TC02508

Appeal number: LON/2007/1103

APPLICATION TO BAR HMRC FROM PROCEEDINGS – HMRC admitted deficiencies which included failure to comply with a Tribunal order timeously – whether prejudicial to appellant – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIRST CLASS COMMUNICATIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 7 December 2012

Mr I Bridge, Counsel, instructed by Field Fisher Waterhouse, for the Appellant

J Kinnear QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 20 August 2012 the appellant applied for HMRC to be barred from these proceedings under Rule 8. On 8 October 2012 it renewed this application with further grounds and made an application for information and disclosure said to be relevant to the barring application.

2. On 7 December 2012 I had to make two determinations: the first was whether on the application of the appellant to adjourn the hearing of the barring application and/or grant the application for information and disclosure, and the second was (if not adjourned) to hear the barring application.

Background

3. This is a case where HMRC have denied the appellant its input tax in transactions in period 03/06 on the basis (it is alleged) the invoices were incorrect. The appeal was lodged in 2007.

4. Sometime in mid-2011 the appellant applied for disclosure of various items. HMRC refused to make the disclosure voluntarily. The appellant also applied for a stay of this case behind certain criminal proceedings mentioned below.

5. The applications came in front of me on 19 December 2011.

6. At that hearing HMRC mentioned a Contempt of Court Act Order ("the Contempt Order") as one of their reasons for their objection to the application for disclosure. From what was said later, I find this Order was issued by the Kingston Upon Thames Crown Court and dated 20 June 2011. It prohibited the disclosure of the report of trials and convictions of some 17 persons (one of whom was a Mr Marshall Boston, to whom I refer below) until the conclusion of all 17 proceedings.

7. At this December 2011 hearing, the parties were able to reach agreement on the disclosure application. My understand of HMRC's position was that the disclosure of the material sought by the appellant would be a breach of the Contempt Order but that the last of the trials was expected to take place in March 2012 and that as soon as that trial finished the Order would be lifted and disclosure could lawfully be made. My understanding is that that was why the parties agreed that disclosure did not have to take place until 31 March 2012; and I was asked to make a consent order to that effect which I did.

8. At this December 2011 hearing, the parties did not reach agreement on the appellant's application for a stay of these proceedings behind the criminal proceedings which were the subject of the Contempt Order. I was required to make a decision on this. My ruling was that the application would not be granted. I also made various consequential case management directions.

9. On 29 March 2012, two days before the final date for disclosure, HMRC lodged an in camera application with the Tribunal for the date of compliance with my December 2011 disclosure order to be deferred until after the Contempt Order was lifted.

10. On 13 April 2012, the appellants made an application that I impose an unless order on HMRC requiring them to comply with the disclosure order within 14 days or be barred from proceedings.

11. HMRC's in camera application did not come on for hearing until 1 June 2012. On that date, I heard an in camera application for the hearing of HMRC's ex parte application to be heard in camera, which I allowed. I then immediately heard HMRC's application in camera and allowed this. The terms of the order, which were immediately communicated to the appellant, are set out in the first appendix to this decision. In brief,

(1) HMRC's compliance with my December Order to disclose was deferred until the earlier of the lifting of the Contempt of Court Act Order, or the criminal proceedings concluding; or the jury in the last of those proceedings returning a verdict.

(2) HMRC were ordered to immediately notify the Tribunal and appellant when the first of those three events occurred.

12. Of the numerous defendants mentioned in the Contempt Order, the only one whose trial was outstanding at the time of the June 2012 hearing was that of Mr Marshall Boston. Mr Boston pleaded guilty on 12 June 2012 which was the day on which his trial was due to commence. The Contempt Order was lifted on the same day as the conviction. Mr Boston was sentenced on 10 July 2012 and on the same day HMRC issued a press release describing all the verdicts in detail.

13. However, HMRC did not notify the appellant and Tribunal of the lifting of the Contempt Order, contrary to the requirements of my Order dated 1 June 2012.

14. The appellant, having received the order of June 2012, did not proceed with its application of April 2012 for the unless order. However, as mentioned in paragraph 1 above, and following the press coverage of HMRC's press release, they did lodge a new application on 20 August 2012 which was for HMRC to be barred from proceedings on the grounds (in brief) for failure to comply with my order of June 2012.

15. HMRC notified the appellant on 9 September 2012 that they objected to that application but their detailed grounds of objection were not served until late on 1 October 2012, which was the day before the hearing of the barring application.

16. Partial disclosure of the material ordered to be disclosed in the December 2011 Order was made by HMRC on 17 September 2012, and more on 26 September 2012. Further disclosure was made on 19 October 2012 and HMRC's position is that by that date they had complied fully (albeit late) with the order for disclosure.

17. The appellant's barring application was listed in front of me on 2 October 2012. At that hearing the appellant made an application for the hearing to be adjourned. I allowed that application orally and made further oral directions. On 10 October, after exchange of correspondence between the parties and the serving of a new application by the appellant on 8 October, I issued written directions, revoking my oral directions which adjourned the hearing, and reconvening the appellant's application for adjournment of the hearing of its barring application. These written directions are in the second appendix to this decision.

18. I mention in passing that I now understand that it is the appellant's position that I misunderstood their position in the October hearing. Whether I did so is a question it is not necessary to resolve for the purposes of this decision.

19. The rehearing of the appellant's application to adjourn the hearing of its barring application came before me on 7 December 2012.

20. The appellant's grounds in December 2012 for seeking adjournment of its barring application were that:

(1) It wished to add new grounds to its first application for barring dated 20 August 2012;

(2) It sought an order for disclosure and provision of information in respect of its barring application.

The adjournment application

21. A comparison of the two applications (made in August and October 2012 respectively) was that in substance they only differed in that the later application had the additional allegations that HMRC had failed to provide full and frank disclosure to the Tribunal at the in camera hearing in June 2012. In particular, it was the appellant's case that by the time of the in camera hearing, that (of the 17 prosecutions the subject of the Contempt Order) only one prosecution (that of Mr Boston) was outstanding, and that there had been plea bargaining in Mr Boston's case and that no trial was expected to take place. At the time the application was made in August 2012, it was the appellant's position that they suspected HMRC had not told the Tribunal any of this at the in camera hearing: at the hearing before me in December their position was that they alleged that HMRC had failed to make full and frank disclosure of some matters to the Tribunal in the in camera hearing.

22. I decided that, in their context, these were minor matters for which I would not have adjourned the hearing in October. And in any event, by December's hearing, HMRC indicated that they were by then prepared to deal with these new allegations and there was therefore no reason at all to adjourn the barring hearing in order for these new allegations to be heard.

23. The second reason proposed for the adjournment was to enable the application for disclosure and information to be made and actioned. The appellant's application, in summary, was for four persons to answer questions. Those four persons were an

HMRC officer; the HMRC solicitor who had had conduct of this appeal on behalf of HMRC; an HMRC director in the Solicitor's office; and Counsel who had represented HMRC at the in camera hearing.

24. The appellant wished to pose over 100 questions to these four persons. The questions went to what they were instructed to do, what they did, when, and why, with respect to the conduct of this appeal on behalf of HMRC.

25. I decided that I would not order disclosure of the information requested on the grounds that, firstly, it was largely if not entirely, asking for material that was privileged communications between a party and its legal advisers; and, secondly, in any event it was not relevant to the hearing but a fishing expedition. This was because the question of who within HMRC's solicitors office was at fault in HMRC's admitted failures in dealing with this case and complying with the June Order was simply not relevant. The sanction (if any) applied by the Tribunal to HMRC for its admitted failures would not be any different by knowing exactly who in HMRC had been negligent. HMRC offered no excuse for what had happened so I did not need to investigate whether there was an excuse.

26. The sanction applied by the Tribunal might well be different if it was established that HMRC's failures were part of a deliberate course of conduct on HMRC's part. Mr Bridge's position was that it was possible that the failures did arise through a deliberate policy by HMRC not to make the disclosure ordered by the December Order. He said the appellant and the Tribunal had an interest in getting to the truth of it. But he made it clear that he did not allege that there was such a deliberate course of conduct on the part of HMRC. As he was not making this allegation, I found it was not relevant. No party can ask for disclosure to embark on a fishing expedition with a view to finding evidence to support an allegation which it does not currently make.

27. As I refused the appellant's application for information and disclosure, there was no point in the hearing of the barring application being adjourned. I ordered it would proceed on the basis of the complete allegations made in the second of the appellant's two applications.

28. Mr Bridge then asked for it to be adjourned on the grounds he was not prepared. I refused. In my opinion, my order of 10 October (set out in the appendix) was clear and in paragraph 7 I had stated that if the appellant's re-convened application for an adjournment was unsuccessful, the hearing would immediately proceed to deal with the barring application itself. The appellant ought to have been prepared to proceed.

29. The appellant then made its barring application, on the full grounds as set out in its 8 October 2012 application.

The barring application

30. The misconduct alleged in the 8 October 2012 barring application was as follows:

(a) Failure to notify the Tribunal of the lifting of the Contempt Order;

(b) Effective breach of an unless order;

(c) Failure to disclose documents.

(d) Failure to provide full and frank disclosure;

(e) Breach of overriding objective

At the hearing the appellant was agreed that it made its application to bar HMRC under Rule 8(3)(b) coupled with Rule 8(7):

> "**Rule 8 Strking out a party's case**
>
> ….
>
> (3) The Tribunal may strike out the whole or a part of proceedings if –
>
> (a) …
>
> (b) The appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly or justly;
>
> (c) …..
>
> ……..
>
> (7) This rule applies to a respondent as it applies to an appellant except that –
>
> (a) a reference to the striking out of proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; …."

Failure to notify the Tribunal

31. The June Order required immediate notification to the appellant and Tribunal of the lifting of the Contempt of Court Act Order. It was lifted on 12 June 2012 but HMRC did not in fact notify the appellant until 6 September 2012 and then only after the appellant pointed out that the convictions were in the public domain.

32. HMRC apologised for this failure and did not seek to excuse it.

Effective breach of an unless order

33. The appellant's case was that it had applied for an unless order in April 2012 which it had not got, but which it would have got if HMRC had notified the Tribunal and appellant earlier of the lifting of the Contempt of Court Act Order. So now it applied for the Tribunal to "consider the Respondents' conduct by reference to an unless order being deemed to have been issued."

34. I do not find this persuasive. This Tribunal has no power to strike out an appeal under Rule 8(1) or 8(3)(a) unless an Unless order has been issued. There is no such

thing as breach of a non-existent unless order. The power to bar HMRC, if any, is under Rule 8(3)(b). And HMRC's conduct in failing to comply with the Order is relevant to that application, and considered below. But there was no "effective breach" of an unless order: there was no unless order.

Failure to disclose documents

35. The June Order required disclosure to take place after the lifting of the Contempt Order. Yet even after their letter of 6 September, HMRC did not make prompt disclosure. Indeed it was not completed by the time of the October Hearing and, as stated above, it was their case it was not complete until 19 October 2012.

36. The appellant's written applications allege a failure to disclose: and indeed at the time the allegations were made it was the case that HMRC had not made the disclosure ordered by me in December 2011. By the hearing in December 2012, the appellant's position was that it was not in a position to confirm that full disclosure had taken place but it did confirm that it was not making a further application for disclosure nor claiming that the disclosure made was incomplete.

37. So at this point in time the Tribunal regards the disclosure ordered by the December 2011 Order to have been completed on 19 October 2012 but finds that it was not made timeously. HMRC accepts it should have been completed very shortly after 12 June 2012.

38. It was not just that HMRC ignored the terms of the June Order. Disclosure had been due to take place on 31 March 2012 under the terms of the December 2011 Order. The application to defer the disclosure was not made until 2 days before the due date. At this point HMRC ought to have have had the disclosure prepared, but it was clear (from the time taken to comply in the Autumn of 2012) that the disclosure was not prepared by 29 March 2012. So by the time of the application for deferment HMRC were not in a position to comply with the December 2011 Order in any event.

Failure to provide full and frank disclosure

39. This was the new allegation in the October application which did not appear in the August application and I have mentioned it above.

40. The appellant's case was that, as at 1 June 2012, the only outstanding matter was the trial of Mr Boston and that there were on-going plea bargaining in his case and that no trial was expected to take place. As I have said, it was the appellant's suspicion in August that HMRC had failed to communicate this to me at the June in camera hearing: by the time of the December 2012 hearing Mr Bridge said the appellant alleged that HMRC had not made the full and frank disclosure to me to the extent that would be required in an in camera hearing.

41. My recollection is that I was informed that only one prosecution was outstanding, although my notes do not record this. In any event, I consider it was of little relevance how many prosecutions were outstanding: the relevant question in

June 2012 was whether the Contempt Order was in place and whether the disclosure ordered by me in December 2011 would be in breach of it.

42. With respect to the allegation that I was not told that the defendant was plea bargaining and that no trial was likely to take place, HMRC agree that I was not told this. But HMRC do not agree that it was true or, if true, that they knew it: their position is that even in December 2012 they do not and could not know this. Mr Bridge's position at the December 2012 hearing is that he had "information" that there was plea-bargaining in early June and no trial was expected but no *evidence* that this was the case. I am unclear what Mr Bridge considers the difference between evidence and "information" to be, but I am clear that Mr Bridge was not attempting to substantiate this allegation, and I find it is not made out.

43. At the December hearing, Mr Bridge also said that I was not informed in June hearing that the Contempt Order was likely to be lifted shortly after the hearing because the trial was due to start on 12 June. However, I do not understand why this allegation was made as on the face of HMRC's ex parte application, which was later disclosed to the appellant, it said at paragraph 4 that proceedings were expected to conclude at the end of June 2012. I do not find this allegation made out.

44. In conclusion, I find there to be no substance in the appellant's claims that HMRC failed to provide full and frank disclosure at the in camera hearing before me.

Breach of the overriding objective

45. This allegation related in particular to HMRC's failure to respond to all letters sent to it by the appellant. HMRC accepted that there were letters which had not received a reply, although there was no suggestion that at this hearing in December 2012 the appellant had raised any outstanding queries to which HMRC had still failed to respond.

46. Rule 2 provides as follows (in so far as relevant):

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) ….
>
> (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."

47. While it is for the Tribunal to seek to give effect to the overriding objective, both parties should help the Tribunal to do so. What the appellant appeared to be really saying was that HMRC's failure to respond to letters or deal with matters raised

promptly was but one aspect of HMRC's failings in respect of this appeal and meant (in the appellant's view) that the Tribunal would be unable to deal with the case fairly and justly. I consider this below.

Conclusions

48. HMRC accepted that it did not comply with the June Order to immediately notify the lifting of the Contempt of Court Act Order, that disclosure was made late, that some letters from the appellant were not replied to, and that HMRC's defence to the appellant's first barring application was served on the day before the hearing of it, giving the appellant no time to consider it. As I understand their position, HMRC apologises for these failings but offers no excuse. They accept the appeal has been mismanaged on their part and that Tribunal Orders have not been adhered to timeously.

49. So far as the allegations of "effective breach of an unless order", and less than full and frank disclosure, I have dismissed these as not made out for the reasons set out above.

Barring?

50. The Tribunal has power to bar HMRC from taking any further part in the proceedings. Barring HMRC from some or all of the proceedings does not necessarily mean HMRC will lose its appeal although in many cases that would be the effect as it would leave HMRC unable to offer evidence: however, in a usual appeal the burden of proof is on the appellant and the appellant would still need to make out a prima facie case to succeed. In this case, I understand the burden of proof is on the appellant. Nevertheless, barring HMRC is likely to have much the same effect as summary judgment against HMRC and I approach it on that basis.

51. In my view, I agree with counsel for HMRC that there are at least two situations where Rule 8(3)(b) could apply.

52. Firstly, Rule 8(3)(b) could apply where the appellant has already been so prejudiced by HMRC's conduct in a manner which cannot be remedied and that therefore the proceedings cannot be fair and just. In such a case HMRC should normally be barred from the proceedings. Secondly, I consider that Rule 8(3)(b) could apply where there has been a course of conduct by HMRC which, while it has not yet meant it is not possible to deal with the appeal fairly and justly, nevertheless is part of a pattern of conduct which, if it continues, will mean that the appeal cannot be dealt with fairly and justly. In such a case, I consider it might be appropriate to bar HMRC from proceedings.

53. I look first at whether HMRC's conduct so far has resulted in such prejudice to the appellant that the appeal cannot be dealt with fairly and justly.

54. As I understood it, the appellant's case was that they were prejudiced by the delays caused by HMRC's conduct.

55. Delay may well be prejudicial. Firstly, the appellant is out of the money it claims is rightly its. Any delay is prejudicial, assuming that its appeal is ultimately successful, in that it is kept out of its money longer. Secondly, delay puts back the date of the ultimate substantive hearing. The longer the delay, the poorer the witnesses' recollection of events, and the greater the financial and mental stress of conducting litigation. This may be prejudicial to the appellant, particularly if it has the burden of proof, as in this case.

56. So how long was the delay and what prejudice has it caused the appellant?

57. The parties could not agree on the length of delay. The appellant's case is that the delay was of approximately 14 months. They asked for disclosure in mid-2011 and finally got it in October 2012. HMRC's position is that the delay was of approximately 4 months from the date the June 2012 Order should have been complied (within a few days of 12 June 2012) to the date of final compliance on 19 October 2012.

58. I find disclosure was not due to be made until a few days after the lifting of the Contempt Order on 12 June 2012. This is because, although HMRC initially disputed the disclosure and then consented to it in the December 2011 hearing, my June 2012 Order was that disclosure should not be made until Contempt Order was lifted.

59. It was the appellant's position that HMRC should not have made the in camera application which resulted in the extension of time for compliance. I dismissed this as a ground for barring them: whatever the appellant's view of that application, the fact is that it was successful. The appellant was informed of the resulting Order immediately after it was made and the appellant chose not to appeal it and accepts it is now out of time to do so. It is not open to it to criticise HMRC for making an application that succeeded. And it can only criticise the Tribunal for allowing the application by making an appeal, which it declined to do. That is the end of the matter.

60. Because I made the June Order, which was not appealed, disclosure did not have to take place until the Contempt Order was lifted. HMRC cannot be criticised for not making disclosure before that Order was lifted.

61. The delay for which HMRC is (it admits) responsible and for which it has no excuse is the delay since that date. And that is slightly over four months.

62. What prejudice has this delay of 4 months caused the appellant? The appellant pointed to no specific prejudice.

63. I note that the appellant applied for a stay of its appeal behind the appeal of Mr Dilawar Ravjani. At the time of the hearing before me in December 2011 he had already been tried and convicted and sentenced to 17 years in prison. Mr Bridge told me at that hearing that the appellant wished to call him as a witness but that Mr Ravjani would not give evidence while his appeal was pending. His conviction was one of the ones in respect of which the Contempt Order had been issued.

64. The stay was, as I said above, refused by me at the December 2011 hearing. That decision was not appealed. HMRC's position at the December 2012 hearing before me was that the appeal was heard in the Court of Appeal on 1 November 2012 and the court released its decision upholding the conviction on 29 November 2012. Mr Bridge said that this was not previously known to the appellant.

65. In these circumstances, it is difficult to see how the appellant can claim the delay was prejudicial in the sense that HMRC's failure to comply with the Tribunal's order gave the appellant the stay they had applied for but had been refused.

66. On the other hand, it is the case that if the appellant ultimately wins this appeal, the delay has kept it out of its money for four months longer. Putting aside the point that the appellant wanted a stay, a four month delay in a case which has already taken 5 years to get to this point is not particularly large. Nevertheless, the delay is still very undesirable. However, it is also true that the appellant, if ultimately successful, may be compensated to some extent for the delay in interest or repayment supplement.

67. On balance, I do not consider that the delay of four months, albeit caused by HMRC without any excuse being offered, is by itself sufficient to justify barring HMRC, which as I have said, would probably amount to allowing the appeal. I do not in any way wish to suggest that HMRC's conduct is condoned. HMRC's conduct is very serious indeed and on slightly different facts or longer delay might lead to a barring order.

68. The appellant did not claim any other specific prejudice had already been occasioned to it, and so I reject its application to bar HMRC on the basis of prejudice already occasioned to it.

69. However, as I have said Rule 8(3)(b) would, in my view, permit the Tribunal to bar HMRC where HMRC's conduct has been such in the past that, were it to continue, justice could not be done. In this respect, the question is whether HMRC's failings to date are likely to continue.

70. I agree with the appellant that HMRC has shown a pattern of conduct up to fairly recently of mismanagement of this appeal and late compliance with directions. Letters of the appellant have not been replied to promptly; disclosure that they had agreed to make was not prepared; the June Order of this Tribunal was not complied with timeously despite the clear terms of it requiring immediate compliance; even HMRC's defence to the barring application was not served until the night before the hearing. HMRC have not shown courtesy to the appellant nor respect to orders of the Tribunal.

71. If I considered that this behaviour was likely to continue then I consider it would be within my power to bar HMRC on these grounds and I would be likely to so do.

72. However, I am not satisfied that this behaviour will continue. I am informed that the HMRC solicitor who had conduct of the appeal up to the October 2012

Hearing no longer has conduct over it (indeed the Tribunal was informed she is no longer employed by HMRC). I am informed that a new solicitor took over responsibility for the file on 2 October 2012, but that in any event more senior persons in HMRC will have a closer supervisory role over this solicitor's handling of the file than would normally be the case, with a view to ensuring such deficiencies do not occur again.

73. There is no suggestion that HMRC's conduct since 2 October 2012 has been open to criticism. All the criticisms levelled by the appellant which I have found justified relate to earlier conduct.

74. I am therefore not satisfied I should bar HMRC on the basis of a pattern of conduct either. Based on the change of personnel and HMRC's reassurances, I do not expect the mishandling of the appeal to continue. If, despite HMRC's reassurances, the failures on HMRC's part do continue, then no doubt the appellant will renew its barring application.

75. But its applications made on 20 August and 8 October 2012 are refused.

76. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE:

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on

APPENDICES

1. The June 2012 Order

"Sitting in private at Bedford Square, London on 1 June 2012

Having heard Mr Watkinson, Counsel, for HMRC, the hearing being in camera and without notice to the appellant

IT IS DIRECTED that the date for compliance by HMRC with Directions 1, 2, 3 of the Directions of this Tribunal dated 20 December 2011 be deferred until the Order dated 20 June 2011 and made by Kingston Crown Court under s 4(2) Contempt of Court Act 1981, a copy of which is attached to this Direction, is lifted by the Crown Court or the proceedings therein mentioned concluded or the jury in the last of those proceedings returns a verdict, whichever is earlier;

That as soon as that Order is lifted in whole or in part or varied or the proceedings therein mentioned concluded or the jury in the last of those proceedings returns a verdict, whichever is earlier, HMRC shall immediately notify the Tribunal and the appellant;

That compliance with the Directions 4-6 dated 20 December 2011 is deferred until after HMRC have complied with Directions 1-3;

That the inter partes hearing due to be listed for a half day will take place but will be solely to consider HMRC's application for the old costs regime to apply to this appeal as it follows from the above directions that the hearing of the appellant's application for an unless order in relation to HMRC's failure to comply with directions 1-3 of Directions of 20 December 2011 is hereby deferred until after the Order of Kingston Crown Court is lifted or the proceedings therein mentioned concluded or the jury in the last of those proceedings returns a verdict, whichever is earlier.

REASONS FOR DIRECTION

The Tribunal considers that it has jurisdiction to entertain an application without notice to the other party and to hold a hearing in camera and without notice to the other party: Rule 5(1), Rule 6(4), Rule 32(2)(c) and Rule 32(4)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. Nevertheless, the Tribunal would only exercise such power in exceptional circumstances as its overriding purpose is the fair administration of justice.

Nevertheless, in this instance, the Tribunal was satisfied that HMRC was right to make its application in camera as it involved disclosure of matters to the Tribunal disclosure of which in an inter partes hearing would have been in breach of the above Order; the Tribunal was further satisfied that the date for compliance with Directions

1, 2 & 3 ought to be deferred because compliance with any one of those Directions would involve a breach of the Order.

The Tribunal noted that the effect of this Direction is that the hearing of the appellant's appeal will inevitably be delayed. But the Tribunal also noted that the appellant had in its application dated 4 April 2011 asked for its appeal to be stayed behind the criminal proceedings. If the appellant no longer seeks a stay of its appeal *and* no longer seeks disclosure of the items mentioned in Directions 1, 2 & 3 of 20 December 2012 then it should notify the Tribunal accordingly so the appeal may be progressed to an earlier hearing.

2. The October 2012 Order

"Having read

1. the letter from Field Fisher Waterhouse dated 4 October 2012;
2. HMRC's letter of 3 October 2012;
3. Appellant's amended application dated 8 October 2012

The Tribunal rules as follows:

1. the oral directions given at the hearing on 2 October and given in writing (but not yet released to the parties) on the same day were to give the appellant leave to "serve…an amended application to include an additional allegation in respect of its claim that HMRC misrepresented the factual situation to the Tribunal in the in camera hearing…"

2. The amended application now served does not contain such an allegation. The additional allegation it contains is that HMRC failed to provide full and frank disclosure at the in camera hearing.

3. The appellant's position at the hearing in front of me on 2 October 2012 was that the verdicts were in and the defendants sentenced some months before the in camera hearing and so that the entire premise of the in camera hearing was false; HMRC's position now as set out in their letter of 3 October 2012 is that that was a misrepresentation of the position which was that, at the time of the in camera hearing, one defendant was still awaiting trial and in the event pleaded guilty shortly after the in camera hearing.

4. The directions I gave on 2 October were given on the understanding that the appellant intended to make an additional and very serious allegation against HMRC based on their statement to me at that hearing that all the relevant first instance criminal proceedings had come to an end before the in camera hearing. However, in the event the appellant has chosen to make only the lesser accusation that HMRC's disclosure was not full and frank. Unless I am told otherwise, I assume that it is not proceeding with the original accusation of misleading the Tribunal because it no

longer considers that HMRC did mislead the Tribunal and in particular it accepts what HMRC say in their letter of 3 October that one of the relevant criminal proceedings had not come to an end at the time of the in camera hearing.

5. I did not give the appellant permission to amend its application to add in only a lesser accusation; moreover, it is not certain that, had I known that this was all they would do, that I would have adjourned the hearing on 2 October.

6. While the mistake on the part of the appellant may well have been innocently made, I cannot allow the hearing of 2 October to stand adjourned on a false basis.

7. Therefore, unless the appellant notifies the Tribunal by return that it does intend to apply to amend their application to include an allegation that HMRC misled the Tribunal at the in camera hearing, I accede to HMRC's request to reconvene the adjourned hearing to reconsider the appellant's application to adjourn the hearing. This hearing will proceed to deal with the appellant's original application to bar HMRC if the adjournment application is unsuccessful.

The parties are therefore directed within 7 days to provide their dates to avoid for the hearing to be reconvened in October or November 2012.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 31 January 2013