TC08021

EXISE DUTIES-application to debar HMRC-whether HMRC has realistic prospect of success–application to strike out appellants' cases--whether fair hearing possible-whether fair to have a hearing-whether abuse of process by HMRC-whether abuse of process in re-litigating facts by appellants

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: LON/07/8081(1)
LON/07/8089(2)

BETWEEN

MARK WILD (TRADING AS MARK WILD HAULAGE) (1) ANDREW HOWARD PARNHAM (TRADING AS A H PARNHAM TRANSPORT) (2) **Appellants**

-and-

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MS CELINE CORRIGAN

The hearing took place on 9 December 2020. With the consent of the parties, the form of the hearing was V (video).The remote hearing was attended by the Appellants, Mr Wild and Mr Parnham, Mr Ian Bridge, Counsel for the Appellants, Mr Martin O'Neill, the Appellants' representative, Ms Isabel McArdle, Counsel for HMRC, Mr Sanjeev Bakhshi of HMRC's Solicitor's Office, and Mr Paul Simpson and Ms Gabrielle Bruno, representatives of HMRC. The hearing was held on the Tribunal Video Platform. A face to face hearing was not held because of the Covid-19 emergency and it was considered that the case was suitable for a remote hearing. The documents to which we were referred are a Document Bundle of 445 pages, a Supplementary Bundle and Index, an Authorities Bundle of 132 pages, a list of documents provided by HMRC to the Appellants, the Appellants' Skeleton Argument on preliminary issues dated 20 November 2020 and the Respondents' Skeleton Argument on preliminary issues dated 1 December 2020. All the documents were provided in electronic format.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Ian Bridge, counsel, instructed by Mr Martin O'Neill for the Appellants

Ms Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This hearing addressed preliminary issues as to whether the Respondents should be barred from further participations in the case and whether the Appellants' case should be struck out.

2. The substantive case relates to assessments on the Appellants for excise duty on certain loads of duty suspended spirits which they were contracted to transport from the UK to a warehouse belonging to the supermarket chain, Aldi SA, located in Vaux-Sur-Sure in Belgium (the "Aldi warehouse"). The main contractor for these loads, and others, was a haulage company called SDM European Transport Ltd ("SDM"). SDM sub-contracted the delivery of a number of loads to other hauliers including the Appellants. The Respondents' case is that the spirits never arrived in Vaux-Sur-Sure and that an Excise Duty Point arose in the UK. Under Regulation 7 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 ("the Regulations") the person primarily liable for the duty is the person who guaranteed the duty, in this case SDM. Regulation 7(2) goes on to provide:

> "Any other person who causes or has caused the occurrence of an excise duty point…shall be jointly and severally liable to pay the duty…".

3. HMRC's case is that the Appellants are jointly and severally liable with SDM for the duty on the loads they transported as, in each case, they had "caused the occurrence of an excise duty point". That is to say, they failed to deliver the loads to the Aldi warehouse in Belgium.

4. Mr Parnham was assessed for duty in the amount of £484,206 and Mr Wild was assessed for duty of £1,302,036.

5. We will consider the history of the cases below, but for present purposes we note that the events occurred in 2006. HMRC assessed SDM and the Appellants (and other drivers). The drivers' cases were stayed behind SDM and the FTT heard SDM's case in 2007. That case was finally disposed of, in the Respondents' favour, in 2016. The stay was subsequently lifted. There were further delays and in 2018, HMRC unsuccessfully sought to have the Appellants' case struck out on the grounds that the Appellants had failed to co-operate with the Tribunal and that, in the light of the SDM case, the appeals had no reasonable prospect of success.

6. On 7 November 2019 Judge Poole issued Directions that "the question of whether HMRC should be debarred from any further participation in these appeals and all issues therein should be summarily determined against them, … shall be decided as a preliminary issue".

7. In their Preliminary Issues Statement of Case dated 6 January 2020, the Respondents invited the Tribunal to strike out the Appellants' appeals on the basis that they were an abuse of process. The Appellants made no objection to this until the week before the hearing when they objected on the basis that there had been no formal application to strike out the appeals.

8. We heard argument on the issue at the start of the hearing and determined that HMRC should be allowed to proceed with the strike out application. The Appellants had been on notice since January that HMRC proposed to argue that the appeals should be struck out, so that they had had more than adequate time to prepare a response. Their objection was very late-only days before the hearing. The application to debar HMRC and the application to strike out the Appellants' case require us to consider many of the same facts and issues although from different perspectives. If we refused to allow HMRC to proceed, and required

them to make a formal application, there would be further costs and delay and we considered it to be in accordance with the overriding objective that we should hear argument on both applications at this hearing.

THE HISTORY OF THE SDM CASE

9. We need to look first at the SDM case as it is submitted that the ultimate decision in that case determines these appeals.

10. SDM was the guarantor of 63 movements of duty suspended alcohol from England to Belgium. There were two further movements to Latvia and Germany respectively (so 65 disputed movements in total), but we focus on the Belgian movements. The movements took place between July and November 2006. SDM was engaged by two companies, Doktor Czech UK Limited and Liquid Marketing Limited. SDM sub-contracted the movements to other hauliers, either owner drivers or haulage companies who further sub-contracted the deliveries. There were more than a dozen individual drivers involved in the movements, including the Appellants, who were both owner drivers sub-contracted by SDM.

11. In August 2006, HMRC made enquiries of the Belgian authorities which informed HMRC on 31 October 2006 that the goods in question had not arrived at the Aldi warehouse. HMRC obtained copies of AADs (Accompanying Administrative Documents intended to record the movements of duty suspended alcohol) in relation to 18 movements to Aldi. They bore forged Belgian Customs stamps and forged Aldi stamps and signatures. No AAD was returned for the other 47 movements. All CMR International Consignment Notes to Aldi carried Aldi stamps of a type not in use at the time apart from eight which carried no Aldi stamp. Two Aldi employees made statements to the Belgian police to the effect that Aldi did not receive the goods at the warehouse. A Belgian Customs officer, formerly responsible for the Aldi warehouse, was arrested on 30 November 2006 and later admitted forging 11 AADs in relation to consignments by Dr Czech and Liquid Marketing to the Aldi warehouse. HMRC formed the view that none of the consignments had reached its destination.

12. HMRC assessed SDM, as guarantor, for duty on the basis that none of the consignments arrived at the Aldi warehouse and SDM was, accordingly, strictly liable.

13. SDM contended that the consignments did arrive at the Aldi warehouse and whether or not they arrived, the duty point did not occur in the UK and so they were not liable.

14. Five of the sub-contractors, including the Appellants, were assessed to duty as having caused the occurrence of excise duty points. Mr Parnham was the driver of six of the consignments and Mr Wild was responsible for 14 movements. The assessments were issued on 26 April 2007 and were appealed on 30 July 2007.

15. On 21 November 2007 and 26 March 2008, the Appellants' appeals were stayed behind SDM's appeal.

16. The decision in the case of *SDM European Transport Ltd v HMRC* [2011] UKFTT 211(TC) was issued in March 2011. SDM succeeded in the First Tier Tribunal ("FTT 1"). Mr Parnham was among the witnesses who gave evidence at the hearing and was cross-examined on it. Mr Wild had made a witness statement but had emigrated to Canada and was not present at the hearing and was not cross-examined. In all, thirteen witnesses gave evidence over fourteen days including witnesses from SDM, the UK warehouses, the drivers and HMRC. There were no witnesses from Aldi or the Belgian authorities. FTT 1 considered that there were two possible scenarios. Scenario one is that the goods had been diverted en route to Vaux-sur-Sure (as HMRC contended) so that, under the Regulations, the duty point arose in the UK. It would necessarily follow that the drivers were implicated and their evidence that they had delivered the consignments to the Aldi warehouse were false. The alternative is that

the drivers had, indeed, delivered the goods to the Aldi warehouse (in which case the duty point was in Belgium and SDM was not liable) and the diversions had happened after arrival. This required dishonest employees at Aldi to ensure that 63 illicit consignments were processed but not entered into Aldi's stock records without anybody noticing. There were difficulties with both scenarios.

17. FTT 1 concluded that on the evidence, with the drivers' evidence "tipping the balance", all the disputed journeys except one had taken place and that the goods had been delivered to the Aldi warehouse.

18. HMRC appealed to the Upper Tribunal ("UT 1") ([2013] UKUT 251 (TCC)) on four grounds. The appeal was allowed on one ground only, based upon *Edwards v Bairstow* [1956] AC 14. FTT 1 had concluded that all loads except one had been delivered to their intended destination. HMRC submitted that the FTT's conclusion on this point was contradicted by the evidence and was one that no reasonable tribunal properly instructed as to the relevant law could have come to on the evidence. Judge Sinfield and Judge Hellier said:

> "50. The FTT's conclusions on the facts divide as follows: 15 (1) at [441] - [475], the FTT considers principally the evidence relating to the movements for which the drivers gave evidence and concludes that the evidence of the drivers "tips the balance" in respect of those deliveries and that they were therefore delivered to Aldi; (2) at [476] - [477], the FTT accepts the evidence of delivery to Aldi by Mr Wild; and (3) at [479] - [491], the FTT considers the 22 movements (all by JJI/Connie) for which there was no driver evidence.
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> 51. In [441] to [475], the FTT first considers the alternative scenarios and their logical consequences; then, at [450] to [467], the evidence of the drivers; and, between [468] and [474], the effects of the evidence from SDM personnel. At [475], the FTT concluded that it was satisfied, on the balance of probabilities, that the drivers who gave evidence (Mr Waters, Mr Blunsden, Mr Parnham and Mr Francis) had delivered the goods to Aldi. The evidence of those drivers covered 26 or 28 of the 65 disputed movements (Mr Waters was not sure whether he was the driver on two of the movements). The FTT stated that the drivers' evidence tipped the balance in favour of delivery to Aldi in respect of those movements.
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> 52. The reasoning in [475] is important. It shows that the FTT recognised that the analysis of the alternative scenarios, even in the light of the SDM evidence, does not show on balance that the deliveries were made to Aldi. That conclusion can only be reached with the drivers' evidence. As a result, if the FTT's acceptance of the drivers' evidence was unreasonable then the conclusion in [475] cannot stand.
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> 53. If the FTT should not have accepted the drivers' evidence, then, first, at least some of the movements would not have been proved to have been delivered to Aldi; second, the corroborative value each driver's evidence for that of the others would be diminished; and third, it would not be possible for the FTT to conclude that there was a consistent system of diversion (as to which see section (3) below). The acceptance of the drivers' evidence is the linchpin on which the FTT's decision rests.
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> 54. The FTT saw the drivers giving their evidence. The witnesses were in the stand for many hours. Mr Waters was cross-examined for some two hours and Mr Blunsden for three and a half hours. The FTT saw them cross examined and being tested on material said to be inconsistent with their testimony. The FTT weighed the criticism of their evidence against what

> they had said. In our view, the FTT's acceptance of the drivers' evidence could only be unreasonable either:
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> (a) on the narrower ground that there were one or more material facts which are so inconsistent with the evidence as to make a conclusion that a material part of it was true impossible. In this regard Ms Simor advanced an argument that some 10 of the journeys which the drivers said, and the FTT had accepted, they had undertaken were impossible; or
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> (b) on the broader ground that the sheer weight of the concerns with the drivers' evidence makes it impossible to believe it (or to accept the balancing exercise the FTT conducted)."

19. The Tribunal rejected HMRC's arguments on the "broader ground" that an accumulation of evidence including the lack of documentary evidence of delivery, reports by the Belgian authorities that the diversions had taken place in the UK, the motive of the drivers to lie, the destruction of the tachographs and evidence of delays in the journey after picking up the loads, cast doubt on the accuracy of the drivers' evidence.

20. The discussion focussed on the narrower ground of the "allegedly impossible journeys". HMRC relied on evidence which, they submitted, showed that some of the journeys which the drivers claimed to have made were impossible within the time taken according to other evidence, such as evidence of the time of arrival at the Eurotunnel in England and/or France, time and location of refuelling receipts or toll motorway receipts. Ten of the sixty-three movements were allegedly impossible. Seven of the journeys were undertaken by one driver and Mr Wild and Mr Parnham had undertaken one each. The importance of the issue was dealt with in paragraphs [63] and [64]:

> "63. If evidence established that it was impossible for a driver to make a particular journey which the driver testified he had made then it would be impossible to accept that driver's evidence in relation to that journey. Further, the existence of evidence that showed that a particular journey was impossible would call into question the truthfulness of that driver's evidence in relation to other journeys. If one driver's evidence could be shown to be unreliable then that would also cast doubt on the evidence of the other drivers that they had made similar journeys.
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> 64. It seems to us therefore that the resolution of the issue of the "impossible" journeys was critical to the FTT's conclusion. If they were indeed impossible, the FTT could not properly have come to the conclusion on the evidence before it that those deliveries had been made to Aldi and without further reasons it would not be possible to accept the evidence of the drivers involved in relation to other movements."

21. The Tribunal went on to conclude:

> "But this paragraph [FFT1's conclusion] does not explain *why* the FTT concluded that the timings of the journeys shown on the schedule, apart from movement 29, were possible.
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> 69. The FTT's conclusion is that the timings offer "no support to Customs' case"; whether or not that is a relevant conclusion, the issue the timings raise is that of a challenge to the veracity of the drivers' evidence. That challenge cannot simply be put aside by relying on the drivers' evidence; that would be circular. The two must be resolved.
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> … the fact is that there was no explanation of the resolution of very material conflicting evidence.

> 72. Thus it seems to us that either the FTT's conclusion could not have been reached on the evidence, or that the FTT has not adequately explained why it felt able to ignore the disparity between the evidence of how long the round trip would take and the evidence of the actual, much shorter, times taken in at least some of the movements identified by HMRC, or how it reconciled any disparity with the drivers' evidence.
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> 73. Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the FTT to give full written findings and reasons in any decision upon which an application for permission to appeal may be based. The failure to give such reasons may therefore be an error of law. The failure to give reasons may thus be an error on a point of law which was involved in the making of the decision. Indeed failure to give reasons or adequate reasons for findings on material matters was one of the items noted in paragraph 9 of the judgement of Brooke LJ in *R(Iran) v Home Secretary* [2005] EWCA Civ 982 in relation to similar rights of appeal from the Immigration Tribunal, as an error of law.
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> 74. It seems to us that the absence of any explanation for accepting the evidence of the drivers that the journeys in movements 17, 19, 24, 29 and 37 took place as described in the face of other evidence that, on the FTT's own calculation of the time required, showed that the journey times were impossible was a failure to give reasons on a material matter - a matter vital to the conclusion reached by the FTT that all the journeys (apart from those to Germany and Latvia) resulted in delivery to Aldi. The failure to give reasons for accepting the evidence of the drivers was, in our view, an error of law."

22. On this basis, UT 1 set aside the decision of FTT 1 and considered whether it should remit the case to the FTT or re-make the decision in accordance with Section 12(2) of the Tribunals, Courts and Enforcement Act 2007. It concluded:

> "77. Not having heard the witnesses and consequently being unable to attach relevant weight to material parts of their evidence we are unable on the material before us fairly to reach any conclusion as to whether or not any of the nine allegedly impossible journeys, apart from movement 29, were in fact possible and, if any were impossible, what effect that would have on the evaluation of the evidence in relation to the other journeys: and without being able to address the FTT's reasoning we cannot fairly conclude whether the FTT's conclusion was one it could or could not have reached on the evidence. We are thus not equipped to remake the decision.
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> 78. Therefore the case should be remitted to the FTT. Our preference would have been to remit it to the panel which heard the original appeal with a direction to give reasons in relation to the conclusions on the "impossible journeys". That is unfortunately no longer possible because of the retirement of Judge Wallace.
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> 79. Accordingly, we set aside the decision of the FTT and remit the case to a differently constituted First-tier Tribunal to reconsider the evidence and determine whether the goods were delivered to Aldi."

23. The parties were invited to make submissions on the terms of the directions to be given to the First Tier Tribunal.

24. In summary, UT 1 determined:

> (1) There was evidence-the allegedly impossible journeys-which contradicted the drivers' evidence.

(2) Notwithstanding that, FTT 1 had accepted the drivers' evidence that the goods had been delivered to the Aldi warehouse.

(3) The drivers' evidence was the determining factor which "tipped the balance" of FTT 1's decision.

(4) If the journeys, or some of them, were indeed impossible, that would undermine the veracity of the drivers' evidence.

(5) FTT 1's failure to give reasons for preferring the drivers' accounts in the face of the contradictory evidence amounted to an error of law as without the reasons, UT 1 could not evaluate whether the conclusion was one which was open to the FTT on the evidence.

(6) FFT 1's decision would be set aside.

(7) UT 1 could not fairly re-make the decision, not having heard the witnesses.

(8) The case would therefore be remitted to a differently constituted FTT (the judge of FTT 1 having retired) to reconsider the evidence and the conclusions to be drawn from it.

25. The parties could not agree on the directions which should be made and a further hearing took place before UT 1 in November 2013. HMRC's position, at that stage, was that the appeal should be re-heard while SDM preferred reconsideration without a re-hearing of the evidence. UT 1 came to the conclusion that a complete re-hearing should be avoided (a conclusion in which HMRC by that time concurred), and that the appeal should be remitted to a differently-constituted panel which should reconsider the conclusions to be drawn from the evidence heard by FTT 1.

26. UT 1's directions were in the following terms:

> "…
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> 2. That the case be remitted to the First-tier Tribunal to
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> a. determine whether all or any of the journeys described in the schedule of the ten allegedly impossible journeys produced at the hearing (other than movement 29) could not have taken place as described in the evidence of the drivers as recorded in the [FTT] Decision by reference to the evidence that was before the First-tier Tribunal at the hearing, including the witness statements, oral testimony as set out in the transcript and documents;
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> b. in determining the issue at (a), the First-tier Tribunal shall have regard to the propositions of law and findings of fact (other than in relation to the allegedly impossible journeys) in the Decision;
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> c. if it is found that all or any of the journeys could not have taken place as described, consider what effect such finding has on the conclusion in the Decision that
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> i. the goods carried on those journeys were delivered to Aldi in Belgium, and
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> ii. the goods carried on other journeys, not alleged to be impossible, were delivered to Aldi in Belgium; and take such steps as they consider just to determine the appeal either with or without hearing further evidence; and
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> d. if it is found that all of the journeys could have taken place as described, to determine the appeal on the basis of the other findings contained in the Decision."

27. Judge Berner, an Upper Tribunal judge, sitting in the First Tier Tribunal ("FTT 2") ([2014] UKFTT 829 (TC)) noted that even though UT 1 decided it could not fairly reach a conclusion on the impossible journeys as it had not heard the witnesses, the directions required him to determine whether the allegedly impossible journeys could not have taken place on the basis only of the evidence before FFT 1. Only if he found that one or more of the journeys could not have taken place was he permitted to consider whether further evidence was needed in order to determine the effect of that conclusion on the decision of FTT 1.

28. FTT 2 approached the matter by considering the evidence as to timings before FTT 1 and journey times suggested by Google Maps to determine the shortest possible time in which the journeys could have been completed, also assuming that the drivers did not necessarily abide by the speed limits or take their statutory rest periods. It then analysed the allegedly impossible journeys against that benchmark. The journeys analysed included the allegedly impossible journeys made by Mr Wild and Mr Parnham. Judge Berner considered that possibility of Mr Wild's journey was "marginal" but that neither of the journeys was impossible.

29. FTT 2 concluded that all but one (movement 29) of the allegedly impossible journeys could have taken place as described in the drivers' evidence. In complying with direction 2c. it decided that the conclusion that movement 29 was impossible did not have any effect on the conclusions of FTT 1in relation to any other journeys that the relevant goods were delivered to the Aldi warehouse. It did not matter whether the journeys were allegedly impossible or not. FTT 2 had found that the allegedly impossible journeys, except for movement 29 could have taken place).

30. SDM's appeal was allowed, except in respect of movement 29 and the consignment sent to Germany which FTT 1 had already decided had not reached its destination.

31. HMRC again appealed to the Upper Tribunal ("UT 2") ([2015] UKUT 625 (TCC)). There were two grounds of appeal. The first ground was that FTT 2 did not confine itself to the evidence before FFT 1 as the directions required it to do. Secondly, FTT 2 adopted a test of scientific or theoretical possibility, in relation to the allegedly impossible journeys rather than asking whether those journeys were realistically possible. Judge Bishopp, the Chairman of UT 2 commented at paragraph 167:

> "167. Although the underlying question in the appeal is not whether the relevant journeys were possible but whether SDM has discharged the burden of showing that the goods were delivered to the Aldi warehouse …, it will be apparent from what has gone before that the focus of much of the debate, before F-tT 1, UT 1 and F-tT 2 and now before us, has been on the possibility of the journeys, upon the basis that if it can be demonstrated that the journey was possible the goods comprised in that movement are to be treated, without more, as having arrived. I have concluded that, even if that is not strictly the correct approach, it would be unfair, at this late stage, to impose any greater burden on SDM than to show that the journeys were possible. Although Miss Simor did not formally concede that mere possibility was enough, she did not, as I understood her submissions, demur from the proposition that the appeal should be determined in that fashion."

32. The Tribunal's decision was split. Judge Bishopp wished to allow the appeal and Judge Cannan would have dismissed it. Judge Bishopp exercised his casting vote and HMRC's appeal was allowed. Judge Bishopp then decided that he was able to re-make the decision and that it was appropriate for him to do so. At paragraph 28 he commented that both HMRC and SDM had asked that UT 2 should remake the decision, should HMRC's appeal be allowed.

33. Judge Bishopp decided [147] that FTT 1 had, indeed applied a theoretical rather than practical or reasonable test to the allegedly impossible journeys. He also concluded, at paragraph 149 that FTT 2 had not applied the normal civil standard of proof-on the balance of probabilities-as it had commented that if it had been reaching its conclusions on the balance of probabilities, it would determine that the journey was impossible, whereas applying its test, the journey was found to be possible.

34. He also concluded that FTT 2 had not, as required by the directions, determined whether any of the journeys could not have taken place "as described in the evidence of the drivers". FTT 2 had assumed that the drivers consistently exceeded speed limits and failed to take statutory breaks and in determining the baseline time for the journeys had taken the shortest time for each leg which might have been mentioned by a driver, even though they generally said that longer times where what were routinely achieved. Judge Bishopp considered that FTT 2 had not taken account of all the evidence of the drivers, but selectively considered only parts of it.

35. In summary, Judge Bishopp considered that:

> "Judge Berner…has asked himself the wrong question, has applied an incorrect standard of proof and has examined the evidence selectively. In short, I am persuaded that he misunderstood the task required of him by UT 1 and for those reasons too I would allow HMRC's appeal"

36. As set out in paragraph 167 of his decision, Judge Bishopp's conclusion that the allegedly impossible journeys could not have taken place meant that SDM had not satisfied the burden of proving, on the balance of probabilities, that the goods had arrived at the Aldi warehouse.

37. He acknowledged the importance of the drivers' oral evidence, and the fact that FTT 1 was the only Tribunal to have heard the drivers, but stated that the fact that FTT 1 believed the drivers' claims that the goods had been delivered could not outweigh all other evidence, especially where a driver claims to have done something which "manifestly he could not have done".

38. He highlighted the point that if he concluded the goods had not arrived at the Aldi warehouse, it necessarily followed that the drivers had been dishonest and this had not been put to them. He dealt with this at paragraph 161:

> "161. I have throughout been conscious of the point that I have already made that I have not heard the oral evidence, and in particular the evidence of the drivers. That F-tT 1 believed their evidence in preference to the other evidence, even if they did not explain their reasons, is a factor to which I must necessarily attach considerable weight, and I must correspondingly be cautious before coming to conclusions from which it follows that the drivers who claimed that they did deliver the goods gave untruthful evidence to F-tT 1. I am very conscious of the point made by Judge Cannan in his dissenting decision that it is not permissible to make findings of dishonesty, as a finding that the goods were diverted before delivery necessarily implies, without first giving the person said to be dishonest an opportunity to deal with the allegation. It was, however, put to those of the drivers who gave evidence, in cross-examination, that some of their journeys were impossible and that the goods were not delivered to the Aldi warehouse. I have concluded that the combination of assessments based upon complicity in the diversions and the cross-examination put the drivers sufficiently on notice of what was being said against them, and that they had an adequate opportunity of dealing with it. In addition, the issue in this appeal is not whether the drivers were party to a conspiracy, but whether SDM has discharged the

> burden of showing that the goods were delivered. For those reasons I have concluded that if I am satisfied that the evidence of delivery at the Aldi warehouse cannot be true, I am bound to reject it even though I have not heard it myself. It should also be remembered that SDM invited us to remake the decision without hearing the drivers again."

39. Judge Bishopp then proceeded to re-make the decision by broadly following UT 1's direction to FTT 2. He proposed to examine the allegedly impossible journeys and then consider the impact of his conclusions on those journeys on the view to be taken of the remaining journeys, taking into account all the evidence available at the time of his decision including the drivers' evidence and evidence introduced later including that derived from Google Maps. In considering whether the journeys were possible, Judge Bishopp considered whether they were "realistically possible" and not possible only on the assumptions that the drivers routinely disregarded the law and never encountered any delays. He based the estimated "realistic" journey times broadly on the evidence of the drivers and Google Maps and used this as a starting point for an examination of the alleged impossible journeys.

40. He concluded that the journeys could not have taken place as claimed. In relation to Mr Wild's allegedly impossible journey, he concluded in paragraph 189 that, on an optimistic basis, he could have checked in at the Coquelles end of the Eurotunnel at 19.35 whereas the recorded check-in time was 17.10. He said "I do not see how it can realistically be argued that this journey was feasible". Mr Parnham's journey was dealt with in paragraph 190. The recorded check-in time was 18.27 and on the optimistic basis, he would have arrived at Coquelles at 20.00. Judge Bishopp was "not persuaded that the goods comprised in this movement can have been delivered to Aldi's warehouse".

41. Judge Bishopp reached the conclusion that at least six of the allegedly impossible journeys could not, or were not shown to, have taken place as claimed and there were serious doubts about two other movements. He then went on to consider the proposition that either all of the loads destined for Aldi's warehouse arrived there or none of them did and concluded that the better view was that it was an "all or nothing" decision. He concluded, at paragraph 211:

> "I am satisfied, on the balance of probabilities, that some of the 63 consignments supposedly sent to the Aldi warehouse at Vaux-sur-Sûre cannot have arrived there. In consequence SDM has failed, in my judgment, to discharge the burden of showing that any of the 63 movements was properly discharged or, for the sake of completeness, that the place at which the goods were diverted was in an identified or identifiable Member State other than the United Kingdom. It follows that it is liable, as guarantor, for the duty on those consignments."

42. He allowed HMRC's appeal.

43. Judge Cannan wrote a dissenting judgement. He took the view that Judge Berner *did* do what UT 1 required of him, that he applied a test of *reasonable* possibility and accordingly HMRC's first ground of appeal was not made out.

44. He also took the view that, to the extent Judge Berner took account of additional evidence such as Google Maps, he was entitled to do so and that his decision was consistent with the underlying evidence and his conclusion that the journeys were possible was not perverse. Accordingly, he rejected HMRC's second ground of appeal.

45. As noted, Judge Bishopp exercised his casting vote to allow HMRC's appeal and went on to re-make the decision as requested by the parties and despite the reservations set out in paragraph 38 above.

46. Judge Cannan, had he concluded that FTT 2 was in error, and he was required to re-make the decision would have taken a different approach. He said in paragraphs 264-267:

> "264. If I had been satisfied that F-tT 2 had fallen into error and was required to remake the decision then I would want to hear further evidence from the drivers in order to make my own findings. As UT 1 stated at [77], one of the reasons it did not reach any conclusion on whether the journeys were impossible was that it had not heard the witnesses. That point assumes added significance where the result of finding that the journeys were impossible must be that there was a conspiracy involving the individual drivers and the directors of SDM who F-tT 1 have previously found to be honest witnesses. I do not consider that it would be right to decide the principal issue as to delivery in this appeal by reference to the burden of proof. In general terms, either the drivers were telling the truth, or they were lying.
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> 265. Henderson J noted in *Ingenious Games LLP v Commissioners of HM Revenue & Customs* [2015] UKUT 0105 (TCC) at [65]:
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> " … as the FTT rightly recognised, it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it."
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> 266. If there is to be a forensic analysis of journey times, I consider that Mr Blunsden and Mr Parnham would be entitled to have that analysis fairly put to them in cross examination. The question for those drivers, in light of the specific material and analysis this tribunal has been taken to, would be to explain in detail how each journey was possible. Those questions were put to Mr Blunsden in relation to movement 29, but they were not put in relation to all the other movements now said to be impossible. Certainly it does not appear to me that the detailed analysis now relied on by HMRC as to why movement 37 was impossible was put to Mr Parnham.
>
> 267. I am conscious that Mr Barlow on behalf of SDM had been strenuously resisting any form of re-hearing. Indeed both parties before this tribunal invited us to remake the decision in the event that the appeal succeeded. For the reasons given above I do not think it appropriate to do so without hearing evidence from the drivers."

47. Although there was no further appeal, SDM challenged UT 2's jurisdiction and whether Judge Bishopp had properly exercised his casting vote in judicial review proceedings. The challenge was unsuccessful and the matter was determined in April 2016.

48. The result is that it took nearly ten years from the time of the events in question for SDM's case to reach a final conclusion. That final conclusion was that SDM had not proved, on the balance of probabilities that the 63 movements of duty suspended alcohol had arrived at the Aldi warehouse. That conclusion in turn followed a split decision of UT 2, determined by the exercise of a casting vote, that at least some of the 63 movements could not realistically have been completed in the time available according to the evidence, even though the drivers of those consignments had given evidence that they had delivered the goods to the Aldi warehouse. It was further concluded that if some of the loads had not arrived, none of the loads had arrived.

49. It is against that background that we must now consider the history of Mr Parnham's and Mr Wild's appeals and the present applications.

THE HISTORY OF THE PRESENT APPEALS

50. Assessments were issued against both the Appellants on 26 April 2007 on the basis (according to HMRC's original Statement of Case) that irregularities caused by the Appellants caused the occurrence of an excise duty point and that they were jointly and severally liable with SDM for the duty. HMRC's letter of 26 April 2007 notified the Appellants that they were satisfied that the Appellants had been directly concerned in the diversion of the goods from their intended destination. In other words, the assessment alleged that the Appellants had not delivered the goods to the Aldi warehouse.

51. The Appellants appealed against the assessments on 30 July 2007.

52. On 21 November 2007 and 26 March 2008 respectively the Appellants' appeals were stayed behind SDM's appeal.

53. As we have set out above, SDM's appeal proceeded in a somewhat tortuous fashion with the case finally being disposed of in April 2016.

54. We do not have copies of all of the subsequent correspondence and some of the following information is derived from HMRC's chronology set out in their Preliminary Issues Statement of Case.

55. On 1 November 2016 the Respondents requested the Tribunal to ask the Appellants as to whether or not Mr Parnham wished to pursue his appeal. It is unclear why Mr Wild was not mentioned.

56. On 26 November 2016, the Tribunal wrote to the Respondents and, according to HMRC's Chronology, to both the Appellants requesting notification within 14 days as to how the parties intended to proceed in relation to their respective appeals.

57. On 28 November 2016, the Respondents confirmed that they did not wish to withdraw their defence to "any of the appeals that were stood behind SDM…" and requested confirmation as to the Appellants' intentions with respect to the same.

58. On 27 July 2017, the Respondents emailed the Tribunal requesting an update in respect of both Appellants' appeals.

59. On 14 November 2017, the Respondents emailed the Tribunal again requesting an update within 21 days in respect of both Appellants' appeals.

60. HMRC state that on 16 November 2017, the Tribunal wrote to Mr Wild requesting an update as to how he wished to proceed with his appeal and on 11 April 2018, the Tribunal wrote to Mr Wild attaching an authority form for his representatives. Although the Chronology does not state this, we infer that Mr Wild or his agent must have responded and said he wished to proceed with his appeal. HMRC also state that on 11 April, the Tribunal wrote to Mr Parnham requesting an update as to how he wished to proceed with his appeal. We do not know why Mr Parnham was contacted some five months after Mr Wild. HMRC state that on 20 April 2018, the Mr Allan Brown, the Appellants' representative emailed the Tribunal with authorisation forms to act on behalf of both Appellants.

61. On 24 September 2018 the Respondents filed an application to strike out the Appellants' appeals. On 9 October 2018 Mr Brown responded to the Respondents' application. He did not object to it but pointed out the Appellants' inability to pay the assessments and questioned whether it was in the public interest for those assessments to be pursued. The email to noted that Mr Brown was no longer acting on behalf of either of the Appellants owing to lack of funds.

62. Neither of the Appellants appeared for the strike out hearing.

63. In October 2018 the Tribunal refused to strike out the Appellants' appeals and later issued a fully reasoned decision on 19 December 2018.

64. HMRC applied to strike out the appeals on two grounds. The first was that the Appellants had failed to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the appeals fairly and justly.

65. Judge Poole did not consider that ground to have been made out at that stage as he considered that "it could fairly be said that the Respondents' position was only made clear in their [strike out applications] dated 24 September 2018" although HMRC had notified the Tribunal in November 2016 that they did not intend to withdraw their defence to the appeals and wanted to know if the Appellants proposed to proceed with them.

66. The second ground was that "the findings of fact made in the Upper Tribunal's decision in *HMRC v SDM European Transport Limited* [2015J UKUT 625 (TCC) as to the conduct of the Appellants meant that the appeals had no reasonable prospects of success in any event."

67. Judge Poole rejected that ground for the following reasons:

> "…Ms Monaghan referred to the findings of the Upper Tribunal in its 2015 decision referred to above, in particular as to the plausibility of the evidence of the Appellants as to their delivery of the loads in question to the stated destinations. In the light of those findings, she argued that these appeals were bound to fail, as the Upper Tribunal had effectively found the Appellants to have been party to the fraudulent diversion of the relevant goods.
>
> 5. I do not consider it appropriate to strike the appeals out on this basis, It is clear that HMRC put their case in these appeals on the basis that the appellants were complicit in the fraudulent diversion of the relevant loads. It is a well-established principle (as Judge Cannan observed in his dissenting judgment in the 2015 UT decision at [265]) that "it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it" (see Henderson J in *Ingenious Games LLP v HMRC* [20l5l UKUT 0105 (TCC) at [65]). Judge Bishopp considered this requirement had been satisfied because:
>
> > "It was.., put to those of the drivers who gave evidence, in cross-examination, that some of their journeys were impossible and that the goods were not delivered to the Aldi warehouse, I have concluded that the combination of assessments based on complicity in the diversions and the cross-examination put the drivers sufficiently on notice of what was being said against them, and that they had an adequate opportunity of dealing with it. In addition, the issue in this appeal is not whether the drivers were party to a conspiracy, but whether SDM has discharged the burden of showing that the goods were delivered... It should also be remembered that SDM invited us to remake the decision without hearing the drivers again."
>
> 6. It can readily be seen that the qualifications which Judge Bishopp made were dependent upon two extra factors which are highly relevant to the present appeals, namely: (a) The core issue in the present appeals (unlike in SDM, as Judge Bishopp put it) is whether the appellants were party to a conspiracy; and (b) The Tribunal had been asked by SDM to remake the decision without hearing the drivers again (whereas it is not clear, at least

> not yet, whether the Appellants in these appeals are content to proceed on the same basis).
>
> 7. I therefore consider that the findings of fact made by the Upper Tribunal (without actually seeing the witnesses give evidence) cannot be regarded as definitive for the purposes of these appeals, to which the "normal rule" should apply so that the appellants should be given the opportunity of answering the specific allegations of dishonesty which HMRC are levelling against them as a core part of their case.
>
> 8. I also note that Mr Wild did not even give live evidence in the previous appeal of SDM. 9.
>
> It follows that I do not consider the appeals to have "no reasonable prospect of success". The appellants must at least be given the opportunity of convincing a Tribunal of the truth of their evidence (as the FTT in the first hearing was apparently convinced) in the face of the supposed "impossibility" of the journeys they claim to have made."

68. The Tribunal made Directions on 29 October 2018 requiring the Appellants to say, within 14 days, whether they wished to continue with their appeals. Mr Parnham did so, but Mr Wild did not state whether he wanted to continue and his appeal was struck out, but subsequently reinstated.

69. The Directions also required the Appellants, if they wished to continue, to provide their grounds of appeal. They failed to do so within the time limit. Initially, this was due to the illness of their representative and the time for compliance was extended. Further applications for an extension of time to deliver their grounds of appeal were made in February, March, April and June 2019. The Appellants also made an Application for disclosure in May 2018 which was refused although HMRC provided some documents. On 29 July 2019 the Tribunal issued Directions that the Appellants' cases would be struck out unless they provided their grounds of appeal by 16 August 2019.The Appellants produced revised witness evidence on 16 August but had not provided their grounds of appeal. On 23 August 2019 the Respondents requested that the appeals be struck out in accordance with the Directions. The Appellants objected on 2 September 2019 and were granted a further extension until 18 October 2019. On that date they produced their grounds of appeal and setting out preliminary issues which they considered should be determined first.

70. The Tribunal issued Directions on the preliminary issues on 7 November 2019 which have led to this hearing.

THE APPELLANTS' APPLICATION FOR DEBARMENT/ABUSE OF PROCESS

71. The Appellants' grounds of appeal are essentially that they delivered the loads to the Aldi warehouse and so there was no duty point under Regulation 3 of the 2001 Regulations. It follows that they are not liable for the duty and in any event, the Appellants deny that they caused an excise duty point to occur.

72. In their Grounds of Appeal dated 13 October 2019 as supplemented by their Notice of Objection to HMRC's second strike out application dated 2 September 2019, the Appellants initially put forward three preliminary issues that needed to be dealt with:

> (1) Whether, in view of the delay it was possible to have a fair trial and/or whether it was fair to try the issue.
>
> (2) Linked to issue (1): it was an abuse of process to re-litigate the facts which had been found by FTT 1 which was the only Tribunal which had heard evidence from the

drivers and continuing with the proceedings were an abuse of process for the following further reasons

(a) The delay meant that the Appellants could not have a fair trial

(b) The Appellants are not responsible for any of the delay

(c) The Appellants do not have all the papers from the SDM hearing and are unable to obtain them

(d) The Appellants do not know whether the relevant witnesses will be able to give evidence

(e) The Appellants do not have the financial resources to pay for representation or pay the duty if it is due

(f) The Appellants are nearing retirement, have health issues and Mr Wild is non-resident

(g) The Appellants do not know whether SDM paid the duty and consequently whether the assessments constitute a penalty rather than the payment of duty.

(3) As HMRC's case is effectively based upon the dishonesty of the Appellants and amounts to an accusation of fraud, the burden of proof lies on the Respondent's to prove matters to the criminal standard.

73. In his Skeleton Argument dated 20 November 2020 Mr Bridge also sought to argue that HMRC should be debarred on the basis that it's case had no reasonable prospect of success under Rule 8(3)(c) and 8(7) of The Tribunal Procedure (First-Tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules"). Although this was the first time this had been put forward, Ms McArdle, for HMRC did not object and was content to address the point.

Burden of proof

74. Mr Bridge referred to the case of *Engel and Others v The Netherlands* ECHR 8 June 1976 5100/71, a case on the European Convention on Human Rights which held that matters categorised as civil transgressions under national law could be regarded as "criminal charges" attracting the protections of the Convention in certain circumstances. Mr Bridge submitted that the assessments in the present case amounted to penalties and should be treated as subject to the burden of proof applicable to criminal cases.

75. This submission was mentioned only briefly at the hearing and was not developed or fully argued.

76. Whilst recognising the severity of the potential consequences for the Appellants if the assessments are upheld, these are straightforward assessments of duty alleged to be due and we agree with HMRC that the normal civil standard of proof on the balance of probabilities applies and the burden of proving the assessment is not due lies on the Appellants.

77. Mr Bridge suggested the assessments might constitute a penalty in that HMRC was recovering the duty twice. We do not know whether SDM paid the duty or some of it, but the Appellants' alleged liability is a joint and several liability with SDM. It is in the nature of joint and several liability that each liable person is liable for the whole of the amount due, but that the other party can only recover the sum due and not multiple sums from each person. In other words, HMRC can only recover from the Appellants duty unpaid by SDM and still owing, so that the assessment cannot be regarded as a penalty, as opposed to an assessment for duty due.

Decision on the Burden of Proof

78. For the reasons set out above, we have decided that the normal civil standard and burden of proof applies to this case.

No reasonable prospect of success

79. It is agreed by the parties that the sole factual issue in dispute is whether the Appellants delivered their loads of alcohol to the Aldi warehouse.

The Appellants' submissions

80. FTT 1, which was the only tribunal to hear the drivers themselves and where the panel included a member who was experienced in international haulage, believed the drivers and found that the movements had ended at the Aldi warehouse.

81. That decision was set aside by UT1on the grounds that there was conflicting documentary evidence and the failure of FTT 1 to give sufficient reasons for preferring the drivers' accounts amounted to an error of law on *Edwards v Bairstow* principles. UT 1 was reluctant to re-make the decision, not having heard the witnesses itself and decided to remit the case to the First Tier Tribunal. It required a further hearing before the terms on which the First Tier Tribunal was to determine the matter were decided. By that time both parties, that is to say, HMRC and SDM were keen to avoid a rehearing and so the Directions to FTT 2 were that the case should be *reconsidered*, but, at the first stage at least, only on the evidence before FTT 1 and without hearing further witness or other evidence. The reconsideration was confined to deciding whether the allegedly impossible journeys could have taken place.

82. Judge Berner in the FTT 2 decision had reservations about making the decision without hearing further evidence, but did so in accordance with the Directions of UT 1. He decided that the allegedly impossible journeys, with one exception, could have taken place.

83. The decision of UT 2 was split. Judge Cannan, dissenting, considered that Judge Berner had taken the correct approach to his task. He also thought that if FTT 1 was wrong, it was necessary to hear the drivers give evidence and that it was wrong to find that the drivers were dishonest without this being put to them directly.

84. Judge Bishopp, exercised his casting vote to find that FTT 2 had not carried out its task properly and he decided to re-make the decision rather than remitting it to the First Tier Tribunal yet again. He was also conscious of the fact that he had not heard the oral evidence and that the allegation of dishonesty had not been put to the drivers in cross-examination. He concluded that he was properly able to re-make the decision, and find that the goods had not been delivered to the Aldi warehouse for the reasons set out in paragraph 38 above.

85. Judge Poole, in rejecting HMRC's application to strike out the Appellant's case, pointed out, in the passage at [67] above that Judge Bishopp's findings were not determinative in the present appeals for two reasons. The core issue in the SDM case was whether SDM had shown on the balance of probabilities that the movements arrived at the Aldi warehouse (and the assumption had developed that they would have shown this if the allegedly impossible journeys were possible). The issue in the present case is whether the drivers "caused" the occurrence of the duty point which necessarily involves the dishonest diversion of the goods. Further, both parties in the SDM case asked the Tribunal to re-make the decision rather than have another hearing. He concluded that Judge Bishopp's finding that the allegedly impossible journeys could not have taken place in SDM's case, was not binding in the present case.

86. Mr Bridge, for the Appellants submits that if the present case proceeds to trial, fifteen years after the events in question and eleven years after the decision of FTT 1, no new evidence with be produced and the evidential picture will be less clear than it was at the time

of the FTT 1 hearing in 2010. Judge Wallace had pointed out the evidential problems which arose then, with the witnesses' memories fading, only four years after the events. In the light of this and the history of the SDM case he submits that there is no realistic prospect of a conclusion being reached different from that reached by FTT 1 and FTT 2 on the factual issue of whether the goods arrived at the Aldi warehouse.

87. Further or alternatively, Mr Bridge submits that Judge Bishopp erred in law by remaking the decision as he was not exercising the power under section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to decide an appeal on a point of law only. He considered that Judge Bishopp did what was found to be impermissible in *Georgiou t/a Mario's Chippery v HMRC* [1996] STC 463, where the Court of Appeal said:

> ".....the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision making process which is undertaken by a tribunal of fact. The question is not , has the party on whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled. It follows, in my judgement, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

The Respondents' submissions

88. Ms McArdle for HMRC, points out that the burden of proof is on the Appellants to prove that the goods were delivered to the Aldi warehouse, which is the sole factual issue between the parties.

89. She submits that only the decision of UT 2 now stands and that it decided, after a thorough review of all the evidence that the allegedly impossible journeys could not have taken place and none of the 63 journeys resulted in the goods arriving at the Aldi warehouse in Vaux-sur-Sure. The Appellants assert that the journeys did take place but in the light of UT 2's findings, HMRC's prospects of success are far higher than a realistic one.

90. Ms McArdle drew attention to the following findings of UT 2 which support the Respondents' case that the goods were diverted:

> (1) SDM had not been able to produce the documentary evidence of discharge, the AADs and the few "Copy 3 AADs" which were produced bore forged stamps and receipts.
>
> (2) The relevant authorities in Belgium, Germany and Latvia concluded that the goods consigned to their respective countries had not arrived.
>
> (3) In relation to the allegedly impossible journeys, SDM had produced documents such as Eurotunnel documents, vignettes (allowing a lorry to drive on a motorway) and fuel receipts which suggested that the time available between arrival in France and departure from France was too short for the journey alleged to have been undertaken to be accomplished.

(4) There were, in some cases, inexplicable delays between a driver collecting his load and arriving at the Eurotunnel terminal at Folkstone.

(5) None of the tachograph discs relating to the journeys were produced in evidence.

(6) The allegedly impossible journeys could not realistically have been accomplished in the times available.

(7) The drivers' evidence could not be reconciled with the documents.

91. In short, it is not the case that the Appellants' evidence is so strong that the Respondents have no reasonable prospect of success in the appeal. There is a large volume of evidence supporting the Respondents position that the movements did not result in the goods being delivered to the Aldi warehouse. Further, the only extant finding of fact in the SDM case is that the movements in issue did not occur and consequently the relevant duty points have arisen in the UK.

92. Ms McArdle also submits that it has never been the Respondents' case that the Appellants have been dishonest or that they necessarily conspired to commit the fraud that led to the alcohol disappearing. SDM was strictly liable as guarantors of the duty and the Appellants are jointly and severally liable with them.

93. The Respondents do not need to allege or prove fraud or dishonesty. It is for the Appellants to prove that the duty point arose in Belgium and not in the UK.

Discussion

94. Although HMRC have not expressly alleged that the Appellants were dishonest, dishonesty is implicit in the assertion that the Appellants "caused" the duty point.

95. For the purposes of the SDM proceedings before FTT 1 both Mr Wild and Mr Parnham prepared witness statements stating that they had delivered the goods in accordance with their instructions to Aldi at Vaux-sur-Sure in Belgium. Mr Wild emigrated to Canada shortly before the hearing and did not give oral evidence. Mr Parnham attended the hearing and was cross examined on his witness statement.

96. HMRC's case is that the loads were diverted before they arrived at Aldi as part of a criminal conspiracy involving Belgian nationals and a corrupt Belgian customs official based at the Aldi warehouse. It does not matter whether the goods were slaughtered in Belgium or the UK. Where the place of diversion is not known, the Regulations provide for the duty point to have occurred in the UK so that HMRC is entitled to assess the duty.

97. The alleged liability arises under Regulation 7 because the drivers "caused the occurrence of an excise duty point". This requires that the drivers diverted the loads of duty suspended alcohol and did not deliver them to the bonded warehouse designated in the AADs and CMRs, contrary to the evidence given in their witness statements, and in Mr Parnham's case, at the FTT 1 hearing. It necessarily follows that HMRC are accusing the Appellants of lying in their witness statements/at the hearing and of dishonestly diverting the goods.

98. As Judge Cannan noted, in the passage quoted at [46] above, it was held in *Ingenious Games LLP* that:

> " it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it."

99. The allegation of dishonesty was not put to either Mr Parnham or Mr Wild "fairly and squarely" or otherwise. Mr Wild, of course, chose not to give evidence before FTT 1. The nearest HMRC came to putting the allegation to Mr Parnham is set out in pages 69 to 80 of the transcript of Day 7 of the FTT 1 hearing on 29 September 2010. Ms Simor cross-examined Mr Parnham about the fact that he had made a large number of short phone calls and sent texts to other drivers during the movements in question. Given that this was four year later, Mr Parnham did not, of course, remember the content of them and it would not have been possible to find out the content of the calls. Ms Simor said:

> "My intention had been to go through and show the extensive communications between all these people in relation to each load which both precede and follow the completion of the load. The purpose for doing that was to put to the witness that actually there was a high level of communication between different drivers in order to coordinate dropping-offs, trailer swaps, removals of loads, that this was a coordinated operation and these contacts are not social contacts; they are very short phone exchanges and texts, phone exchanges of around 10 or 11 seconds."

100. It was Mr Barlow, SDM's counsel who, in re-examination said, at page 124 of the transcript:

> "You understand that the questions you were being asked by Ms Simor included an allegation that you and the other drivers who drove for SDM -- and I think logically that must mean all of the drivers who drove for SDM -- were involved in a criminal conspiracy in this case involving millions of pounds. What do you say to that allegation?"

101. To which Mr Parnham replied:

> "Well, completely untrue, and to suggest that just because you've texted or spoken to someone for a short period of time, that you're trying to organise some big scam is just not true…".

102. We respectfully adopt Judge Poole's reasoning in the Strike Out application decision as to why Judge Bishopp's finding that the goods did not arrive is not determinative in the present appeals.

103. Essentially, UT 2 and, indeed, FTT 1, UT 1 and FTT 2 decided *SDM's* case, not the Appellants' cases. The core issues are different. Although the Appellants provided evidence for the FTT 1 hearing they played no further part in, and had no say in, the subsequent conduct of SDM's case. They had no opportunity to agree or disagree with the proposal to reconsider rather than rehear the case. They were not given the opportunity to address the allegation of dishonesty.

104. Accordingly, we find that it would be open to a Tribunal hearing the Appellants' cases to reach a different conclusion from that reached by UT 2 about whether the goods reached the Aldi warehouse.

105. On the other hand, as set out in HMRC's submissions, there are many pieces of documentary evidence which support the Respondents' case and UT 2's decision that the allegedly impossible journeys could not, on a realistic basis have taken place, was based on a careful review of all the evidence, including that of the drivers given to FTT 1, albeit there was no further evidence from the drivers.

106. The Appellants also argued that Judge Bishopp had erred in re-making the decision as he was not exercising the power under section 11 of the 2007 Act to decide an appeal on a point of law. We reject this submission. First, the point of law here was whether the directions had been complied with and by exercising his casting vote, he decided they had

not. Judge Bishopp then went on to re-make the decision under the power to do so conferred by section 12 of the 2007 Act. In any event, the propriety or otherwise of Judge Bishopp's decision is not a matter which this Tribunal can address. So far as we are concerned the relevant final decision in the SDM case is that of UT 2.

107. Having considered the parties' submissions and reviewed the SDM case in all its iterations and the evidence which was considered in that case, some parts of which are briefly outlined above, we find that it cannot be said that HMRC would have no realistic prospect of success if this case were to proceed.

Decision on debarring

108. For the reasons set out above, we refuse the application under Rule 8(7) of the Rules to debar HMRC from taking further part in the proceedings as the Appellants have not shown that HMRC would have no reasonable prospect of success.

Fairness/abuse of process

109. The second issue is whether the Respondents should be debarred or the proceedings stayed on the basis that proceeding would constitute an abuse of process as the cases can no longer be dealt with fairly and justly in accordance with the Tribunal's overriding objective as set out in Rule 2 of the Rules.

110. The first question is whether this Tribunal has jurisdiction to consider the question of abuse of process and, if so, and if there is an abuse, whether it has power to debar HMRC or stay the proceedings in order to provide a remedy.

111. The Appellants rely on the Upper Tribunal case of *Foulser v HMRC* [2013] UKUT 038 (TCC) as authority for the proposition that the First Tier Tribunal has jurisdiction to deal with an alleged abuse of process which affects the fairness of proceedings in a tax appeal (as opposed to illegality) and further that the general powers of the Tribunal under the Rules, express or implied, permit the Tribunal to order disbarment in a case which does not fall within Rule 8(7).

112. The *Foulser* case considers two separate issues. First, it determines when the First Tier Tribunal has jurisdiction to deal with an alleged abuse of process. Secondly, it sets out what powers the Tribunal has to remedy an abuse of power which is within its jurisdiction.

113. On the jurisdiction point, the Upper Tribunal set out its view, from first principles, saying, at [27]:

> "If their [Mr and Mrs Foulser's] contention is that those events [alleged conduct by HMRC] have implications for a fair hearing of the tax appeal by the FTT, then there can be no doubt that the FTT can use whatever powers it has to ensure so far as possible that the procedures adopted for the hearing of the tax appeal are fair. I will refer later in this judgment to the extent of the powers of the FTT in this respect. Conversely, if the contention is that the events of 29th September 2010 amounted, in public law, to unlawful behaviour by HMRC then a claim in public law for some sort of prohibiting order will be a claim which should be brought by way of an application for judicial review. As explained, an application for judicial review is not within the jurisdiction of the FTT and must be brought elsewhere, either in the High Court or the Upper Tribunal…"

114. Morgan J. then reviewed a number of cases concerned with the jurisdiction of the magistrates' court which he considered applied relevant principles and continued at [34]:

> "34. In this passage, Brooke LJ distinguished between: (i) cases where the court concluded that the defendant cannot receive a fair trial, and (ii) cases

where it concluded that it would be unfair for the defendant to be tried. He noted that these two categories might overlap. He also noted that in "some" (and therefore not necessarily all) of the cases in the second category, it was the High Court rather than the magistrates' court which had jurisdiction to deal with the alleged abuse.

35. I consider that there is much in these authorities to support the distinction I earlier drew, based on first principles. I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority."

115. *Foulser* indicates that we have jurisdiction to consider whether HMRC's actions amount to an abuse of process because they have prevented or would prevent a substantive hearing being a fair hearing. We do not have jurisdiction to consider whether HMRC's actions are such that they should not be allowed to pursue the matter to a hearing at all.

116. The Upper Tribunal then went on to consider the powers that the First Tier Tribunal might exercise. It concluded that the potentially relevant Rules were Rules 2, 5, 7, 8 and 15, which we summarise, so far as relevant, below:

"**2 Overriding objective and parties' obligation to cooperate with the Tribunal**

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

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must— (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally. …

5 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction…

7. Failure to comply with rules etc

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case)

(d) restricting a party's participation in proceedings;…

8 Striking out a party's case

(1) …

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(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; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding. …

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

15 Evidence and submissions

(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, …

(2) The Tribunal may—

(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

(b) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or (iii) it would otherwise be unfair to admit the evidence."

117. Having considered these express powers, Morgan J. reviewed authorities dealing with the extent to which a Tribunal can rely on implied powers and concluded:

> "If Mr and Mrs Foulser contend that the events of 29th September 2010 have made a fair hearing of the tax appeal impossible or that safeguards against possible unfairness must now be provided, then the FTT can deal with that contention and can exercise the express powers conferred by the 2009 Rules to deal with possible unfairness or to provide safeguards. It seems to me that the width of the express powers conferred by the 2009 Rules, to which I have referred, ought to be sufficient for these purposes. If it should turn out that the express powers conferred by the 2009 Rules are not sufficient, then the FTT can consider whether it has, and whether it ought to exercise, some implied power which might exist to enable it to achieve fairness in its procedures and/or to observe the rules of natural justice. Conversely, if the FTT considers that the events of 29th September 2010 do not make a fair hearing of the tax appeal impossible, with or without further safeguards, then any contention that HMRC acted unlawfully in public law must be put forward by way of an application for judicial review and such an application is not within the jurisdiction of the FTT. The cases which discuss the implied powers of a statutory tribunal have no bearing on this question. Those cases and any implied powers are only relevant to matters which are within the jurisdiction of the statutory tribunal. Those cases do not justify any widening of the jurisdiction of a statutory tribunal."

118. Morgan J. also concluded that, in circumstances where Rules 7 and 8 would not permit the Tribunal to debar HMRC, the express powers under Rule 5 could be exercised in order to achieve the overriding objective of dealing with cases fairly and justly to make a debarring order against HMRC where the case cannot be fairly dealt with in any other way. He said:

> "64. The point which has been argued would only arise in a case where the FTT considered that a debarring order was justified and no lesser order would meet the justice of the case but yet, for whatever reason, the facts of the case did not come within Rules 7 and 8. In my judgment, in that somewhat exceptional case, I am not persuaded that I should hold that the FTT could not produce the desired just result by using its power under Rule 5 to "regulate its procedure", particularly to deal with the case fairly and justly (as required by Rule 2(1) and (3)). Accordingly, I am not prepared to accept the submission of Ms Dewar for HMRC that the FTT could not make a debarring order against HMRC if, on the facts, the FTT considered that the only way to deal with the case fairly and justly was to make such an order."

119. We now turn to the submissions of the parties.

The Appellant's submissions

120. Mr Bridge submits that the case can no longer be dealt with fairly and justly and he seeks an order staying the proceedings as an abuse and summary determination of the appeals in favour of the Appellants pursuant to the Tribunal's powers under Rules 2 and 5 of the Rules.

121. The Appellants' reasons why it would be unfair to continue with the proceedings are set out below.

122. The Appellants submit that the delay in bringing their appeals to a hearing now mean that they cannot be dealt with fairly. The relevant events occurred more than 15 years ago. FTT 1, in 2010, considered that a four year delay was "regrettable". Mr Bridge submits that a 15 year delay is unfair.

123. The Appellants' recollections of the journeys made in 2006 will unavoidably be poorer than in 2010, especially as they have both completed very many other journeys since. It is highly unlikely that they will be in a position to add any meaningful detail to the evidence they have already provided.

124. Mr Bridge submits that the delay is not the fault of the Appellants. They have not been required to act since their participation in SDM's hearing in 2010. In the 2019 Notice of Objection it is stated that at least part of the reason for the Appellants' stay of proceedings behind SDM was that SDM was able to fund representation whereas the Appellants were not.

125. He goes on to argue that there is no explanation for the delay beyond the decision of UT 2 in 2015 and HMRC do not seem to have made any attempt to move matters along. Judge Poole stated that HMRC only made clear their intentions in the strike out application of 2018.

126. The whereabouts of the witnesses is not known and the Appellants do not know if relevant people will be able or willing to give evidence.

127. The Appellants do not have access to a full set of case papers from the SDM appeal and HMRC have failed to provide them. In order to prepare their case they will need to seek disclosure of the case papers and of the Belgian evidence in order to explain that the diversion of the goods took place after delivery of the goods to the Aldi warehouse. Given the lapse of time, such papers may not be available any longer.

128. Pausing there, Mr Bridge took us to the transcripts of FTT 1 from 11 October 2010 which dealt, amongst other things, with the evidence from Belgium. The main points which arose were as follows:

(1) International requests for information take a long time;

(2) SDM was only presented with partial evidence about what happened in Belgium;

(3) There was no evidence as to where the diversions had taken place, although the UK Customs had told the Belgian authorities that the exports were fictitious.

(4) The Belgian authorities had, as permitted by local law, carried out extensive phone tapping of the Belgian criminals' phones. There was no evidence that they tapped the phone of anyone in the UK although they had the phone numbers. Judge Wallace commented that the Belgian authorities might not have been permitted to tap calls to or from the UK.

(5) SDM's counsel suggested that it was clear that serious criminals in Belgium or Luxembourg were involved and there must have been someone on the inside at Aldi. He submitted that the evidence supported SDM's case that the fraud centered on Aldi

and Belgian criminals and there was no evidence that the goods did not reach Belgium.

129. Mr Bridge makes the point that they need further evidence of what happened in Belgium. There was no statement in *SDM* from any Aldi staff and no information about the investigation into the corrupt Belgian customs officer. In order for there to be a fair hearing the Appellants would need to obtain full disclosure of the Belgian investigation and the background to the conspiracy. He considered that this information is likely to support the Appellants' case that the goods were delivered to Aldi. It is also likely to be difficult and time-consuming to obtain such disclosure and after the lapse of 15 years, much of the information may have been destroyed.

130. The Appellants do not have the financial resources to obtain the evidence, pay for continued representation or to meet the assessment if found due.

131. Mr Parnham will be retiring soon and has health difficulties.

132. Mr Wild has been resident for many years in Canada.

133. The Appellants have not had the opportunity to answer the allegations of dishonesty which have been made against them and that can only be done if the appeals proceed to a hearing, but for the reasons set out above, there can no longer be a fair hearing.

The Respondents' submissions

134. The Respondents agree that, in the light of the time which has elapsed, it is not appropriate for the appeals to proceed to a substantive hearing. Ms McArdle points out that the Appellants accept that they do not have further evidence to add and the quality of evidence provided 15 or more years after the events will be of poorer quality than that initially provided. HMRC's solution is that the *Appellants'* case should be struck out as an abuse. We return to this later.

135. While accepting that the lapse of time has an impact on the ability to have a fair hearing, HMRC strongly deny that the Respondents have caused unreasonable delay. The main reason for the delay is the fact that the Appellants' appeals were stayed behind the *SDM* case. Whatever the reasons for the Appellants agreeing the stay, they considered it appropriate to do so at the time and they could have applied for the stay to be lifted earlier than it was so that their appeals could be heard.

136. *SDM* did not reach the Tribunal until 2010, and as we have seen, it then bounced between the Upper Tribunal and the First Tier Tribunal three more times until UT 2's decision in 2015. There was then a procedural challenge to UT 2's decision by way of judicial review. That challenge failed, but it meant that the decision in *SDM* was not final until April 2016. While Judge Wallace indicated that a delay of four years was regrettable he did not consider that there could not be a fair trial and none of the three other Tribunals involved raised this issue even though the last hearing was in 2015-nine years after the events.

137. Judge Poole stated in the Strike Out decision that HMRC had not made their intentions clear about the appeals until they made the Strike out Application in September 2018. However, Ms McArdle pointed to the Chronology in the Preliminary Issues Statement of Case as indicating that HMRC had not been responsible for the delay since the *SDM* decision and that it was in fact the Appellants who had delayed and failed to pursue their case.

138. In relation to disclosure and access to the documentary evidence, case papers and information about the Belgian investigation, HMRC submit that it is for the Appellants to obtain the evidence they need to support their case. They could and should have applied for

disclosure. Judge Poole invited the Appellants to make a "proportionate and properly focussed application for disclosure" within 28 days of HMRC delivering their Statement of Case. The Appellants did not do so. In November 2020 the Appellants requested documents from HMRC which were provided where readily available.

139. HMRC submit that it is for the Appellants to keep or obtain whatever evidence they need to support their case. There is no basis to say that HMRC is at fault and the Appellants cannot argue that HMRC should be debarred because the Appellants have been prejudiced by their own failure to apply for disclosure.

140. Further, the Tribunals in *SDM* considered that they had sufficient evidence to decide the case fairly and the Appellants cannot now argue that there cannot be a fair trial because of a lack of evidence.

141. The Appellants allege they have been accused of dishonesty and the criminal burden and standard of proof should apply. HMRC's position is that this is simply an excise appeal and the normal civil standards apply.

142. Further, HMRC does not allege that the Appellants were dishonest. The liability is a strict one. There is therefore no need to put dishonesty to the Appellants in cross-examination. In any event, Judge Bishopp in UT 2 emphasised the issue was whether SDM had discharged the burden of showing that the goods were delivered and in paragraph 161 of his judgement [which we have set out above] he considered the issue of whether the drivers gave untruthful evidence and concluded that the allegations had been sufficiently put to them. This was not the case for Mr Wild who was in Canada and did not appear at the FTT 1 hearing, but he cannot rely on his own failure to attend and give evidence as an argument to say HMRC should be debarred.

143. The Appellants argue they lack means and could not pay the assessments if they are due. They have not produced any evidence of means, but in any event, HMRC should not be barred because the Appellants are poor. All appellants should be treated equally and it would not be fair to treat them in different ways depending on means. HMRC was seeking to do what it is required to do in order to collect revenue due.

144. There is no legal basis on which to find that the facts as found in the overturned decisions of FTT 1 and FTT 2 should be binding.

145. The Appellants have not been deprived of a forum by staying their appeals behind *SDM*.

Discussion

146. It is clear from *Foulser* that this Tribunal has power to debar HMRC where there has been an abuse of process and that abuse is within our jurisdiction.

147. To the extent that Mr Bridge argues that HMRC's conduct has made it impossible to hold a fair hearing, we have jurisdiction to consider whether there has been an abuse of process. To the extent that Mr Bridge seeks to argue that HMRC's conduct is such that it is unfair to have a hearing at all, that is a matter for judicial review and is not within our jurisdiction.

148. It should be apparent that in order for there to be an abuse of process, someone must be responsible for the abuse. There is no abuse, and we do not have power to strike out or debar a party, simply because it is asserted that it is not in the interests of justice or fairness for the proceedings to continue, but that state of affairs is not due to the actions of one of the parties.

149. Mr Bridge states in his skeleton argument:

> "27. The Appellants rely upon the decision of the Upper-tier Tribunal in the case of *Foulser v HMRC* [2013] UKUT (TCC). In broad terms Foulser establishes that in respect of alleged unfairness of proceedings, rather than illegality, the FTT has the jurisdiction to ensure natural justice. The Appellants consider such natural justice includes the overriding objective set out in rule 2(2) and dealing with a case fairly and justly. Rule 5(1) & 5(2) provide general powers. Rule 5(3) provides non-exclusive specific examples powers including at 5(3)(e) the hearing of a preliminary issue and (j) stay or sist.
>
> 28. *Foulser* provides authority for the proposition that debarment can be ordered under the general powers if to do otherwise would not provide a fair and just disposal of the case."

150. That is perhaps stating the principle too widely. *Foulser* is not looking at fairness and justice in the abstract. As set out in the extracts from the case cited at paragraphs 117 and 118 above, in discussing the power of the Tribunal to debar HMRC, it is clear from the context that it only applies where debarment is justified because of HMRC's conduct. It would scarcely be fair or just to prevent a party from participating in proceedings where they were not at fault.

151. Ground of appeal vi) of the Appellant's Grounds of Appeal is whether, in view of the delay, a fair trial can be had and/or whether it is fair to try the issue. This seems to include both types of abuse of process identified in *Foulser*. Mr Bridge's submissions were based on abuse and he argues that the Respondents have been responsible for the unreasonable delay, which would make a hearing unfair/make it unfair to have a hearing.

152. We do not agree. As HMRC submit, the majority of the delay arises from the long drawn out appeal in *SDM* and the Appellants' decision to stay their case behind it, whatever the reason for that decision was. Mr Bridge drew our attention to Judge Poole's comment that HMRC had not made their position clear as regards the appeals until the Strike Out application in September 2018, some 29 months after *SDM* was finally disposed of. Having considered the Chronology set out in HMRC's Statement of Case, we consider that HMRC had indicated much earlier that they proposed to continue with the cases, or at least, that they did not wish to withdraw from them.

153. We set out the history of these appeals in some detail above and following the final disposal of *SDM* in April 2016, HMRC first contacted the Tribunal to find out whether the Appellants wished to proceed with their case on 1 November 2016. The Appellants did not respond to the chasers from the Tribunal until around April 2018.

154. It will also be apparent that much of the delay after the Strike Out application arose from the Appellants' failure to provide their grounds of appeal as required by the directions, although at least part of that delay was caused by the illness and subsequent retirement of their representative.

155. Even if HMRC had been responsible for some delay, it was not their delay which did the damage, but the nine year delay occasioned by SDM's tortuous journey through the Tribunals.

156. We do not consider that HMRC's conduct caused the delays in the hearing of the cases and to the extent that the delay has made a fair hearing difficult, that is not the result of an abuse of process by HMRC and does not provide a ground for debarring the Respondents.

157. Similarly, the failure of the Appellants to seek disclosure until a time when it will be difficult to obtain the evidence sought cannot be laid at the door of the Respondents. It is understandable that the Appellants did not want to incur the expense of seeking disclosure

until they knew if it was necessary, but they could have sought disclosure of the evidence they say they need long ago. On any view, they knew that HMRC wished to go ahead with the hearings by 2018 and they were invited by the Tribunal to submit a disclosure application within 28 days of HMRC submitting their preliminary issues Statement of Case, which was dated 6 January 2020, but they did not do so.

158. We have rejected HMRC's assertion that its case does not involve an allegation of dishonesty for the reasons set out above. In these circumstances the fair and just course is for those allegations to be put to the Appellants in cross-examination and for them to have the opportunity of answering those allegations. In 2018, Judge Poole did not suggest that it would be unfair to proceed to a hearing in order to do that.

159. The other circumstances which Mr Bridge submitted made it unfair to proceed-the Appellants' lack of means, Mr Wild's residence status and Mr Parnham's health issues are likewise not the fault of HMRC.

160. We have jurisdiction to consider whether there is an abuse of process by reason of HMRC's conduct making it impossible to have a fair hearing and if we find there has been an abuse of process, we have power to debar HMRC from further participation in the proceedings.

161. However, we have found that the long delay in progressing this matter and the other factors which the Appellants submit mean that there can no longer be a fair and just hearing were not caused by HMRC.

Decision on the Application to debar HMRC

162. For the reasons set out above we find that there has been no abuse of process by HMRC as a result of which there cannot be a fair hearing and we decline to bar HMRC from the proceedings.

163. Mr Bridge also argues that, because of the factors set out in his submissions, it is, in any event, unfair to proceed with the hearing as it is not in the interests of justice and fairness to do so.

164. To the extent that he is arguing that HMRC's abuse lies in its refusal to withdraw from the appeals because it would be unfair to hold a hearing at all, that falls within the second category of abuse of process identified in *Foulser* and is not within the jurisdiction of this Tribunal.

HMRC'S APPLICATION TO STRIKE OUT THE APPELLANTS' APPEALS

Submissions

165. Ms McArdle agrees that it is not in the interests of justice to proceed to a hearing, but she submits that the appeals should be struck out on the grounds that they are an abuse of process by the Appellants. She argues that the Appellants are seeking to re-litigate the facts which have been determined for the purposes of this case by UT 2 in *SDM*. She submits this is a quasi-*res judicata* situation.

166. Ms McArdle submitted that her contentions were supported by the Court of Appeal case of *Ashmore v British Coal Corporation* [1990] 2 QB 338. In her Skeleton Argument, she said:

> "In *Ashmore,* a large group of Applicants brought equal pay claims. The Industrial Tribunal ordered that sample claims be heard, which would be persuasive but not binding in relation to the other claims in the group. One Applicant whose claim had been stayed behind the sample claims sought to pursue her claim to a substantive trial. The Court of Appeal held: "Mr.

> Goldsmith accepted that the applicant's claim is not a collateral attack on the decision of the tribunal in *Thomas v. National Coal Board* [1987] I.C.R. 757; but he submits that it is analogous to it. He submits that, where sample cases have been chosen so that the tribunal can investigate all the relevant evidence as fully as possible, and findings have been made on that evidence, it is contrary to the interests of justice and public policy to allow those same issues to be litigated again, unless there is fresh evidence which justifies re-opening the issue. I agree; it is no answer to say that, if the applicant's claim fails, the employers can be compensated in costs….Moreover, it is not in the interests of justice that the time of the courts or tribunals is taken litigating claims that have effectively been already decided…
>
> If it were contended in the present appeal that there was evidence available to the applicant which had not been presented to the tribunal in Thomas's case which might affect the decision on section 1(3), then we should have to consider that evidence and whether it satisfied the test which would make it inappropriate to strike the claim out… Moreover, it appears to me that the correct test for determining whether fresh evidence is of such a kind that the court should permit a claim which would otherwise be an abuse of the process of the court is that it "should entirely change the aspect of the case." …
>
> As it is, if the matter were relitigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice; nothing could be calculated to cause a greater sense of injustice in those who lost in *Thomas v. National Coal Board* [1987] I.C.R. 757, if some other tribunal reached a different result on the same evidence." (p348-9, p354-5 per Stuart-Smith LJ).

167. Ms McArdle submits that in the present case, the Appellants are seeking to re-litigate the same issues as were determined in the *SDM* proceedings. They agreed to stay their appeals behind SDM's. They did not seek to have their appeals heard at the same time. They present no new evidence (only in fact less cogent evidence).

168. She argues that, as in *Ashmore*, the Appellants' position is powerfully analogous to a collateral attack.

169. Furthermore, she contends that the interests of justice are not served in the same issues being litigated, yet again and submits that the Appellants' appeals should be struck out as an abuse of process in the circumstances, and the finality of litigation should be upheld.

170. Mr Bridge declined to make submissions on the point on the basis that the preliminary issues Directions had referred only to the debarring issue. In any event, he considered it to be an identical application to that made in September 2018 which was refused.

Discussion

171. We considered whether Ms McArdle should be allowed to make the strike out application at the beginning of the hearing and for the reasons set out we gave permission for her to do so.

172. HMRC's grounds in this application are not quite the same as the grounds put forward in 2018. HMRC do not argue that the Appellants have no reasonable prospects of success. They argue that the Appellants are seeking to re-litigate the facts which have already been found in relation to the identical issues in UT 2 and to continue with the appeals would be an abuse of process.

173. We agree that the facts found by FTT 1 and/or FTT 2 cannot determine the issue in this case as those decisions were overturned by UT 1 and UT 2 respectively.

174. However, as set out in paragraphs 102 to 104 above we have also concluded that Judge Bishopp's finding that the goods were not delivered to the Aldi warehouse (the only question of fact which is relevant in these cases) cannot be determinative of that fact in these cases. Paragraphs 67 and 103 set out why that is so. The "core issue" in these appeals is different from that in *SDM* and involves an allegation of dishonesty which the Appellants must have the opportunity to challenge. Further the Appellants had no say in the conduct of SDM's case and did not agree to the matter being decided without hearing further evidence.

175. *Ashmore* is not therefore applicable to the present case. The facts found by UT 2 in *SDM* do not determine the facts in the Appellants' cases. Accordingly, it would not be an abuse of process for the Appellants to continue with their appeals.

Decision on the Strike Out Application

176. For the reasons set out above we do not find that it would be an abuse of process for the appeals to proceed and we decline to strike out the Appellants' appeals.

CONCLUSION

177. We do not underestimate the difficulties of proceeding to a hearing of these appeals after the passage of so much time and we have some sympathy for the Appellants who continue to have this matter hanging over them.

178. However, for the reasons set out above, we have declined to debar the Respondents from further involvement in the proceedings, nor do we consider it appropriate to strike out the Appellants' appeals. We do think it is in the interests of fairness and justice that the Appellants should have the opportunity to deal with the allegations of dishonesty which have been made against them.

179. If the Appellants wish to pursue their contention that it is not fair to have a hearing at all, that is not a matter which this Tribunal can address.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

180. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 08 FEBRUARY 2021