TC04176

Appeal number: TC/2010/07574

PROCEDURE – lead case direction – rule 18, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 –direction for disposal of related case under rule 18(5) – whether facts of related case materially different from those in lead case – scope of jurisdiction of tribunal under rule 18(5)

FIRST-TIER TRIBUNAL
TAX CHAMBER

GENERAL HEALTHCARE GROUP LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London EC4 on 1 December 2014

Sam Grodzinski QC, instructed by Deloitte LLP, for the Appellant

Owain Thomas and Matthew Donmall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This hearing was to consider the making of directions in this appeal under rule 18(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. I directed that there should be such a hearing following an application by the appellant, General Healthcare Group Limited ("GHG"), under rule 18(4) not to be bound by the decision in the lead case of *Nuffield Health v Revenue and Customs Commissioners* [2013] UKFTT 291 (TC), [2014] SFTD 164, an application I refused for the reasons set out in my decision released on 16 April 2014 [2014] UKFTT 353 (TC), [2014] SFTD 1026.

2. The circumstances in which I made that direction were unusual. The lead case direction specified only common or related issues of law, and not of fact. GHG asserted that there were several factual issues that were not addressed in any detail in *Nuffield* in respect of which GHG's case was different. I decided, at [21], that it was only the determination of the tribunal in *Nuffield* on the common or related issues of law that was binding on GHG as a related case. The argument for GHG that its facts were different from those in *Nuffield*, and that on those facts its appeal should be allowed notwithstanding that it was bound by the findings of law in *Nuffield* was something I considered should properly be determined by the tribunal, having heard the relevant evidence.

3. In reaching that conclusion I emphasised the essential division of jurisdiction as between this tribunal and the Upper Tribunal. In so far as GHG wished to challenge the decision of the tribunal in GHG on a question of law, I made it clear that this could only be done by way of an appeal to the Upper Tribunal. I said, at [21]:

> "... it is only the determination of the tribunal in *Nuffield* on the common or related issues of law that is binding. To the extent that GHG wishes to challenge that determination, in my view the only appropriate means of such challenge is to apply for permission to appeal to the Upper Tribunal. Such an application would be in respect of the disposition of GHG's own appeal, in respect of which a direction by the tribunal is required by r 18(5). On an appeal to the Upper Tribunal on that basis, there would, in my view, be no impediment to the Upper Tribunal determining that appeal having regard to factual assertions, if different from the lead case, put forward by GHG, making necessary findings of fact, or if appropriate remitting the case to the First-tier Tribunal for further findings and application of the law as found by the Upper Tribunal."

Factual differences

4. I had a witness statement from Mr Richard Evans, who is now the managing director of hospital operations for GHG. He has worked for GHG for 22 years, holding a variety of roles in that time, both financial and operational. Mr Evans was cross-examined by Mr Thomas for HMRC.

5. The parties also produced a short statement of agreed facts.

6. For reasons I shall explain, I do not intend to make extensive findings of fact in this case. Only three possible differences between the facts in *Nuffield* and the facts in this case were identified. I shall consider each of those in turn.

Choice of prosthetic

7. The first concerns the question of patient choice. The evidence of Mr Evans was that it was the consultant who would discuss the options concerning the prosthetic with the patient. Mr Evans explained that, due to the nature of the procedure, there would be only a limited need or requirement for the patient to resist the choice of prosthetic. It would be rare for a patient to have sufficient expertise to make a choice; in 99% of cases the patient was happy to accept the choice of the consultant. The consultant would make that choice based on the patient's condition. In cases where the patient disagreed with the consultant, he or she would be referred to a different consultant who would recommend the relevant prosthetic.

8. GHG has no involvement in the selection of the prosthetic to be used. Its role is limited to making sure that the relevant prosthetic is available at the time of surgery. From GHG's point of view, the important task is to ensure that the choice of prosthesis is not limited or inhibited.

9. GHG has a wide range in stock to suit the needs and preferences of various consultants. This is usually done by way of a consignment stock system whereby the supplier continues to own the prosthetic, and GHG pays for an item when used. For NHS patients, given cost considerations, a more limited range is available.

10. Although not contemporaneous with the relevant period for this appeal, there was evidence of a form of agreement between GHG and consultants, under which the consultant agreed not to bring in any prosthesis for the use or supply to a patient other than one sourced through the hospital and for which it had a "supply chain trackback mechanism" for which it takes primary supplier or manufacturer liability. Mr Evans explained that if legal action were commenced in respect of the procedure or the prosthetic, it would usually be against the consultant and GHG jointly. Issues relating to a faulty prosthesic would be passed on to the manufacturer.

11. At the close of Mr Evans' evidence, Mr Grodzinski, for GHG, acknowledged that it could not be said that the degree of patient choice in GHG's case was significantly different from that found in *Nuffield*. Indeed, it was an agreed fact that "[the] Consultant will prescribe the prosthetic device. He or she will select any medical device." The relevant findings of fact in *Nuffield* were at [30] - [31]:

> "[30] Although Nuffield takes responsibility for planning and forecasting the drugs and medical devices likely to be required during the year, purchasing and managing logistics, storage and appropriate document trails whether a patient requires medication and/or a prosthesis is determined by the consultant after a clinical assessment.

> [31] It is the consultant who prescribes, tailors or amends the patient's medication as relevant, and/or prescribes a device (taking into account relevant information, such as radiology results). The consultant selects the required medication and any medical device by reference to the patient and the stock available."

12. Mr Grodzinski's submission in this respect was more complex than a straightforward difference of fact. He argued that the tribunal in *Nuffield* had appeared to have adopted the factual premise that it was Nuffield, rather than the consultant, who exercised the choice about what drugs to supply, or at the least the tribunal appeared to have ignored the fact that the choice was made by the consultant and not by Nuffield. It then found that the position in relation to prostheses was similar to that of drugs. Thus, the tribunal appeared to have ignored that the choice of prosthetic was made by the consultant, and not by Nuffield, and that the installation of the prosthetic (and all associated medical decisions) was carried out by the consultant and not by Nuffield.

13. In *Nuffield*, the tribunal said, at [95]:

> "It is not the patient who determines the nature or quantity of the drugs he is provided with, even if this is separately itemised on an invoice. We find that in the absence of any significant element of choice in relation to the volume or nature of drugs provided, the economic reality is that that provision is not dissociable from all the other elements that Nuffield provides as part of a single supply of medical and hospital care. Similarly in the case of the prostheses, any element of patient choice is subject to the overall clinical judgment as to the identification of the patient's needs and the appropriate appliance."

14. Mr Grodzinski's case in this respect is not, therefore, that the facts in this case are materially different from those in *Nuffield*. It is that the tribunal in *Nuffield* failed to consider the correct facts in applying the law as it had found it to be (which finding, of course, GHG considers to have been an error of law, but accepts can only be challenged on appeal). Mr Grodzinski submitted that it would be wrong for this tribunal to perpetuate such an error by the tribunal in *Nuffield* in making a direction in a related case.

15. That is not something that is open to this tribunal to determine on the making of a direction under rule 18(5). It is an argument that the tribunal in the lead case erred in law in reaching its conclusions, because it failed to take account of relevant facts, or took into account something that was irrelevant. As I explained in my earlier decision, questions of law are for the Upper Tribunal to determine on appeal. The role of this tribunal, on the making of a direction under rule 18(5) is confined to applying the binding effect of the lead case decision to a related case. Applying that binding effect, factual differences might lead to a different result in a related case. But the lead case is binding to the extent of the common or related issues "warts and all", and it is not open to this tribunal to make a determination as to whether the tribunal in *Nuffield* made such an error. Jurisdiction in that respect lies only with the Upper Tribunal on appeal.

Contractual arrangements

16. During the relevant period for Nuffield's claim, the tribunal in that case found, at [26], that there were no written contractual relationships between Nuffield and the consultants, but merely a "gentleman's agreement" requiring the consultants to abide by Nuffield's policies.

17. Despite it being submitted that there was a written agreement between GHG and the consultants in the relevant period for GHG's claim, there was no direct evidence that was the case. The evidence of Mr Evans in this respect exhibited contracts from 2003 and 2014 (outside the claim period of April 1973 to May 1987). Mr Evans candidly accepted that he was unable to say whether such contracts had been in place throughout the relevant period. He surmised that they must have been; such contracts had been entered into for the 22 years he had been associated with GHG. However, since the relevant period ended some years ago, it had not been possible to locate any contemporaneous documents.

18. On the basis of this evidence I am, in consequence, unable to make a finding of fact that contracts of the nature of those dating from 2003 and 2014 were in force in the relevant period. In any event, I do not consider that is material.

19. The only element of the contract which Mr Grodzinski sought to rely on was that it made clear that the consultant was self-employed and not an employee of the hospital. That cannot be a material difference as between the facts of this case and those in *Nuffield*. It is quite clear from the tribunal's decision in *Nuffield* that it did not regard the consultants as employees of Nuffield. There was no issue in that regard in *Nuffield*; any more than there is in this case, where the statement of agreed facts records that the consultants are self-employed.

20. There is therefore no factual difference in this regard. Furthermore, I agree with Mr Thomas that the reasoning of the tribunal in *Nuffield* did not rely at all on the nature of the obligations of the consultants under the gentleman's agreement in that case. Accordingly, even if it had been established that such written contracts had been entered into between GHG and the consultants in the relevant period, that could not have led to any different conclusion from that reached by the tribunal in *Nuffield*.

Invoices for insurance claims

21. Finally, Mr Grodzinski submitted that there was a difference between GHG's circumstances and those of Nuffield in the way in which the invoices were dealt with, in the cases of private patients whose treatment was funded by insurance. At [27], the tribunal in *Nuffield* had found that Nuffield would generally send its invoice to the patient, who would then recover the cost from the insurer. In some cases, for expediency, Nuffield would submit the insurance claims on the patient's behalf.

22. The evidence in GHG's case was that when a patient was funding the procedure through an insurer, GHG would invoice the insurance company directly.

23. I cannot see how this difference can be material. Although it is clear as a matter of law that the question of the classification of a supply must be viewed objectively from the perspective of a typical consumer, I cannot accept that the fact that in one case the patient might see the invoice, and in another he might not, can have any bearing on the outcome.

Other findings of fact

24. As there is no argument that any other facts in this case can distinguish it from the factual position in *Nuffield*, there is no reason for me to make any further findings on the evidence in this case. Indeed, it would be inappropriate for me to do so in the context of a direction of this nature.

25. As I said in my earlier decision, the proper course for a related case party that wishes to appeal on a question of law arising out of the lead case, is to appeal the decision in the related case, which will be made under rule 18(5). In an ordinary case, there will be no question of a hearing being required for the purpose of rule 18(5), and the tribunal will make no specific findings of fact in respect of the related case.

26. Where, as in this case, it is argued that, even allowing for the binding effect of the decision in the lead case, there are material distinguishing features in the related case that make it arguable that a different conclusion should be reached in the related case, a hearing for the purpose of rule 18(5) (and, I would add, any corresponding hearing on an unbinding application under rule 18(4)) may not be used as an opportunity for full fact-finding by the tribunal. The tribunal will confine itself to an examination only of the features of the related case which are asserted to be distinguishing and material features.

Decision

27. For these reasons, I conclude that there is no basis on which, in the light of the binding effect of *Nuffield* as regards the common or related issues of law, any different decision should be reached on the facts of GHG's case.

28. I therefore direct, in accordance with rule 18(5), that this appeal is dismissed.

Costs

29. Subject to any representations which GHG wishes to make (which should be sent in writing to the tribunal and to HMRC not later than 14 days from the date of release of this decision), I propose to order that the costs of HMRC of and incidental to this hearing be borne by GHG, such costs to be subject to detailed assessment of a Costs Judge, unless agreed.

30. As any order for costs will be subject to detailed assessment, I dispense with the requirement for a schedule of costs to be sent to the tribunal and GHG.

Time estimates for hearings

31. I cannot conclude without saying a few words about the time that was estimated for this hearing.

32. It is the invariable practice of the tribunal, in standard and complex cases, to ask the parties for convenient (or inconvenient) dates for the listing of the hearing, and for a time estimate. That, to state the obvious, is to assist the tribunal in properly managing its resources. It is important that parties take seriously the responsibility for providing and, where circumstances dictate, revising those estimates. A failure to do so will result in an inefficient use of court space, and judicial and other resources.

33. In this case this hearing was listed, in accordance with the time estimate provided to the tribunal, for 3½ days. In the event, the hearing was concluded within one day, and much of that was taken up with submissions more appropriate to an appeal before the Upper Tribunal than on a hearing to consider a direction under rule 18(5).

34. I appreciate that it can be difficult, in some cases, to give an accurate estimate. In this case, as I understand it, it had been anticipated that more evidence would have been made available, and that the cross-examination of Mr Evans might therefore have occupied a greater amount of time. Even so, it seems to me that an estimate of 3½ days must have been on the over-generous side, and it must have been clear well before the hearing itself that the estimate needed to be revised. Mr Evans' witness statement, for example, is dated 9 June 2014.

35. In the interests of efficiency, and in cooperating with the tribunal (which, as the parties will be well aware, is required to enable the tribunal to achieve its overriding objective of fairness and justice under rule 2), I urge all users of the tribunal to give careful consideration to the time estimates that are produced to enable the tribunal to list hearings. In particular, parties should be assiduous in keeping time estimates under review and if a revision is required (in whatever direction) in notifying the tribunal in good time to enable the lists to be adjusted.

Application for permission to appeal

36. This document (read with the decision of the Tribunal in the lead case of *Nuffield Health v Revenue and Customs Commissioners* [2013] UKFTT 291 (TC), [2014] SFTD 164) 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: 9 December 2014