TC04083

Appeal number: LON/2008/01421

PROCEDURE – application to strike out – rule 8(3)(b), Tribunal Procedure Rules – whether the appellant had failed to co-operate with the tribunal to such an extent that the tribunal cannot deal with the proceedings fairly and justly

FIRST-TIER TRIBUNAL
TAX CHAMBER

NUTRO UK LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 6 October 2014

The Appellant was represented by its director, Mr Gurdeep Singh Sethi

Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. I have before me two aplications. The first, by HMRC, is that this appeal be struck out pursuant to rules 2 and 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the basis that the appellant, Nutro UK Limited ("Nutro"), has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. The second, by Nutro, is for the admission of further evidence in this appeal, to which HMRC object. The two applications are linked, as I shall describe.

Introduction

2. Nutro has appealed against two decisions of HMRC denying it entitlement to the right to deduct input tax in the total sum of £1,037,712.64 claimed in the VAT quarterly accounting periods 06/06 and 12/06. The basis of that refusal is the familiar one commonly described as MTIC fraud, namely that Nutro's transactions were connected with the fraudulent evasion of VAT and that Nutro knew, or should have known, of that connection.

3. The appeal has a long procedural history, as I shall describe in some more detail later, but two appeals (consolidated into this) were made by Nutro on 26 June and 12 November 2008.

4. Nutro has at times during the conduct of this appeal been represented by professional advisers. At other times it has not. Only shortly before the hearing of these applications, by letter dated 3 October 2014, Nutro's latest advisers, Imran Khan & Partners wrote to the Tribunal and HMRC to say that they were "professionally embarrassed" and no longer in a position to represent Nutro at the hearing. Nutro was therefore represented by Mr Sethi, a director of the company. I have, however, had regard to the written skeleton argument that Mr Khan filed on behalf of Nutro on 16 May 2014.

Strike out application

5. I turn first to HMRC's strike out application. In this respect I had witness statements and heard oral evidence from two witnesses called by HMRC. The first was Mr Liban Ahmed, director of Controlled Tax Management Limited ("CTM"). CTM acted for Nutro in these appeals from 26 August 2008, when notice of acting was given by CTM to the Tribunal, until ceasing to act on 4 January 2013. The second was Ms Catherine Shaw, a solicitor at the Solicitor's office of HMRC who currently has day to day conduct of Nutro's appeal. Mr Sethi gave oral evidence for Nutro.

6. I shall describe the factual background, as to which there was no dispute, and make findings of fact where there was a conflict of evidence. But before doing so, I turn to the law informing the jurisdiction of the Tribunal in this respect.

The law

7. The power of the Tribunal to strike out an appeal is contained in rule 8 of the Rules. In the context of HMRC's application, the power is a discretionary one, as indicated by the terms of the applicable rule, which is rule 8(3)(b):

> "The Tribunal may strike out the whole or a part of the proceedings if –
>
> …
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly …"

8. As is the case with the Rules generally, in the interpretation and exercise of rule 8 the Tribunal must seek to give effect to the overriding objective to deal with cases fairly and justly, according to rule 2. Dealing with cases fairly and justly includes (by rule 2(2)):

> "(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 the special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

9. In addition, rule 2(4) requires that the parties help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.

10. This Tribunal has previously considered the application of rule 8(3)(b) in *First Class Communications Ltd v Revenue and Customs Commissioners* [2013] UKFTT 090 (TC), a case concerning an application for HMRC to be barred from taking part in the proceedings. In that case, Judge Mosedale, whilst being careful not to limit the cases in which rule 8(3)(b) could apply, described, at [52], the following two situations where the rule might be applicable:

> "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."

11. Mr Watkinson submitted that the conjunctive construction of rule 8(3)(b) – fairly *and* justly – is intended to provide the Tribunal with a broad discretionary power. It was not intended that such a power be dependent on whether a fair trial is still possible. The reference to "justly" in addition to "fairly" is intended to allow the Tribunal to consider the wider effects on the administration of justice of the failure of an appellant (or, of course, in appropriate circumstances, HMRC) to co-operate.

12. Mr Watkinson derived support for this proposition from two cases concerning the powers of the court to strike out a case under the Civil Procedure Rules 1998 ("CPR"). The first is *Biguzzi v Rank Leisure PLC* [1999] WLR 1926, a case concerning an application to strike out a claimant's statement of case on the ground of repeated procedural failures. In the Court of Appeal, Lord Woolf MR referred to the then new CPR as emphasising the importance of the keeping of time limits, referring in particular to the discretion of the court to strike out a case where there has been a failure to comply with a rule, practice direction or court order. At p 1933, he said:

> "In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

13. On the other hand, as Mr Watkinson quite properly pointed out, Lord Woolf made clear that the step of striking out a case was a draconian one, and that the existence of the power did not mean that in applying the overriding objective (of enabling the court to deal with cases justly) the initial approach will be to strike out the statement of case. Lord Woolf emphasised the existence of other powers to deal with delay or failure to comply. He gave as examples orders for costs, including costs on an indemnity basis.

14. The view of the courts as to the draconian nature of a strike out order can also be discerned from two authorities referred to in Mr Khan's skeleton argument, *Hytec Information Systems Ltd v Coventry City Council* [1997] WLR 1666, and *Marcan Shipping (London) Limited v Kefalas and another* [2007] EWCA Civ 463. In *Hytec*, the power was referred to by Ward LJ at p 1676 as an "atomic weapon in judicial armoury" (though one that in that case the court was fully justified in employing). In *Marcan Shipping*, which concerned the effect of an "unless" order, Moore-Bick LJ, at [36], described a conditional order for striking out of a case as:

> "… one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field*[1] as 'good housekeeping purposes'"

[1] [2006] EWCA Civ 1524

15. The second case on which Mr Watkinson relied in support of his proposition as to the approach required by the construction of the Tribunal's Rules is *Eatwell v Smith & Williamson (A Firm)* [2003] EWCA Civ 1932. There one question was whether, in deciding to strike out the claimant's case, the Master had made an error of law in not referring, in his decision, to the question whether or not, having regard to all the delays, there could have been a fair trial. In the Court of Appeal, at [8], Jacob LJ said:

> "I … do not see that the Master made any error in failing to consider the question of fair trial. Of course the question of fair trial is an important consideration in the operation of the rule, but it is equally apparent that the rule is not limited to cases where there can be no fair trial. It was a liberating rule and intended to be so. The fact that the Master did not mention the question of a fair trial is neither here nor there. No-one had said there could not be a fair trial. It was implicit that there could be in his decision. It was also explicit in his decision that there would be difficulties with the trial, though that is quite a different thing. One hardly needs the Master's decision to know that trying an issue of the kind with which this is concerned some 10 years after the event is bound to be complex and difficult and made more so because of the passage of time. That the Master had regard to."

16. Jacob LJ went on to approve the manner in which the Master had dealt with the likely future conduct of the case. The Master had foreseen more costs being incurred, applications for extensions of time and general problems with such future conduct. He had considered that there would be inevitable prejudice to the defendants and that they were likely to have unfair burdens placed upon them Those matters, held Jacob LJ at [10], were proper factors which the Master was entitled to take into account.

17. These judgments have resonance with the decision of Judge Mosedale in *First Class Communications*, to which I have referred. Thus, the issue whether there can be a fair hearing is an important one, but not decisive. Regard may be had to the likely future conduct of the proceedings. The Tribunal should, in short, take account of all the circumstances, having regard to the overriding objective, including the need to ensure that case management directions, aimed at achieving the objective of dealing with cases fairly and justly, are observed.

18. I should say that I do not consider that, in the context of an application to strike out, much direct assistance can be derived from the line of cases dealing with relief from sanctions, starting in the courts with *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and culminating more recently in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906, and cases concerning extensions of time in the Upper Tribunal in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC).

19. In so far as those cases afford any guidance to the approach to be adopted to the exercise of my discretion in a case such as this, it is in the need, according to *Denton*, to avoid taking an unduly draconian approach, and not to regard compliance with rules as an end in itself superior to doing justice in the case. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, Davis LJ gave a timely

reminder, at [62], that "… the courts do not exist for the sake of discipline", an observation reinforced by Sir David Eady in *Groarke v Fontaine* [2104] EWHC 1676 (QB), at [7].

20. That is particularly apposite in the Tribunal where, as noted by Judge Bishopp in *Leeds City Council*, which is as apposite to this Tribunal as it is to the Upper Tribunal, in contrast to the emphasis placed by the changes to the CPR, including the description of particular features of the overriding objective as applicable to the courts, which elevate the importance of enforcing compliance, the Tribunal's overriding objective requires the Tribunal to avoid unnecessary formality and to seek flexibility. That does not mean, of course, that compliance with the Rules is regarded as unimportant; that much is clear from the express provisions of rule 8 which enable the Tribunal to strike out proceedings where that sanction is expressed in a direction. It is a factor to which the Tribunal should have regard, but one which has no necessarily elevated importance and to which the relative weight to be given to that factor is a matter for the Tribunal in all the circumstances.

The facts

21. With those principles in mind, I turn to the facts of this case.

22. There is no doubt that these proceedings have been beset with delay. The result is that, although the events in question concerning the appeal took place as long ago as 2006, the appeal has some way to go before a hearing is likely to take place.

23. While the proceedings have been characterised by delay throughout, I do not consider it is necessary for me to recite the whole history of these proceedings. I shall focus instead on those matters which have prompted HMRC to make this particular application. In doing so, however, I shall have regard to the full history.

24. I start the chronology in May 2012, which was the first occasion on which HMRC applied to the Tribunal for a direction that Nutro's appeal be struck out, unless Nutro served its witness statements in reply on HMRC by 15 June 2012 and confirmed by that date that its notice of issues dated 15 April 2011 remained accurate. That application came before Judge Raghavan, who made the direction, not in the form that would give rise to an automatic strike out for non-compliance, but with a warning that if the direction was not complied with the appeal might be struck out. That direction was complied with by CTM (at that time representing Nutro) advising that the notice of issues remained unchanged, and that there was no evidence to serve in reply.

25. The parties then made an agreed application for case management directions intended to lead to the substantive hearing of the appeal. Those directions, which were approved by me in July 2012 and issued to the parties, made provision for a hearing in the period October 2012 to July 2013. On 30 October 2012 the Tribunal sent a notice of hearing to the parties stating that the final hearing had been listed between 2 – 13 December 2013.

26. On 4 January 2013, CTM notified HMRC that it no longer acted for Nutro. Notification was given to the Tribunal on 8 January 2013.

27. There was then a considerable hiatus, when neither party appears to have corresponded with the other, although the substantive hearing had been listed for December 2013. It was not until August 2013 that HMRC first sought to correspond directly with Nutro, when an application was made by HMRC to replace a witness statement. The application was served on Nutro's registered office on 26 August 2013. Nutro did not respond.

28. On 12 September 2013, HMRC wrote to Nutro. In that letter, rather curiously, HMRC said that they had only recently become aware of the fact that Nutro was not represented by CTM. The letter enclosed a copy of the pre-trial directions (these were the July 2012 directions which the Tribunal had re-issued to HMRC and to Nutro on 23 August 2013), and sought contact details from Nutro. It also expressed the view that any outstanding applications for directions in the appeal that Nutro wished to make should be made as soon as possible, and advised that a case management hearing would be sought.

29. On 17 October 2013, HMRC served a request for disclosure on Nutro. The request covered (i) bank statements and account opening documents for Nutro's bank accounts; (ii) personal bank statements of Mr Sethi; (iii) documentation in relation to the proceeds of sale of a business by Mr Sethi; (iv) any documentary evidence of negotiation of the transactions subject to this appeal; (v) Nutro's full terms and conditions; (vi) copies of market research carried out by Nutro and logs of telephone calls made to other traders to monitor market prices; and (vii) copies of all purchase orders issued to Nutro for the relevant transactions. Nutro did not respond.

30. HMRC applied for an unless order to the effect that if Nutro did not attend the case management meeting on 21 October 2013 and if by 31 October 2013 Nutro had not confirmed in writing to the Tribunal and HMRC that it intended to prosecute the appeal, the appeal would be struck out. A direction in that form was made by Judge Sinfield.

31. The case management hearing before Judge Blewitt on 21 October 2013 was attended by Mr Sethi on behalf of Nutro. Mr Sethi indicated that he was close to making a final decision as to his legal representation for the final hearing. Judge Blewitt made three directions, all of which were required to be complied with by 18 November 2013. First, Nutro was to provide the Tribunal and HMRC with details of Nutro's representative. Secondly, Nutro had to respond to HMRC's application to adduce additional evidence. Thirdly, any application to adjourn the hearing of the appeal had to be made.

32. Nutro failed to comply with Judge Blewitt's directions. On the working day before the hearing was due to commence, Nutro applied to adjourn the final hearing because Mr Sethi had injured his back. After receiving medical evidence, HMRC consented to the adjournment.

33. On adjourning the final hearing, Judge Blewitt issued further directions dated 12 December 2013. The judge listed a case management hearing on 6 February 2014 and issued a third unless order against Nutro in relation to Nutro's attendance at that hearing. The judge further directed that at the hearing Nutro was to provide full details of witness requirements, matters in issue in relation to each witness, further witnesses that it intended to call and full details of its case on matters in issue. Nutro was also directed to provide at the hearing copies of any documents on which Nutro sought to rely, if not already served.

34. Imran Khan & Partners served notice of acting for Nutro on 4 February 2014, two days before the 6 February hearing. An application was made at the hearing, before Judge McKenna, for the hearing to be adjourned. That application was met by an application by HMRC for the appeal to be struck out. Judge McKenna decided that any strike out application should be adjourned to enable HMRC to make a fully-substantiated application, and for Nutro to respond. The judge made further directions with a view to a substantive hearing after 30 January 2015. Mr Khan indicated that Nutro wished to serve further witness statements, and that a formal application would be made. Such an application was directed to be made by 31 March 2014. The judge explained that the obligation of a party to co-operate with the Tribunal under rule 2 applied to Mr Sethi as well as to his representatives, and that if Nutro was unrepresented at any time Mr Sethi would be personally obliged to comply with the Tribunal's directions and assist it in dealing with the appeal. It was furthermore made clear that the sanction for non-co-operation in the future might include the striking out of the appeal.

35. On 31 March 2014, Nutro served on HMRC three witness statements and exhibits; a further witness statement of Mr Sethi, said to be for the purpose of compiling into chronological order certain documents already in evidence, and witness statements from Ms Reshma Oomarow and Mr Balvir Kataria, said to go to the issue of whether Mr Sethi, and so Nutro, knew or should have known that the deals were fraudulent, on the basis that Mr Sethi was operating as a normal business person. There was no application to admit this evidence, as had been directed by Judge McKenna, but that omission was remedied, albeit late, with effect from 2 April 2014. In the application, Nutro sought to blame CTM for failing to properly represent its best interests, failing to identify what it described as crucial witnesses and failing to serve material that was provided to it.

36. On 7 April 2014, HMRC made the present application to strike out Nutro's appeal (it was amended on 29 September 2014). At the same time a request was made for consent to HMRC contacting CTM and waiving any privilege in that respect. There followed correspondence on the nature of privilege and the need for a waiver, and consent was given on 16 May 2014, one working day before the date on which a case management hearing had been listed. In the event that case management hearing did not proceed.

37. In support of the application to admit the new evidence, and to resist HMRC's strike out application, Mr Sethi made a witness statement on 16 May 2014. In that statement he sought to blame CTM for any procedural failings during the period of

their engagement, and his own lack of expertise and experience for the periods when Nutro was unrepresented. He said that he had given CTM all the paperwork in relation to the case at the first meeting with them. That specifically was said to have included the exhibits attached to the witness statement of Ms Oomarow. Mr Sethi's witness statement to this effect was served on 20 May 2014 with a skeleton argument prepared by Mr Khan.

38. On the same day, 20 May 2014, HMRC served a further disclosure request which repeated the earlier such request made on 17 October 2013. It thus sought documentary evidence of negotiations of the relevant transactions, and evidence of contact with other traders, which Mr Sethi was at the same time asserting was the purpose of the statements made by Ms Oomarow and Mr Kataria, along with the exhibits.

39. On 13 August 2014, Ms Shaw, along with a paralegal at HMRC, Mr Muktar, and HMRC's junior counsel, Natasha Barnes, attended Nutro's registered office to inspect the files of CTM which had, following termination of its engagement, been returned to Nutro. They were met there by Mr Sethi. The evidence of Ms Shaw was that, having inspected five boxes of documents, only one item of correspondence between CTM and Mr Sethi was found. This, said Ms Shaw, contrasted with the items of correspondence exhibited to Mr Ahmed's witness statement.

40. In giving evidence, Ms Shaw clarified that the boxes had been numbered "1 of 6", "2 of 6", and so on, and that box 5 of 6 had not been available for inspection. This was a matter that had been noted by all the participants at the meeting, including Mr Sethi.

41. Mr Ahmed's evidence was that his firm, CTM, had been engaged by Mr Sethi on behalf of Nutro, in August 2014. Mr Sethi had also introduced two other clients at around the same time, Solution Center Limited and Gurminder Rattan trading as Susvin 2. An agreement was made with Nutro based on an up-front payment of £5,000 plus VAT and a success fee. The agreement provided that CTM could withdraw if it believed there was no realistic chance of success.

42. At an initial meeting after the engagement had been agreed, Mr Ahmed said, the question of the number of witnesses was discussed. Mr Ahmed saw no need for there to be witnesses for Nutro other than Mr Sethi, partly because Mr Sethi had told him that he did everything in relation to the deals in question. He explained that if that had not been the case he would have evaluated the potential witnesses. He did not recall any talk of anyone else being involved. Mr Ahmed said that it was clear to him that Mr Sethi was well aware of the case against him and what his defence was. It had been agreed that Mr Sethi would be Nutro's only witness.

43. Mr Ahmed said that he did not recall being given the materials attached to Ms Oomarow's witness statement. If he had seen that material, he would have served it, if he had thought it would assist the appeal and was credible. He would have been surprised if Mr Sethi had not insisted on the material being served if it had been vital.

44. Mr Ahmed accepted certain procedural failings on the part of CTM, in not responding to HMRC's then representatives, Howes Percival, such that an early strike out application had been made. This error, he said, was due to the sheer weight of new business coming in from MTIC cases. Nevertheless, there were regular discussions with Mr Sethi and he would have been aware of the position. From a review of email and other correspondence, Mr Ahmed said that he was satisfied that it was Mr Sethi who had failed at times to contact CTM.

45. Questioned by Mr Sethi, Mr Ahmed reiterated that, at the initial meeting, he had requested not only due diligence material, but also evidence of the company's trading at the relevant time, such as how it obtained its stock, and how the deals were negotiated and put together. His instructions from Mr Sethi had been that it had been Mr Sethi who had conducted the business, at the office or on his mobile in the evenings. He did not remember seeing the documents exhibited to Ms Oomarow's witness statement; he had not met Ms Oomarow or Mr Kataria. Mr Ahmed did not, however, produce any of his own notes of the meetings.

46. Mr Ahmed said that there had been considerable and frequent correspondence, including by email. He had not been aware until September 2010 that Mr Sethi had changed his email address in the latter part of 2009, and that consequently emails between those dates might not have been received by Mr Sethi. He accepted that Mr Sethi frequently phoned asking for updates, but also said that there were occasions on which no response could be obtained from him. The evidence of the communications supports the fact that, throughout its period of engagement with Nutro, CTM was often chasing for information.

47. In the event, the engagement between CTM and Nutro was terminated because Mr Ahmed considered that the appeal had no reasonable prospect of success. Lack of cooperation by Mr Sethi was not given as a reason for the termination.

48. In his evidence, Mr Sethi accepted that, contrary to his witness statement, he had not given Mr Ahmed the documents that now formed the exhibits to Ms Oomarow's statement. I find, therefore, that Mr Sethi's assertion that Mr Ahmed had wrongly failed to serve this material is unfounded. Mr Sethi sought to explain that the reason the documents were not given to Mr Ahmed was because Mr Ahmed had not asked for such documents. Everything had been available at the initial meeting, he said, and although there were many documents that Mr Ahmed had been able to take, he was given only those documents that he had asked for. Mr Sethi's oral evidence included a claim that, at the initial meeting, Mr Ahmed had seen the documents in question, and that he knew Mr Sethi had that documentation.

49. This is contrary to the evidence of Mr Ahmed. I prefer Mr Ahmed's evidence over that of Mr Sethi. It is not plausible, in my view, that Mr Ahmed, who was experienced in the area of MTIC fraud, both from his work for HMRC and in later advising clients of CTM, would have disregarded evidence he had seen as to the way the business operated and which could be relevant to the question of negotiation of transactions. I find that the documents were not shown to Mr Ahmed, and he did not see them at Nutro's premises. In my view, Mr Sethi's evidence that, although the

relevant documents were not given to Mr Ahmed, he was shown them and ignored them, cannot be accepted as truthful. I also accept Mr Ahmed's evidence that Mr Sethi instructed him that he alone had carried out the relevant transactions, so that Mr Ahmed had not been made aware that Ms Oomarow and Mr Kataria were potential material witnesses.

50. I find that Mr Sethi's evidence that he did not receive communications from CTM, whether because he had changed his email address or because mail had been sent to an old registered office address, implausible. Given the frequent telephone conversations, it is inconceivable that CTM would have omitted to inform Mr Sethi that there were outstanding unanswered emails and other correspondence. Mr Sethi is in any event, as I find, at fault for not having ensured that CTM had up to date contact details for him.

51. On the other hand, I accept that Mr Sethi himself had not been aware, during the tenure of the engagement of CTM, of the possible significance of the documents exhibited to Ms Oomarow's witness statement. Whilst I am sure that Mr Ahmed raised the question of the negotiation of deals with Mr Sethi, the initial instructions from Mr Sethi that he alone had conducted the transactions seem to have been left unquestioned, and informed the whole conduct of Nutro's appeal, including the preparation of the initial witness statement of Mr Sethi. I find that Mr Sethi himself did not help matters by failing to engage wholly with the process, whether by taking the view, as I find he did, that the appeal was something to be dealt with by CTM, and not by him, or by failing to enable CTM to have a proper line of communication. But I do not find that Mr Sethi deliberately withheld the relevant information.

Consideration of strike out application

52. Mr Watkinson rightly referred to the litany of persistent defaults on the part of Nutro which have characterised these proceedings. It is correct that I should have regard to the whole history, not only in considering the conduct of the proceedings to date, but also the likely conduct in the future. I also have to take account of the fact that the Tribunal has seen fit to deal with those instances by way of case management, including the making of unless orders, in a manner which has, until now, fallen short of a striking out of the appeal. I disregard entirely the reasons given by CTM and Imran Khan & Partners respectively for having withdrawn from representing Nutro.

53. The defaults by Nutro form the background to the issue of the belated production of witness evidence that could, and indeed should, have been made available at a very early stage in the proceedings. Of itself, I would not regard that, even in combination with earlier defaults, as sufficient for me to decide that the Tribunal cannot deal with the proceedings fairly and justly. I have regard in this respect to the fact that, as late as 20 May 2014, HMRC were continuing to seek disclosure from Nutro of material of the very nature that Mr Sethi wished to adduce. Absent any finding that Mr Sethi had been deliberately withholding material evidence, it does not seem to me that the production of these materials, albeit late, should, either alone or in combination with other procedural defaults, lead to a striking out of the appeal on this basis.

54. There is, on the other hand, the most serious issue of a false statement having been made by Mr Sethi in support of the application to admit the new evidence, and in seeking to resist a strike out. It was wrong of him to seek to lay the blame for procedural defaults on CTM, when it is clear that he failed himself to engage properly in the process and made it difficult for Mr Ahmed and CTM to contact him. It was especially reprehensible for him to have made a statement that the material exhibited to Ms Oomarow's statement had been provided to CTM and that they had failed to take the necessary statements and exhibit the materials, when it was not true that the material had been provided to CTM. It was only when his statement was challenged in this respect by Mr Watkinson in cross-examination that Mr Sethi admitted that it was untrue. It was equally wrong for Mr Sethi to have claimed in evidence, falsely as I have found, that Mr Ahmed had been aware of the material in question from the initial meeting, and that it had only not been provided to Mr Ahmed because he had not asked for it.

55. That is a matter which goes to the core of cooperation with the Tribunal. It is fundamental to the operation of the system of administration of justice, and enabling the Tribunal to deal with cases fairly and justly, that the Tribunal, and other parties to the proceedings, are able to rely on the truth of statements. That is as applicable to the conduct of case management as it is to the substantive appeals themselves. To attempt to obtain or resist a direction of the Tribunal by making false statements undermines the system of justice which the Tribunal embodies.

56. I am conscious of the draconian nature of a striking out of the appeal, and of the fact that this Tribunal no more exists for the sake of discipline than do the courts. Nonetheless, the sanction of a strike out is available to the Tribunal in an appropriate case if it considers that it cannot deal with the proceedings fairly and justly. After much consideration I have concluded that such is the position in this case.

57. This is not a case where the basis for a strike out can be described in terms of good housekeeping. Even though I do not consider that this is a case where there could not be a fair hearing (Mr Watkinson did not seek to argue that it was), the combination of the persistent defaults by Nutro, the numerous warnings given by the Tribunal, and the reprehensible attempts by Mr Sethi to mislead the Tribunal, lead me to the clear conclusion that this is a case in which the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

58. This is not a case, in my view, where any other remedy, short of striking out, is appropriate. The only possible such remedy would be in costs, including costs on an indemnity basis. I was informed that this is a case, being an appeal which commenced before 1 April 2009, where a direction has been made for the costs rules under rule 29 of the Value Added Tax Tribunals Rules 1986 to apply; this is thus a case in which I have a full costs-shifting jurisdiction. But I do not consider that a costs order in favour of HMRC would provide an appropriate remedy in a case such as this, where what is prejudiced is not only the conduct of an appeal to which HMRC is a party, but also the ability of the Tribunal to deal with the case fairly and justly.

59. In the circumstances, I conclude that the only appropriate remedy is to strike out these appeals.

Decision on strike out application

60. These appeals are struck out pursuant to rule 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

Application to admit new evidence

61. In view of my decision to strike out Nutro's appeals, the question of the admission of new evidence does not arise. I therefore make no decision in that respect.

Application for permission to appeal

62. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 21 October 2014