[2018] UKFTT 0250 (TC)

TC06482

Appeal number: TC/2011/ 01784 & TC/2016/01479

PROCEDURE – recusal application – comments made in relation to a second application for permission to appeal – appellant arguing that it had not appreciated that substantial penalties may be imposed –appeal adjourned part-heard on one issue pending outcome of another appeal - whether a fair-minded and informed observer would conclude that there was a real possibility of bias in relation to resumed appeal – held no

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Telephone hearing on 8 March 2018 and subsequent written submissions

Mr Michael Upton, Advocate, instructed by Russel & Aitkin Solicitors, for the Appellant

Ms Harry Jones, of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant applies under Rules 5(1), 5(3)(d), 5(3)(f) and 6 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273) that I should recuse myself from hearing appeals TC/2011/01784 ("the corporation tax appeal") and TC/2016/01479 ("the penalty appeal"). I should note that, as far as I am aware, I am not listed to hear the penalty appeal – this has been joined with other appeals to be heard by another judge.

Background

The First Decision

2. The corporation tax appeal concerned the amounts of corporation tax chargeable to the appellant for the tax years 2005 to 2009. I heard part of this appeal in May and October 2014 and, following further written submissions, gave my decision on 10 February 2015 reported as *Spring Capital Limited v HMRC* [2015] UKFTT 0066 (TC) ("**the First Decision**"). The full details of that part of the appeal are set out in the First Decision, but the relevant points can be summarised as follows.

3. The appellant had claimed corporation tax relief in respect of the amortisation of goodwill on a transfer of a trade ("the seafood business") from an associated company, Spring Salmon & Seafood Ltd ("SSS") in the following circumstances. The appellant contended that on 22 September 2004 SSS transferred its seafood business to Mr Roderick Thomas and Mr Stuart Thomas ("Messrs Thomas") (who were at various stages either directors or shareholders of the appellant). Then, on the same day, Messrs Thomas were said by the appellant to have transferred the seafood business to the appellant for a consideration equal to market value (the **"**tripartite transaction**").** The value of the seafood business mainly consisted of goodwill which the appellant claimed was, on 22 September 2004, approximately £20 million. This issue (and the associated dispute as to the value of goodwill – see below) took up most of the time at the hearing.

4. The appellant also argued that HMRC were precluded from raising certain enquiries pursuant to an undertaking given by HMRC on 19 March 2010 ("the Undertaking") before the Court of Session in Scotland in relation to the restoration of SSS to the Register of Companies.

5. In the First Decision, I concluded, first, that the tripartite transaction had never taken place and that Mr Roderick Thomas' evidence was not credible ([216] – [232] of the First decision). Instead, I found that the trade had migrated from SSS directly to the appellant. Secondly, I held that HMRC were not precluded from raising enquiries in relation to the appellant in respect of the Undertaking ([272] – [282] of the First Decision).

6. In addition, the appellant challenged the validity of a consequential amendment, made by HMRC on 10 December 2010 under paragraph 34 Schedule 18 Finance Act 1998, in relation to the accounting period ended 30 April 2008 (the "2008 period") ("the consequential amendment issue"). I found against the appellant on this point and concluded that the amendment in respect of the 2008 period had been validly made ([254] – [261] of the First Decision).

7. There was a dispute about the value of any goodwill acquired by the appellant from SSS and expert valuation evidence was produced by both parties. In the light of my decision that the tripartite transaction had never taken place, it was unnecessary for me to decide the point, but I indicated that I was minded to accept the valuation of the appellant's expert witness, Mr Taub, of £6.39m ([216] – [252] of the First Decision).

8. Finally, there was a dispute as to the whether the appellant was entitled to carried forward tax losses derived from the trade of SSS under s 343 ICTA 1988 ("the section 343 issue"). HMRC accepted that the appellant had a prima facie entitlement to carry forward losses under section 343 ICTA 1988 (subsequently re-written in the Corporation Tax Act 2010) to the extent that there were losses available for carry-forward in SSS at the date of the cessation of its trade. Because this question depended, at least in part, on whether there were any losses available for carry forward in SSS after a terminal loss relief claim had been made by SSS – a matter which was the subject of another appeal – I adjourned the hearing on this point (with the agreement of the parties) pending the outcome of that appeal ([272] – [282] of the First Decision). That other appeal having been decided (*Spring Salmon & Seafood Ltd v HMRC* [2017] UKUT 0205 (TCC)), the section 343 issue now falls to be determined in this appeal.

9. On 7 April 2015, with my permission, the appellant appealed the First Decision on two points although, in the event, pursued the appeal only in relation to one issue before the Upper Tribunal, viz the consequential amendment issue in relation to the 2008 period. My finding that the tripartite transaction had never taken place was not appealed. The Upper Tribunal dismissed the appellant's appeal on 10 June 2016 (*Spring Capital Limited v HMRC* [2016] UKUT 264 (TCC)).

The second application for permission to appeal

10. In the meantime, the appellant sought to pursue a further, and in effect, second appeal against the First Decision. The sequence of events is set out in my decision in relation to that second application for permission to appeal ("**the Second PTA Decision**") which was released on 21 September 2016. For ease of reference and because this application relates observations that I made in that decision, I attach the full text of that Second PTA Decision as an appendix to this decision. In short, I held that although I had jurisdiction to hear a second application for permission to appeal, I refused permission to appeal. I did so on the ground that the appeal was out of time and, in any event, I indicated that it would have been an abuse of process to allow a further appeal on issues which could have been raised (and indeed were raised on the initiative of the Tribunal) in the submissions leading to the First Decision.

11. In support of its second application for permission to appeal, Mr Upton, appearing for the appellant, filed a Note of Submissions dated 8 June 2016 with the Tribunal. Those submissions addressed, *inter alia*, the fact that the appellant's second application was out of time, although a number of the submissions overlapped with the substantive grounds for the application for permission to appeal. Mr Upton's Note of Submissions quoted a letter from the appellant's solicitors dated 6 May 2016. In support of its contention that leave to appeal out of time should be granted, the 6 May 2016 letter stated:

> "In addition, on 30 March and 21 April 2016 HMRC gave the appellant notice of penalties of £61,190, £61,058 and £210,539.77 in respect of, respectively, the periods ended 30 April 2007, 2008 and 2009 based on the judgment of 10 February 2015... [These penalty notices] significantly alter, and render significantly more adverse, the implications of the judgment of 10 February 2015. It was reasonable of the appellant to reassess its interests in, and grounds for, the appeal which it now seeks to make, in the light of those extremely severe penalties.
>
> The Tribunal is asked to have regard to these matters in determining the application to appeal late."

12. HMRC opposed the appellant's second application for permission to appeal and the application for leave to appeal out of time.

13. In my Second PTA Decision I dealt with this penalty argument, which was one of a number of arguments put forward on behalf of the appellant, as follows:

> "57. Next, the appellant argued that it did not appreciate until 30 March 2016 that HMRC intended to issue penalties following the Decision in February 2015 regarding the additional tax adjustments for the accounting periods 2005 to 2009. This seems to me an impossible argument to sustain. In a letter dated 10 April 2015 from HMRC (Mr Stewart) to the appellant stated in the final paragraph of the letter:
>
> 'PENALTIES
>
> I have referred at the foot of page 2 above in which you referred to claimed transactions of 22 September 2004 and claims to intangibles relief of £2m per annum arising from the acquisition of goodwill valued at £20m. The Tribunal has determined that the company is not entitled to relief of £2m per annum.
>
> …
>
> I have an evidence based reason to believe that a penalty may be due not only for the period ended 30 April 2011 but for other periods. I am considering penalties, and am taking advice. I shall write you further where that is concerned. I am required in the meantime to make you aware of your rights under Article 6 of the HRA and enclose a copy of leaflet EC/FS 9.'
>
> 58. It is, therefore, impossible to contend that the appellant was unaware of the prospect of penalties. Mr Stuart's letter was written one month after the release of the Decision and within the 56 day period allowed for appeals against decisions of this Tribunal. Moreover, in the Decision the Tribunal had found Mr Thomas's account of the tripartite

> transaction, in which it was said the appellant had acquired goodwill, to be lacking in credibility and that the tripartite transaction had not taken place. The appellant had made an inflated claim for amortisation relief of £2 million per annum based on the appellant's valuation for goodwill of £20 million (for which there was no independent support), even though the appellant's own expert witness put a value of £6.39 million on goodwill. It would be remarkable in these circumstances if HMRC had not considered imposing penalties. In my view, Mr Thomas was well aware of the prospect of penalties being imposed, which, given the circumstances, would no doubt be substantial."

The Directions

14. On 24 October 2017 I issued directions in this appeal with a view to narrowing and defining the issues between the parties relating to the section 343 issue. This followed the exchange of correspondence referred to at the beginning of the directions. In particular, in a letter dated 20 September 2017 HMRC indicated that they might object to the production of new evidence by the appellant. There was no indication that the appellant had any objection to bringing forth new evidence. Accordingly, in paragraph 1(c) I asked the parties to "specify what further evidence, and particularly any new evidence (if any) it proposes to call at the resumed hearing." In paragraph 3 of the "Notes and reasons" section following the directions, I explained:

> "Once the steps in Direction 1 and Direction 2 have been completed, a Case Management hearing should be held to determine *inter alia* what, if any, evidence will be led at the resumed hearing, to consider such objections (if any) that HMRC may have to such additional evidence (HMRC's email of 20 September 2017 refers) and any other matters which require discussion. Thereafter, timetables for list of documents, exchange of witness statements and skeleton arguments etc. can more conveniently be assessed and the resumed hearing listed."

Submissions and discussion

The Second PTA application

15. Mr Upton, appearing for the appellant, submitted that [58] of the Second PTA Decision would lead a fair-minded and informed observer to conclude that there was a real possibility that I would not give the appellant a fair hearing.

16. In particular, Mr Upton focused on the sentence in [58]:

> "It would be remarkable in these circumstances if HMRC had not considered imposing penalties."

17. Mr Upton argued that I had gone out of my way to make a public statement which could reasonably be construed to mean that the appellant was deserving of substantial penalisation in respect of the tax years which were at issue in the appeals before me.

18. Moreover, at the hearing of this application, Mr Upton submitted that until the present appeal was decided, the tax effects of the overstated claim for goodwill amortisation were unknown.

19. Further, Mr Upton referred to the Undertaking and argued that following a decision of the Upper Tribunal released on 5 July 2016 (*Spring Salmon & Seafood Ltd v Revenue & Customs* [2016] UKUT 313 (TCC)), which held that the Undertaking was enforceable by SSS; he argued that this made it unreasonable to attribute to Mr Thomas knowledge of the prospect of penalties when he believed that he had a reasonable argument in relation to the Undertaking.

20. Ms Jones, appearing for HMRC, argued that the Tribunal's comments at [57]-[58] of the Second PTA Decision would not lead a fair-minded and informed observer to conclude that the Tribunal was, is or would be biased.

21. Ms Jones noted that the comments in [58] were not unsolicited or unprompted declarations. They were the Tribunal's explanation of its conclusion that the appellant's appeal ground (viz its assertion that it should be allowed to make a late appeal because it did not appreciate HMRC would issue penalties) was "an impossible argument to sustain". There was, argued Ms Jones, nothing in the Tribunal's comments that could be construed as expressing the view that the appellant was "deserving of substantial penalties." Instead, the Tribunal's comments set out a finding of fact that the appellant must have been aware from an early point in time of the prospect of penalties. They further explained that the amount of penalties was also foreseeable given the amount of tax under-declared and the circumstances of the under-declaration.

Discussion of the Second PTA Decision issue

22. The correct legal test to apply was not in dispute. The leading authority is the speech of Lord Hope of Craighead (with whom their Lordships agreed) in *Magill v Porter* [2001] UKHL 67 at [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

23. In my judgment a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that I was biased.

24. It is clear from the context that [57]-[58] of the Second PTA Decision were addressing the argument in the appellant's application that it should be allowed to appeal out of time because the imposition of penalties by HMRC on the appellant gave it cause to reconsider its position. The implication was, and this was not called into question by Mr Upton, that until HMRC notified the appellant of the penalties which it sought to impose the appellant did not, or had no reason to, take this factor into account in deciding whether to apply for permission to appeal on a timely basis. The comments in [57]-[58] were simply addressing this issue and did not express a

view on the appellant's actual liability in respect of penalties – an issue which was not before me.

25. It was the appellant that put in issue its alleged lack of awareness of the prospect of penalties being imposed and it was necessary in determining the appellant's application to address that issue.

26. I did so by referring at [57] to HMRC's letter of 10 April 2015 and at [58] by referring to the surrounding circumstances which seemed to me to indicate that Mr Thomas would have been aware (or ought reasonably to have been aware) of the possibility of penalties being sought.

27. Contrary to Mr Upton's submission, at no stage did I suggest that the appellant "deserved" the penalties in question and I do not think that any of the words used at [57]-[58] can fairly be said to bear that meaning. Furthermore, at [58] I referred to the likelihood of HMRC *considering* imposing penalties. I did not express a view as to whether the appellant was, in fact, liable to any penalty. The only issue that was relevant was whether the appellant knew or should have known that HMRC might consider imposing penalties – the issue raised by the appellant in support of its application for a late appeal.

28. Although the point was not pursued by Mr Upton at the hearing, as regards the reference at [58] the fact that any penalties sought by HMRC were likely to be "substantial", this echoed of the reference in the 6 May 2016 letter from the appellant's solicitors to the penalties being sought by HMRC being "severe". Given the amounts of money involved in the appeal it must have been apparent that it was unlikely that HMRC would consider issuing small fixed rate penalties.

29. I gather from Mr Upton that the corporation tax liability figures which underlie the amount of the tax-based penalties in relation to the 2007 and 2008 years are in dispute. That may be so, although Mr Upton did not explain why that was relevant to the penalty for 2009 which is the largest penalty in question and claimed on a different basis, as I understand it, from those in respect of 2007 and 2008.

30. Furthermore, in relation to the potential awareness of the appellant in relation to the possibility of penalties, I do not think that the decision in July 2016 of the Upper Tribunal in relation to the Undertaking is relevant. The decision of the Upper Tribunal (in proceedings to which the appellant was not a party) came after the expiry of the appeal period in relation to the First Decision and no appeal was pursued in respect of my decision regarding the Undertaking.

The Directions

31. Mr Upton submitted that the Directions were one-sided by referring only to the objections of HMRC in respect of the production of new evidence in relation to the section 343 issue.

32. Mr Upton argued that the valuation of goodwill of the trade of SSS was important in relation to the definition of "relevant asset" for the purposes of sections 343 and 344 ICTA 1988. Mr Upton said that HMRC had indicated that in respect of another year that it might wish to re-litigate that issue. In Mr Upton's view, I had expressed myself as contemplating only an objection by HMRC whereas it was possible that the appellant would have reasonable grounds to object to an attempt by HMRC to adduce further evidence in order to re-litigate matters already decided by the First Decision.

33. Ms Jones submitted that the Directions would not lead a fair-minded and informed observer to conclude that the Tribunal was, is or would be biased.

34. First, Ms Jones argued that the Tribunal had not directed that only the Respondents were able to object to the production of new evidence. There was nothing in the wording of the Directions or the accompanying note that led HMRC to understand that the normal procedure and process should not apply to the remainder of these proceedings.

35. Secondly, Ms Jones observed that the comments were contained in the "Notes and reasons" section that stated that the hearing will cover "***inter alia*** what, if any evidence will be led at the resumed hearing to consider such objections (if any) that HMRC may have…." (Ms Jones' emphasis). Ms Jones noted that this, as the Tribunal made clear in, was clearly a reference to the objections raised by HMRC in correspondence. The comment amounted to no more than a confirmation that matters raised by the parties would be dealt with at the proposed case management hearing.

36. For completeness, Ms Jones did not accept that the valuation of SSS's goodwill was relevant to the section 343 issue.

Discussion of the Directions Issue

37. I think I can deal with this point relatively briefly – it was certainly not a point pursued by Mr Upton with any vigour at the hearing.

38. The purpose of the Directions was to prepare the ground for a case management hearing. I wished to ensure that that hearing covered all the issues raised by the parties and that all issues were, so to speak, on the table. HMRC had specifically objected to the introduction of new evidence. In the Notes to the Directions I made it clear that the case management hearing would consider those objections. No specific objection in respect of new evidence was raised by the appellant. Indeed, the outline of the appellant's case in Russel & Aitken's email of 22 September 2017 was vague. At no stage did I prohibit the appellant from raising any objection and, if it had wished to do so, it could have made an application in the normal manner. I was simply attempting to deal with the issues that had actually been raised.

39. I therefore consider that there is no basis upon which a fair-minded observer, informed as to the facts, would consider that there was a real possibility that I was biased.

Decision

40. For the reasons given above, I refuse this recusal application.

41. 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.

GUY BRANNAN

TRIBUNAL JUDGE
RELEASE DATE:

APPENDIX: SECOND PTA DECISION

Appeal number: TC/2011/01784

FIRST-TIER TRIBUNAL
TAX CHAMBER

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF

SPRING CAPITAL LIMITED **Appellant**

- and -

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

1. The appellant, Spring Capital Limited ("Spring Capital"), applies again for permission to appeal against my decision released on 10 February 2015 ("the Decision").

Background

2. The Decision related to appeals against a number of decisions of HMRC relating to accounting periods ended 9 March 2005 up to and including 30 April 2009. The main question in those appeals was whether the appellant was entitled to an amortisation deduction in respect of the acquisition of goodwill under the provisions of the Finance Act 2002 ("FA 2002").

3. On 7 April 2015, the appellant applied to the Tribunal for permission to appeal to the Upper Tribunal. That application raised two grounds of appeal, both relating to the validity of consequential amendments. I granted permission to appeal on both grounds in June 2015, but confined permission to appeal to those two grounds. In the event, only one ground of appeal was pursued before the Upper Tribunal, viz that the Tribunal erred in its interpretation of the consequential amendment provisions under paragraph 34 (2A) Schedule 18 FA 1998.

4. On 7 October 2015, the appellant applied to the Upper Tribunal for permission to add an additional ground of appeal. The Upper Tribunal indicated, on 22 October 2015, that the application for permission to amend the grounds of appeal must first be referred to the Tribunal. The Upper Tribunal referred to its decision in *HMRC v Earlsferry Thistle Golf Club* [2014] UKUT 2050 (TCC) at [24] to [25] ("*Earlsferry"*).

5. The appellant, therefore, applied to this Tribunal on 27 November 2015 to amend the grounds of appeal. The additional ground of appeal which the appellant sought to put forward related to the part of the Decision which concerned the finding that the Tribunal was not bound by the alleged findings of fact made by the Tribunal in Edinburgh in another appeal, *Spring Salmon & Seafood Ltd v HMRC* [2014] UKFTT 887 (TC) ("the Edinburgh Decision") and that HMRC was not bound by their submissions made in relation to that appeal. The reason given for the application for permission to appeal being submitted out of time was that HMRC had only recently indicated that they intended to impose penalties on the basis of the above finding and the appellant had recently received closure notices for later periods which relied on the Decision.

6. On 29 December 2015, this Tribunal informed the appellant that the Tribunal regarded the matter of permission to appeal as having been finally determined. The Tribunal advised the appellant to apply to the Upper Tribunal for permission to amend the grounds of appeal. The appellant duly sent its application to the Upper Tribunal on 5 January 2016. The Upper Tribunal informed the appellant, on 12 January 2016, that the appellant could apply to amend its grounds of appeal at the start of the appeal hearing.

7. The hearing before the Upper Tribunal of the appeal against the Decision took place on 3 May 2016. The Upper Tribunal decision, released on 10 June 2016, was

that the appeal should be dismissed (*Spring Capital Ltd v HMRC* [2016] UKUT 0264 (TCC)). That decision records at [26] that the application to add an additional ground of appeal in relation to the Edinburgh Decision was not pursued by the appellant. Therefore, the Upper Tribunal decision concerned only the issue relating to the validity of the consequential amendment.

8. Meanwhile, on 3 May 2016 (the same day as the hearing before the Upper Tribunal), the appellant's solicitors, Russel & Aitken, lodged with this Tribunal a further application for permission to appeal to the Upper Tribunal in respect of the Decision. Essentially, the new ground for appeal was that, because Spring Salmon & Seafood Ltd ("SSS") and the appellant were "connected" (in fact, paragraph 95 Schedule 29 FA 2002 defines the expression "related party") within the meaning of paragraphs 101 and 95 Schedule 29 FA 2002, there was a transfer of SSS's goodwill which was deemed by paragraph 92 Schedule 29 FA 2002 to be at market value. For convenience, I set out the relevant provisions of Schedule 29 FA 2002 in an appendix to this decision.

9. The notice of appeal asserted that the Tribunal had "found" that the value of SSS's goodwill was £6.39 million. In fact, it would be more accurate to say that the Tribunal had found it unnecessary to decide the valuation issue but indicated that if it had it decided the point it would have accepted the £6.39 million valuation rather the much lower valuation put forward by HMRC. I make this point only to draw attention to the fact that there was no formal decision on the question of valuation of goodwill.

10. It was further asserted, in the 3 May 2016 application, that the Tribunal's finding that SSS's trade had "migrated" to the appellant over a period of time between September 2004 and February 2005 was tantamount to a conclusion that there had been a "transfer" of the trade for the purposes of paragraph 92 Schedule 29 FA 2002.

11. The notice of appeal also gave reasons why the further application for permission to appeal was being made late i.e. outside the 56 day period provided for in rule 39 of this Tribunal's Procedure Rules (see below). In short, the reason put forward was that the appellant was not professionally represented before the Tribunal. Instead, it was represented by Mr Roderick Thomas who was neither legally qualified nor an accountant. He therefore did not identify paragraph 92 of Schedule 29 FA 2002 as being important. On the other hand, so the notice of appeal continued, neither HMRC nor the Tribunal had identified this provision as being important. It argued that the Tribunal did not try in any detail to relate the contentions concerning the transfer of the goodwill to the legislation which governed the issue i.e. the detailed provisions of Schedule 29 FA 2002; had the Tribunal done so, then it was likely that either HMRC or Mr Thomas would have identified the importance of paragraph 92 timeously.

12. The notice of appeal stated that Mr Thomas had been prompted to investigate the point by this Tribunal's consideration of the relationship of his and his brother's (Mr Stuart Thomas) to the relevant companies in *Thomas v HMRC* [2016] UKFTT 133 (TC) (Judge Clark and Mr Noel Barrett) released on 25 February 2016. In particular, it was said that the Tribunal's determination that both he and his brother were settlors

of the MacLennan Trust was relevant. This, apparently, had prompted the appellant to seek professional advice with the result that this application was then made.

13. On 12 May 2016, this Tribunal wrote to the appellant at the direction of Judge Mosedale. The letter indicated that the Tribunal's preliminary view was that it may not have jurisdiction to grant permission to appeal a second time, even on entirely different grounds. The Tribunal's preliminary view was that the proper procedure would have been for the appellant to apply to the Upper Tribunal for permission to amend its grounds of appeal before the Upper Tribunal. Nevertheless, it was recognised that following the Upper Tribunal decision in *Earlsferry* the respective jurisdictions of the Tribunal and the Upper Tribunal may not be entirely clear. Accordingly, this Tribunal invited submissions from both parties on the following issues:

> (1) whether the Tribunal had jurisdiction to grant a second application for permission to appeal on different grounds from those for which it originally gave permission to appeal;
>
> (2) if it does have such jurisdiction, whether it should extend the time in which the appellant may make the application.

14. In addition, the Tribunal wrote to the appellant on 24 May 2016 pointing out that paragraph 92 Schedule 29 FA 2002 had been raised by the Tribunal with the parties at the hearing and invited the appellant to consider the application of paragraph 118 Schedule 29 FA 2002. Furthermore, the letter noted that the Tribunal had invited further submissions from the parties on this issue in Directions released in November 2014.

15. The Tribunal has now received written submissions from the parties in response to its letters of 12 and 24 May 2016.

16. As I have already explained, the appellant's notice of appeal effectively asserts that the parties and the Tribunal overlooked the application of paragraph 92 Schedule 29 FA 2002. This is not correct and it appears that the appellant's solicitors drafted the 3 May 2016 application under a misapprehension.

17. In the course of the hearing, I drew the parties' attention to the provisions of paragraph 92 and asked them what application it had, if any, to the facts of the appeal before me. Neither party had previously referred to paragraph 92. When I raised paragraph 92, I was informed by Mr Roderick Thomas that the provision had no application because the goodwill concerned was "old goodwill" (a comment which was reflected in the Directions mentioned below). I had expected paragraph 92 to be discussed in the closing submissions in October 2014 but my recollection is that neither party referred to paragraph 92 in any detail (if at all) in their closing submissions. It was for that reason, in November 2014, that I directed that both parties submit written submissions in relation to this subject. Those Directions asked the parties to consider the application of the provisions of Schedule 29 FA 2002 in relation to 2 factual scenarios. The Directions referred to paragraphs 92, 95 and 118 Schedule 29 FA 2002. One of those factual scenarios (the second scenario) involved a

transfer of goodwill directly from SSS to the appellant in or around September 2004. The other factual scenario (the third scenario) concerned the alleged "tripartite transaction" which I eventually found had not occurred.

18. The appellant's response was, in essence, that SSS and the appellant were not related parties within the meaning of paragraph 95 (1). The appellant also stated that its position was that Mr Stuart Thomas was not a settlor of the MacLennan Trust (noting that this issue was not addressed in the appeal). Therefore, the appellant argued, SSS and the appellant were not related parties. Moreover, the appellant argued that the related parties test under paragraph 95 Schedule 29 FA 2002 (in particular, the definition of "control") was narrower than the concept of common ownership for the purposes of section 343 ICTA 1988. The appellant accepted that SSS and the appellant were under common ownership for the purposes of section 343 ICTA 1988 but did not accept that they were related parties for the purposes of paragraph 95 Schedule 29 FA 2002 – the tests for the two provisions were different. I note, in passing, that the notice of appeal, without explanation, now appears to take an entirely contrary view and this last point.

19. HMRC submitted that SSS and the appellant were related parties for the purposes of paragraph 95. Therefore, it was necessary for the appellant to satisfy paragraph 118 (1)(c) and, consequently, one of the tests in paragraph 118 (2). HMRC submitted that the goodwill was not a chargeable intangible asset in the hands of SSS and that, therefore, paragraph 118 (2) (a) could not apply. Paragraph 121 treated the goodwill as created before 1 April 2002 (the business having commenced before that date) and, therefore, HMRC argued that paragraph 118 (2) (c) did not apply. HMRC pointed out that the appellant's reference during the hearing to "old goodwill" was to paragraph 121.

20. I should add that the submissions contained assertions of fact concerning the relationship between Messrs Thomas, SSS and the appellant (including assertions in relation to a company called Bala and to the MacLennan Trust) which were not supported by any evidence. Indeed, at [13] of the Decision I endorsed the views of the Tribunal in *Spring Salmon & Seafood Limited v HMRC* [2014] UKFTT 887 at [25] (Judge Reid QC and Dr Heidi Poon) where the Tribunal said: "The same background facts are canvassed but many matters while aired, remain obscure and unresolved." I made a similar comment in relation to the section 343 ICTA loss carry forward issue at [284].

21. In the event, the conclusion of both parties, albeit for different reasons, was that the deemed market value provisions of paragraph 92 could not apply. In my view, it would have been impossible to have formed a conclusion, on the evidence before me, whether SSS and the appellant were related. In the light of this and the joint conclusion that paragraph 92 was inapplicable, I decided not to address these provisions in an already very long decision but rather to concentrate on the issues identified by the parties and in relation to which evidence had been adduced.

22. It was, therefore, incorrect for the notice of appeal to suggest that the relevant provisions, in particular paragraph 92 and the related party provisions of Schedule 29

FA 2002, were in some way overlooked both by the parties and by the Tribunal. The Tribunal drew the parties' attention to the specific provisions in question and, further, directed that the parties submit written submissions on these issues. Moreover, it was apparent from Mr Thomas' reference to "old goodwill" at the hearing that he had already considered these provisions.

23. On 6 May 2016, Russel & Aitken wrote to the Tribunal in support of the notice of appeal lodged on 3 May 2016. The letter set out additional factors to be taken into account by the Tribunal in deciding whether to give permission to appeal out of time. First, the letter noted that on 5 October, 23 November and 21 December 2015, HMRC had issued to the appellant two closure notices and a consequential amendment which each disallowed amortisation deductions in respect of goodwill for the accounting periods ended, respectively, 30 April 2010, 2011 and 2012. In other words, HMRC disallowed the goodwill amortisation deductions on the same basis that those deductions had been disallowed in the Decision for earlier accounting periods.

24. Russel & Aitken noted that the closure notices and the consequential amendment expressly relied on the findings of the Tribunal in the Decision in respect of earlier accounting periods. In their view, the appellant was justified, therefore, in seeking permission to appeal out of time because it was not until 5 October – 23 December 2015 that HMRC gave notice that it was holding the Decision of 10 February 2015 to have the consequence that those amendments should be made for 2010 – 2012.

25. In addition, on 30 March and 21 April 2016 HMRC issued penalty notices of £61,190, £61,058 and £210,539.77 in respect of the accounting periods ended 30 April 2007, 2008 and 2009 respectively. Again, these penalty notices were based on the Decision. Russel & Aitken argued that these penalty notices significantly altered and rendered significantly more adverse the implications of the Decision. They contended that, in the light of the above, it was reasonable of the appellant to reassess its ability to appeal the Decision.

Submissions and Discussion

26. There are potentially three issues before me. The first two issues are those set out in the Tribunal's letter of 12 May 2016 sent at the direction of Judge Mosedale. In short, the first issue is whether the Tribunal has jurisdiction to hear a second application for permission to appeal. The second issue is, if such jurisdiction exists, whether I should I should extend the period in which an application for permission to appeal can be made. The third issue, if the answers to the first and second issues are in the affirmative, whether I should give permission to appeal.

27. Before discussing these issues, I should make it clear that I have considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 whether to review the Decision but decided not to undertake a review as I was not satisfied that there was an error of law in the decision.

Jurisdiction: second application for permission to appeal by appellant

28. The right of appeal from the First-tier Tribunal to the Upper Tribunal is set out in the Tribunal, Courts and Enforcement Act 2007 ("TCEA 2007") as follows, so far as relevant:

> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by—
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal,
>
> on an application by the party.

29. The relevant procedural provisions are contained in rules 39 and 40 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273) ("the Rules"), as follows:

> 39.—(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application—
>
> [(za) the relevant decision notice;
>
> (a) where— (i) the decision disposes of all issues in the proceedings, or (ii) subject to paragraph (2A), the decision disposes of a preliminary issue dealt with following a direction under rule 5(3)(e), full written reasons for the decision;]
>
> (b) notification of amended reasons for, or correction of, the decision following a review; or
>
> (c) notification that an application for the decision to be set aside has been unsuccessful.
>
> (2A) The Tribunal may direct that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings.
>
> (3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 38 (setting aside a decision which disposes of proceedings), or any extension of that time granted by the Tribunal.

(4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)—

(a) the application must include a request for an extension of time and the reason why the application notice was not provided in time; and

(b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must—

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors in the decision; and

(c) state the result the party making the application is seeking.

40.—(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision).

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or a part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision—

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Tribunal may give permission to appeal against part only of the decision or on limited grounds, but must comply with paragraph (4) in relation to any part of the decision or grounds on which it has refused permission.

30. It will be noted that rule 39 (2) sets out the normal 56 day time limit for applications for permission to appeal. Also, rule 39 (4) refers to the general power of this Tribunal to extend time limits as part of its case management powers under rule 5 (3) (a); the application to extend the time for permission to appeal is an application asking the Tribunal to exercise its power under rule 5 (3) (a).

31. In his written submissions, Mr Upton (for the appellant) argued, that there was no express prohibition on a party to an appeal lodging a second application for permission to appeal against the same Tribunal decision. I agree and would merely add that the same observations apply in relation to section 11 TCEA 2007 (which

provides for the right of appeal). It would be wrong, said Mr Upton, to construe the statutory provisions in a way which effectively added words which the statute did not contain (see per Lord Nicholls in *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586). Words should only be read into a statute in a plain case of a drafting mistake.

32. Secondly, Mr Upton argued that to allow the appellant to have a second appeal would be consistent with the overriding objective in that it would allow a proper consideration of the issues in a way which duly reflected the law.

33. Thirdly, Mr Upton argued that the Rules imposed a duty on the Tribunal to consider an application for permission to appeal and conferred a power to grant permission. Section 12 Interpretation Act 1978 provided that:

> "Where an Act confers power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

34. Consequently, it was implied that the power to give permission to appeal and the duty to consider an application for permission was to be performed from time to time as the occasion required, in accordance with the Interpretation Act 1978.

35. Ms Jones for HMRC argued that the Tribunal did not have jurisdiction to grant permission to appeal a second time. Ms Jones conceded, however, that if the appellant's application of 3 May 2016 could properly be classified as an application to amend grounds of an existing appeal then this Tribunal did have jurisdiction to consider it (*Earlsferry* [24]-[25]).

36. The application for permission dated 3 May 2016 was not, Ms Jones submitted, an application to amend an existing appeal. First, it was submitted on the day of the substantive hearing of the appellant's appeal to the Upper Tribunal. In the Upper Tribunal the appellant elected to proceed with their existing appeal rather than seek an adjournment to allow the new ground to be considered by the Tribunal.

37. Secondly, the application, Ms Jones argued, did not on its face seek to amend the appeal grounds for the appeal before the Upper Tribunal but rather bore the characteristics of a fresh appeal.

38. Ms Jones submitted that, except in cases involving an amendment to the grounds of an existing appeal, this Tribunal did not have jurisdiction to grant more than one application for permission to appeal. There was a long held principle that a claimant may not litigate a claim that has already been adjudicated upon or which should have been brought before the court in earlier proceedings arising from the same facts. Ms Jones referred to the well-known judgment of Sir James Wigram V.-C in *Henderson v Henderson* (1843) 3 Hare 100 at 114.

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case,

> and will not (except under exceptional circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case…"

39. Ms Jones further submitted that her submissions were consistent with the decision of this Tribunal in *Fraser v HMRC* [2012] UKFTT 189 (TC) (Judge Poole) relating to an application for permission to appeal which the Tribunal elected to treat as an application to set aside under rule 42. Judge Poole said [at 42]:

> "The function of the Tribunal is to provide efficient resolution of disputes between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers who are inexperienced in presenting their case, it would completely undermine the Tribunal's function if it were routinely to allow losing parties (whether taxpayers or HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient evidence before the Tribunal when it first heard the appeal. *Parties should be well aware that an appeal offers a one-off opportunity to put their case as best they can, not an opportunity to hope for a successful outcome on the basis of minimal effort and then make a better second attempt if the first fails, possibly followed by an even better third attempt, and so on. To put it in layman's terms, an appellant must realise that the appeals system gives him one bite at the cherry unless a very good reason can be shown why he should have a second.*"(emphasis added)

40. Section 11(4) TCEA 2007 makes it clear that permission to appeal may be given either by the First-tier Tribunal or by the Upper Tribunal. Rule 21 (2) of the Upper Tribunal Rules states that a person may only apply for permission to appeal to the Upper Tribunal if: (a) they have made an application for permission to appeal to the First-tier Tribunal and (b) that application has been refused or has been granted only on limited grounds. There was some uncertainty in the light of the *Earlsferry* case whether the Upper Tribunal could hear an application to amend the grounds of an existing appeal and which resulted in the sequence of events described in paragraphs 4 – 6 above.

41. The position has now been helpfully clarified by the Upper Tribunal in *Hills v HMRC* [2016] UKUT 0266 (TCC) where Judge Berner said at [26] – [27]:

> 26. … I have had regard to the obiter comments of Lord Tyre in this Tribunal in Revenue and Customs *Commissioners v Earlsferry Thistle Golf Club* [2014] UKUT 0250 (TCC), where the learned judge took the view, having regard to Rule 21(2) of the UT Rules, that a particular contention could not be entertained by the tribunal because leave had not been sought from the First-tier Tribunal. That was a case where, in contrast to this case, permission to appeal had been granted by the First-tier Tribunal to HMRC, and it was the taxpayer respondent to the appeal that wished to challenge an element of the decision of the First-tier Tribunal. In the circumstances of that case, Lord Tyre decided that the respondent would have required permission to appeal and that since

> no application for permission had been made by the respondent to the First-tier Tribunal, no such application could be entertained by the Upper Tribunal.
>
> 27. *Earlsferry* thus differs from this case in that no application for permission to appeal had been made by the respondent in that case. In this case, by contrast, an application was made by Mr and Mrs Hills to the FTT, the FTT refused the application, and permission to appeal was given by this Tribunal. Where permission to appeal has been given, whether by the First-tier Tribunal or the Upper Tribunal, an application in this Tribunal for further grounds to be permitted to be advanced is not properly regarded as a fresh application for permission to appeal, and does not require to be made in the first instance to the First-tier Tribunal. Nothing in *Earlsferry* runs counter to that basic proposition. I would add too that a similar analysis would apply on an application for permission to appeal in this Tribunal; once such an application has properly been made (for example, where the First-tier Tribunal has refused permission) any new ground of appeal which the applicant wishes to raise may properly be considered by this Tribunal, without first having to have been subject to an adverse decision below.

42. I therefore reject Ms Jones' submission that the 3 May 2016 application was a new appeal. In my view it was simply an application to add an additional ground of appeal to an existing appeal, albeit one which was before the Upper Tribunal.

43. Although I recognise the force of the arguments put forward by Ms Jones, I have come to the conclusion that there is nothing in section 11 TCEA 2007 or the Rules which indicates that this Tribunal does not have jurisdiction to entertain a second application for permission to appeal. Granting a second permission to appeal would only happen in exceptional cases but to hold that there was no jurisdiction whatsoever to entertain a second application would mean that those exceptional cases could not be heard.

44. Although the Rules impose a duty on the Tribunal to consider an application for permission to appeal, the Tribunal has a discretion whether to grant permission. That discretion should, in my view, be sufficient to guard against repeated applications in circumstances which would amount to an abuse of process.

45. The passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* quoted above, when read in context, indicated that the learned judge considered that the principle he was enunciating was a manifestation of the general substantive rule of *res judicata*. The more modern analysis of the principle is that it is an example of a court's duty to prevent an abuse of process (see per Lord Bingham of Cornhill in *Johnson v. Gore Wood Co.* [2000] AC 1 at 23 citing, with approval, the above passage from *Henderson v Henderson* citing the judgment of Somervell L.J. put it in *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 at 257. See also per Lord Millett at 58 citing the judgment of May L.J. in *Manson v. Vooght* [1999] BPIR 376 at p. 387).

46. In relation to this Tribunal, the duty to prevent an abuse of process is part of the overriding objective contained in rule 2 which requires the Tribunal to deal with cases

fairly and justly. In particular, rule 2(3) requires that the Tribunal must seek to give effect to the overriding objective when it exercises any power under the rules e.g. the powers contained in rule 39 and 40. Thus, an application for a second or subsequent permission to appeal which amounted to an abuse of process would be denied in pursuance of the overriding objective.

47. I therefore consider that I have jurisdiction to consider the appellant's application for permission to appeal dated 3 May 2016 (as supplemented by the letter of 6 May 2016). I accept, of course, that in most cases the usual course of action after an appeal has come before the Upper Tribunal would be for a party wishing to supplement or alter its grounds of appeal to apply for permission to the Upper Tribunal.

Extension of time for permission to appeal

48. The principles to be applied by the Tribunal in relation to applications for permission to extend the period of time for an appeal were recently summarised by the Upper Tribunal (Judges Berner and Falk) in *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) ("*Romasave*") after a review of the authorities. I have borne in mind the factors referred to in that decision in reaching my own decision on this application.

49. The purpose of the 56 day period in which an application for permission to appeal must be made is clear enough. After 56 days, the parties are entitled to assume that the litigation has reached finality or that matters raised in an appeal to the Upper Tribunal represent the only matters still in dispute between the parties.

50. In this case, the Decision was released on 10 February 2015. The 56 day period for an appeal expired on or around 7 April 2015. The application for permission to appeal (ignoring the application for permission to appeal on 7 April 2015 and the application to the Upper Tribunal add an additional ground of appeal on 7 October 2015) with which I am now concerned was lodged with the tribunal on 3 May 2016, over one year late and with the appellant having had over 14 months in which to consider its position. On any view, this is a serious breach of the 56 day time limit. I note that in *Romasave* at [98] a delay of three months in relation to a 30 day appeal period "could not be described as anything but significant and serious." The Upper Tribunal, in denying an extension, had also assumed that the applicant had an arguable case and was aware that by refusing an extension of time the applicant would not be able to put that case forward.

51. I shall now consider the reasons put forward by the appellant why the Tribunal should extend the period of time in which it is permitted to lodge an application for permission to appeal.

52. In short, the appellant argued that it should be allowed an extension of time on the basis that Mr Thomas, who presented the appellant's case before the Tribunal, was not professionally qualified and did not identify the importance of paragraph 92 Schedule 29 FA 2002.

53. I do not accept that submission. Mr Thomas was well aware of the import of paragraph 92. I directed his (and HMRC's) attention to it at the hearing and in the Directions issued in November 2014. Indeed, as I have said, Mr Thomas' view that the goodwill at issue was "old goodwill" clearly showed that Mr Thomas had given these issues some consideration. That Mr Thomas belatedly decided to take advice on behalf of the appellant on these issues is not a matter which justifies granting a second permission to appeal out of time. I would further add that, although Mr Thomas is not legally qualified, he is no stranger to this Tribunal and its proceedings. On the contrary, he is an experienced self-representing litigant who has appeared in a number of Tribunal appeals, although I fully accept that he is not a tax expert. I have no doubt that Mr Thomas had ample opportunity to consider the relevant issues and apply to adduce any evidence that he thought necessary and taking such timely professional advice as he considered appropriate.

54. It was also said, in support of the above argument, that Mr Thomas had been prompted to investigate the point by this Tribunal's in *Thomas v HMRC* [2016] UKFTT 133 (TC) released on 25 February 2016. In particular, it was said that the Tribunal's determination that both he and his brother were settlors of the MacLennan Trust was relevant. This, it was said, had caused the appellant to seek professional advice with the result that this application was then made. But Mr Thomas knew in January 2015 (the date of HMRC's submissions in response to the November 2014 Directions), at the latest, that HMRC considered that SSS and the appellant were related parties and knew or should have known that issues relating to the MacLennan Trust were relevant.

55. Furthermore, the appellant's written submissions in response to my November 2014 Directions accepted that the identity of the settlor of the MacLennan Trust was not addressed in the appeal and simply stated that: "Stuart Thomas's (and the appellant's) position is that he is not a settlor of the MacLennan Trust. Accordingly, the appellant and SSS were not related parties." Moreover, as the correspondence summarised in the Decision makes clear, it seems that there was a dispute between the parties over the identity of the settlor of the MacLennan Trust going back many years. Yet at no stage was evidence put before the Tribunal which would enable this issue to be resolved. References to the MacLennan Trust and to the identity of its settlor were fragmentary, mainly in correspondence produced in relation to other issues. Mr Roderick Thomas must have known that this issue would be resolved by the First-tier Tribunal after the Decision in this appeal. There was no request made for a postponement by either party pending resolution of this issue.

56. As regards the contention that the appellant was not aware until 5 October 2015 that HMRC intended to apply the findings of the Tribunal in its Decision regarding the amortisation of goodwill for the accounting periods 2005 to 2009 to subsequent accounting periods, I find that argument very strange. The issue in the subsequent accounting periods was exactly the same as in the accounting periods 2005 to 2009. Exactly the same circumstances i.e. the alleged events between September 2004 and February 2005 gave rise to the amortisation claim. The statutory provisions were the same. If the appellant was not entitled to an amortisation deduction in respect of earlier periods it would not be entitled to an amortisation deduction in respect of later

periods. As HMRC submitted, it is inconceivable that the appellant did not appreciate the position. Moreover, in an e-mail dated 29 April 2015, the appellant indicated its understanding that their corporation tax return for the 2013 accounting period should be amended to reflect the Decision. In addition, there was no explanation why after October or December 2015 there was a further delay until 3 May 2016 before raising this matter with the Tribunal.

57. Next, the appellant argued that it did not appreciate until 30 March 2016 that HMRC intended to issue penalties following the Decision in February 2015 regarding the additional tax adjustments for the accounting periods 2005 to 2009. This seems to me an impossible argument to sustain. In a letter dated 10 April 2015 from HMRC (Mr Stewart) to the appellant stated in the final paragraph of the letter:

> "PENALTIES
>
> I have referred at the foot of page 2 above in which you referred to claimed transactions of 22 September 2004 and claims to intangibles relief of £2m per annum arising from the acquisition of goodwill valued at £20m. The Tribunal has determined that the company is not entitled to relief of £2m per annum.
>
> …
>
> I have an evidence based reason to believe that a penalty may be due not only for the period ended 30 April 2011 but for other periods. I am considering penalties, and am taking advice. I shall write you further where that is concerned. I am required in the meantime to make you aware of your rights under Article 6 of the HRA and enclose a copy of leaflet EC/FS 9."

58. It is, therefore, impossible to contend that the appellant was unaware of the prospect of penalties. Mr Stuart's letter was written one month after the release of the Decision and within the 56 day period allowed for appeals against decisions of this Tribunal. Moreover, in the Decision the Tribunal had found Mr Thomas's account of the tripartite transaction, in which it was said the appellant had acquired goodwill, to be lacking in credibility and that the tripartite transaction had not taken place. The appellant had made an inflated claim for amortisation relief of £2 million per annum based on the appellant's valuation for goodwill of £20 million (for which there was no independent support), even though the appellant's own expert witness put a value of £6.39 million on goodwill. It would be remarkable in these circumstances if HMRC had not considered imposing penalties. In my view, Mr Thomas was well aware of the prospect of penalties being imposed, which, given the circumstances, would no doubt be substantial.

59. I shall now deal with the written submissions put forward by Mr Upton in relation to the extension of time. I note, however, that some of the submissions seem more appropriate in relation to the substantive question whether permission to appeal should be granted rather than to the question whether an extended period of time should be allowed for an application permission to be made.

60. In the appellant's written submissions in support of an extension of time, Mr Upton correctly pointed out that the Directions issued by the Tribunal in November 2014 did not ask the appellant for written submissions in relation to the scenario (the first scenario) where there was a gradual migration of the trade from SSS to the appellant rather than an outright transfer at a specific date. This was the factual scenario (the first scenario) which, in the event, the Tribunal held had actually happened during the period from September 2004 to February 2005. This first scenario was directed to the application of section 343 ICTA i.e. the carry-forward of losses in the context of a company reconstruction without a change of ultimate ownership.

61. Mr Upton argued that the application of paragraph 118 to the facts as found (i.e. a gradual migration of the business) was not a matter which the applicant had notice of the need to address. Instead, the appellant had addressed scenario 2 i.e. a direct transfer of goodwill from SSS to the appellant in or around September 2004. In giving its response to the second scenario, Mr Upton said that Mr Thomas did so on the assumption that the "goodwill and business pre-dated 1 April 2002 so as to exclude the application of paragraph 118 (2) (c)."

62. Mr Upton then maintained that the appellant could and would have led evidence to qualify the facts found by the Tribunal in paragraph 19 of the Decision had the need to address paragraph 118 (2) (c) been identified. Mr Upton submitted that:

> "the trade or business that migrated from SSS had begun in July 2002, before when that company had carried on a different trade. Because July 2002 post-dated 1 April 2002, so that even if the respondents' late submissions about the rejected second scenario had been relevant to the facts as subsequently found, they proceeded on an assumed and untested factual assumption."

63. Although I have concluded that Mr Thomas was well aware of the implications of paragraph 92 and paragraph 118, Mr Upton's submissions raised a number of issues which I shall address.

64. First, in its notice of appeal of 3 May 2016, the appellant argued that the Tribunal's finding that there was a gradual "migration" of the SSS's trade was tantamount to a finding that there was a transfer ("The Tribunal found that there was a 'migration' – hence a transfer – of the trade from SSS to the appellant."). Presumably, this was on the footing that it would be necessary for there to be a *transfer* of the goodwill in order to engage paragraph 92. On that basis, it is hard to see the substance of the distinction that Mr Upton sought to draw in relation to the appellant's response to scenario 2 (a direct transfer from SSS to the appellant in the period September 2004 to February 2005) and scenario 1 (a gradual migration of trade).

65. Secondly, Mr Upton was, in effect, arguing that the goodwill was created after 1 April 2002, an argument that was not put forward, or at least not put forward with any clarity, in the appellant's notice of appeal. Evidently, the argument had been prompted by the Tribunal's letter of 24 May 2016. More importantly, it appears that this argument would require the appellant to adduce fresh evidence, viz that the trade

that had migrated from SSS had begun in or around July 2002 and that before that time SSS had carried on a different trade and that in some way, unspecified in Mr Upton's submissions, the goodwill of SSS's business post-dated July 2002. The Tribunal would then presumably, be called upon to make further findings of fact in relation to this evidence. The difficulty with this submission is that this Tribunal is only entitled to grant permission to appeal on a point of law. It would be for the Upper Tribunal, if it considered it was entitled to do so, either to make further findings of fact under section 12 TCEA or to remit the appeal to this Tribunal to make those further findings (but see, for example, the comments of the House of Lords in *Yuill v Wilson (Inspector of Taxes)* [1980] STC 460 on the circumstances in which fresh evidence should be admitted – a case under section 56 TMA 1970 and *Ladd v Marshall* [1954] 1 WLR 1489).

66. In any event, in the light of my conclusion that Mr Thomas was well aware of the paragraph 92 and 118 issues, he should have applied either at the hearing or in response to the Directions of November 2014 to adduce new evidence. Indeed, I consider Mr Upton's submission in relation to the new evidence that Mr Thomas would have adduced to be fatal to his case because it shows that there was no error of law by the Tribunal on the basis of the evidence before it.

67. Moreover, Mr Upton's reference to the new evidence that the appellant "would have led" is so vague that it is impossible to assess, either in determining whether to grant an extension of time or, indeed, to grant permission to appeal, whether the appellant's case was at least arguable. I am mindful of the desirability that any appeal should be decided on the correct legal basis. I am not, however, persuaded that the appellant has demonstrated that it has an arguable case that the appeal was decided on an incorrect basis in all the circumstances and certainly not on the evidence that was before the Tribunal.

68. Finally, Ms Jones referred to the decision of the Court of Appeal in *Tinkler v Elliott* [2012] EWCA Civ 1289 where Maurice Kay LJ said at [32]:

> "I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

69. It seems to me that the comments of Maurice Kay LJ are particularly apposite in this case. Certainly, self-representing appellants are entitled to some latitude from the Tribunal but that does not extend so far as visiting unfairness on the other party, in this case HMRC.

70. For the reasons given above, I refuse to grant an extension of time for permission to appeal and I therefore dismiss this application.

Permission to appeal

71. In the light of my decision not to permit an extension of time for the appellant for the appellant to seek permission to appeal, it is not necessary for me to decide whether I would have granted permission to appeal.

72. Nonetheless, I think it is worth recording that, had I been persuaded to grant such an extension, I would have refused permission to appeal in this case. Some of the reasons for reaching this conclusion have already been set out in relation to the application for an extension of time. In particular, some of the written submissions of Mr Upton were, as I have noted, more relevant to this third and final question and my conclusions remain the same in relation to the substantive application for permission to appeal.

73. It is clear to me that Mr Roderick Thomas, who conducted the appeal on behalf of the appellant, had the opportunity at the hearing and subsequently to put forward the arguments (and evidence) which are now advanced on the appellant's behalf. He was specifically directed to these issues by the Tribunal. It would have been inappropriate for the Tribunal to enter into the arena and attempt to make the appellant's case for it or to tell it how it should argue its appeal or what evidence it should lead. Having drawn the appellant's attention to the relevant issues it was then for the appellant to consider the issues and take such advice as it considered appropriate. For whatever reason, the arguments now advanced were not put forward until 3 May 2016. I express no view as to the strength or merits of those arguments – indeed, the vague manner in which they have been put forward makes any such conclusion impossible. It would in my view be an abuse of process now to allow the appellant to have a further hearing to re-argue its case on a different basis and it would be unfair to HMRC, having successfully fought an appeal to the Upper Tribunal, to now find that they were faced with new evidence and a new appeal. By 3 May 2006, HMRC were entitled to conclude that the decision of the Upper Tribunal would bring finality to this dispute.

74. Furthermore, the right of appeal from this Tribunal is confined to points of law. Its purpose is to allow errors of law contained in this Tribunal's decisions to be corrected. Its purpose is not, however, to allow a litigant have a second "bite at the cherry", as Judge Poole put it in *Fraser*, nor is it to allow a party to turn the appeal procedure into an iterative process with a succession of new issues and evidence being raised and fought sequentially through the Tribunal system. If a party has the opportunity to raise issues in a hearing, then absent some very good reason, it is neither fair nor just for the appeal process to be used to allow that party re-fight the battle on different grounds and with additional evidence.

75. I would therefore have refused permission to appeal in this case.

Decision

76. I have decided that I do have jurisdiction to consider a second application for permission to appeal. Having considered the application, I have decided not to extend

the time limit in which the appellant can make its application. In any event, I would have refused permission to appeal.

77. If the person who applied for permission to appeal is dissatisfied with the outcome of the application for permission to appeal the decision, that person has a right to apply to the Upper Tribunal for permission to appeal against the decision. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber).*

GUY BRANNAN

TRIBUNAL JUDGE

Release Date

1 May 2018