph does not expressly state that these were only some of the pallets in the unit. However, I do not accept that it is arguable that there was any misunderstanding of the facts by the FTT, or that this was material to its decision.

74. At the section of the Decision dealing with the Third Duty Assessment and the seizure, the FTT started by recording in FTT[82] that "A number of companies, including MSD, held accounts to store alcoholic goods at those premises." The findings then address the communications between Officer Cooper and Mr Andrews of MSD, recording at FTT[84] that Mr Andrews explained that the alcohol from the unit belonged to MSD. FTT[85] was not itself a finding that the 28 pallets were the entire contents of the unit; this is a statement of what was said and has to be read in the context of the surrounding paragraphs.

75. Addressing subsequent written communications, the FTT recorded the following:

> "89. However, MSD appears to have accepted ownership of those goods in a letter to HMRC, dated 17 July 2022, sent in response to the AWRS "minded to refuse" letter issued by HMRC on 23 June 2022 (see below) in which it is stated:
>
> "In relation to the goods seized on 31st October 2018: Again, we repeat that these goods were stored at premises that we had been told by HMRC did not need to be "registered". In relation to the documentation regarding those, and other goods, we provided extensive documentation to HMRC at the time and were told that they were content for the rest of the stock that was stored there to be collected by MSD Wholesale.""

76. Not only is it not arguable that the FTT had misunderstood the factual position, but its findings and conclusions relied on positive identification of the alcohol as belonging to MSD by MSD. In circumstances where, as the skeleton acknowledges, Mr Andrews accepted that the seized alcohol belonged to MSD, it is not arguable that the FTT made an error of law by not referring to all of the evidence before it. In any event the FTT did state at FTT[85] that no paperwork and/or insufficient evidence to verify that excise duty had been paid was provided. The lack of documentation was referred to again at FTT[88] and FTT[168].

77. The FTT had identified that the issue was whether MSD had demonstrated that it was not the holder of the 28 pallets that were seized at the time of seizure or any relevant prior time, and that is the question it answered at FTT[169].

78. It is not arguable that there was an error of law in the FTT Decision. Permission to appeal on this ground is refused.

Ground 6

79. The sixth ground of appeal is that the FTT made an error of law in concluding that the AWRS Refusal Decision was one that a reasonable officer could reach.

80. Mr Walker-Nolan submitted that the FTT failed to take account of material evidence relevant to MSD's commercial viability and gave inadequate reasons for rejecting MSD's case that the liabilities relied upon by HMRC were, in practical terms, soft loans and did not represent a realistic threat to the continuation of the business. MSD's case was not merely that these liabilities had been labelled "soft loans" but that the objective evidence demonstrated that they had, in practice, been treated as funding arrangements which were not expected to be enforced (and were therefore not a genuine threat). Mr Walker-Nolan submitted that the FTT failed to deal with the absence of any written demand for repayment of the loans or any enforcement action after the contractual enforcement date and after the death of Mrs Kaur, or the evidence in the Muggridge Report.

81. I am not persuaded that it is arguable that the FTT made an error of law.

82. The FTT had correctly identified the issue at FTT[133(4)] as being whether HMRC's decision was one which no reasonable officer could have reached, and in particular whether, on the primary facts, Officer Bain failed to consider any matter which should have been taken into account, took into account any irrelevant matter, or whether the decision was otherwise one that was plainly wrong in that no officer of HMRC, acting reasonably, could have reached it. The FTT was not considering afresh whether it would have reached the same decision.

83. The FTT then set out the application for AWRS approval, and HMRC's reasons for refusal, at FTT[90] to [98]. HMRC's reasons for refusal were recorded at FTT[97].

84. There is significant consideration of the financial position of MSD in the Decision:

(1) The FTT made detailed findings as to MSD's finances at FTT[15] to [36]. This included not just MSD's accounts but also the creditors referred to as the Kuflink debenture and Harwinder Singh.

(2) The FTT found at FTT[25] that despite provision in the loan agreement for payment of interest none had been paid by 9 February 2023; that MSD had made no repayments to Kuflink (FTT[26]); and that Mrs Deol's evidence was that both the Kuflink and Harwinder Singh loans were taken on personally by Mrs Kaur and converted to director's loans (FTT[26]). The FTT also found that "Mrs Deol was unable to help in respect of the value of the late Mrs Kaur's estate and what action, if any, might be taken by her personal representatives in relation to these loans" (FTT[27]).

(3) The FTT addressed the evidence in the Muggridge Report at FTT[30] to [35]]. The report referred to the financial support provided by Mrs Kaur and family members and, at FTT[34], that MSD was reliant on the continued financial support of family members and other loan funders.

85. The FTT's consideration of this issue was then at FTT[170] to [180].

86. The FTT expressed agreement with Officer Peacock's conclusion that he had not considered £1.6m to be a "soft loan" (at FTT[173]), and also recorded not only the position in MSD's accounts but also the uncertainty as to what action might be taken in relation to the soft loans by the personal representative of the estate of the late Mrs Kaur (at FTT[179], in the context of whether HMRC would inevitably come to the same conclusion if directed to conduct a further review).

87. Mr Walker-Nolan relied on the amount of a loan not being determinative of whether repayment is to be expected, as well as the evidence of past forbearance in relation to the loans. These matters may well be relevant to the consideration of the commercial viability of an enterprise. However, in the context of the FTT's findings of fact and its jurisdiction on this issue, it is not arguable that they required the FTT to have concluded that the funding arrangements which were in place meant that no officer of HMRC, acting reasonably, could have reached the decision to refuse AWRS approval.

88. It is not arguable that there was an error of law in the FTT Decision. Permission to appeal on this ground is refused.

DECISION

89. None of the grounds of appeal identify an arguable error of law that was material to the FTT's decision. Permission to appeal is REFUSED.

Signed: **Jeanette Zaman**
Issued to the parties on: 9 November 2026