[2017 UKUT 246 (TCC)

Appeal number: UT/2016/0178

PROCEDURE — appeal withdrawn in error by appellant's solicitors — reinstatement application made on following day — Tax Chamber Rules r 17 — whether appropriate to deal with application without a hearing — tribunal's assessment that appeal without merit and reinstatement refused — factors tribunal should take into account — appeal allowed, decision set aside and matter remitted to First-tier Tribunal for reconsideration

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SRN HORIZON LIMITED **Appellant**

- and –

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

Tribunal: Hon Mrs Justice Asplin DBE
Judge Colin Bishopp

Sitting in public in London on 12 April 2017

Geraint Jones QC, instructed by Rainer Hughes, for the Appellant

Will Hays, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from a decision of Judge Mosedale, sitting in the First-Tier Tribunal (Tax Chamber) (the "F-tT"), released on 27 July 2016, by which she refused to reinstate an appeal by SRN Horizon Limited ("SRN") against a post-clearance demand for customs duty and VAT amounting in all to about £87,000. Judge Mosedale refused permission to appeal but Judge Berner granted it, on renewal of the application to this tribunal, because, he said, "this application does raise important questions as to the approach of the F-tT on an application for reinstatement of this nature, and there are questions whether the F-tT applied the right principles and took account of all relevant factors".

2. The commodities imported by SRN are e-cigarettes and e-liquid, that is the liquid which enables an e-cigarette to function. The underlying issue between the parties relates to the correct classification of e-liquid for customs duty purposes: SRN's import declarations allocated it to heading 3303 of the Combined Nomenclature, the annually amended Annex 1 to Council Regulation 2658/87 (EEC), by reference to which all goods are classified on importation into the European Union for the purpose of determining, among other things, the rate of customs duty which is payable. HMRC took the view that the e-liquid should have been declared under heading 2824, which attracts a higher rate of duty than heading 3303, and the post-clearance demand is designed to recover the additional duty and VAT on it. The post-clearance demand was upheld by a review letter of 17 April 2015, and SRN appealed against it to the F-tT on 15 May 2015.

3. The grounds set out in its notice of appeal, served on SRN's behalf by the solicitors who have represented it throughout, stated simply that SRN "disputes the codes that HMRC state are correct." SRN did not support its use of heading 3303 with reasons, or propose instead some other heading, nor did it indicate whether (assuming HMRC were right in allocating the goods to heading 2824) it challenged the amount demanded or instead accepted that it was arithmetically correct. At section 8 of the notice of appeal, where an appellant is required to set out what it considers the decision should have been, SRN entered only "Grounds of Appeal to follow." No grounds have since been served. Despite the inadequacy of the notice of appeal and the absence of the promised grounds HMRC served a statement of case on 10 November 2015; in it they explained the rationale for the use of the commodity codes which had been applied.

4. On 4 December 2015 the F-tT made case management directions providing for a timetable leading the appeal to a hearing. The directions included provisions for the exchange of witness statements and skeleton arguments. A witness statement made by Richard Russell, a manager employed by SRN, was served in accordance with those directions. In it he described the chronology of the events which led to the demand. In brief summary, he said that an officer of HMRC informed him that SRN was using the wrong code whereupon he took the matter up with SRN's shipping agents, DHL, because either DHL or SRN's suppliers, who were in contact with DHL, had decided upon the codes to be used, which SRN had evidently adopted without further enquiry. His witness statement went on to say that the error, if error it was, had been beyond SRN's control (because SRN relied on DHL or its suppliers to provide the correct code) and that the full code, 38249099299, quoted in the review decision was different from

the code mentioned by the investigating officer and repeated in a letter of 1 July 2014 from HMRC to SRN. What he did not do in his statement, as the F-tT found significant, was indicate whether SRN challenged either the code applied by HMRC or the amount of duty demanded, and in either case what were its reasons for doing so.

5. The appeal was listed to be heard on 29 July 2016, in accordance with the F-tT's case management directions. SRN failed to serve a skeleton argument by the date stipulated by the same directions.

6. On 25 July 2016 SRN's solicitors sent an email to the F-tT in which they said that they were instructed to withdraw the appeal, and that the hearing on 29 July 2016 should therefore be vacated. The email was copied by the solicitors to HMRC. However, by an email sent on the following day, the solicitors filed an application, pursuant to rule 17(3) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), by which they sought to have the appeal reinstated. The substantive reason given was that the notice of withdrawal of 25 July 2016 had been: "… sent in error. The Appellant's solicitor had thought this matter related to another client. The withdrawal of this appeal is the result of mistake and error made by the Appellant's solicitor. We respectfully submit that this should not have any impact or prejudice on the Appellant's appeal being reinstated."

7. HMRC objected to the reinstatement and set out their reasons in an email, also of 26 July 2016. In summary, in their email HMRC argued that the grounds of appeal set out no arguable basis for challenging the decision and, accordingly, the appeal was defective; that, in accordance with the principles identified in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 3321 (TCC) the F-tT was required, on an application for reinstatement, to take into account the lack of merit of the appeal—here because the grounds of appeal did no more than express disagreement with the commodity codes applied by HMRC, with no further particulars; that in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 the Court of Appeal had said that a solicitor's mistake would never amount to a good explanation for an error; that there would be prejudice to HMRC in the form of further unanticipated costs and a lack of finality if the appeal were to be reinstated; and that, because the appeal was hopeless, it would be contrary to the public interest to expend further resources upon it. HMRC also pointed out that counsel had been "stood down" for the hearing and that it would now be impossible to hear the appeal on 29 July as had been intended.

8. By a further email of the same date the appellant's solicitors responded to HMRC's objections in six numbered paragraphs, of which two are relevant for present purposes. The first was as follows:

> "The Respondent states there is no arguable basis for challenging the decision. This is incorrect, details of our client's case has [*sic*] clearly been set out in its documentation filed. The Tribunal is not able to consider the merits of this appeal in the absence of evidence and a full hearing, to do so would be to pre-judge the matter."

9. The second relevant paragraph was as follows:

> "The Respondent states they [*sic*] would be prejudiced in that the withdrawal entitled the Respondent to come to the view that the debt was no longer being challenged. With respect the withdrawal email, sent in error, was only sent yesterday. No action has been taken in relation to the Respondent's decision. In any event the prejudice to the Appellant if this matter is not reinstated far

> outweighs any prejudice to the Respondent. As stated in our Notice of Application dated 26 July 2016 the email withdrawing this appeal was sent in error."

10. In the email it was recognised that it would be impossible to proceed with a hearing on 29 July, a hearing on a later date was proposed, and the email concluded with these, if we may say so rather poorly expressed, observations:

> "Where it can, the Tribunal should not allow a simple oversight/administrative error to prosper. It cannot be argued that it is interests of justice to allow the Respondent to succeed on an appeal which invariably would have succeeded had it not been withdrawn."

11. HMRC responded later the same day in order to repeat the point that, despite what was claimed, SRN had not set out what its case was, and to argue that it should not be permitted to do so by advancing it for the first time at the hearing. Their email concluded: "The position cannot now be cured by evidence as the Appellant suggests. The remainder of the submissions that the Respondent seeks to rely upon has been set out in our earlier email and await the Tribunal's decision."

12. On the following day, 27 July 2016, the F-tT sent letters (by email) to the parties informing them that the hearing on 29 July 2016 would not go ahead and that: "The Tribunal must now resolve the reinstatement application and the Tribunal will contact you shortly about this matter." Later the same day, the F-tT sent a further letter to the parties stating that Judge Mosedale had already considered the reinstatement application and had refused it. The decision notice was enclosed.

13. Judge Mosedale opened her decision with the sentence "In my view, the Tribunal should not normally reinstate an appeal unless satisfied it has a reasonable prospect of success." There followed a critique of SRN's notice of appeal and of Mr Russell's witness statement, and in particular of the absence from them of any reasoned counter to HMRC's case. She observed that the argument that SRN had relied on the suppliers or shipping agents would be of no assistance since, as importer, it was liable to pay the right amount of duty regardless of its having received incorrect advice. She was clearly impressed by the fact that, even though the lack of any particularity in its case had been pointed out to SRN, it had not taken the opportunity, even at a late stage, to make the omission good, but instead had merely stated that it intended to rely on what the judge plainly considered to be wholly inadequate grounds. Her conclusion, with brief reasons, appeared at [9]:

> "The absence of any grounds of appeal suggests that there are no grounds of appeal. I am therefore not satisfied that the appeal has a reasonable prospect of success: in the absence of any grounds of appeal it cannot have a reasonable prospect of success. The appeal should therefore not be reinstated."

14. Rule 17(3) states merely that "A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated." Other provisions set out the procedure to be followed, but give no guidance on the approach to be adopted by the F-tT. It is arguable, on a literal reading of the rule, that a party may have its case reinstated as of right, but here the parties agree that the remedy is discretionary, and that Judge Mosedale was correct to deal with the application accordingly.

15. In her refusal of permission to appeal the judge said that even if she had been persuaded that the notice of withdrawal had been sent without any fault on the part of SRN itself she would not have reinstated the appeal, because of its lack of any prospect of success. She mentioned the provisions of rule 8, which permits the F-tT to strike out

an appeal which has no prospect of success, and rule 20, which requires an appellant to state its grounds of appeal, and observed again that SRN had not taken the opportunity to set out some grounds when the inadequacy of what it had put forward was pointed out. For those reasons she refused permission.

16. SRN's application to this tribunal for permission to appeal focused on the factors relevant to such an application as they were identified by Proudman J in *Pierhead Purchasing*, a case to which we shall return. The essence of the argument was that Judge Mosedale should not have focused on the perceived merits of the appeal to the exclusion of all else. Conspicuously, SRN said nothing about those merits, and did not seek to advance any argument to the effect that Judge Mosedale was mistaken in her perception. As the extract from his decision we have set out shows, Judge Berner was persuaded by those arguments that permission should be granted.

SRN's submissions

17. Mr Geraint Jones QC, for SRN, began his attack on the decision with the observation that the F-tT had simply proceeded to determine the application without offering SRN the opportunity of a hearing, or of putting forward more reasoned grounds for reinstatement, in the form of a skeleton argument or in some similar fashion. There is, he said, if not a right to a hearing, at least a presumption, derived from rule 2 of the Rules, that the tribunal ought at least to consider whether a matter of dispute could properly be decided on paper or a hearing should be offered. In particular, rule 2(2)(c) requires the tribunal to ensure "so far as practicable, that the parties are able to participate fully in the proceedings". Here, however, it seemed that the judge had decided the point without even considering whether a hearing should be offered; certainly she had not caused any enquiries to be made of the parties on the point. That, Mr Jones said, was a material error; the judge had adopted a course which, in the similar although not parallel case of *Frey & others v Labrouche* [2012] EWCA Civ 881, [2012] 1 WLR 3160, the Court of Appeal had condemned. Lord Neuberger MR, who gave the leading judgment, explained the reasons:

> "[22] It is a fundamental feature of the English civil justice system, and indeed any civilised modern justice system, that a party should be allowed to bring his application to court, and make his case out to a judge. Of course, this principle is subject to some exceptions and limitations, which exist to ensure the proper administration of justice. Thus, the court may refuse to entertain argument from a party who is in contempt of court, a civil restraint order can fetter the right of access in the case of a person who has used the court process to harass others, and time limits are routinely imposed for hearings. However, even where a party is in contempt or is subject to a civil restraint order, the court will ensure that he is not prevented from making an application or submissions where it would be unjust to shut him out; and time limits are imposed simply to ensure that a party is not allowed an extravagant amount of time to the detriment of other court users.
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> [23] Accordingly, it seems to me clear that, where an application is brought to strike out the whole or part of a claim, then, unless, for instance, the applicant is in contempt or subject to a civil restraint order, the judge before whom the application is listed has a duty to consider it properly. In particular, the judge is bound to listen to oral argument in support of the application (unless he is satisfied by what he has read, before coming into court, that the application should be granted, in which case he could call immediately on the respondent to the application – but that is not always a wise course). Particularly where the judge has had the benefit of time to

> read all the papers, and to consider a full written argument on behalf of the applicant (and the respondent), he may quite properly be able to dispose of the hearing of the application far more quickly than the parties and their advisers may have expected. For instance, while again it often may be unwise to do so, the judge could (i) begin by saying that, having read the papers, his provisional view was that the application should be rejected on one of the many grounds raised by the respondent, (ii) then give the applicant a fair opportunity to disabuse him of this view through oral argument, and (iii) if the judge was unpersuaded by that argument, end the hearing by giving judgment for the respondent on the ground in question.
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> [24] But what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the applicant a fair opportunity to make out his case orally. It is vital that justice is seen to be done, but that is by no means the only, or even the main, reason for this. It is also because it is vital that justice is done. Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument."

18. Moreover, the judge did not explain in her decision why she had not asked the parties whether or not they would prefer to have the application dealt with at a hearing. She had instead determined the application by reference to one factor alone, that is her own perception that there were no, or no adequate, grounds of appeal, without regard to any other factor, and in particular the circumstances in which the application came before her, as a very prompt attempt to correct a simple error. Her refusal of reinstatement amounted to a draconian step as it shut the appellant out of its appeal altogether, in consequence of a mistake for which it was not itself responsible. Despite the absence of formal grounds it was obvious that the correct classification of the goods was in dispute, and that even HMRC were not sure of it. The full code SRN was advised to use in the future by the officer who made the original decision was 38249099799 but the reviewing officer used 38249099299 (*ie* …299 rather than …799).

19. Mr Hays pointed out that the argument that the application should have been dealt with at a hearing, or that a hearing should at least have been offered, appeared for the first time in Mr Jones' skeleton argument, which Mr Jones agreed was the case. He asked, without conceding that it was necessary to do so, for permission to extend the grounds of appeal to cover this point, an application which Mr Hays opposed. Although Judge Berner's decision notice does not allude to the question whether an opposed reinstatement application should ordinarily be dealt with at a hearing it is implicit in the ground on which he granted permission that he expected the tribunal to consider all relevant factors. In our view it would be artificial in that context to exclude the question whether or not a hearing should take place, or be offered, from consideration and, in so far as it is necessary, we extend the existing permission to appeal to cover this argument.

20. In *Atec Associates Ltd v Revenue and Customs Commissioners* [2010] UKUT 176 (TCC), [2010] STC 1882, Briggs J, sitting in this tribunal, said at [48] that

> "In the context of the obtaining of relief from sanctions under the Civil Procedure Rules, it is relevant (in mitigation of the applicant's default) that the relevant failure to comply was caused by the party's legal representative, rather than by the party himself."

21. That was a case in which there had been a persistent failure by the appellant's representative to comply with the tribunal's rules and directions, a failure which he had concealed from the appellant's directors. It was true that in *Mullock v Price (t/a Elms Hotel Restaurant)* [2009] EWCA Civ 1222 the Court of Appeal had taken a different view about a representative's failings, but in that case the defendant had himself known for more than two years that a default judgment against him had been obtained when he made his application. In this case, by contrast, the representatives had discovered their mistake quickly and had taken immediate action to rectify it.

22. Although she declined to essay an authoritative statement of the principles to be adopted, Proudman J, also sitting in this tribunal, did offer some guidance in *Pierhead Purchasing Ltd v Revenue and Customs Commissioners* [2014] UKUT 321 (TCC), [2015] STC 331:

> "[23] Although … there is no guidance in the Rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v Revenue and Customs Comrs* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490 (at [21]). In *North Wiltshire* (at [56]–[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were:
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> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement.
> - Loss to the appellant if reinstatement were refused.
> - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
> - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.
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> [24] I was asked by Mr Jones [for the taxpayer] to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance given in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 2 All ER 430, [2014] 1 WLR 795 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to tribunals in any event) does not now exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective."

23. It was important to remember, Mr Jones said, that Judge Mosedale was not making a case management decision in the ordinary sense of that term, but a determinative ruling capable of putting an end to the litigation. In that context he referred us to the judgments of the Court of Appeal in *Beedell v West Ferry Printers Ltd* [2001] EWCA Civ 400, [2001] ICR 962, in which the court refused to set aside permission to appeal which had been granted in a case which, on current Court of Appeal authority, was bound to fail. Mummery LJ explained the decision as follows:

> "[13] … the critical question for the court on Mr Swift's application [for the respondent] is whether this court would be dealing with this appeal justly if it exercised its power to set aside the permission to appeal, rather than letting the permission to appeal stand and dismissing the appeal, which Mr Millar QC, on behalf of Mr Beedell, accepts is the inevitable consequence of this appeal being heard.
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> [14] I have no doubt that the correct approach to the exercise of our discretion - bearing in mind the overriding objective - is to refuse to set aside the permission to appeal. If we followed the course which Mr Swift invites us to follow, the consequence would be, in effect, that this court would be making an unappealable decision in an area recognised by the Court of Appeal in its judgments in *Foley* [*v Post Office* [2000] ICR 1283] to be the subject of considerable controversy in unfair dismissal cases.
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> [15] That would not be a just result. If we take the alternative course which Mr Millar accepts is inevitable of dismissing this appeal, we will be able to entertain an application for permission to appeal; and if we refuse that, it will be open to Mr Beedell to petition the appellate committee for permission to appeal. It will be a matter of discretion for the court which hears the application for permission to appeal to decide, if it grants permission, what conditions, if any, should be attached to that permission."

24. In other words, said Mr Jones, the tribunal should take care not to make a decision which effectively excluded the appellant from any access to justice.

HMRC's submissions

25. For HMRC, Mr Will Hays argued that Judge Mosedale was right not to reinstate an appeal which the appellant, despite several opportunities to do so, had failed to support with any grounds at all. The burden was on SRN to show that the assessment was wrong, yet it had failed to put anything forward, whether of argument or evidence, from which the tribunal might decide any issue in its favour. The merits of the appeal were one of the factors identified as relevant by Proudman J in *Pierhead Purchasing* and Judge Mosedale was right to take them into account and come to the conclusion that there were none, and that it would be wrong to reinstate an unmeritorious appeal. It is much too late for SRN to challenge the judge's assessment of the merits of the appeal. Moreover, even now it was unclear whether SRN was challenging the classification of the goods, the calculation of the underpaid duty, or something else, and it was equally unclear what the basis of any challenge it was pursuing might be. Conspicuously, no application for permission to amend the grounds of appeal had been made, and it was a fair inference for the judge to draw that there were no grounds.

26. There is nothing in the point that the original decision referred to one code and the review letter to a slightly different code. The difference was attributable to nothing more than an amendment to the numbering in the tariff, and not to any difference of substance. The rate of duty is the same. Similarly, there is nothing in the point that SRN relied on its shipping agents or suppliers; as the judge rightly said, the responsibility for declaring imported goods to the correct tariff code lies on the importer. We shall not dwell on these points: Mr Hays is plainly right in respect of both; indeed the difference in the code lies in that part of it which is used for statistical rather than duty purposes.

27. Mr Hays says that once it is recognised that there is no right to reinstatement, and that it is a matter for the tribunal's discretion, it follows, contrary to Mr Jones'

argument, and despite the finality of a refusal to reinstate, that this was properly to be regarded as a case management decision. The judge was required to, and correctly did, consider whether, by application of the overriding objective of rule 2, it was fair and just to put HMRC to the inconvenience and expense of further defending an appeal when the appellant had failed to advance any reasoned case. It was well-established that an appellate tribunal should be very slow to interfere with a case management decision, and there was nothing which excluded this case from that general principle.

28. Assuming we were willing to entertain the argument at all we should, said Mr Hays, treat the complaint that no oral hearing was offered with care, since at no time did SRN ask that its application be dealt with at a hearing, and it did not suggest at any time before the decision was made that it wished to put in further submissions—on the contrary, its solicitors' correspondence with the tribunal suggested that they were not expecting a hearing. In their email of 26 July, the last sent before the decision was made, the solicitors argued their case and concluded by saying "we invite the Tribunal to allow our Application to reinstate this appeal and list this matter on a date of all parties convenience". The "matter" there referred to was plainly the substantive appeal; it is implicit in the remainder of the sentence that the solicitors were not seeking a hearing of the application. It was not a case, as in *Frey v Labrouche*, of the refusal of a hearing, but of a judge disposing of an application in the manner expected by the parties.

Discussion and conclusions

29. Like Proudman J in *Pierhead Purchasing* we shall not attempt to set out guiding principles. We agree with her that each reinstatement application turns on its own facts and circumstances; moreover, the circumstances of this case are unusual and we do not think it would be helpful to lay down principles derived from an unusual case.

30. While we agree with Mr Hays that the emails sent by SRN's solicitors suggest, to put it no higher, that they were not expecting that the application would be dealt with at a hearing they also indicate, on a fair reading, that despite HMRC's opposition the solicitors assumed that the application would be granted. They were, of course, wrong to make that assumption, but we do not think their doing so is to be regarded as wholly unreasonable rather than excessively optimistic. In an ordinary case one would expect an application for relief from the consequences of a simple mistake, made as promptly as was this application, to be unopposed and even if opposed to be granted quite readily. As the Court of Appeal made clear in *Denton and others v TH White Ltd (and related cases)* [2014] EWCA Civ 906, [2014] 1 WLR 3926, the stricter regime to be applied with regard to applications for relief from sanctions which was discussed in *Mitchell v News Group*, to which Proudman J referred, was not intended to lead to a culture of non-cooperation between litigants and their lawyers and to a proliferation of satellite litigation; that must be all the more the case when a party is not seeking relief from a sanction but to undo a mistake.

31. We are not at all surprised that Judge Mosedale reached the conclusion, on the material before her, that the appeal lacked merit. As we have said, even now it is not at all clear what SRN's grounds of appeal are, and it may well be fair to draw from the absence of grounds the inference that SRN has little to say in answer to the assessment. It also became apparent to us from some of Mr Jones' observations that, even before the appeal was mistakenly withdrawn, SRN was ill-prepared for the forthcoming hearing.

Both the judge and Mr Hays were right to be critical; whether the blame lies with SRN or its solicitors the failure to set out SRN's case clearly is lamentable. However, HMRC made no application for further particulars when the notice of appeal was sent to them, but instead served their statement of case. They also did not make an application in accordance with rule 8 for the appeal to be struck out on the ground that it had no reasonable prospect of success, but instead allowed it to proceed towards a hearing. In other words, HMRC were not so badly embarrassed by the lack of particularity that they were unable to deal with the matter.

32. Against that background we think that once she had formed the initial view that the application should be refused the judge should have asked SRN's solicitors whether they were content to have the application determined by reference to their written submissions and, if so, should have given them the opportunity of making further submissions. If they were not so content she should have offered a hearing. This case is not on all fours with *Frey v Labrouche* but there are similarities; and the principle to be derived from what the Master of the Rolls said is that there is a presumption in favour of a hearing when a draconian step—there striking out, here refusal to reinstate—is in contemplation. Had the solicitors not made the mistake of withdrawing the appeal it would have proceeded to a hearing on 29 July 2016. SRN might well have lost, for all the reasons the judge identified, but at least it would have had the opportunity of advancing its case, such as it was. Instead, the judge deprived it of that opportunity by reason of an error for which SRN was not itself responsible. We do not think it was appropriate to do so, and in consequence leave SRN in a position similar to that which might have faced the claimant in *Beedell v West Ferry Printers*, excluded from any opportunity of ventilating its case.

33. It follows that the judge committed a procedural error. Whether or not the decision is properly to be regarded as a case management decision we consider the error to be of such a character that we must allow this appeal. We do not think it appropriate to re-make the decision ourselves; we heard argument directed to the correctness or otherwise of the judge's approach, and not directed to the merits of the reinstatement application. We shall instead remit the matter to the F-tT, to be determined by a different judge at (unless the parties otherwise agree) an oral hearing.

Hon Mrs Justice Asplin DBE **Judge Colin Bishopp**

Upper Tribunal Judges

Release date: 15 June 2017