NCN: [2021] UKFTT 318 (TC)

TC08259

COSTS – applications by Appellant for order under rule 10(1)(b) based on Respondents' conduct – decision made prior to outcome of substantive appeals known – held Respondents had acted unreasonably – conduct of Appellant also relevant – order made for costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07755

BETWEEN

SHINELOCK LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the costs applications on the papers. The applications and responses are described in the decision notice.

DECISION

INTRODUCTION

1. This is my decision on two costs applications which have been made by Shinelock Limited ("Shinelock") in respect of HMRC's conduct of Shinelock's appeal. They seek an order for costs under Rule 10(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules").

2. As detailed further below, they are being determined at a stage at which the hearing of the substantive appeal has been part-heard (by me), with the date of the resumed hearing yet to be scheduled. (The first part of the substantive hearing was heard on 27 and 28 January 2021.) There is thus no decision on the substantive appeal, and accordingly there is no successful or unsuccessful party. HMRC has provided a full response to the applications which have been made and has not made any representations to the effect that the costs applications should only be determined after the outcome of the substantive appeal is known. Indeed, whilst one of the applications (the second application) could be considered after the event, the first application addresses the costs that have yet to be incurred by Shinelock for the resumed hearing. I have concluded that it is fair and in the interests of justice that I make a decision on these applications at this stage.

3. Whilst in this decision I give a brief description of the facts and issues in the substantive appeal, they are set out by way of background and to explain the matters which give rise to the costs applications. Those descriptions are not findings of fact or conclusions on any of the issues which are disputed in the substantive appeal.

4. Shinelock has made two costs applications:

   (1) application dated 19 February 2021 – this application seeks costs on an indemnity basis of the resumed hearing (whether that be by way of remote video or written submissions for determination on the papers) in respect of what Mr Boch has termed the new jurisdiction argument, although I refer to as the Carry Forward Jurisdiction Argument; and

   (2) application dated 4 March 2021 – this application seeks costs on the standard basis in respect of some of Shinelock's costs incurred in pursuing this appeal to date, including for the hearing in January 2021 and preparing the costs application. That application asks that the costs (of £10,000 plus VAT) be summarily assessed.

5. For the reasons set out below, I have concluded that the threshold for an order for costs under Rule 10(1)(b) of the Tribunal Rules is met, but that a more nuanced order than that sought is appropriate in that Shinelock must bear a proportion of its costs. HMRC's conduct does not merit an order for costs being made on the indemnity basis.

RELEVANT LAW AND TRIBUNAL RULES

6. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") provides as follows:

> "29 Costs or expenses
>
> (1) The costs of and incidental to–
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party–

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses."

7. Rule 10 of the Tribunal Rules provides:

"10. Orders for costs

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

(c) if—

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or

(d) in a MP expenses case, if—

(i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a

Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph.

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses [, including the costs or expenses of the assessment,]6 incurred by the receiving person, if not agreed.

…

(8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings;"

BACKGROUND CONCERNING THE SUBSTANTIVE APPEAL

8. Before considering the basis for the costs applications made by Shinelock, I need to set out some information in relation to the substantive appeal.

9. Shinelock had bought 8 Trumpsgreen Road, Virginia Water (the "Property") on 31 March 2009 for £725,000 and disposed of it for £1,030,000 on 4 December 2014. It had paid £305,000, ie an amount equal to the difference, on 15 December 2014 to Mr Ahmed (who had been the sole shareholder from to 30 September 2014, and had then re-acquired the shares at some point), and had been a director of the company until December 2014. Shinelock did not bring any chargeable gain into account in its self-assessment for the year ended March 2015.

10. During HMRC's enquiry into Shinelock's self-assessment, Shinelock's position had been to argue that the Property was beneficially owned by Mr Ahmed, not Shinelock, such that any chargeable gain could only have been realised by Mr Ahmed (who had not been UK resident at the relevant time).

11. HMRC rejected this argument and concluded that Shinelock had realised a chargeable gain on the disposal of the Property which was subject to corporation tax. The chargeable gain was calculated as £94,270 once deductions for incidental costs of both the purchase and sale were allowed and indexation relief applied. The tax on this chargeable gain was £18,854. HMRC amended Shinelock's self-assessment to give effect to this conclusion.

12. Shinelock's grounds of appeal (in the Notice of Appeal of 29 November 2018) were that Shinelock was not taxable on the capital gain on the sale of the Property because either:

(1) an amount equal to the gain was a deductible cost (under the loan relationship regime or otherwise), or

(2) Mr Ahmed was the beneficial owner of the Property so the gain was taxable only in his hands.

13. The parties entered ADR and the ADR process concluded on 19 June 2019.

14. HMRC's Statement of Case dated 1 August 2019 (the "SOC") emphasised the legal separation between Shinelock and Mr Ahmed (as director and controlling party), submitted that Shinelock was the beneficial owner of the Property (as well as legal owner). Addressing any loan relationship argument, HMRC's position was that the loan relationship was between Shinelock and the bank; any guarantee Mr Ahmed had provided (which they disputed) was not sufficient to create a loan relationship, and the arrangement between Shinelock and Mr Ahmed did not constitute a non-trading loan relationship and the payment to Mr Ahmed cannot be set off against the capital gain.

15. There was correspondence between the parties in which Shinelock challenged whether the SOC properly addressed the matters in dispute between the parties in the light of the ADR.

16. The parties agreed a Statement of Agreed Facts dated 22 July 2020.

17. The hearing bundle also included a Statement of Issues from August 2020. The issues raised therein relate to the funding of Shinelock and question whether the payment to Mr Ahmed was an allowable business expense (and if so, under which provision it is allowable). The six issues specified make no mention of any jurisdiction arguments or the distributions rules.

18. In Mr Boch's skeleton argument dated 31 December 2020 he set out Shinelock's position that the payment of £305,000 by Shinelock to Mr Ahmed in December 2014 (the "Payment") was deductible under the loan relationship provisions (with alternative arguments as to whether the relevant loan relationship was that between Shinelock and the bank and/or between Shinelock and Mr Ahmed) or under the property income rules in Part 4 CTA 2009.

19. In HMRC's skeleton argument dated 19 January 2021 Mr Vallis refuted both, but stated that the Tribunal did not have jurisdiction to consider the loan relationship argument. HMRC's position was that:

(1) the Tribunal does not have jurisdiction to consider the loan relationship argument as Shinelock had not made the necessary claim under s459 Corporation Tax Act 2009 ("CTA 2009") to set off the Payment against the deficit by the time the closure notice

was issued. Such a claim needed to be made within two years of the end of the accounting period (s460), whereas Shinelock did not mention the possibility of using a loan relationship debit until 22 June 2018. The Tribunal only has the power to allow or disallow a claim if it was the subject of a decision contained in a closure notice (by virtue of s50(7A) Taxes Management Act 1970 ("TMA 1970"));

(2) the Payment was a distribution and not deductible for corporation tax;

(3) if s307 CTA 2009 can be relied on, the loss is only £27,500 and not £305,000; and

(4) the Payment is not deductible under the property income rules in Part 4 CTA 2009.

20. On 21 January 2021 Mr Boch applied for a direction that HMRC not be permitted to rely on the loan relationship jurisdiction argument (which has since been referred to as the old jurisdiction argument, or the Current Year Jurisdiction Argument). That application was made on the basis that:

(1) HMRC had not previously pleaded this argument; and

(2) the timing caused serious prejudice to Shinelock's ability to prepare its case – this is a complex issue, involving the Tribunal's jurisdiction, statutory interpretation including as to whether the 2-year limit applies where an enquiry has been opened and consideration of the "subject-matter of the enquiry" concept developed in the Tower MCashback line of cases, as well as public law concepts.

21. On 21 January 2021 I refused to give such a direction, stating as follows:

> "3. There is clear prejudice to the Appellant in HMRC only challenging the absence of a timely claim under s459 CTA 2009 in their skeleton argument. This is particularly so in the context of an appeal which has progressed to ADR and in relation to which the parties have prepared a Statement of Agreed Facts and a Statement of Issues.
>
> 4. Nevertheless, in a matter which goes to the question of whether the Tribunal has jurisdiction to hear an appeal, I am not persuaded, without the benefit of further representations, that I can or should refuse to allow the argument to be made. As noted above, I agree that there is clear prejudice to the Appellant in allowing HMRC to run this argument, but there is a risk that otherwise I extend the Tribunal's jurisdiction beyond that which is prescribed by statute.
>
> 5. For this reason, I REFUSE to grant the application in advance of the hearing. I put it that way deliberately - HMRC should not take this to mean that I give permission for the argument to be made."

22. The parties were directed to seek to agree an approach to the hearing scheduled for the following week.

23. On 25 January 2021 Mr Vallis confirmed by email that "Upon reflection, we agree with Mr Boch's proposal that the hearing should go ahead this week to consider the substantive grounds. The Tribunal can then list a hearing at a later date to consider, if necessary, the jurisdiction point."

24. Later that day I directed:

> "In the light of the fact that HMRC agree with the appellant's proposal that the substantive hearing should proceed this week I am also content to proceed on that basis.

> Both parties are invited to consider the anticipated length of the resumed hearing and timing and can make representations thereon orally at the end of this week's hearing. I will then arrange for an additional listing date."

25. During the hearing Mr Boch stated that Shinelock had decided not to pursue the property income argument. I heard evidence and submissions from both parties in relation to both the loan relationship argument and HMRC's submission that the Payment was a distribution. The hearing was adjourned at the end of the second day (ie 28 January 2021), it being anticipated that it would be resumed at a later date to hear HMRC's submission that the Tribunal did not have jurisdiction to consider and thus, by necessary inference, decide whether a loan relationship debit was available for the year ended March 2015.

26. There were then discussions between the parties (to which, obviously, I was not party). The first update to the Tribunal was on 4 February 2021. Mr Boch stated:

> "The parties have agreed that the hearing of the jurisdiction issue is no longer necessary, and need not, therefore, be listed.
>
> This is on the basis that the parties are in agreement that the Tribunal had jurisdiction to hear the substantive issues; and that if the Tribunal finds in the appellants favour on those issues then the appellant can set the loan relation debit against its non-trading profits in future years."

27. HMRC expanded on this on 5 February 2021. That explanation was as follows:

> "By way of background for the Judge, the Respondents on discussing the issue of jurisdiction with clients, concluded there may be a way to move forward and avoid the need for a separate hearing. The Respondents contacted Mr Boch maintaining the argument as set out in their skeleton, namely that the Tribunal did not have jurisdiction to consider an "in-year" set off, as no claim under section 459 CTA 09 was made, but that it was considered that the Tribunal did have jurisdiction to consider whether a NTLR deficit arises, in which case it will automatically be set-off against future years without a claim.
>
> It has always been the Respondents' understanding that the Appellant wished to set off any amount in the year of disposal. However, to avoid the need of any further hearing, and since it was considered that the Tribunal did have jurisdiction for future years, the Respondents contacted the Appellant to ascertain if the Appellant accepted that any loss which arose can only be set off against future years, then no hearing would be required. Mr Boch replied agreeing with this approach."

28. I gave directions on 5 February 2021 seeking representations on the following to ensure clarity as to the parties' positions:

> "The appeal to the Tribunal was against the assessment made by HMRC against Shinelock for the period ended 31 March 2015. Section 50(6) TMA 1970 then sets out the powers of the Tribunal on hearing that appeal. If it is agreed that any non-trading loan relationship deficit which arose in the period ended 31 March 2015 cannot be offset against profits or gains for that period but is only available for (automatic) carry forward, then is it not the case that there is then no argument before me which could displace the assessment under appeal (irrespective of my conclusions as to whether or not the payment to Mr Ahmed was a distribution). In that situation, on what basis is it contemplated that the Tribunal can or should proceed to make findings as to whether or not there was a loan relationship deficit arising in the period, given

> that the only relevance of that question is to periods which are not the subject of the appeal before me?"

29. The question as to the jurisdiction of the Tribunal to determine the availability of a carry forward deficit is hereafter referred to as the Carry Forward Jurisdiction Argument.

30. Mr Boch replied on 11 February 2021 setting out why he considered that the Tribunal does have jurisdiction. His letter referred to paragraphs 25, 32 and 34 Schedule 18 Finance Act 1998, the decision of the Court of Appeal in *Fidex* and the interpretation of s50(6) and 50(7A) TMA 1970.

31. On 12 February 2021 HMRC set out their position:

> "It appears to the Respondents that there are two different issues of jurisdiction:
>
> Whether the Tribunal has jurisdiction under section 50(7A) TMA to consider a claim to set off an NTLR deficit "in year" where a claim has not been made; and
>
> Whether the scope of the "matter in question," and therefore the Tribunal's jurisdiction, extends to cover whether or not there is a NTLR deficit.
>
> Our position, in brief, as regards each issue is as follows:
>
> The Tribunal does not have such jurisdiction, as per the Respondents' skeleton;
>
> The Tribunal does not have such jurisdiction, as the "matter in question" does not concern NTLR. This is because this was not an amendment which had been made by the closure notice.
>
> These arguments will, of course, be set out in more detail in the Respondents' skeleton argument.
>
> As regards the question of whether the Tribunal has jurisdiction under section 50(6) TMA to consider an appeal against an amendment to a closure notice where the Appellant is not "overcharged by a self-assessment" (as the loss is to be carried forward to a different period), it is the Respondents' submission that this question need not be determined by the Tribunal given that the Appellant's grounds do not fall within the scope of the "matter in question." However, the Respondents' full position will be set out in their skeleton argument.
>
> We appreciate that this position is at odds with the position set out to the Tribunal on 3 February 2021 (and we sincerely apologise for this). It is the Respondents' case that the Tribunal does not in fact have jurisdiction to consider the arguments as regards the year under appeal or indeed any other year.
>
> Once again, we apologise to the Appellant and to the Tribunal for the confusion. However, we respectfully contend that no prejudice could have arisen to the Appellant as a result.
>
> As such, the Respondents consider that a hearing will be necessary in order for the Tribunal to hear the arguments in respect of these points."

32. HMRC thus took the position that the Tribunal does not have jurisdiction to consider the loan relationship arguments for the year to March 2015 or any other year.

UNREASONABLE CONDUCT APPLICATIONS

33. Shinelock has made two applications for orders for costs under Rule 10(1)(b):

(1) On 19 February 2021 Mr Boch drew attention to the different jurisdiction arguments which were being raised. He submitted that HMRC could not raise the Carry Forward Jurisdiction Argument three weeks after the hearing. He gave two reasons - it should have been raised in the SOC, and HMRC had conceded this in correspondence (on 3 February and 5 February 2021). If the Tribunal were to decide to allow this new jurisdiction argument to be heard, then these arguments militate in favour of ordering HMRC to pay Shinelock's costs of such hearing on an indemnity basis, whether such hearing is oral or determined on the papers.

(2) On 4 March 2021, Mr Boch applied for an order for costs incurred by Shinelock to date, contending that HMRC have relied on arguments that should have been raised earlier in the proceedings (the two arguments on jurisdiction and the distribution argument) and that the standard of handling fell short in certain respects. That application for costs sought costs of £10,000 plus VAT (these being some but not all of the costs incurred), to be assessed summarily (on the standard basis).

34. The relevant principles governing applications made under Rule 10(1)(b) of the Tribunal Rules were summarised by the Upper Tribunal in *Market & Opinion Research International Ltd v HMRC* [2015] STC 1205, particularly at [22], [23] and [49]. At [49] the Upper Tribunal said:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules."

35. In *HMRC v Cheshire Centre for Independent Living (now known as Disability Positive)* [2020] UKUT 275 (TCC) the Upper Tribunal addressed an argument that HMRC had acted unreasonably in failing to argue what was ultimately a winning argument sooner. At [8] Judge Raghavan stated:

> "8. The parties were broadly agreed as to the general case-law principles regarding the threshold contained within Rule 10(1)(b) and the FTT's discretion to make a costs order. For the purposes of this case it is sufficient to note the following:
>
> (1) The intention behind Rule 10 of the FTT rules is "that the First-tier Tribunal is designed in general to be a 'no costs shifting' jurisdiction … Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal" (*Distinctive Care v HMRC* [2019] EWCA Civ 1010 per Rose LJ at [7] with whom Lewison and Floyd LJJ agreed).
>
> (2) Whether the threshold condition, of the tribunal considering that a party had acted unreasonably in a relevant respect is satisfied, is a value judgment which depends on the particular facts and circumstances of the case. It requires

> the Tribunal to consider "what a reasonable person in the position of the party concerned would reasonably have done, or not done" (*Market & Opinion Research International Ltd v HMRC ("MORI")* [2015] UKUT ([15]-[16] and [49]).
>
> (3) "questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight" (*Distinctive Care v HMRC* Upper Tribunal [2018] UKUT 0155 (TCC) (at [45]).
>
> (4) "the focus should be on the standard of handling the case rather than the quality of the original decision …the jurisdiction to award costs is intended to be exercised in a straight-forward and summary way and should not trigger a wide-ranging analysis of HMRC's conduct relating to the applicant's tax affairs". (*Distinctive Care* CA (at [25]).''

36. Judge Raghavan later set out the approach to be adopted when considering whether it was unreasonable for particular arguments not to have been raised earlier:

> "28. In terms of the framework to address the issue, in the circumstances of this case where it is plain that HMRC's raising of Ground 2 was the reason for CCIL conceding, I am content to adopt the adaptation which Mr Hill, who appeared for HMRC, proposed, to the three stage approach set out in the case-law (e.g. *MORI* where the complaint is of an unsuccessful party unreasonably not conceding sooner: (1) What was the reason for HMRC raising Ground 2 as a new ground before the UT? (2) Having regard to that reason, could HMRC have raised Ground 2 at an earlier stage in the proceedings? (3) Was it unreasonable for HMRC not to have raised Ground 2 at an earlier stage?"

37. I have considered all of the submissions made with these principles in mind. The reminder that questions of reasonableness should be assessed by reference to the facts and circumstances at the time of the acts in question is pertinent.

38. I bear in mind that the applications have been made at a time when the substantive appeal remains undetermined. There is thus at this stage no "successful" or "unsuccessful" party, and no conclusions have been reached as to whether or not the jurisdiction arguments which have been raised are meritorious. The approach I have taken is first of all to consider HMRC's conduct (irrespective of whether relevant to either of the first or second applications) and then the appropriate order to be made. I do not lose sight of the fact that the applications seek orders for costs on different bases.

Conduct of HMRC

39. Mr Boch contends that the Current Year Jurisdiction Argument, the Carry Forward Jurisdiction Argument and the distribution argument should have been raised earlier, relying on the Upper Tribunal decision in *Disability Positive* as authority for the proposition that a failure to raise arguments in a timely manner can amount to unreasonable conduct. In *Disability Positive* the taxpayer had won before the Tribunal, and on appeal to the Upper Tribunal HMRC raised a new argument; the taxpayer conceded on the basis of that argument. In considering whether the threshold for an order under Rule 10(1)(b) was met Judge Raghavan noted:

> "27. There is ample case-law concerning the approach to be taken where the alleged unreasonable conduct concerns an unsuccessful party continuing to run what turned out to be a bad argument and not settling sooner. The same is not true of the allegation here, that a successful party was unreasonable in not

> revealing a good argument sooner. Nevertheless, the question of what constitutes unreasonable conduct is an open category dependent on the particular facts and circumstances. There is no reason in principle why failing to raise a ground sooner, taking account of the circumstances at the time, might not constitute unreasonable conduct."

40. HMRC submit that *Disability Positive* only becomes relevant if Shinelock either (1) accepts that its case has no merit and withdraws (as occurred in *Disability Positive*); or (2) is unsuccessful on account of the new issues raised by HMRC and permission to appeal is not granted in respect of the grounds already considered by the Tribunal.

41. I do not agree with HMRC's position that *Disability Positive* is not relevant; it is guidance from the Upper Tribunal which affirms that failing to raise a ground sooner can constitute unreasonable conduct.

42. Rule 25(1) of the Tribunal Rules requires that HMRC deliver a Statement of Case, and Rule 25(2)(b) requires that this document sets out HMRC's position in relation to the case. Mr Boch argues that the purpose of Rule 25(2)(b) is to enable an appellant to understand the strength, scope and complexity of the case it has to meet, and that is required to help it to determine whether it wishes to incur the likely costs of contesting such a case. Had the arguments been raised at the outset, he submits, it is possible Shinelock might have taken the view the likely costs involved were disproportionate to the benefits of winning the appeal given that the amount of tax at stake is just under £19,000.

43. I therefore consider the arguments raised by HMRC which are said by Shinelock to have been raised late.

Current Year Jurisdiction Argument

44. This was raised one week before the hearing, in HMRC's skeleton argument, and there had been no prior suggestion at any point that the Tribunal lacked jurisdiction to hear the appeal.

45. I note that Shinelock do not submit that they had in fact made a claim under s469 CTA 2009 (the lack of such a claim being the basis of HMRC's argument), either within two years of the end of the accounting period, before the issue of the closure notice or at all. Instead Shinelock states that this argument disrupted preparation for the hearing (Shinelock spending two days dealing with the argument and preparing an application for the Tribunal) and would have been relevant to considering whether to pursue the appeal at all.

46. That this argument had not been raised previously is not disputed by HMRC. Shinelock had given Notice of Appeal to the Tribunal on 29 November 2018. The parties then entered ADR (which concluded in June 2019) and HMRC delivered the SOC on 1 August 2019. It was not referred to in the Statement of Issues in August 2020.

47. HMRC explained that the Current Year Jurisdiction Argument was only identified by a new litigator, who had been appointed shortly before the skeleton arguments were due on account of an injury of the previous litigator. He took the view that the Tribunal did not have jurisdiction to consider the appeal. HMRC considered that they were under an obligation to notify the Tribunal of this view, regardless of the lateness of this notification. HMRC contend that it is only prudent to continuously discuss and assess the issues of a case, especially with the introduction of a litigator not previously involved.

48. Having regard to that reason, and accepting that HMRC only identified the argument in December 2020 or January 2021, the potential existence of the Current Year Jurisdiction

Argument has been present throughout. Shinelock argued in the Notice of Appeal that an amount equal to the gain was deductible (as a loan relationship or otherwise). The existence of a loan relationship between Shinelock and another party (whether that be Mr Ahmed or the bank) was at the front and centre of its appeal.

49. HMRC's failure to raise this point earlier is particularly striking given that the SOC was not delivered within 60 days of the Notice of Appeal – instead, the parties proceeded to ADR, which was ultimately unsuccessful, but nevertheless meant that HMRC would have had further opportunities to consider their position before delivering the SOC on 1 August 2019. As the parties then prepared for the video hearing they agreed to directions that they prepare a statement of agreed facts and a statement of issues. The Statement of Agreed Facts is dated 22 July 2020 and is detailed. By contrast, the Statement of Issues is short and whilst the background to the preparation of that document indicates that it was not a list of all the issues, but rather a list of the issues that the parties could agree were issues (an approach which I consider to be unhelpful), nevertheless that Statement of Issues, delivered in August 2020 does not refer to the Current Year Jurisdiction Argument.

50. I recognise that parties' arguments may develop and evolve as they progress towards a hearing of the appeal. This is particularly the case where there are significant matters of disagreement as to the facts, and evidence is exchanged (including witness statements) in accordance with directions. HMRC's skeleton argument (delivered shortly before the hearing) may therefore differ in several respects from the statement of case, and in many instances this should not of itself be a source of criticism. However, in the present appeal, the challenge made by HMRC in its skeleton argument has not arisen as a result of new facts (disputed or otherwise). HMRC could and should have identified that Shinelock had not made a claim under s469 withing two years of the end of the accounting period in which the chargeable gain arose; and this should have been identified by the time they prepared the SOC, particularly given that the ADR process would have meant that HMRC were re-visiting their position during that period and had the opportunity to consider their arguments further. HMRC have been open in acknowledging that the point was just not identified earlier.

51. That may well be, but I do consider that this failure to raise the Current Year Jurisdiction Issue until January 2021 amounted to HMRC acting unreasonably in defending or conducting proceedings for the purpose of Rule 10(1)(b). This delay alone is sufficient to meet the threshold for me to consider making an order for costs. I continue to assess the remaining matters relied upon by Shinelock as this may be relevant to either the extent of any costs order and as to whether such order should be made on the standard or indemnity basis.

Carry Forward Jurisdiction Argument

52. This was raised by HMRC after the first part of the substantive hearing, on 12 February 2021, when HMRC set out its position that the Tribunal does not have jurisdiction to determine the loan relationship arguments for the year under appeal or any other (ie future) year. Mr Boch submits that this argument should have been raised in the SOC and also criticised the way in which HMRC have changed their position.

53. There was no reference to the Carry Forward Jurisdiction Argument in HMRC's skeleton argument, ie it was not identified when they set out the Current Year Jurisdiction Argument.

54. As can be seen from the description of how matters have unfolded in Background, after that part of the hearing, at a time when it was envisaged that the resumed hearing would hear arguments as to the Current Year Jurisdiction Argument, HMRC had approached Shinelock to test the possibility of agreeing that any non-trading loan relationship deficit which the Tribunal

were to find existed would be available, not for the current year, but for carry forward to future years. The premise was that this would avoid, for both parties, the costs of a further hearing. Shinelock agreed to that approach. However, I asked the parties for representations (on 5 February 2021) as to the basis on which the Tribunal could or should make findings and reach conclusions as to a loan relationship deficit in circumstances where, as it appeared from the correspondence from the parties, Shinelock were no longer seeking to displace the amendments made by HMRC to the closure notice for the year to March 2015. HMRC then responded on 12 February 2021.

55. HMRC have explained that, upon holding further discussions with policy, they came to the conclusion that there was a different issue of jurisdiction that prevented the Tribunal from considering the appeal (ie that the grounds of appeal did not fall within the "matter in question"). They emphasise that their position has changed only as regards whether a hearing is required, in light of the "matter in question" issue.

56. I have already concluded that HMRC raised the Current Year Jurisdiction Argument late and that this was unreasonable within Rule 10(1)(b). That argument did not go on to express any position on carry forward. HMRC's skeleton argument set out HMRC's position that the Tribunal does not have jurisdiction to consider the loan relationship argument as Shinelock had not made the necessary claim under s459 CTA 2009 to set off the Payment against the deficit by the time the closure notice was issued. HMRC was thus arguing that Shinelock's ground of appeal seeking to set the Payment off as a loan relationship debit against the chargeable gain should be struck out for lack of jurisdiction. There was no need at this stage to go further than this.

57. It is apparent that if, having completed the hearing of the substantive appeal, I were to conclude that I agree with HMRC on the Current Year Jurisdiction Argument but also (in case that decision is appealed to the Upper Tribunal) go on to make findings as to the loan relationship argument and distributions argument, this does leave the potentially uncertain situation that I conclude that there was a non-trading loan relationship deficit, albeit one which cannot be used in the current year. The appeal would be dismissed, but the finding would remain that there was a deficit.

58. HMRC initially (albeit this is still after the first part of the hearing) accepted that if there were a loan relationship deficit then this would be available for carry forward. However, they then changed their mind. HMRC changing its position in this way is clearly unhelpful. They had approached Mr Boch with a view to seeking a way for the parties to move forward which would have involved me reaching a decision on the issues which I had heard, no further hearing, and the parties agreeing that if I were to find in Shinelock's favour on the substantive issues then Shinelock would effectively benefit from this in future years.

59. HMRC have apologised for the confusion, explaining they consider that the change in arguments all flow from the jurisdiction issue.

60. The changing of position occurred within less than two weeks; and HMRC's re-consideration of its position may well have been prompted by my direction on 5 February 2021 that the parties set out their representations. This cannot excuse HMRC having first made a proposal which it had not properly tested internally. I do recognise that once HMRC had identified that the proposal they had put forward to Shinelock on 3 February 2021 with a view to resolving matters was not in fact one which they would be able to proceed with, then they needed to correct the position as soon as possible. They did so on 12 February 2021. HMRC clearly made a mistake within this window; it is the correction of the mistake which prejudices

Shinelock (in that HMRC are no longer prepared to agree that any deficit can be carried forward and means that a further hearing, which may be either a remote hearing or determination on the papers, is required to determine the issue).

61. Not every mistake by a party should constitute unreasonable conduct for the purposes of Rule 10(1)(b). Viewed in isolation, I would regard this mistake as one which was not unreasonable for this purpose. However, against the backdrop that HMRC were late raising the Current Year Jurisdiction Argument, the changing of position on the Carry Forward Jurisdiction Argument reveals that HMRC had not fully thought through their position ahead of the hearing, notwithstanding its significance (given that it does mean, if successful, that arguments on the technical merits of the loan relationship rules and the distributions provisions are irrelevant). It is for this reason that I consider that HMRC has acted unreasonably in relation to raising the Carry Forward Jurisdiction Argument on 12 February 2021 having failed to first of all identify it in preparing its skeleton argument in January 2021 and then having proposed a way forward which was, on HMRC's view now, ill-conceived.

Distribution Argument

62. Shinelock also relies on HMRC's conduct in relation to its argument that the Payment was a distribution (and could not therefore be deductible). Mr Boch states that the SOC does not clearly conceptualise the payment as a distribution - there are allusions to it in [50] and [52], but they make no reference to the legislation in Part 23 Corporation Tax Act 2010 ("CTA 2010").

63. HMRC accept that full details of their arguments were not set out in their SOC. However, they submit that Mr Boch was not surprised by their arguments and was not prejudiced as he was able to make detailed submissions. Furthermore, he had not applied to prevent HMRC from relying on this argument during the hearing.

64. The SOC includes:

> "50. HMRC note that if the Company had not been under the control of Mr A Ahmed there would have been no legal mechanism for Mr A Ahmed to force the Company to transfer the disposal proceeds to him. HMRC submit that the only reason that the proceeds were distributed in this way was because Mr A Ahmed, as the controlling party, directed it to be so.
>
> **Beneficial Ownership of Gain**
>
> 51. HMRC submit that the Appellant has not evidenced that Mr A Ahmed had a contractual entitlement to the gain element of the proceeds.
>
> 52. HMRC note therefore that while the Company could effect arrangements in order to pay Mr A Ahmed an amount equal to the gain that this would have to come out of post-tax profits of the Company."

65. There is thus no reference to the distributions provisions, albeit that HMRC had used the word "distributed" and referred to a payment being made out of the post-tax profits. Furthermore, the Statement of Issues does not give any indication that HMRC's position is that it is irrelevant whether or not the Payment gives rise to a loan relationship debit.

66. In their skeleton argument HMRC's primary position was that the Payment was a distribution under s1000(1)F CTA 2010 (special securities). Mr Vallis cited Condition C in s1015 and then proceeded:

> "43. This provision clearly applies to the facts of this matter: the consideration given by the company (i.e. the gain on the sale of the Property) depended on

> the appreciation in value of the Appellant's assets and thus on performance of the business.1
>
> 44. Furthermore, even if the Disputed Payment does not fall within the specific examples in section 1000(1), the Respondents invite the Tribunal to find that it was a return to a shareholder of profit made in the course of the Appellant's business."

67. Footnote 1 reads:

> "If, on the other hand, the Tribunal should find that paragraph F is not applicable and that the Disputed Amount did not include the principal, then it is submitted that paragraph E should apply as this return would exceed the commercial rate."

68. Few additional detailed submissions were offered at the hearing. Following a question I raised, Mr Vallis re-stated [44] from his skeleton as intending to capture paragraph B of s1000(1).

69. So HMRC were arguing that one of paragraphs B, E or F of s1000(1) applied to the Payment; but they did so in a manner from which it had not been clear before the skeleton argument was served that they would be running a positive argument that the Payment was a non-deductible distribution. I find this striking, as there can be no doubt as to the legal position that if a payment is a distribution it is not deductible and this rule takes priority, including over the loan relationships rules. Thus from the outset it was the case that Shinelock would need to establish that the payment to Mr Ahmed was within the loan relationship rules and not a distribution.

70. HMRC's setting out of its position on distributions was poor. The distributions legislation is known to be difficult and potentially wide-ranging. Notwithstanding that the burden of proof in the substantive appeal is on Shinelock, if HMRC intends to mount a positive argument that a payment is a distribution it should set out the basis on which it seeks to do so in its SOC.

71. I do not place any weight on Mr Boch not applying before or at the hearing for a direction that HMRC not be permitted to run this argument. I do, however, consider that Shinelock could have sought directions after receiving the SOC to require HMRC to confirm its position. However, by the time the parties were agreeing the Statement of Agreed Facts and the Statement of Issues, I would consider it entirely reasonable for Shinelock to conclude that HMRC would not be mounting a positive argument that the Payment was a distribution. There is no hint of this in those documents.

72. The manner in which HMRC has raised the distribution argument is unreasonable conduct within Rule 10(1)(b).

Standard of handling of the case

73. Shinelock also criticises HMRC's standard of handling the case. Mr Boch contends that some of these instances would not, by themselves, amount to unreasonable conduct, but, when taken together, particularly with the other matters relied upon, a pattern of conduct emerges that does fall within Rule 10(1)(b). Mr Boch refers to:

> (1) HMRC having changed its position as to whether there was a contract between Shinelock and Mr Ahmed for Shinelock to pay to Mr Ahmed any gain realised by Shinelock on the disposal of the Property. HMRC had conceded the issue during ADR, contested it in the SOC, conceded in the Statement of Agreed Facts and then contested

in their skeleton argument. Mr Boch submits that this creates uncertainty as to the case Shinelock is required to meet – did the contract issue need to be addressed in the skeleton (he had decided to include this) and did it need to be addressed in his examination of Mr Ahmed during the hearing.

(2) The authorities bundle which had been prepared by HMRC contained sections that were illegible or missing. Mr Boch had to create a supplementary authorities bundle.

(3) The presentation of HMRC's arguments at the hearing, including an argument on GAAP, the introduction of a new argument in relation to distributions (namely the reliance on paragraph B), the partial development of such arguments without addressing questions relating to whether the sale of the Property was in the course of a business or whether there was a security, was below the standard expected.

74. Addressing these matters, and having considered the submissions of HMRC, I conclude as follows:

(1) It is only in the most extreme scenarios that I would envisage that errors in bundling could constitute unreasonable conduct within Rule 10(1)(b). This is not such a case.

(2) Whilst HMRC contend that the disagreement as to the contract is one as to the scope of the argument, that is not made out in the documents to which Mr Boch refers. I do not criticise HMRC for contesting the position in the SOC. However, the Statement of Agreed Facts is detailed and appears to have required considerable effort to agree from both parties. It was unfair for HMRC to have sought to change their mind after that time in circumstances where there was no suggestion of there being any new evidence to explain or justify such a change.

(3) As to the presentation of the arguments at the hearing, HMRC was entitled to challenge what it alleged was the artificiality of the arrangements between Mr Ahmed, Shinelock and other companies owned by Mr Ahmed. I do agree with Mr Boch that HMRC's approach to the distributions argument fell well short of what is expected, and I have addressed that above.

75. The additional matter where I consider that HMRC's conduct did not aid the Tribunal in dealing with matters fairly and justly is the failure to adhere to the agreed facts in relation to whether or not there was a contract between Shinelock and Mr Ahmed for the payment of any gain realised on the sale of the Property. This change in position hindered the ability to deal with the appeal efficiently. Viewed in isolation, I would not have regarded it as unreasonable to a degree that would justify an order under Rule 10(1)(b); however, taken together with the matters I have set out in the context of the Current Year Jurisdiction Argument, the Carry Forward Jurisdiction Argument and the Distributions Argument, it does form part of a pattern of unreasonable conduct.

Exercise of discretion

76. For the reasons set out above, I have concluded that some aspects of HMRC's conduct in defending or conducting the proceedings were unreasonable such that the threshold for an order in respect of costs under Rule 10(1)(b) is met.

77. In considering how to exercise my discretion to make an order for costs I have had regard to the overriding objective in Rule 2 to deal with cases fairly and justly, including the need to deal with an appeal in ways which are proportionate to the complexity of the issues, anticipated costs and resources of the parties, whilst also seeking flexibility and avoiding delay.

78. The submissions made by the parties include:

(1) HMRC have argued that even if their conduct is found to be unreasonable, no order for costs should be made if Shinelock would have incurred those costs anyway (eg in dealing with the distribution argument). They are arguing that an order should only be made to the extent that it can be established that the unreasonable conduct gives rise to additional costs for Shinelock.

(2) In the context of its first application, Shinelock submit that HMRC's conduct in relation to the jurisdiction arguments, in particular the Carry Forward Jurisdiction Argument, justifies an order that costs be on the indemnity basis (this applying to its application for the costs of the further or resumed hearing).

(3) The relevance of Shinelock's own conduct in the proceedings. HMRC have made it clear that they are not themselves applying for an order for costs "at this stage" but they refer to certain aspects of Shinelock's conduct either to explain their own conduct or to illustrate a point that, essentially, they should not be held to a different standard.

(4) Shinelock has applied for costs under the second application to be assessed summarily at £10,000; HMRC have rejected such an approach, stating that a detailed schedule of costs is required.

Causation

79. Rule 10(1)(b) simply provides that the Tribunal may make an order in respect of costs if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings. This can be contrasted with Rule 10(1)(a) which provides that an order may be made in respect of costs under s29(4) TCEA 2007, for which purpose s29(5) provides that "wasted costs" means any costs incurred by a party (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

80. For a wasted costs order, there is thus a clear causal link between the costs and the conduct. There is no such link in Rule 10(1)(b), although I do accept that this can be one factor to which I have regard when exercising my discretion. Furthermore, to the extent that HMRC argues that Shinelock would have needed to incur the costs of dealing with certain arguments earlier in any event, this does not take account of the fact that, faced at the outset with the range of arguments being advanced by HMRC – which each need to be dealt with in terms of incurring costs, but also which need to be won, thus potentially affecting views as to the likelihood of success – Shinelock may have decided not to pursue the appeal. This is particularly relevant here given that the amount of tax at stake is less than £19,000; there must be a risk that the costs of pursuing an appeal exceed the amount of tax at stake.

Conduct of Shinelock

81. HMRC has drawn attention to some aspects of Shinelock's own conduct, arguing that its own actions have resulted in it incurring increased costs.

82. As I assess how matters have evolved since the Notice of Appeal was given to the Tribunal in 2018, I note at the outset that Shinelock's reference to its reliance on a loan relationship argument was very briefly set out. The grounds of appeal simply state that an amount equal to the gain was a deductible cost (under the loan relationship regime or otherwise) – it is not clearly asserted that Shinelock would be arguing that there was a loan relationship

between Shinelock and Mr Ahmed in addition to a loan relationship between Shinelock and the bank.

83. This is relevant in the context of the complaint being made by Shinelock as to the lack of detail as to HMRC's argument on distributions. Furthermore, not only had the grounds of appeal not spelt out that Shinelock was asserting that there was a loan relationship between Shinelock and Mr Ahmed but also Shinelock had denied it was running such an argument in correspondence with HMRC in November 2019. It was only when the parties were agreeing the Statement of Agreed Facts that it became apparent that Shinelock were seeking to rely on such a loan relationship. However, the reality is that irrespective of which loan relationship Shinelock were seeking to rely on, a claim needed to have been made and none had been. This omission was there in plain sight from the time that the Notice of Appeal was given to the Tribunal.

84. I have criticised HMRC's conduct in failing to raise the Current Year Jurisdiction Argument and the Carry Forward Jurisdiction Argument until January and February 2021. However, Shinelock also bears responsibility for not having fully evaluated the merits of its own case and the range of the potential challenges which they may face. I recognise that the enquiry had focused on Shinelock's position that the Property was beneficially owned by Mr Ahmed and not by Shinelock, such that Shinelock was a mere nominee (and consequently had not made the disposal or realised any gain). The loan relationship argument was not relevant in that scenario. In moving to accept that Shinelock was the beneficial owner of the Property (or at least no longer pursuing any argument to the contrary), Shinelock should have considered the analysis which flows from that and the potential issues as to time limits. Had HMRC raised these arguments in their SOC then Shinelock would undoubtedly have done so; however, I do not consider that this completely absolves Shinelock of responsibility.

85. This leads me to conclude that, when making an order in respect of costs incurred to date, I should apply a discount to reflect Shinelock's share of responsibility.

86. I have referred already to the brevity of the grounds of appeal. HMRC did not apply for directions that this be amplified. In Mr Boch's skeleton argument dated 31 December 2020 he set out Shinelock's position that the Payment was deductible under the loan relationships provisions (with alternative arguments as to whether the relevant loan relationship was that between Shinelock and the bank and/or between Shinelock and Mr Ahmed) or under the property income rules in Part 4 CTA 2009. HMRC had included their response to the property income argument in their skeleton argument. At the hearing Mr Boch informed the Tribunal and HMRC that Shinelock would no longer be pursuing this argument.

87. Shinelock thus decided at a late stage to abandon one of its arguments, albeit one that had only been spelt out in the skeleton argument. This is significant in the context of Shinelock's application of 21 January 2021 for a direction that HMRC be precluded from relying on the Current Year Jurisdiction Argument. At that time, the Current Year Jurisdiction Argument would, if admitted and argued successfully by HMRC, not have been determinative of the appeal. It would have defeated the loan relationship argument (irrespective of whether or not Shinelock established that the Payment was not a distribution) but would have had no relevance to the property income argument.

88. When I refused Mr Boch's application to prohibit HMRC from relying on the Current Year Jurisdiction Argument, an application which had referred to the difficulty caused by introducing complex technical arguments at a late stage, the parties were invited to consider whether to postpone the hearing, to enable all arguments and the evidence to be heard at a later

stage, or press ahead with the scheduled hearing, at which the parties could make submissions on the two alternative arguments, deal with the evidence and then the jurisdiction argument could be dealt with at a later hearing. I did not explicitly ask the parties to make representations as to the alternative possibility, of using the scheduled hearing dates to deal with the Current Year Jurisdiction Argument as a preliminary issue (leaving evidence and submissions on other arguments to be dealt with at a later date). That was because such matter would not have dispensed with the matters under appeal (as it then appeared to the Tribunal and, indeed, HMRC).

89. Shinelock's decision not to pursue the property income argument could not have been known to either the Tribunal or to HMRC ahead of the hearing. Such knowledge may well have influenced HMRC's representations as to how to proceed and my decision on the same.

Standard versus indemnity basis

90. The first application seeks costs on an indemnity basis for the costs of what is described as a further hearing – but would be a resumption of the hearing - or determination on the papers.

91. In *Disability Positive* Judge Raghavan summarised the necessary standard of conduct which had been considered by the Court of Appeal:

> "48. CCIL maintains that any costs order made should be made on the indemnity basis as referred to in Rule 10(7) of FTT Rules . The relevant threshold for an award of costs on such basis was considered by the Court of Appeal in two cases I was referred to. In Kiam II v MGN Ltd.(2) [2002] EWCA Civ 66 the necessary standard of conduct was expressed as having to be "unreasonable to a high degree" (at [12] per Simon Brown LJ). In Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879 Lord Woolf subsequently explained the standard thus: "there must be some conduct or some circumstance which takes the case out of the norm" (at [32]).
>
> 49. CCIL say the norm, in the light of obligation to conduct a rigorous review throughout the proceedings would therefore have been to rely upon Ground 2 from the beginning of the dispute. They highlight that litigation took seven years during which a stay of a period of almost one year was sought to better understand the position, and yet the point (which was not complex) was not raised until the FTT process had ended. HMRC's failure to carry out a review and raise Ground 2 was, CCIL submit, unreasonable to a high degree.
>
> 50. While I have concluded above that HMRC's conduct of the proceedings was unreasonable, in my judgement it was not conduct which was unreasonable to a high degree or outside of the norm (in the context that expression is to be understood). Both the above explanations in Kiam and Excelsior make it clear in my view that it is not enough that the conduct is unreasonable and the difficulty with CCIL's stance is that it seems to me to equate conduct which is unreasonable with conduct which is outside the norm. Although the period of litigation was lengthy some of that was accepted to be due to the CCIL's circumstances and the purpose of the stay to allow for consultation was, as HMRC had explained previously, to see if HMRC's basis of defence could be narrowed which would have been to the CCIL's benefit. I therefore refuse CCIL's application for costs to be ascertained on an indemnity basis."

92. Shinelock have argued that HMRC's failure to raise the Carry Forward Jurisdiction Argument until after the first part of the substantive hearing was unreasonable to a high degree,

adding that there had been nothing to prevent HMRC from raising this new jurisdiction argument earlier, HMRC had conceded this argument in correspondence at the beginning of February 2021 and the costs will now exceed the tax at stake.

93. I have concluded that HMRC's conduct in relation to the failure to raise the Carry Forward Jurisdiction Argument in the skeleton argument was unreasonable. However, I do not put it stronger than that – the concession in correspondence has no doubt been aggravating, and would not have been made if HMRC had fully considered its position ahead of serving the skeleton, but the mistake was corrected relatively swiftly.

94. I do recognise that there is now a risk that the costs for Shinelock will exceed the amount of tax at stake. However, that has been factored into my conclusions as to HMRC's conduct having been unreasonable. I accept HMRC's submission that Shinelock has contributed to the position it now finds itself in by failing to assess fully the merits of its own case, and not having set out the details of its arguments until (implicitly) the agreement of the Statement of Agreed Facts and its skeleton argument.

95. The conduct of HMRC does not merit an order for costs being made on the indemnity basis.

Application for summary assessment

96. The application of 4 March 2021 seeks costs of £10,000 plus VAT to be summarily assessed, these comprising £6,500 for the hearing (including advice and the skeleton argument), £500 for the letter to the Tribunal and £3,000 for the application for costs itself. The application notes that these costs do not include the costs of a conference to advise on merits or costs for assisting with the preparation of witness evidence.

97. HMRC have responded that a detailed schedule of costs should be prepared.

98. I consider that the level of costs claimed are such that summary assessment ought to be appropriate, but that in the absence of a detailed schedule I do not have sufficient detail to undertake such a summary assessment.

COSTS ORDER

99. Shinelock has made two applications for costs and seeks costs of £10,000 plus VAT (to be summarily assessed) in respect of some of its costs to date and its costs of the resumed hearing (or paper determination) on an indemnity basis.

100. I have concluded that HMRC have acted unreasonably in conducting the proceedings such that I do have discretion to make an order in respect of costs and consider that it is appropriate for me to do so. I have already set out my conclusion that the conduct does not merit an award of costs on an indemnity basis.

101. As was the case in *Disability Positive*, I consider it preferable that the parties first seek to agree an amount of costs between themselves taking account of the matters identified below, on the basis that I would be minded to take account of these matters (together with considerations of reasonableness and proportionality relevant where costs are ordered on the standard basis if it proved necessary to make a summary assessment):

(1) I agree that the costs of the initial advice on the merits should be borne by Shinelock alone.

(2) The costs claimed in the second application should be discounted to reflect that Shinelock bears some responsibility for not having fully evaluated the strength of its own

case as put forward in its grounds of appeal. In my judgment a discount of 30% should be applied.

(3) As regards the costs of the resumed hearing (whether that be a remote video hearing or determination on the papers having received written submissions), such costs cannot yet be agreed or assessed as they have not been incurred. However, I consider that it will be appropriate to apply a larger discount in respect of such costs, as Shinelock had not addressed the potential consequences of its abandonment of the property income argument, ie that if they were minded not to rely on that argument then it may well have been appropriate to seek to agree with HMRC (or seek directions from the Tribunal) that the hearing scheduled for January 2021 be either postponed or take place as hearing of a preliminary issue on jurisdiction. In my judgment a discount of 50% should be applied.

102. Shinelock's applications for an order in respect of costs under Rule 10(1)(b) are allowed, and the parties are directed to seek agreement with each other on the amount of costs under the second application taking account of the matters set out in the preceding paragraph. In the absence of costs being agreed within 21 days of the release of this decision, the parties shall revert to the Tribunal for further directions.

DIRECTIONS IN RELATION TO PROGRESS TOWARDS RESUMED HEARING

103. There remain steps to be taken pursuant to my directions of 23 February 2021. The remaining steps are suspended save that Shinelock shall:

(1) confirm within 28 days of the release of this decision whether or not it is pursuing any argument that it has been overcharged by the amount assessed by HMRC in respect of the accounting period ended March 2015; and

(2) at the same time, confirm its position as to whether the matters remaining to be resolved in the resumed hearing may be dealt with by way of a remote video hearing or on the papers. I note in this regard that HMRC has confirmed it would be content with the remaining matters being dealt with on the papers.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

104. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 16 April 2021