[2019] UKUT 201 (TCC)

Appeal number: UT/2018/0070

PROCEDURE - MTIC appeal - whether parts of HMRC witness statements should be struck out - no - whether in view of response to "Fairford" directions certain HMRC witnesses need attend for cross-examination – appeal allowed in part – revised guidance as to "Fairford" directions

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ELBROOK CASH AND CARRY LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London WC2 on 17 May 2019

Geraint Jones QC and Marc Glover, instructed by Portner Law Limited, for the Appellant

Howard Watkinson and Joshua Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the decision on an appeal by Elbrook Cash and Carry Limited ("Elbrook") against the decision of the First-tier Tribunal ("FTT") published at [2018] UKFTT 252 (TC) ("the Decision").

2. The appeal concerns two issues determined in the Decision. The first is the refusal by the FTT of Elbrook's application for parts of certain HMRC witness statements to be struck out and redacted. The second is the decision (contained in separate directions issued at the same time as the Decision) that certain HMRC witnesses would not be required to attend in the substantive appeal for cross-examination.

Background

3. Elbrook's substantive appeal, which has yet to be heard, is against HMRC's decisions firstly to revoke Elbrook's registration as an owner of duty registered goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 and secondly to deny input tax credits for VAT purposes on various transactions carried out by Elbrook. The Decision relates solely to case management matters determined by the FTT in preparation for the substantive appeal.

4. The VAT decisions were made by HMRC on the grounds that Elbrook knew or should have known that the transactions it had entered into were connected to the fraudulent evasion of VAT. The alleged connection was with a form of fraud known as Missing Trader Intra-Community or MTIC fraud.

5. In *Mobilx v Revenue and Customs Commissioners* [2010] EWCA Civ 517, the Court of Appeal confirmed that in MTIC fraud cases HMRC bears the burden of proving four issues, namely that:

(1) There was a tax loss.

(2) That tax loss resulted from fraudulent evasion.

(3) The transactions by the appellant which are the subject of the appeal were connected with that tax evasion.

(4) The appellant knew or should have known that its transactions were connected with a fraudulent evasion of VAT.

6. In practice, the majority of the court's time in a typical MTIC fraud case is taken up in considering the fourth of these issues, namely the actual or constructive knowledge of the appellant. However, in many but not all such appeals the taxpayer also challenges HMRC to prove any or all of the first three issues. The taxpayer may in making that challenge advance a positive case or produce its own evidence, but often, as in this case, it simply puts HMRC to proof. That is enough to bring those issues into play in the appeal.

The approach of this Tribunal

7. Both of the issues in this appeal are case management decisions. We are guided in our approach by the two principles set out by this Tribunal in *Goldman Sachs* v *Revenue & Customs Commissioners* [2009] UKUT 290 (TCC) as follows:

> "23. First, I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in *Walbrook Trustee v Fattal & Others* [2008] EWCA Civ 427, not as establishing any novel proposition but as containing in paragraph 33 the following convenient statement from the judgment of Lord Justice Lawrence Collins:
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> 23.1.1. "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
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> 24. I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system.
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> 25. The second observation I would make is that I do not consider that there is any substantial difference between "reviewing" the decision and "remaking" the decision of the first tier. That is because, in remaking the decision, the decision of the judge of the first tier tribunal is to be accorded respect. That judge was a judge appointed for his specialist knowledge; that judge was one who daily deals with cases of the type under appeal and who, in making an assessment, can draw upon a depth of practical experience in the conduct of such cases…"

Ground one: HMRC witness statements

8. The witness statements served on Elbrook and the FTT by HMRC comprised the statement of Officer Ginn, which dealt with all four MTIC fraud issues set out above, and statements by several other officers which dealt only with one or more of the first three issues.

9. Elbrook applied to the FTT for various identified sections from both Officer Ginn's statement and many of the other statements to be struck out or redacted. The basis of the application was that those statements contained inadmissible opinion evidence; expert opinion without permission having been sought from the FTT for its admission; comment on the credibility of witnesses, and hearsay evidence. Mr Jones contended before the FTT that these amounted to more than occasional or inadvertent slips. The "sheer scale" of the inadmissible statements meant that they must be excluded. If they were not, it could give rise to a perception of bias by an informed bystander, especially in relation to the lay tribunal member, whose role equated to that of a jury: [21] of the Decision.

10. In considering the application, the FTT quoted at length from the FTT decision in *Megantic Services Ltd v Revenue & Customs Commissioners* [2013] UKFTT 492 (TC), from which two propositions can be derived. First, there is no rule that non-expert opinion evidence must be excluded before the FTT, and the FTT has a discretion to admit it and give it such weight, if any, as it considers that it is worth. Second, there is no requirement in the FTT for permission to be obtained for the service of expert evidence.

11. The FTT considered and rejected Mr Jones' submission as to the likely perception of bias, applying the Court of Appeal's decision in *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451: see [22] and [23] of the Decision.

12. The FTT then set out its decision on the issue as follows, at [23] and [24] of the Decision:

> "23. …[I] find myself in a similar situation to that in the substantive hearing of *CF Booth v HMRC* [2017] UKFTT in which I observed, at [10], that the Tribunal was:
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> "… disappointed to find that, in addition to factual matters, the witness statements, particularly those of HMRC officers, contained opinions and conclusions to be drawn from the evidence. As the Tribunal (Judges Berner and Walters QC) observed in *Megantic Services Limited v HMRC* [2013] UKFTT 492, at [15], such evidence:
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> "… is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded. Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions that the tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude."
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> 24. In that case I referred to [15] in *Megantic* and adopted a similar approach in that case. Although I understand that Judge Wallace on several occasions did direct HMRC to redact witness statements to exclude such matters this was before the decision of Judge Berner and Judge Walters QC in *Megantic*. Although I seriously considered directing HMRC to redact the witness statements, I have come to the conclusion that a this is not strictly necessary. As the Tribunal observed at [20] in *Megantic*:
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> "… the tribunal itself is quite capable of distinguishing between the evidence on which a conclusion falls to be drawn by the tribunal and an attempt by a witness to draw that conclusion themselves."
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> I therefore dismiss Elbrook's application for the striking out and redaction of parts of HMRC's witness statements."

13. In the hearing before us, Mr Jones made the following submissions:

(1) The FTT had failed to address or make findings regarding his submission that HMRC had "deliberately and cynically flouted and abused the recognised rules" on a wide scale for preparing witness statements. This was a clear attempt by HMRC to gain improper advantage in the litigation.

(2) It is accepted that the FTT Rules might be more informal than those in a court, but evidence is never admissible in any forum unless it is relevant. The guiding principles in this respect are set out in *J D Wetherspoon plc v Harris and others* [2013] EWHC 1088 (Ch).

(3) There can be no doubt that the HMRC witness statements were prepared by or under the supervision of HMRC's in-house solicitors. Those solicitors breached their duty to ensure that the proper standards for the preparation of witness statements were observed, as set out in *Aquarius Financial Enterprises Inc v Lloyd's Underwriters* [2001] 2 Lloyd's Rep. 542.

(4) Where the abuse is so flagrant and on such a scale as in this case, policy dictates that the application should have been granted, to ensure fairness and discourage repetition.

(5) In so far as the FTT applied a test of "strict necessity" in considering the application, this was an incorrect legal test.

(6) If the FTT in *Megantic* was setting out a general proposition of law, it erred in failing to consider the requirement for a fair hearing in the overriding objective and in failing to consider *J D Wetherspoon.*

(7) The greater latitude in relation to the admission of evidence afforded to tribunals should be applied sparingly at the interlocutory stage of an appeal.

(8) The FTT erred in failing to consider individually each of the passages identified as objectionable by Elbrook.

14. The appropriate starting point for the FTT's consideration of Elbrook's application was Rule 15 of the FTT Rules. So far as relevant, this provides as follows:

> "15 Evidence and submissions
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> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
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> (a) issues on which it requires evidence or submissions;
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> (b) the nature of the evidence or submissions it requires;
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> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
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> (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or

(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

(2) The Tribunal may—

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

15. A number of Mr Jones' submissions failed to recognise the importance of Rule 15(2)(a). The question for the FTT was not, as it was for the court in *J D Wetherspoon*, whether the relevant HMRC statements would have been admissible in a civil trial, under CPR or other civil procedure guidance. In a similar vein, Mr Jones referred us to a recent decision of the Competition Appeal Tribunal as evidence that tribunals were "rowing back" from the more relaxed approach as to admissibility of evidence. That point has little force given that the Competition Appeal Tribunal has no equivalent in its rules (Rule 21 of which deals with evidence) to Rule 15(2)(a) of the FTT Rules.

16. The practical application of Rule 15(2)(a) in an MTIC appeal was considered by this Tribunal in another decision in the Megantic litigation: *Megantic Services Ltd v Revenue and Customs Commissioners* [2011] UKUT B2 (TCC). In that case, Mr Justice Arnold stated as follows:

"78. Megantic's second ground is that the [Bank] evidence is unreliable and that the judge made an error in law in admitting it. Megantic contends that the [Bank] evidence is unreliable for two reasons. First, because [HMRC Officer] Downer's evidence amounts to non-expert opinion. Secondly, because no positive evidence has been adduced by HMRC as to the authenticity, integrity or accuracy of the documents obtained from the [Bank] server. On the contrary, Mr Letherby has stated in three witness statements in other proceedings (only one of which was shown to me) that some of the records are missing and others are damaged.

79. In my judgment there are two short answers to these contentions. First, the judge's decision to admit the evidence discloses no error of law. It was a case management decision which was well within the ambit of his discretion. I agree with the view expressed by Norris J in *Goldman Sachs* that this tribunal should exercise extreme caution before interfering with the Tribunal's case management decisions.

80. Secondly, rule 15(2)(a) of the Tribunal Rules allows the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial. It follows that the Tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the Tribunal considers that it is worth. What weight should be given to the evidence is a matter for the Tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence

> being received by the Tribunal. As for the reliability of the [Bank] evidence, Mr Letherby's statement in these proceedings does contain
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> some evidence as to the reliability of the [Bank] documents. Furthermore, I am quite unpersuaded that the other statement of Mr Letherby relied on by Megantic demonstrates beyond argument that the FCIB evidence is unreliable. It may well provide material for cross-examination of Mr Letherby in due course, but that is another matter."

17. In considering the FTT's decision on this issue, we take account in particular of the following factors. First, we agree with Mr Jones that the FTT did not consider separately each passage identified as objectionable by Elbrook. However, that did not amount to a failing on the part of the FTT. Elbrook itself did not identify the specific ground of complaint for each passage, so that the precise basis of their objection was left unclear. In those circumstances, we consider that the FTT acted within the broad ambit of discretion open to it in concluding that it was preferable, as a matter of case management, to decline to investigate each passage complained of but instead to leave it to the tribunal hearing the trial to consider what weight, if any, to give to the relevant passages. Secondly, a number of arguments put to us were not put by Mr Jones to the FTT. In particular, if Elbrook's case was that relevance was the touchstone of admissibility, or that *J D Wetherspoon* set out the correct approach (which we do not accept), it is not clear why those points were not put to the FTT. Thirdly, the submissions by Mr Jones as to cynical abuse and breach of duty by HMRC's solicitors were raised by Elbrook only two days before the FTT hearing. Given the seriousness of the allegations, and the lack of opportunity afforded to HMRC to respond to them, we consider that the FTT was justified in not addressing the allegations in its Decision. When we put the lateness issue to Mr Jones, his response was that HMRC had "brought it on themselves", but that is not a good reason for litigation by ambush.

18. Mr Jones rightly referred to the objective of dealing with cases fairly and justly in Rule 2 of the FTT Rules. However, the overriding objective requires the balancing of a number of (often competing) objectives, including dealing with cases in a proportionate way and avoiding delay. The FTT adopted the approach set out in [15] of the *Megantic* decision cited at [23] of the Decision. We consider that in doing so it applied the correct principles, and its decision was not plainly wrong. While the FTT referred to "strict necessity" in [24] of the Decision, it was not applying some different legal test; that was simply the language used to describe the result of its consideration.

19. The appeal on this point is therefore dismissed.

20. We nevertheless stress that it is incumbent on all parties, and their advisers, in MTIC cases to ensure that their witness statements contain only evidence which is relevant. In addition to the costs which might be imposed where parties fail to do so, there is an important interplay, as we note below, with the issue we consider under the second ground of appeal in this case, namely the extent to which clarity can be obtained in advance of the trial as to the witnesses who are required to attend for cross-examination.

Ground two: cross-examination of certain HMRC witnesses

The Decision

21. The FTT gave what have become known as "Fairford" directions, after the decision of the Upper Tribunal in *Revenue & Customs Commissioners v Fairford Group plc* [2014] UKUT 0329 (TCC).

22. By Direction 6, the Appellant was required, not later than 10 November 2017, to notify HMRC and the Tribunal:

> "(1) whether it accepts the transaction chains as set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases on which the Respondents have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;
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> (2) whether it accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud; and
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> (3) whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain, and if not why."

23. By Direction 7, the Appellant was required, not later than 10 November 2017, to notify HMRC as to:

> "(1) In respect of the witness statements served what, if any are the matters of fact in dispute;
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> (2) Which of the Respondents' witness it requires for cross examination; and
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> (3) The Appellant's time estimates for cross examination of the Respondents' witness."

24. After several extensions of time for compliance, the FTT ordered, on 16 February 2018, that unless the Appellant complied with Directions 6 and 7 by 5pm on 1 March 2018 the Appeal would be automatically struck out.

25. On 1 March 2018 the Appellant purported to comply with Directions 6 and 7. By an email of that date, the Appellant stated, in essence, that it did not accept any of the matters referred to in Direction 6 and, in response to Direction 7, stated:

> "1. The Appellant can only admit facts and matters within its own knowledge.

> 2. Insofar as the witness statements deal therewith, the Appellant disputes/denies that, as a matter of fact, it, whether by itself its servants or agents knew or ought to reasonably ought to have known that the goods supplied to it (referred to in the respondents' witness statements) had been bought/sold in connection with any tax fraud.
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> 3. So far as the served witness statements are concerned: (a) The Appellant is prepared to accept (cf admit) that the several documents referred to therein were prepared by the person(s) said to have prepared same, on the dates specified therein. The appellant does not admit that any facts or matters recorded therein are true and correct –same being outside the knowledge of the appellant. (b) None of the unattributed hearsay is admitted as to the truth of the facts asserted. (c) So far as attributed hearsay is concerned the appellant is prepared to accept that the maker of any such statement made it (in accordance with any written record thereof) but not that the maker was making a true and/or accurate statement of fact.
>
> 4. Subject to re-assessment once the respondents' witness statements have been redacted, the following witnesses are required for XX [there is then a list of all of HMRC's witnesses]
>
> 5. Subject to revision when the witness statements have been redacted the XX [cross-examination] time estimate is 2 –3 days."

26. HMRC took the view that the Appellant had failed to comply with Directions 6 and 7 and sought confirmation from the FTT that the Appeal was struck out.

27. The FTT concluded, in respect of Direction 6, that although not as full as HMRC expected, the Appellant had "just about" answered the questions and therefore complied with Direction 6.

28. As to Direction 7, the FTT concluded as follows (at [14] of the Decision):

> "Turning to direction 7, as Elbrook has not identified any matters of fact in dispute in HMRC's witness statements and stated that it requires all HMRC's witness for cross-examination which it estimates will take two to three days it has in my judgment, again just about, complied with direction 7. However, the absence of further detail, especially regarding which factual elements of HMRC witness statements are disputed does have a bearing on which of HMRC's should be directed to attend for cross-examination."

29. Having cited from *Fairford* and from the subsequent decision of Judge Berner sitting in the FTT in *C F Booth Limited v Revenue & Customs Commissioners* [2016] UKFTT 261 (TC), the FTT concluded as follows (at [17]):

> "Mr Jones criticised *Fairford* for not addressing the position where one party wishes to put the other to proof. However, as is clear from [40] in that decision, it is hard to see how the Upper Tribunal cannot have had such circumstances in mind when giving its case management guidance. Given the

> similarities with the argument advanced on behalf of Elbrook, I consider that it is appropriate to the apply the guidance given in *Fairford* in this case and, in directions issued at the same time, but separately from, this decision I have directed that witnesses whose evidence solely concerns the issues of whether there was a fraudulent tax loss and whether the appellant's transactions were connected to such fraudulent tax loss are not required to attend for cross-examination and that their witness statements shall stand as their evidence in chief."

Fairford Directions

30. Before turning to the arguments of the Appellant in this appeal, it is helpful to refer in more detail to the *Fairford* and *Booth* decisions.

31. The issue in *Fairford* was whether the FTT had power to strike out part of the taxpayer's case, and whether that power should in all the circumstances have been exercised.

32. Having concluded that the FTT does have power to strike out part of a case but that the FTT had not erred in refusing to strike out parts of the taxpayer's case, the tribunal went on to note that the case raised an important point of case management and proceeded to provide guidance to the FTT.

33. As we have explained, it is not uncommon for an appellant to advance no positive case on the first three issues which arise in an MTIC fraud case (which we will refer to as the "VAT Loss Issues"), but to put HMRC to proof on them. In *Fairford*, at an earlier stage in the proceedings, those advising the taxpayers had indicated that they might require half a day cross-examining each of the 14 HMRC witnesses on the VAT Loss Issues. The tribunal expressed concern both at this length of cross-examination by a taxpayer who professed to have no knowledge of the VAT Loss Issues and at the prospect of cross-examination being used for the purpose of "highlighting various matters in the evidence". Moreover, it was not satisfied that it was appropriate to list a hearing on the basis of such lengthy cross-examination only for it to be seriously curtailed at or shortly before the hearing when the taxpayer's representatives, having reviewed the evidence, decided that either no, or only a little, time was needed in cross-examination.

34. In those circumstances, taking into account the overriding objective, in particular dealing with cases in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resource of the parties, the Upper Tribunal in *Fairford* set out guidance which ought to be followed in MTIC fraud cases. In the first place, this consisted of directions largely in the form of Direction 6 given by the FTT in the present case. At [48] to [49] of its decision the tribunal continued as follows:

> "48. In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is No. An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in

> witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.
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> 49. In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at para 47 above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted."

35. The entirety of this part of the decision in *Fairford* was *obiter*, the tribunal having already concluded that the appeal should be dismissed on other grounds. Mr Jones contends that it was also probably *per incuriam* as no argument appears to have been addressed to the tribunal on the point. As Mr Watkinson correctly points out, however, one of the functions of the Upper Tribunal is to provide guidance on issues of practice of general application within the FTT. In *BPP Holdings Ltd v Revenue & Customs Commissioners* [2017] UKSC 55, the Supreme Court reiterated (referring to *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48, per Lord Carnwath at [41]) that it is an important function of the Upper Tribunal to develop guidance so as to achieve consistency in the FTT.

36. That is not to say, however, that this tribunal is bound to accept that the *Fairford* directions are correct. If it subsequently transpires that directions given by the Upper Tribunal operate unfairly or are unclear then it is open to this tribunal either to reject or to modify them.

37. The *Fairford* Directions have in fact been the subject of critical comment from Judge Berner, albeit sitting in the FTT, in *Booth*. At [10] to [16] of his judgment, Judge Berner made the following points:

> (1) The Upper Tribunal in *Fairford* cannot have intended to set a template for all cases or to commoditise MTIC appeals. Each such appeal must be considered on its own merits.
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> (2) The two aims discerned in the approach of the Upper Tribunal in *Fairford* were, first, that the appellant should set out whether it advances a positive case or merely puts HMRC to proof on relevant issues and, second, that if it makes no positive case, serves no evidence and does not

identify the areas of dispute in the evidence of HMRC's witnesses, then the appellant will not be entitled to cross-examine those witnesses.

(3) On the other hand, the Upper Tribunal recognised that cross-examination is not dependent on advancing a positive case, since there may be many reasons (such as internal inconsistencies, or inconsistencies with other evidence) why an appellant may wish to cross-examine a witness. It would be wrong to place obstacles in the way of an appellant wishing to test evidence in that way.

(4) It is important, therefore, that directions are not over-prescriptive so as to lead to an appellant being denied the opportunity to cross-examine those witnesses whose evidence is genuinely a matter of dispute. While the modern approach to case management was one of 'cards on the table', that did not mean that a party was required to disclose in advance its line of cross-examination: "It is enough … that the appellant identify the respects in which the relevant witness statements are disputed or, I would say, not accepted. There is no necessity for an appellant to go further than that."

38. Then, at [17], in a passage omitted from the citation of the case in the judgment of the FTT in this case, Judge Berner said:

> "There is a balance to be struck between enabling an appellant who has a legitimate purpose in cross-examining a witness to do so and avoiding the disproportionate attendance of witnesses whose evidence, with hindsight, was accepted and in respect of whom there can have been no legitimate reason for requiring their attendance. It is important, in my view, that the balance should not be set so as to risk the exclusion of any valid questioning of a witness. To do so would risk an injustice. The risk on the other side, that of an appellant acting unreasonably in requiring a witness to be presented for no meaningful cross-examination, can if necessary be dealt with, proportionately, by a costs order, which can be made either as a wasted costs order (as provided for by s 29(4) of the Tribunals, Courts and Enforcement Act 2007) or on the basis of unreasonable conduct, even in a case such as this, which is a Complex case in which CFBL has opted-out of the general costs-shifting regime. It follows that the balance must be tilted towards participation of an appellant, rather than against it."

The Appellant's arguments

39. Mr Jones contends that the FTT's decision is fundamentally flawed because it prevents him from cross-examining all of those witnesses called by HMRC who deal solely with the VAT Loss Issues. He points out that cross-examination may be divided into two broad categories: (1) where the appellant positively disputes the evidence of a witness and is entitled to put a positive case to the witness; and (2) where the appellant has no positive case to put to the witness but wishes to test the evidence of the witness, for example by pointing out internal inconsistencies or

inconsistencies between the evidence of that witness and other evidence. While he accepts that he would be unable to cross-examine on the first basis, he is fully entitled to do so on the second basis. He submits that the FTT's decision is contrary to the basic obligation reflected in the overriding objective to provide the appellant with a fair trial. He contends that the FTT's decision to preclude the Appellant from cross-examining the relevant HMRC's witnesses was wrong in law.

40. Mr Jones submits that the FTT erred in law in its application of the *Fairford* directions in this case, but also that the *Fairford* directions are themselves flawed and should be jettisoned.

41. As the Appellant's arguments were developed at the hearing of this appeal, it became apparent that the Appellant's interpretation of the phrase "matters of fact in dispute" as used in Direction 7(1) was that it related only to matters of fact in respect of which the Appellant had a positive case to put. In other words, a matter of fact was not "in dispute" if the Appellant merely did not accept that it was true and wished to test it by the second form of cross-examination referred to above. If, as Mr Jones contends, the approach advocated in *Fairford* entitles the FTT to preclude an appellant from cross-examining HMRC's witnesses unless the appellant advances a positive contrary case in respect of the facts asserted by that witness, then it would plainly be unfair. But we do not think that is the correct interpretation of the directions. We will return to this point below.

Discussion and decision on second ground of appeal

42. As noted above, in order for the appeal on the second ground to succeed, we would need to conclude that the FTT erred in the sense that it failed to apply the correct principles, took into account irrelevant matters or failed to take account of relevant matters, or reached a decision which was plainly wrong.

43. We have concluded that the FTT did err in this sense, for the following reasons.

44. The FTT's conclusion, at [14] of the Decision, rests on its finding that the Appellant had not identified any matters of fact in dispute in the relevant HMRC witness statements. That is not an accurate reflection of the answers provided by the Appellant.

45. We pass over paragraph 2 of the Appellant's response to Direction 7(1), which does not relate to the VAT Loss Issues, merely noting that the Appellant stated that it did dispute the allegation that it knew or ought reasonably to have known that the goods supplied to it had been bought or sold in connection with any tax fraud.

46. More importantly, in paragraph 3 of the Appellant's response to Direction 7(1), which related to the VAT Loss Issues, the Appellant did not admit any of the facts recorded in documents exhibited by HMRC's witnesses, nor any unattributed hearsay in those witnesses' statements, nor the truth of any statement included as attributed hearsay. In effect, the Appellant was saying that it did not accept any of the underlying matters of fact (whether introduced as hearsay or in documents) in

HMRC's witness statements. In light of that response, we consider that the FTT's conclusion that the Appellant had not identified any matters of fact in dispute was plainly wrong. Moreover, that error infected its decision not to permit cross-examination.

47. In circumstances where it was clear that the Appellant *did not accept* any of the matters of fact contained in HMRC's witness statements dealing with the VAT Loss Issues, we consider that it was plainly wrong to apply the guidance in *Fairford* to preclude the Appellant from cross-examining the relevant witnesses. According to [49] of the judgment in *Fairford* the circumstances in which the FTT might refuse to permit an appellant to cross-examine HMRC's witnesses in respect of the VAT Loss Issues are where the appellant (1) raises no positive case, (2) serves no evidence challenging the relevant statements and (3) does not identify "the respects in which" the relevant statements are disputed. In this case, the Appellant *had* identified the respects in which the relevant statements were disputed, namely (in effect) in *all* respects.

48. Before addressing the disposition of this appeal, we will first address the Appellant's broader attack on the FTT's decision on the basis that the relevant *Fairford* directions are wrong in law.

Are Fairford Directions wrong in principle?

49. The first point to make is that, as we have noted above, Mr Jones' interpretation of Direction 7(1) is incorrect. Properly understood, the reference to matters "in dispute" must sensibly be to matters which are not accepted, in the sense that the appellant wishes to test the evidence by cross-examination albeit that it does not have a positive case, or rebuttal evidence, to put to the witness. There is only a need to consider making the relevant *Fairford* directions in the first place where an appellant in an MTIC case does *not* advance a positive case but merely puts HMRC to proof in relation to the VAT Loss Issues. Those were the circumstances being addressed in *Fairford* itself. It would therefore make no sense if the FTT was entitled to preclude an Appellant from cross-examining HMRC witnesses merely because no *positive* case was to be put to them.

50. Moreover, of the three matters of which the FTT needs to be satisfied (as identified in [49] of *Fairford*) the other two are that the appellant makes no positive case and serves no evidence challenging the evidence of the relevant witness. Accordingly, if the third matter (identifying matters in dispute) was limited to identifying matters where a positive case was put (Mr Jones' interpretation), then this would be an unnecessary and redundant repetition of the other two.

51. Even if (as we find) "in dispute" means in this context "not accepted", Mr Jones maintains that it is inappropriate and unjustified as a matter of principle to impose a direction on an appellant, at a stage prior to the full hearing, requiring it to identify which matters of fact contained in the statements of HMRC's witnesses who address only the VAT Loss Issues are not accepted (and upon which the appellant therefore

wishes to cross-examine the relevant witnesses). We do not accept this broad proposition.

52. The principal objective of the directions is to enable the full hearing to be listed for an appropriate length of time given the number and identity of the witnesses that need to be called to give evidence. If there are, say, ten witnesses called by HMRC dealing only with the VAT Loss Issues and the appellant wishes to leave open until the final hearing the possibility of cross-examining each of them, then it is necessary to list the hearing both (1) for the length of time necessary to allow for that cross-examination and (2) on dates (at least potentially) that take into account their availability. If the appellant decides at or just before the hearing that it is unnecessary to cross-examine any of them, or only some of them, or on only very limited parts of their statements, then this risks wasting the time of the parties and the tribunal, leading to the possibility of void days in the hearing if witnesses scheduled to be heard later, under the original timetable, are unavailable on any earlier date.

53. We consider that this is a legitimate objective which justifies a requirement that, in appropriate cases, the appellant is required to identify at a stage earlier than the final hearing the particular matters in the relevant statements which it does not accept. Mr Jones submits that such a direction places an onerous burden on an appellant because it is time-consuming and because it may not be until the full hearing that its legal representatives will have sufficiently prepared the case to be able to identify those parts of the evidence which are not accepted. He also submits that it is unfair to require an appellant to have to disclose its lines of cross-examination in advance.

54. As to the first of these points, while accepting that it is not possible to legislate for every case, since (as Judge Berner pointed out in *Booth*) each case must depend on its own merits, we do not accept that the task will necessarily place an onerous burden on the appellant. It is important to note that the *Fairford* directions are given only after all the witness evidence has been served. This is a relatively late stage in the process, as there will normally be no further substantive steps until the full hearing itself. In the present case, the appellant has already been through each of the statements, line-by-line, to identify those parts which it objects to on grounds of admissibility (the first ground of appeal). Doing the same in order to identify those parts which are not accepted is unlikely to be any more onerous.

55. As to the second point, we agree that an appellant should not be required to disclose in advance its lines of cross-examination, but we do not consider that an appellant would be doing so, merely by identifying those parts of the witness statements which are not accepted. The appellant must in responding to this part of a *Fairford* direction say what he objects to; he need not say why.

56. We do not accept Mr Jones' contention that such a direction abrogates the right to a fair trial embodied in the overriding objective. In fact, the overriding objective does not refer to a right to a fair trial, but to the objective of dealing with cases "fairly and justly". The distinction is not semantic, because the five specific objectives listed as being included within this general objective are, self-evidently, not always entirely compatible. In the present case, the objectives of dealing with cases proportionately

and avoiding delay support a formulation such as the *Fairford* directions as an aspect of case management.

57. We conclude that *Fairford* directions are justified in principle as a tool of efficient case management.

Guidance as to Fairford Directions

58. We nevertheless consider that the guidance in [49] of *Fairford*, relating to the circumstances in which an appellant is to be precluded from cross-examining witnesses, requires some clarification and modification. We therefore take this opportunity to provide further guidance to the FTT.

59. First, for the reasons set out above, we consider that it is open to the FTT to give directions, prior to the final hearing, aimed at identifying and narrowing the scope of cross-examination required at the final hearing. Whether it is appropriate and if so in what form must be judged in all the circumstances of a particular MTIC trial, including, for example, the number and scope of witness statements to which the directions would apply and the likelihood that compliance with the directions would have a material impact on the efficiency of the proceedings.

60. Second, in relation to HMRC witnesses dealing only with VAT Loss Issues, where the appellant does not advance a positive case and does not serve evidence challenging the evidence of the relevant witnesses, the form of direction that may be given in appropriate cases is one requiring the appellant to identify *the passages* in the relevant witness statements *which it does not accept*.

61. We consider that this formulation is preferable to the formulation suggested in *Fairford* at [49] for the following reasons. First, the requirement to identify passages which the appellant "does not accept" avoids the potential ambiguity in the word "disputes". Since the direction only applies where the appellant does not assert a positive case, it is intended to ensure that the appellant identifies those passages upon which it proposes to cross-examine the witness *without* putting a positive case to the witness. Second, the requirement suggested in *Fairford* to identify "the respects in which" evidence is not accepted might be thought to require the appellant to do more than simply identify the matters which are not accepted, for example by explaining *why* they were not accepted. That would risk requiring the appellant to reveal something of its cross-examination strategy. This problem is avoided by requiring the appellant to identify the "passages" in the relevant witness statements which it does not accept. In this respect we endorse the approach of Judge Berner in [16] of *Booth* and emphasise that it is unnecessary for an appellant to do more than identify the relevant passages which are not accepted. This formulation also avoids an appellant (as in this case) purporting to comply fully with the direction merely by identifying thematic reasons (such as by reference to unattributed hearsay, or the truth of statements in exhibited documents) for not accepting the evidence, which would not assist in achieving the objective of the directions.

62. There is, in this respect, an interplay with the first ground of appeal in this case. Generally speaking, witness statements would be confined to matters of fact, since witnesses are called to give evidence of fact. However, a witness statement might contain a statement of opinion (inadmissible in a court, but admissible in the FTT) or comments or submissions. An appellant may well identify such passages as matters that are not accepted. This raises the possibility of witnesses being called to be cross-examined solely on passages in their evidence which are either irrelevant (consisting of comments or submissions) or of marginal relevance (for example where the opinion evidence would not be admissible in a court but might be of some assistance to the tribunal). The solution to that problem lies in the hands of the party calling the witness, since it could cut down the allotted time for cross-examination or even avoid the need to call the witness altogether by choosing to excise such passages from the statement. This emphasises the importance of ensuring that witness statements contain only matters that are strictly relevant.

63. Third, it is only where an appellant identifies that there are no passages in a relevant witness statement that it does not accept that it would be appropriate for the witness not to be called to give evidence. If an appellant complies with the direction by identifying *every* passage in a statement, or even every passage in *every* statement, then that does not provide a reason to preclude the appellant from cross-examining the witness. If, in such a case, it turns out at the full hearing that either no (or no proper) cross-examination is undertaken in respect of the witnesses, then it may well be that the costs sanctions referred to by Judge Berner in [17] of *Booth* would be appropriate. However, again in agreement with Judge Berner in that paragraph, in balancing the risk of an appellant being unable to cross-examine where it genuinely does not accept evidence of a witness and the risk of the tribunal's, the witnesses' and the parties' time being wasted by unnecessarily calling witnesses, the balance should be tilted towards the participation of the appellant, rather than against it.

Disposition

64. Returning to the present case, there is no appeal against the FTT's conclusion that Direction 7(1) was complied with. It was, however, accepted by Mr Jones that if the *Fairford* directions are properly interpreted as requiring the Appellant to identify those parts of HMRC's witness statements which it does not accept, in the sense that they contain evidence which the Appellant wishes to test in cross-examination, then the blanket response provided by the Appellant was inadequate compliance. That is because Mr Jones fairly accepted that it was not the intention of the appellant to cross-examine those HMRC witnesses on every aspect of their witness statements. The Appellant's response was guided, as we have noted above, by its interpretation of Direction 7(1) as requiring it to identify the matters of fact in respect of which it wished to advance a positive case.

65. Having allowed the appeal on the basis that the FTT was wrong to deny the Appellant the opportunity to cross-examine HMRC's witnesses dealing with VAT Loss Issues on matters in their statements that were not accepted, we set aside that decision. We have concluded that we should then exercise our power to remake the decision. Taking into account that it is now apparent that the Appellant has not, on its

own admission, complied with Direction 7(1), we consider that the appropriate decision is to remake that direction in light of our own guidance above, as follows:

> (1) Not later than 5 pm on the date falling 42 days from the date of the release of this decision to the parties, the Appellant shall notify the Respondents of the passages which it does not accept in the statements of those HMRC witnesses who deal only with the issues of the existence of a fraudulent tax loss and connection to transactions entered into by the Appellant.
>
> (2) In the case of any such witness statement in respect of which the Appellant does not identify any passages which it does not accept, that statement shall stand as the evidence of the witness and the witness shall not be required to attend the hearing to be cross-examined on that statement.

66. These directions are to take effect as directions of the FTT, so that any further applications in respect of them shall be made to the FTT, that being the appropriate forum for any further case management in preparation for the substantive appeal.

MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

RELEASE DATE: 12 July 2019