Appeal numbers SC 3128-3135/07, SC 3184-3192/07, SC 3229-3238/07, TCC-JR/01/2009, TCC-JR/02/2009

UPPER TRIBUNAL (TAX AND CHANCERY)
and
FIRST-TIER TRIBUNAL (TAX)

(1) REED EMPLOYMENT PLC (2) REED EMPLOYMENT STAFFING SERVICES LIMITED (3) REED HEALTH LIMITED (4) REED LEARNING PLC (5) REED LEARNING STAFFING SERVICES LIMITED (6) REED MANAGED SERVICES LIMITED (7) REED PAYROLL MANAGEMENT LIMITED (8) REED PERSONNEL SERVICES LIMITED (9) REED STAFFING SERVICES LIMITED (10) RPS PAYROLL MANAGEMENT LIMITED (11) RPS STAFFING SERVICES LIMITED **Appellants**

- and -

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

TRIBUNAL: Mr Justice Warren
Judge Avery Jones CBE

Sitting in public in London on 29 and 30 November 2010

Andrew Clarke QC, David Ewart QC and Richard Vallat, counsel, instructed by Slaughter and May, for the Appellants

Malcolm Gammie QC, Adam Tolley and Abra Bompas, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is our decision following a second directions hearing in which we are both sitting as judges of the First-tier Tribunal ("FTT") and of the Upper Tribunal ("UT"). The case involves a tax appeal in the FTT and judicial review ("JR") in the UT. The difficulty which used sometimes to face taxpayers who had to start a tax appeal before the Special or General Commissioners and separately apply for a related JR in the Administrative Court had been recognised as unsatisfactory for some time. This has been changed, but only slightly, in the new Tribunal system in that the Administrative Court can transfer an application for JR to the UT, as it has in this case. But that does not deal with the problem of two different tribunals having to deal with the two aspects, the FTT for the tax appeal, and the UT for JR. It is possible that the decision of Sales J in *Oxfam v HMRC* [2009] EWHC 3078 (Ch) may provide the answer, since it makes it arguable that the FTT has jurisdiction to deal with legitimate expectation issues arising in the course of a tax appeal, but that at the moment is uncertain.

2. The present case is one where the tax appeal and the legitimate expectation issues are highly interconnected both factually and in law in the following ways.

> (1) The parties are not in agreement about the scope of the Dispensation Issue in the tax appeal. Mr Gammie considers that if the Dispensation Issue is relevant at all it can only be because the expenses are taxable under Chapter 3 of Part 3 of ITEPA 2003 and they are non-deductible, in which case the dispensation cannot apply because the Inspector cannot have been satisfied that no additional tax was payable as a result of the dispensation, and the issue is one of legitimate expectation only; indeed he has already tried unsuccessfully to strike out this aspect from the tax appeal. Mr Ewart considers that the Inspector can be satisfied even though he is wrong which is an issue of interpretation of s 65 ITEPA for the tax appeal on which the relevant evidence will include what the Inspector was told and what he thought, much of which will be the evidence for JR application if Mr Gammie is right.
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> (2) If *Oxfam* permits the FTT to deal with legitimate expectation, this may cover all of the JR issues that arise if Mr Gammie is right on (1). But if the FTT decides that it does not have jurisdiction to deal with legitimate expectation, which may or not be ultimately found to be correct, the issue of legitimate expectations is then a matter for JR in the UT.

3. The issue we have to decide now is whether, as Mr Gammie contends, we should follow the usual route of the tax appeal being heard first in the FTT followed by JR in the UT probably combined with an appeal from the FTT (if one is made but in any event not postponing the JR until after all appeals to the UT and beyond in the tax appeal). Or whether, as Mr Ewart contends, the same judges sitting in two different capacities should hear both aspects either with both cases being heard together with all the evidence being evidence in both and with one set of findings of fact; or with the tax appeal being heard first followed immediately by the JR, with all or the majority of the evidence being heard by the two judges sitting in the FTT, the UT then relying on their (eventual) findings of fact with any additional necessary evidence being heard by the two judges sitting in the UT.

4. As well as the question whether legitimate expectations can be dealt with by the FTT, there is an issue whether we can, in fact, sit in two tribunals at the same time so as effectively to deal with both the tax appeal and the JR at the same time. Mr Gammie says that we have no jurisdiction to do that. For reasons which will become apparent later in this decision, we do not have to decide the point. We do have to say, however, that it would, in an appropriate case, be convenient if two judges could receive evidence as judges of the FTT and the UT at the same time. We do not, at the moment, see why this should not be done.

5. However, if Mr Gammie is right, the point can be met to some extent by hearing the cases sequentially, with the JR following on immediately from the tax appeal. That course does leave some problems about the evidence and fact finding which we will address in a moment. Before doing that, we want to say something about the position if a more conventional route is adopted.

6. That more conventional route would be for the tax appeal to be heard first with the JR being heard on a later date. The tax appeal would be heard by judges of the FTT (and would not involve a High Court Judge). The JR would be heard by judges of the UT (presided over in practice by a High Court Judge) who might conveniently, at the same time, hear any appeal from the FTT. This route does not, ordinarily, give rise to any difficulties in relation to the evidence. But in the present case, there are serious questions about what evidence is relevant to which case, about whether there should be cross-examination in the UT in relation to the evidence on the JR and about the status of the findings of the FTT.

7. We note that Mr Gammie helpfully agrees that the FTT should be able to hear all of the evidence even if it includes material relevant to the JR which is not relevant to the tax appeal and that HMRC's witnesses can be cross-examined accordingly. We record that this stance is taken in the unique and unusual circumstances of the present case. HMRC would not want to be seen as accepting that a practice should be developed in the UT of cross-examination of those providing evidence on a JR: it should be no more usual in the UT than in the Administrative Court. We agree that the present case should not be seen as a pointer towards any practice at all, although whether the practice should be identical to that in the Administrative Court is a different matter which we do not address further in this decision.

8. If the FTT decides that it has jurisdiction in relation to legitimate expectations, all the evidence relevant to the JR will be before it and the witnesses will be subject to cross-examination in any case quite apart from the agreement on the part of Mr Gammie which we have mentioned. It will make all relevant findings of fact accordingly.

9. If the FTT decides that it does not have jurisdiction in relation to legitimate expectations, then it may decline to hear evidence relating solely to that issue or it may, in accordance with Mr Gammie's agreement, nonetheless do so. There would be merit in its doing so: if an appeal were made and it was established that the FTT did have jurisdiction, there would be no need to remit the matter for further evidence and findings of fact.

10. It might be suggested that, if the FTT had no jurisdiction in relation to legitimate expectations, its findings of fact on that issue would be of doubtful status. The UT

11. Under the route which Mr Ewart favours, evidential and fact finding difficulties are not altogether avoided. We mention the following problems:

> (1) The first problem stems from Mr Gammie's stance on jurisdiction. If he is right, the two tribunals cannot sit together and so it would not be possible for the evidence received to be received by both tribunals at the same time or for the two judges to make findings of fact simultaneously in each tribunal. It would follow that the judges would have heard the evidence only in their capacities as FTT judges. As such they would make findings of fact and it is those facts on which they would rely as judges of the UT in the same way as a different panel of UT judges would do so.
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> (2) Of course, if the JR follows on immediately from the tax appeal, the parties will not know what findings of fact the FTT will make: indeed, the judges themselves may not by then have made up their minds. But we see no more difficulty in the advocates making their legal submissions in the JR application on the basis of alternative findings of fact than in making their legal submission in the tax appeal on that basis (as they have to do). Accordingly, provided that the FTT hears all the evidence and makes all relevant findings of fact, there will be no difficulty. And, of course, the judges, in their capacity as UT judges hearing the JR, will know what findings of fact they need to be made by themselves as judges of the UT
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> (3) The second problem is the same as that which exists under the more conventional route, namely the status of findings of fact by the FTT in relation to legitimate expectations. The problem is even less than under the conventional route, however, because the judges, sitting as UT judges, could direct that the evidence given to them in their capacity as FTT judges should stand as evidence in the UT. They would have fresh in their minds the actual evidence and would be able to receive it afresh in the former capacity (with the aid of their notes or any available transcript) without having to hear the witnesses and cross-examination again.

12. We should mention that a third alternative theoretically exists. Both cases could be heard together by the UT if the tax appeal is transferred to it; but this can only be done with the agreement of the parties (which HMRC are not willing to give) and if the consents of the Presidents of the Tax Chamber (FTT) and the Tax and Chancery Chamber (UT) are obtained.

13. In favour of Mr Gammie's route are the following factors (1) the FTT is the right Tribunal to hear the tax appeal; (2) no issue arises about the judges sitting in two jurisdictions at the same time (3) the two aspects come together in the UT as an appeal from the FTT and a JR application in the UT (although a qualification to this

14. Against Mr Gammie's route is that the JR issue will not be decided until later than would be the case under Mr Ewart's route, although it is possible that the FTT will on the basis of *Oxfam* take jurisdiction over legitimate expectation in the tax appeal, leaving nothing to be decided in the JR proceedings. But whatever the FTT decides on *Oxfam* may ultimately be found to be incorrect. In any case, if Mr Gammie's route is adopted, we would envisage as small a gap as possible between the FTT decision and any necessary JR, perhaps shortening the ordinary appeal timetable under the Rules if appropriate. Further, there is a danger if the FTT finds facts relevant only to the issue of legitimate expectations when it in fact has no jurisdiction, the parties might be able to challenge them as valid findings of fact requiring the same witnesses to give evidence again in the JR proceedings and the UT to hear it.

15. In favour of Mr Ewart's route are the following factors: (1) both issues are decided at one time and it will not matter if the FTT's decision on *Oxfam* is ultimately found to be incorrect; (2) whatever the demarcation between the jurisdiction of the two tribunals nothing can fall between the cracks because between them the FTT and the UT must have jurisdiction to deal with everything and to hear all the evidence; (3) the danger mentioned in the preceding paragraph is eliminated since the judges, sitting sequentially in both tribunals, will be able to make the same findings of fact in each tribunal.

16. We need to say a little more, as a factor against Mr Ewart's route, about factor (4) in favour of Mr Gammie's route. Judicial resources and the allocation of the appropriate level of judge to hear a case are important aspects of the overall management of the tribunals. The point has been made before that Parliament has established a structure under which fact finding in tax appeals is, ordinarily, to be carried out by the judges appointed to the FTT. It would require special circumstances to allocate a High Court Judge to a FTT hearing, especially one lasting as long as 13 days. Even more so is that the case where the tax appeal, taken by itself, would not be appropriate to transfer to the UT even if the parties were to agree that it should be transferred. Transfer is a matter for the Presidents of the Tax Chamber and the Tax and Chancery Chamber. Mr Justice Warren would take a great deal of persuading that the present tax appeal, absent the related JR, would be a suitable case for transfer.

17. There is also this point. If a High Court Judge sits on the FTT in the present case, it will, in practice, be Mr Justice Warren. An appeal from the FTT then goes to the UT where it will be heard by UT judges. No doubt the panel would include another

18. We both accept that each of the two routes has its advantages. We are, unfortunately, unable to agree on the best solution.

19. Mr Justice Warren considers that the use of judicial time, particularly for a High Court Judge, is an important factor, which points in favour of Mr Gammie's route. Parliament has directed the FTT to deal with tax appeals and this should be done without a High Court Judge being involved. The appeal route is much more satisfactory enabling a High Court Judge with another Upper Tribunal Judge to deal with all aspects when hearing the appeal from the FTT and the JR proceedings together. The advantage of Mr Ewart's route is more apparent than real. In practice, all of the evidence is likely to be heard in the FTT and findings of fact will be made there on which the UT will rely. Even assuming that the FTT has no jurisdiction in relation to legitimate expectations, it is unlikely that there will be any significant evidence (if indeed there is any at all) which it will be necessary for the UT to hear. There is insufficient to justify a departure from Mr Gammie's more conventional route. It certainly cannot be said, as has been hinted at, that whenever there is a dispute of fact on a JR in the UT, cross-examination must take place (even if it is right that the UT should show a greater willingness than the Administrative Court to allow cross-examination), or that whenever there is a tax appeal and a related JR requiring cross-examination, the appeal and the JR should be heard together.

20. Mr Justice Warren is conscious that he is departing from the preliminary view expressed in our earlier decision. However, that was only a preliminary view and the most important point of the case management directions then was to keep both the tax appeal and the JR moving so that both parties' statements of case and all of the evidence would be prepared and available. We both wanted to see the extent of the areas of dispute of fact and law. Mr Justice Warren had hoped that there would be significantly less dispute on the facts than there clearly is and that the time required to deal with the tax appeal would be significantly less than the current time estimate. A considerably shorter time-estimate would have had an impact on the importance to be attached to allocation of judicial resources. Be that as it may, his conclusion is that the tax appeal should be heard first in the FTT with the JR being dealt with in the UT only in the light of the decision of the FTT.

21. Whilst obviously disagreeing with Judge Avery Jones' conclusion, Mr Justice Warren acknowledges that this is a case where reasonable minds can take different reasonable views. He would like to make two observations however.

22. The first is that it does not seem to him that the conventional route will, in the present case, result in any delay at all in the parties obtaining resolution of all of the issues between them. It is unrealistic to think that this litigation will come to an end after the tax appeal in the FTT unless Reed wins and HMRC do not appeal (in which case no time will have been lost at all). If the tax appeal proceeds from the FTT to the UT, the two cases will then come together in the UT. That will happen just as swiftly,

23. The second observation relates to *Oxfam*. Mr Ewart says it does not matter at all to his clients whether it is the FTT or the UT which can give effect to their legitimate expectations. It may not matter to his clients, but it does matter to HMRC who need to know what jurisdiction is being invoked, and it matters to the tribunals, not least in establishing what the proper appeal route is. Judge Avery Jones himself sees the present case as an opportunity for deciding the *Oxfam* jurisdictional question. But the UT can only resolve that question on an appeal from the FTT (either by Reed when the FTT has rejected jurisdiction or by HMRC when it has accepted jurisdiction) Under Mr Ewart's route, it will not be the UT which decides, in the JR, whether the FTT has jurisdiction.

24. Judge Avery Jones favours Mr Ewart's route and is influenced by the overriding objective of both tribunals to deal with the case fairly and justly which includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues; and avoiding delay, so far as compatible with proper consideration of the issues (and the tax appeal was made in 2007 and the JR has already been stayed since 7 August 2008 and was transferred to the UT on 23 July 2009). He sees it, therefore an ideal case for all issues to be decided by the same judges even if it is necessary for them to sit in two tribunals consecutively. Separating the JR until later creates a further delay before all the issues are resolved for the first time, although it may be that the FTT can in the light of *Oxfam* deal with legitimate expectation, but this is uncertain and its decision on this may ultimately be reversed. Mr Ewart's route also gives the opportunity for an early resolution of the *Oxfam* issue by the UT, which is needed. He disagrees that this can be decided only on an appeal from the FTT because the UT will in practice only exercise JR jurisdiction having decided that the FTT does not have *Oxfam* jurisdiction. While the appeal aspect of Mr Gammie's route is superior it might be still difficult for an appeal against the FTT decision to be combined with hearing the JR aspect because the UT will first have to decide whether the FTT was right to accept *Oxfam* jurisdiction (assuming it does) before it can decide whether JR arises. If the FTT decides that it cannot deal with legitimate expectation, the status of facts found that arise only if it does have such jurisdiction may be open to doubt even though the FTT would have found such facts with Mr Gammie's agreement. The main objection to Mr Ewart's route is that a High Court Judge will have to hear the evidence over 13 days but given we do not know whether this is evidence in the tax appeal on *Oxfam* lines or JR evidence (that Mr Gammie accepts should be heard by the FTT) in his view makes this an exceptional case. If there is a floodgates argument about everyone wanting combined hearings they can already achieve this by transferring the tax appeal to the UT, and the problem of a High Court Judge having to hear long evidence could be overcome by approving other UT judges to hear JR proceedings (which is not very different from quite a lot of the existing jurisdiction of the FTT).

25. Mr Justice Warren is the presiding member of both the FTT and the UT for the purposes of the hearing. He accordingly has a casting vote pursuant to Article 8 of The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2836). He exercises his casting vote in favour of Mr Gammie's route.

26. The tax appeal will be heard in the FTT by Judge Avery Jones with another judge or member as the FTT Chamber President decides with a time-estimate of 13 days starting on 14 March 2011 (but the FTT will not sit on 31 March 2011 if it overruns).

27. The JR proceedings will be stayed until 28 days after the FTT decision during which either party can apply for the stay to be lifted subject to the disclosure order referred to below. This last direction is made on the assumption that, apart from the issue of disclosure, the JR application would be in a fit state to proceed to a hearing had we adopted Mr Ewart's route. If that is not correct, we would wish to make a different direction since our objective is to avoid any unnecessary delay. We would not want to see any appeal from the FTT (which, for reasons already given, we consider should be dealt with at the same time as the JR application) being delayed while further procedural steps or other preparation for the JR took place.

Other matters

28. Mr Ewart seeks specific disclosure of documents held by Head Office or national technical specialists as there are references in witness statements to their being consulted. The documents which he seeks go to the understanding of HMRC from time to time about what type of employment contract was required in order for travel allowances to be capable of falling within a dispensation and the criteria generally for the granting of dispensations. The class of documents sought (which do not just relate to Reed) are set out in Slaughter and May's first letter of 22 November 2010 to the Solicitor's Office under the heading *Head Office Deliberations* referring back, also, to their second letter dated 14 September 2010, especially at paragraphs 25 to 27.

29. We agree with Mr Ewart that the thinking and understanding of HMRC are of relevance to issues concerning legitimate expectations (whether under *Oxfam* in the FTT or under JR generally). The relevance of this understanding and thinking is not entirely straightforward but we see it this way.

> (1) HMRC decided to withdraw the dispensations in March 2006. Such legitimate expectations as Reed then had came to an end. Reed, quite promptly, introduced overarching contracts in about July to produce the same result in terms of tax payable as Reed thought it had had under the dispensations. Ignoring the period between March and July, Reed requires no remedy.
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> (2) However, sometime in February 2007, HMRC communicated to Reed that they were seeking tax retrospectively. This was a development from 2006 when it is reasonable to assume – subject of course to the evidence in court demonstrating something different – that HMRC did not appreciate that the claim for retrospective tax was available; and that the dispensations were effective to preclude such a claim.
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> (3) As Mr Justice Warren noted in argument and as Mr Gammie agreed, it is to be hoped that in making a retrospective tax claim HMRC did not

(4) It is said by HMRC that Reed cannot have had a legitimate expectation to obtain a tax relief outside the dispensation regime; so that it cannot have had a legitimate expectation that HMRC would not seek tax on the basis which they now do.

(5) Both Reed and HMRC (through the relevant Inspectors) must have thought that the travel expenses were within the regime even if they were wrong as a matter of law. The dispensations were given and operated on that basis. It would be unfair, on Reed's case, and a breach of its legitimate expectations if HMRC were to go back on that common position.

(6) Now, Reed's argument may be right or it may be wrong; but it is certainly tenable. Disclosure must be given in relation to the issues it raises. One of the issues will be the understanding of HMRC of the dispensation regime not only at the time of the granting of a dispensation, but thereafter. This understanding is relevant we think, at least up to the time when HMRC communicated to Reed its decision to seek tax retrospectively.

(7) The reason it is relevant is this. It would be one thing for HMRC to seek retrospective tax when it discovered the details of Reed's contracts with its employees if, all along, it had had a consistent understanding of the law namely that the travel expenses (prior to the introduction of the overarching contract) were outside the dispensation regime. HMRC might then argue that the grant of the dispensation was an error based on a less than full understanding of the facts. In those circumstances, it might be fair to seek retrospective tax, for instance if Reed had deliberately obfuscated the nature of the contracts (although it is hard to see why it would have done so given that the introduction of an overarching contract was the solution easily adopted in the events which happened). But it would be quite another thing, however, for HMRC to seek retrospective tax in a case where they knew the full facts – or at least the Inspector did not think it necessary to ascertain further facts in order to be able to grant the dispensation - but considered at the time that those facts did, contrary to their present position, bring the case within the dispensation regime.

(8) In that latter case, Reed would clearly have a stronger case for saying that there was unfairness. It is accordingly relevant to know what HMRC's understanding was not only at the time when the legitimate expectation arose but also later. It is relevant because we know that HMRC did not in fact seek retrospective tax or even hint that they would do so for many months after revoking the dispensations. The fact that the dispensations were not revoked until 2006 and that nothing was done about the retrospective element until later suggests that HMRC did not have a clear view of the law. If they did not have a clear view, then Reed can make the point that it cannot either have been expected to think that it might not have been entitled to rely on the dispensation as covering the Reed travel expenses.

(9) Mr Gammie would say that it is the facts subsisting at the time of the dispensations which are relevant, since it is only those facts which can give rise to a legitimate expectation in the first place: what view HMRC had later are neither here nor there, nor is any change of understanding or change of practice. This is further emphasised by the fact that it the Inspector who has to be satisfied, not HMRC, so it cannot be relevant what a technician in Head Office might have thought.

(10) As to that, it does not meet the points we have made. It may well be that it is only the facts existing at the time of the granting of the dispensations which are relevant to the creation of the legitimate expectation; but subsequent facts (that is to say, the understanding of HMRC from time to time) may be relevant in establishing what the facts were at the earlier time.

30. Relevant as it may be to establish HMRC's understanding of the dispensation regime, any order which we make must be proportionate. We do not consider that HMRC should be expected to search for or produce anything after February 2007 when it had communicated its decision to tax retrospectively to Reed. Further, it is clearly only Head Office material and material involving high level technical staff which should form the subject-matter of any further order. It would be entirely disproportionate for HMRC to instigate a search across is large number of local offices.

31. However, while it may well be that HMRC have already disclosed everything there is to find we consider that Reed is entitled to a further order to reflect what we have said but restricting disclosure to the period to the end of February 2007 and also to Head Office documents and documents produced by or held by technical staff relating to the meaning and operation of the dispensation regime. These are effectively a sub-class of the documents set out in Slaughter and May's first letter of 22 November 2010 to the Solicitor's Office under the heading *Head Office Deliberations*. We are not, unfortunately, aware of the burden that this limited disclosure order will place on HMRC. It may result in a disproportionate burden. We will therefore allow HMRC to apply to us at any time to restrict the extent of our order on the basis of evidence which shows the extent of the obligation and on the basis that it would be consonant with the overriding objective to limit the scope of our order.

32. Mr Ewart also seeks disclosure of documents relating to other employment agencies. Some redacted information has been disclosed by HMRC but only in order to show how the Appellants' arrangements came to the attention of HMRC. Apart from considerations of the practicality of HMRC's task in complying with such a direction we are not persuaded that this will help the FTT or the UT to decide this case. HMRC's treatment of other employment agencies may be different because the facts are different. We certainly do not consider that it is necessary for either the FTT on the tax appeal or the UT on the JR, to go into the facts of other cases to decide this one. And we think it unlikely that disclosure would reveal anything of probative value.

33. Mr Ewart seeks to amend his grounds for JR by reference to the Amended Grounds of Judicial Review handed up on the second day of the hearing. We can see no objection to the amendments contained in paragraphs 2, 19, 24, 26, 29 (other than

34. So far a list of issues has not been able to be agreed and there are rival lists. We express the hope that counsel will meet to try to achieve a common list for the statutory appeal, preferably one that states in outline which party contends for which result on each issue and which issues have to be found in its favour for the party to win.

35. Nor has it been possible to arrive at a statement of agreed facts. We express the hope that something can be agreed even if it is only a timetable of events.

36. So far as directions are concerned in the light of our decision the ones proposed by Mr Gammie are suitable in principle. However, in relation to the FTT we do not approve a general ability for the parties to make further requests for further particulars, further information or specific disclosure before 13 December 2010 on the basis that we would have expected any such applications to be made at this hearing. If the need for this arises it will be dealt with at an urgent hearing before Judge Avery Jones but an explanation will be required as to why it had not been made at this hearing.

37. Another issue on which the parties are not agreed is whether witness statements in reply should be served by 13 January 2011 (as Mr Gammie proposes) or by 20 December 2010 (as Mr Ewart proposes). We consider that 13 January 2011, which gives two months before the hearing, should be sufficient. So far as the timetable is concerned Judge Avery Jones favours a short opening by each party on the basis that the tribunal will have read in advance anything that is requested in the skeletons.

38. We approve Mr Gammie's draft directions for the UT but excluding paragraphs 5 and 6, which deal with cross-examination that no longer arises. A paragraph ordering disclosure in accordance with our decision should be included.

39. As judges of the UT we invite the judges of the FTT who hear the tax appeal (who will include Judge Avery Jones) to find facts that may, depending on its decision in relation to *Oxfam*, arise only in relation to JR, as occurred in *R (oao Hankinson) v HMRC* [2009] STC 2158. As we have said, the way that Mr Ewart puts his case on the Dispensation Issue may mean that there is in fact no such extra evidence. Although, in *Hankinson*, the Administrative Court appears to have given a direction to the Special Commissioners, we do not think that the UT has power to give such a direction to the FTT.

40. In view of the public interest in dealing with appeals of this type we authorise publication by both Tribunals of this decision.

MR JUSTICE WARREN

JOHN F AVERY JONES

RELEASE DATE: 15 December 2010

Corrected