[2019] UKUT 47 (TCC)

Appeal number: UT/2018/0038

PROCEDURE – whether parties should be permitted to pursue new arguments on appeal in respect of an issue where HMRC conceded FTT's conclusions gave rise to an error of law - no - neither party permitted to pursue new arguments - effect of that conclusion on the determination of the relevant ground of appeal in the Upper Tribunal

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EYNSHAM CRICKET CLUB

Appellant

- and -

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

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 22 January 2019

John Brinsmead-Stockham, Counsel, instructed by Hogan Lovells International LLP, Solicitors, for the Appellant

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

DECISION

Introduction

1. This is a case management decision relating to a tax appeal to the Upper Tribunal concerning the question as to whether either or both parties should be permitted to argue a point on appeal which it is accepted was not taken by either party before the FTT.

2. The position is complicated by the fact that HMRC, the Respondents to this appeal, concedes that the basis on which the First-tier Tribunal ("FTT") decided the issue in question was wrong in law and that is common ground. HMRC therefore accept that the decision of the FTT on the issue in question cannot stand on the basis of the reasoning adopted by the FTT. It was also common ground between the parties that the FTT decided the point in question on a basis which was entirely unprompted and of its own volition.

3. However, in their Response to the Appellant's Grounds of Appeal to the Upper Tribunal, HMRC sought to introduce a new argument on the basis of which they contend that the FTT's conclusion on the issue can stand and accordingly the Appellant's appeal on the issue can be dismissed.

4. Eynsham Cricket Club, the Appellant in this appeal ("ECC"), contends that it is not open to HMRC to run the new argument. It contends that the FTT's conclusion on the point, which both parties now accept was wrong, was the sole basis on which the FTT decided the issue in question against ECC. Therefore, since the FTT found in favour of ECC on all other points relevant to the issue, there is no material part of the FTT's decision on the issue left to uphold in favour of HMRC and therefore the Upper Tribunal should now take the necessary procedural steps to determine the issue in the substantive appeal before the Upper Tribunal in favour of ECC.

Background

5. It is necessary to set out in some detail the issues in this appeal that were before the FTT and how they were argued and subsequently determined.

6. The subject matter of the appeal before the FTT was whether the construction of a cricket pavilion by ECC, a cricket club constituted as an unincorporated association, was zero rated for VAT purposes. ECC contended that the services supplied to it in connection with the construction were zero rated by virtue of Schedule 8, Group 5, Item 2 of the Value Added Tax Act 1994 ("VATA"). That provision provides for zero rating to apply to the supply in the course of the construction of a building intended for use only for a "relevant charitable purpose." In order to obtain the benefit of that provision, the requirements of the definition of "relevant charitable purpose" contained in Note 6 to Group 5 of Schedule 8 VATA had to be met, which meant that it had to be found that the pavilion was intended to be used "by a charity" either

"otherwise than in the course or furtherance of a business" or "as a village hall or similarly in providing social or recreational facilities for a local community."

7. HMRC decided that the conditions for zero rating were not met and that the services provided to the Appellant in connection with the construction of the pavilion were standard rated for VAT purposes.

8. ECC appealed to the FTT. There were four issues before the FTT as follows:

Issue 1: At the relevant time, was ECC a "charity" for the purposes of VATA Schedule 8, Group 5, Note 6, which applies the definition contained in the Finance Act 2010 ("FA 2010") Schedule 6?

This issue was broken down into the following three sub-issues:

Issue 1(a): was ECC "established for charitable purposes only" within the terms of FA 2010 Schedule 6 paragraph 1(1)(a)?

Issue 1(b): did s 6 of the Charities Act 2011 ("CA 2011"), which provides that a community amateur sports club established for charitable purposes cannot be a charity under the general law of charities, prevent ECC from being "established for charitable purposes only" under FA 2010 Schedule 6 paragraph 1(1)(a)? and

Issue 1(c): did ECC satisfy the "registration condition" in FA 2010 Schedule 6 paragraph 3, that is did it comply with "any requirement to be registered" under CA 2011?

Issue 2: Was the new pavilion intended for use solely by ECC "otherwise than in the course or furtherance of a business" for the purposes of VATA Schedule 8, Group 5, Note 6(a)?

Issue 3: Was the new pavilion intended for use solely by ECC as "a village hall or similarly in providing social or recreational facilities for a local community" for the purposes of VATA 1994 Schedule 8, Group 5, Note 6(b)?

Issue 4: If ECC was not entitled to treat the services supplied to it in connection with the construction of the new pavilion as zero-rated for UK VAT purposes, then would this constitute a breach of the EU law principles of: (1) equal treatment; and/or (2) fiscal neutrality?

9. The FTT (Judge Richards and Ms Susan Lousada) in a decision originally released on 3 August 2017 but subsequently revised on review and released on 29 December 2017, dismissed ECC's appeal against HMRC's decision.

10. The FTT determined Issues 1 (b), 1 (c), and 3 in favour of ECC. However, HMRC succeeded on Issues 1(a), 2 and 4. I shall return to this point in more detail later, but I mention now that the basis of the FTT's finding that ECC was not "established for charitable purposes only" was that although it was established for a

charitable purpose, namely "the advancement of amateur sport" within the terms of s 3 (1) (g) CA 2011 it was also established for a subsidiary purpose of providing social facilities to the residents of Eynsham. The FTT found that such a subsidiary purpose was not a charitable purpose within s 3 CA 2011 and consequently ECC was not "established for charitable purposes only" for the purposes of Schedule 6 FA 2010.

11. ECC's success before the FTT in respect of Issues 1(b), 1(c), and 3 meant that if ECC had also succeeded in respect of Issue 1(a) then ECC's appeal would have been allowed, in full, on the basis of the VAT analysis as a matter of UK law (i.e. without ECC having to rely on the EU law arguments in Issue 4).

12. ECC applied to the FTT for both a review of, and permission to appeal against, the FTT's original decision. ECC sought permission in respect of Issue 1 (a) and Issue 4. ECC observed that the "subsidiary purpose" point had not been relied on by either party and the FTT had not heard any submissions on it. ECC said, however, that even if, which was denied, the FTT was correct as regards its findings of a subsidiary purpose then it was nevertheless incorrect to conclude that ECC was not "established for charitable purposes only" because the subsidiary purpose was itself a charitable purpose within the terms of ss 3 (1) (m) and 5 CA 2011. ECC therefore contended that the FTT should be satisfied that it had erred in its conclusion that "providing social facilities to the residents of Eynsham" was not a charitable purpose and by not affording ECC an opportunity to make submissions in relation to that conclusion. It therefore requested the FTT to review its decision in relation to Issue 1 (a) and to hear full submissions from both parties on the point.

13. The FTT decided to review its decision on the ground that in concluding that ECC was not established for charitable purposes without considering the provisions referred to at [12] above, it made an error of law. After considering written submissions from both parties on the issue, the FTT issued its revised decision which additionally dealt with the issue. The FTT concluded that ECC's subsidiary purpose was not charitable, thereby confirming its original decision that the existence of its separate, subsidiary social purpose that was not charitable meant that ECC was not "established for charitable purposes only" at the relevant times. The FTT did not deal specifically with the procedural unfairness point.

14. It is helpful at this point to go back to the beginning of the FTT proceedings so as to identify from the pleadings and skeleton arguments of the parties how the case was argued before the FTT and then to see how the FTT dealt with those arguments in the revised decision.

15. The basis of HMRC's decision, which formed the subject matter of the appeal to the FTT, was that the pavilion did not qualify as being used solely for a "relevant charitable purpose" as ECC was not a charity. HMRC's reasoning was that CA 2011 provides that an organisation that is registered with HMRC as a community amateur sports club "is not set up for charitable purposes" and accordingly cannot be a charity.

16. In response to this decision, ECC focused its grounds of appeal on the question as to whether it had a charitable purpose, comparing itself to a neighbouring club

which was a registered charity. ECC contended that both clubs had the same charitable purpose, namely to provide and promote the advancement of amateur sport in their communities. That is apparent from clause 2 of ECC's constitution, which was before the FTT and which described its aims and objectives to be the promotion of "participation within the local community in healthy recreation by the provision of facilities for the playing of cricket". However, clause 2 of ECC's constitution also set out the following as aims and objectives:

- To promote the club within the local community and within Cricket
- To manage the grounds and facilities occupied by or used by The Club
- To ensure a duty of care to all members of the club
- To provide its facilities in a way that is fair to everyone and to ensure that all present and future members receive fair and equal treatment.

17. HMRC expressed its case in its Statement of Case as being that ECC was not a charity for the purposes of VATA and further and in any event the pavilion was not being used by a charity "otherwise than in the course of furtherance of business" and/or the pavilion is not being used by a charity "as a village hall or similarly in providing social or recreational facilities for a local community".

18. HMRC gave the following reasons as to why it considered ECC was not a charity:

(1) it did not meet the registration condition;

(2) since it was registered as a community amateur sports club it was precluded from being a charity in accordance with s 6 CA 2011; and

(3) it failed to fulfil the "charitable purpose" requirement under paragraph 1 (1) (a) of schedule 6 FA 2010 because it "was established to provide facilities to its members and it cannot be considered to benefit the public in general, and therefore the public benefit test is not met."

19. In its skeleton argument, ECC argued that it was established solely for a purpose that falls within s 3 (1) (g) CA 2011, namely the advancement of amateur sport. It observed that HMRC had not sought to argue that ECC was established for any other purpose. It then argued that ECC satisfied the public benefit requirement of s 4 CA 2011 because, among other things, the advancement of amateur sport, such as cricket, is a public good, rejecting HMRCs contention in its Statement of Case that the public benefit test could not be met because it was established to provide facilities to its members.

20. In its skeleton argument, HMRC dealt with the question as to whether ECC was "established for charitable purposes only" by stating that ECC would need to satisfy the FTT that its only purpose could properly be analysed in terms of the advancement of amateur sport in circumstances where ECC's membership included not only playing members but non-playing members and would also need to satisfy the

Tribunal that it benefited the public in general in circumstances where membership is not free.

21. Thus, it can be seen that the battleground on Issue 1 (a) was limited to whether ECC's stated purpose of providing and promoting the advancement of amateur sport was insufficient to satisfy the "established for charitable purposes" requirement because (i) ECC's membership included non-playing members; and (ii) it could not meet the public benefit test because it charged an annual membership fee.

22. In its revised decision, the FTT rejected the arguments relied on by HMRC, as summarised at [18] and [20] above. It accepted ECC's arguments that ECC was established for a charitable purpose, namely the advancement of amateur sport within s 3 (1) (g) CA 2011 and that this charitable purpose satisfied the public benefit requirement in s 4 CA 2011. At [74] of the revised decision, the FTT relied on clause 2 of ECC's constitution for its conclusion that ECC was established for purposes that "included the advancement of amateur sport."

23. However, as we have seen, the FTT went on to say that ECC was also established for a subsidiary purpose of providing social facilities to the residents of Eynsham. It held that the subsidiary purpose was not a charitable purpose within the relevant provisions of CA 2011 and consequently ECC was not "established for charitable purposes only" within the terms of paragraph 1(1)(a) of Schedule 6 to FA 2010.

24. The reasoning of the FTT for arriving at that finding was that the purposes for which ECC was established "were not fixed once and for all when the Club was formed but rather can evolve over time by reference to changing circumstances" and that the "purposes for which the Club intended to use the new pavilion, which would be by far its most significant asset, explain the purposes for which it was established at the time the pavilion was being constructed": see [77] and [80] of the revised decision.

Grounds of Appeal and HMRC's Response

25. Following the release of the FTT's revised decision, ECC applied to the FTT for permission to appeal against that decision in respect of Issue 1 (a) and Issue 4. ECC maintained its position that the procedural unfairness involved in not affording ECC an opportunity to make submissions or lead evidence in relation to the "subsidiary purpose" point constituted, without more, an error of law in the revised decision but in any event the FTT had made errors of law in concluding that ECC was established for the subsidiary purpose of providing social facilities at the time that the new pavilion was being constructed. ECC contended that the correct position was that at all relevant times ECC was established only for the charitable purpose of the advancement of amateur sport within the terms of FA 2010 Schedule 6 paragraph 1 (1) (a).

26. The FTT refused permission to appeal. ECC renewed its application before the Upper Tribunal and expanded on its ground of appeal on Issue 1(a). Among other points, it said:

> "The FTT made the following errors of law in concluding that ECC was "established" for the subsidiary purpose at the time the new pavilion was being constructed.
>
> (1) The approach of the FTT to determining the purposes for which ECC was "established" was wrong in law. In particular, the FTT: (a) held that the purposes for which ECC was "established" could "evolve over time by reference to changing circumstances", and (b) arrived at the conclusion that ECC was "established" for the subsidiary purpose entirely on the basis of the intended and actual use of the new pavilion, and without reference to the constitution of ECC.
>
> Such an approach is directly contrary to binding authority, which holds that:
>
> (i)whether or not an entity is "established for charitable purposes only" is determined by the correct construction of the constitution of that entity; and
>
> (ii)the subsequent activities of the entity are generally irrelevant to that question.
>
> …
>
> In this case, the unchallenged evidence of Ian Miller was that to his knowledge "the objects of the Club have not changed since its incorporation [in 1974]". Accordingly, the approach of the FTT in respect of this issue was clearly wrong in law, as was the FTT's conclusion that the purposes for which ECC was "established" changed solely by reason of the intended and actual use of the new pavilion.
>
> …"

27. I will refer to this point henceforth as the "Establishment Point".

28. ECC also maintained that the FTT erred in law in holding that the subsidiary purpose was not a charitable purpose under ss 3(1)(m) and 5 CA 2011.

29. ECC also observed that the FTT arrived at its conclusions without considering any case law on the point, which was attributable to the fact that the point was not argued by either party before the FTT.

30. On 23 April 2018, I granted permission on the papers to appeal to the Upper Tribunal in respect of Issue 1(a) and Issue 4.[1] ECC's appeal against the FTT's

[1] ECC did not seek permission to appeal to the UT in respect of Issue 2. However, ECC reserved the right to seek to rely upon that issue in future if there are further developments in the case law of the Court of Justice of the European Union, or the UK Supreme Court or Court of Appeal, in respect of that issue.

decision on Issue 4 is therefore a live issue before the Upper Tribunal and regardless of the outcome of this case management decision will be considered on the substantive appeal.

31. On 19 June 2018, HMRC filed a response (the "Respondents' Notice") to ECC's grounds of appeal in accordance with Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"). The filing of a response is not mandatory but Rule 24 (3) provides that any response must state the grounds on which the respondent relies, including any grounds on which it was unsuccessful in the proceedings which are the subject of the appeal, but on which it intends to rely in the appeal. That is a clear indication that it is open to a respondent to argue a point on which it lost in the FTT, provided it gives notice of its intention to do so in its response. HMRC clearly did so in this case, arguing that the FTT erred in law in its conclusions on Issues 1(b) and (c) and 3. However, in the Respondents' Notice HMRC erroneously described this process as a "cross appeal". This terminology is wrong because HMRC were overall the successful party on the appeal before the FTT and therefore was not in a position to appeal against it. As is well established, an appeal to the Upper Tribunal is an appeal against the decision of the FTT, in this case the decision to dismiss ECC's appeal, not an appeal against the reasoning which underlies that decision. Had ECC not appealed, HMRC would have had no interest in appealing the FTT's decision and could not have done so. Therefore, HMRC's so-called "cross appeal" in relation to Issues 1(b), (c) and 3 is simply an argument that the FTT should also have reached the decision that it did for additional reasons.

32. In addition, HMRC accepted ECC's arguments that Issue 1 (a) was wrongly decided by the FTT.

33. In the Respondents' Notice HMRC "accept that the FTT erred in its interpretation of the meaning of 'established'" and "agree with [ECC] that the FTT erred in conflating the events surrounding the construction of the pavilion with the purpose for which [ECC] was established". HMRC go on to accept, in full, the criticisms of the FTT's finding that ECC was "established" for the subsidiary purpose, that are set out in ECC's UT grounds of appeal, as set out at [26] above.

34. HMRC also stated that "the FTT did not need to embark on the exercise of determining a "subsidiary purpose" at the time of the construction of the pavilion…this was an irrelevant exercise and an agreed error of law". As a result, HMRC confirmed that the Upper Tribunal "need not determine any of [ECC's] complaints about the "subsidiary purpose" aspect of the FTT's decision since any finding predicated on the "subsidiary purpose" finding is also vitiated by that error of law." It is clear from these statements that HMRC have accepted ECC's "subsidiary purpose" ground of appeal.

35. HMRC still, however, contest ECC's appeal on Issue 1(a). They do not seek to rely upon either of the arguments that they relied on in that context before the FTT (as summarised at [18] and [20] above). Instead, they seek to rely on a new argument, which was not relied on before the FTT based on the construction of ECC's constitution. The point can be summarised as follows:

(1) The FTT's first task was to ascertain what, on a true construction of its constitution, ECC's objects were. In carrying out that task it was not generally relevant to consider evidence about the actual activities of ECC;

(2) The FTT's second task was to determine whether those objects were exclusively charitable and in doing so the FTT could, in the case of ambiguity, have examined ECC's activities;

(3) The terms of ECC's constitution, correctly construed, are drafted too broadly for ECC to be "established for charitable purposes only". In particular, they were not drafted with any charitable status in mind and they do not exclude non-charitable purposes because aside from the objective of providing facilities for the playing of cricket, as mentioned at [16] above, they have other objectives such as promoting the club within the local community and within cricket and managing the grounds and facilities occupied or used by the club which are not solely charitable. Neither do the terms of the constitution restrict the application of ECC's funds to exclusively charitable purposes.

Issues to be determined

36. ECC requests that the Upper Tribunal should take the following actions in relation to this appeal at this stage in the proceedings:

(1) Determine that HMRC are not entitled to rely on its new argument as regards Issue 1 (a) summarised at [35] above (" the New Argument") before the Upper Tribunal on the basis that it is an entirely new argument that was not before the FTT, and if HMRC are allowed to run this argument before the Upper Tribunal, then it would cause ECC irremediable prejudice;

(2) Give procedural effect to HMRC's concession by either of the following two courses of action:

(i) allowing ECC's appeal and then taking the following procedural steps:

(a) set aside the FTT's revised decision and remit the matter back to the FTT with directions that ECC's appeal be allowed by the FTT on the basis that ECC succeeded on Issue 1(a);

(b) sitting as a judge of the FTT, allow ECC's appeal at first instance on the basis set out in (a); and

(c) sitting as a judge of the FTT allow HMRC permission to appeal against the new FTT decision on the basis of HMRC's arguments in relation to Issues 1 (b), (c) and 3.

(ii) allowing ECC's appeal on Issue 1(a), by determining that aspect of ECC's appeal to the UT as a preliminary issue.

37. ECC had also originally sought a direction that HMRC give further and better particulars of their argument on Issue 3. HMRC clarified their position at the hearing by confirming that their challenge on Issue 3 is made solely on the basis elaborated by the House of Lords in *Edwards v Bairstow* [1956] AC 14. Following that clarification ECC accepted that no further direction is required in respect of Issue 3.

38. HMRC contend that they should be permitted to run the New Argument before the Upper Tribunal on the following basis:

(1) ECC did not assert in its notice of appeal to the FTT that it was established for charitable purposes only by reference to its constitution and that as a matter of law whether it was so established was to be determined by the correct construction of its constitution, with its subsequent activities being generally irrelevant (the "Establishment Point"). As a consequence, HMRC did not address the Establishment Point in its Statement of Case but maintained their case that ECC was not a charity;

(2) The Establishment Point was not made by ECC before the FTT;

(3) ECC's first ground of appeal to the Upper Tribunal on Issue 1(a) is that the FTT erred in law by reference to the Establishment Point. It follows that ECC seeks to take a new point on appeal, and for the reasons that ECC resists HMRC running the New Argument, ECC should not be permitted to pursue this ground of appeal: it is hoisted by its own petard; and

(4) ECC is now arguing that the FTT was wrong in principle in how it approached the issue of "establishment", claiming that this should have been done almost exclusively by reference to construction of its constitution and then seeks to prevent HMRC from arguing what that construction should have been which is unjust and unfair. If ECC is permitted to pursue its ground of appeal on the Establishment Point, it is only right that HMRC are permitted to respond to it by way of the New Argument because that argument arises only because ECC seeks to take a new point on appeal.

39. HMRC submit that if the Upper Tribunal is against them on these issues, it should simply allow the appeal to progress with HMRC not permitted to run the New Argument.

Relevant legal principles

40. It is well-established in the courts that normally a party will not be allowed to raise a new point on appeal. The classic statement of those principles was made by May LJ in *Jones v MBNA International Bank* [2000] EWCA Civ 514, at [52] as follows:

> "Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may

> choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed."

41. An exception to the general principle may be made where the new point is a pure point of law. Even in those circumstances, permission will not be given where there is any possibility of an injustice occurring. This principle was stated by Rix LJ in *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794, at [81], in the following terms:

> "It is a long-standing and fundamental principle of this court that a new point of law which was not presented to the court of trial may be raised on appeal, but normally only where there is no possibility of any injustice occurring by reason of the fact that, if it had been raised at trial, it might have affected the conduct and in particular the evidence or its evaluation in those proceedings…"

42. Mr Watkinson submitted that in public law proceedings the principle established by the cases quoted above is more flexible. He relies on the decision of the Upper Tribunal (Administrative Appeals Chamber) in *Information Commissioner v Home Office* [2011] UKUT 17 (AAC) where the Tribunal said at [67] that it did not find it helpful to consider the approach set out in the courts for three reasons.

43. First, in the tribunals structure, the decision of the First-tier Tribunal is the first judicial proceeding: see [68] of the decision.

44. Second, the Tribunal said this at [69]:

> "…. in my experience the practice of the Court of Appeal is more flexible than such statements suggest, at least in public law proceedings. In *Campbell v South Northamptonshire District Council v Campbell* [2004] 3All ER 387, the Court allowed the appellant to raise a new human rights argument without explaining why. In contrast, in *Secretary of State for Work and Pensions v Hughes (a Minor)* [2004] EWCA Civ 14, the Court refused to consider the merits of an appeal for which the

> Commissioner had given permission on the ground that the issue had not been raised before him. These cases cannot be reconciled solely by reference to the factors identified by May LJ. Since I wrote this passage, the Court of Appeal has delivered judgment in *Miskovic and Blazej v Secretary of State for Work and Pensions* [2011] EWCA Civ 16, in which it has discussed the approach in public law cases in more flexible terms than Jones."

45. Third, the Tribunal said this at [70]:

> "…. The authorities relate to the courts, not to tribunals, which may be less formalistic. The practice varies between tribunals. The Social Security and Child Support Commissioners were always open to new issues being raised, especially in the interests of claimants, and acted inquisitorially to raise issues themselves. The Administrative Appeals Chamber of the Upper Tribunal follows that approach in Social Security and child support cases. In contrast, the Employment Appeal Tribunal is less open to new issues: *Kumchyk v Derby City Council* [1978] ICR 1116. The approach taken in a particular tribunal must depend on the terms of the legislation and on the nature of the issues, the parties and their representation."

46. By way of contrast in this chamber of the Upper Tribunal, the approach laid down by the courts has been followed.

47. In *Tanjoukian v HMRC* [2013] STC 825 Henderson J at [24] quoted with approval the statement of Rix LJ in *Lowe v W Machell Joinery Ltd* quoted above. In that case, he declined to allow a new point of law to be raised because if the argument had been raised below, it would almost certainly have affected the conduct of the case and the evidence which the parties would have adduced. He said this at [58]:

> "There is a strong public interest in finality in litigation of all kinds, and one facet of this is that parties are not normally permitted to raise on appeal arguments which they could perfectly well have run below, but for whatever reason failed to do so. Where the new point is a pure question of law, and where its admission on appeal would not occasion any injustice of the type referred to by Rix LJ in *Lowe v W Machell Joinery Ltd* at [81], the interests of justice will normally favour the grant of permission to argue the point. But the position is very different where the conduct of the trial below either would, or might, have been significantly different if the new point had been taken. In those circumstances, the balance will nearly always come down the other way and permission to argue the new point will be refused."

48. I am of course not bound by what was said by the Upper Tribunal in the *Information Commissioner* case referred to above and in the light of what was said by Henderson J in *Tanjoukian* I have good reason to follow his approach and consequently the approach dictated by the courts. That is particularly so in a case such as this, where the parties are both well represented and there was no case for the FTT to have adopted an inquisitorial role of the type which is common in social entitlement cases.

49. Mr Watkinson also submitted that, where, as in this case the FTT has been deprived by the parties before it of the applicable law because neither party quoted the relevant authorities, the "new ground" point is not a good one. He relies on *ICS Car*

Srl v Secretary of State for the Home Department [2016] EWCA Civ 394, a case involving the imposition of civil penalties on a carrier who was found to be transporting illegal immigrants and where neither party drew the relevant regulations to the attention of the Judge. In those circumstances, the Court of Appeal decided that the Court ought to proceed on the basis of the law as it is and not as it was wrongly supposed to be: see [36] of the judgment. However, in so proceeding the Court of Appeal referred to the fact that this decision did not affect the evidence that was relied on, did not form the basis of an unfavourable judgment and did not require any further evidence: see [35] of the judgment. It is therefore clear to me that even in circumstances where the relevant law was not brought to the attention of the judge, the question as to whether the point might require further evidence to be properly argued is still very much relevant.

50. The Court of Appeal has also made it clear that a party who contends that he might wish to call further evidence in consequence of fresh grounds being raised cannot be expected to be very specific about the nature of that evidence: see *Swarovski-Optik KG v Leica Camera AG* [2014] EWCA Civ 637 at [35].

51. Finally, in this regard the Court of Appeal held in *Crane v Sky In-Home Limited* [2008] EWCA Civ 978, per Arden LJ at [21] that in this context:

> "If there is any area of doubt, the benefit of it must be given to the party against whom [the new point is sought to be raised]. It is the party who should have raised the point at trial who should bear any risk of prejudice."

52. It is therefore clear from these authorities that the party wishing to argue a new point on an appeal has a heavy burden to bear and that if there is any possibility of the other party being prejudiced because he might have conducted his case differently or adduced different evidence then permission should be refused.

53. In deciding whether to exercise my power to allow the New Argument to be relied on, I must give effect to the overriding objective to deal with cases fairly and justly, as provided for in Rule 2 of The Tribunal Procedure (Upper Tribunal) Procedure Rules 2008. Whilst, as required by Rule 2 (2), I must avoid unnecessary formality and seek flexibility in the proceedings I must also ensure that the matter is dealt with in a way which is proportionate to the importance of the case and the resources of the parties.

Discussion

Issue 1: whether the New Argument may be relied on

54. It is clear to me that the FTT was not given all the help it might have been to determine the Establishment Point. The parties appear to agree now that whether or not ECC was "established for charitable purposes only" was to be determined by ascertaining ECCs objects from its constitution and determining whether those objects were exclusively charitable, but neither party provided any assistance to the FTT on that issue.

55. HMRC's decision not to zero rate the supplies in question was made on the basis that ECC was not a charity because it was not "established for charitable purposes only". It is clear from my finding at [16] above that ECC disputed that decision in its Notice of Appeal by contending that its constitution demonstrated that it was established for a charitable purpose. Consequently, the Establishment Point was clearly on the table and capable of being argued if either party chose to make arguments before the FTT based on the proper construction of ECC's constitution.

56. However, HMRC chose not to do so and in its Statement of Case took the position that ECC was not established for charitable purposes, not because of the terms of its constitution, but because it did not meet the public benefit test. ECC did not take the Establishment Point before the FTT, but simply responded to the way that HMRC had chosen to put its case.

57. On that basis, it was no surprise that the FTT proceeded on the basis that ECC was established for a charitable purpose, namely the advancement of amateur sport, as described at [16] above. There was no argument before the FTT that it was precluded from that finding because of the remaining aims and objectives set out in ECC's constitution, as set out at [22] above.

58. In these circumstances it is not fruitful to assign any blame to one party or the other for the fact that the Establishment Point, as it is now put by both parties, was not argued before the FTT. It was clearly open to either party to have done so but neither chose to. Both parties were well represented, and I must therefore assume that the decision to argue the case on the basis that it was before the FTT was a conscious decision.

59. Furthermore, neither party raised the point when they received the FTT's original decision and they saw the basis on which the FTT had decided that ECC was not established for charitable purposes. Since ECC asked the FTT to review its decision on the basis that it had erred as regards its findings of a subsidiary purpose, it could have put the Establishment Point on the table at that point, asking the FTT to agree to hear submissions on the point, and, if necessary, hear further evidence. HMRC could have taken the same approach, on the basis that it too clearly believes that the FTT erred on the subsidiary purpose point.

60. In putting the Establishment Point on the table in its grounds of appeal to the Upper Tribunal, ECC did not also make an application to adduce fresh evidence as to the circumstances in which the constitution was adopted. However, in opposing HMRC's application to run the New Argument Mr Brinsmead-Stockham submits that factual evidence will often be relevant to the determination of the objects for which an entity was "established".

61. Mr Brinsmead-Stockham relies on *Attorney-General v Ross* [1986] 1 WLR 252, where Scott J held (at 263E-F) that:

> "The question whether under its constitution the [entity] is or is not charitable must, in my view, be answered by reference to the content of its constitution,

> construed and assessed in the context of the factual background to its formation. This background may serve to elucidate the purpose for which the [entity] was formed. But if the [entity] was of a charitable nature when formed in 1971 it cannot have been deprived of that nature by the activities carried on subsequently in its name."

62. As Mr Brinsmead-Stockham correctly submitted, this analysis is consistent with the principle that written agreements (of which ECC's constitution is an example) fall to be construed objectively and in the light of the "factual background known to the parties at or before the date of the [agreement]": see *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095 per Lord Hodge, at [10].

63. Indeed, as Mr Brinsmead-Stockham submitted, in their response to ECC's grounds of appeal, as mentioned at [35] above, HMRC contended that ECC's objects were not drafted with any charitable status in mind but made that assertion without pointing to any evidence that was before the FTT on that point. There was no evidence on that point before the FTT because neither party sought to raise the point before the FTT.

64. Mr Brinsmead-Stockham says that ECC's position is that if HMRC had run the New Argument before the FTT in its Statement of Case, then ECC would have made efforts to find and adduce factual evidence relevant to those arguments which may have led to ECC being able to lead evidence as to a number of potentially relevant matters, including for example:

(1) the factual context in which ECC's constitution was agreed in 1974 (or subsequently amended);

(2) the nature and content of the matters referred to in clause 2 of ECC's constitution; and

(3) further evidence as to the general activities of ECC since it was established in 1974, which may have been relevant if the terms of ECC's constitution were held to be ambiguous.

65. I accept that if HMRC had sought to run the New Argument before the FTT, then the conduct of the proceedings either would, or might have been significantly different. As the authorities set out above indicate, I need to be satisfied beyond doubt that the tribunal has before it all the facts bearing upon the new point before granting permission to run a new argument on appeal. I cannot be so satisfied and therefore it would not be in the interests of justice to permit HMRC to run the New Argument on appeal.

66. However, as Mr Watkinson submitted, ECC is hoisted by its own petard on this point. It clearly stated in its own ground of appeal that it wished to raise the Establishment Point and it would not be in the interests of justice to enable it to do so in circumstances where HMRC was precluded from raising it because ECC says that it could not be argued properly without it being given the opportunity of adducing new evidence. That issue must apply equally to both parties. If ECC sought to adduce new evidence then it would have had to make an application to that effect and this

Tribunal, applying the well-known principles in *Ladd v Marshall*, would most likely have refused the application, on the basis that there was no good reason why the evidence could not have been made available at the time of the hearing before the FTT.

67. Accordingly, I should not give permission for either party to argue the Establishment Point before the Upper Tribunal.

Issue 2: Procedural steps to be taken

68. I start by considering the effect of HMRC's concession on the FTT's revised decision in respect of Issue 1 (a) in the light of my decision that the Establishment Point may not be argued in the substantive appeal.

69. In my view Mr Brinsmead-Stockham is correct in his analysis of the effect of the concession. In relation to Issue 1(a) the only basis on which the FTT held that ECC was not "established for charitable purposes only" was because of its findings on the "subsidiary purpose", a point which both parties accept was wrongly decided. There was therefore an error of law on the part of the FTT and it is open to the Upper Tribunal to exercise its powers under s 12 of the Tribunals, Courts and Enforcement Act 2007 to set aside the decision and either remit the issue to the FTT or remake it itself.

70. I have concluded that the only sensible course open to me is to set aside the FTT's revised decision, but only in relation to Issue 1 (a). In view of the fact that neither party is in a position to make any alternative argument on which Issue 1(a) may be determined on appeal and because that issue was determinative of the whole appeal, it makes no sense to proceed with the appeal in the Upper Tribunal on the basis that the FTT was wrong on Issue 1 (a) but take no action in relation to it.

71. The question then arises as to whether I should either remake the decision or remit it and, if I were to decide to remit it, whether I should remit it to the FTT on the basis that it should have a fresh hearing on the issue, on the basis of the Establishment Point, where it would be open to the FTT to hear fresh evidence. I do not think this is a case where it would be appropriate for the Upper Tribunal itself to hear fresh evidence in the context of the ongoing appeal on the other issues. Alternatively, both parties agreed that I do have power to remit it to the FTT on the basis of the first course of action suggested by Mr Brinsmead-Stockham, as set out at [36] above.

72. I do not think that it is appropriate to remit the issue to the FTT for a fresh hearing. Having regard to the overriding objective, I take account of the fact that ECC is a small local cricket club, run by volunteers and represented in these appeals on a *pro bono* basis and that a relatively small amount of money is in issue. It would be disproportionate for the issue to be re-litigated, particularly where the reason for that is to permit a new point to be argued which could have been argued at the original hearing.

73. The question therefore arises as to whether it is appropriate for me to remake the decision by effectively allowing ECC's appeal on Issue 1(a), by either of the procedural routes suggested by Mr Brinsmead-Stockham.

74. It is clear from [74] of the FTT's revised decision that it concluded that ECC was established for purposes that "included" the advancement of amateur sport, the FTT relying on ECC's constitution for that finding and that the way ECC was operated was consistent with its constitution. It also observed in that paragraph that the advancement of amateur sport is a charitable purpose listed in s 3 (1) (g) CA 2011. The FTT also had before it the evidence of Mr Ian Miller, ECC's Chairman, to the effect that ECC operated in the same way as it would have been had it been registered as a charity and that the decision not to seek registration was based on a lack of resources.

75. It is therefore clear to me that if the FTT, having rejected HMRC's arguments on Issue 1 (a), had not relied on the "subsidiary purpose" argument it would have been open to it on the evidence to have concluded that according to the terms of ECC's constitution, having taken account of Mr Miller's evidence as to the surrounding factual matrix, ECC was "established for charitable purposes only". If one ignores the FTT's findings on the subsidiary purpose point, one is left with the conclusion that ECC was established for a charitable purpose, namely the advancement of amateur sport. That is clearly an imperfect conclusion because all the relevant law was not made available to the FTT and if it had been, and the Establishment Point argued, then of course the decision may have been different. However, that is not an unusual situation in itself and, as Mr Brinsmead Stockham observed, the FTT's decision on this point is one that is specific to ECC and sets no precedent. It is open to HMRC to argue the Establishment Point in similar circumstances in future cases.

76. For these reasons, in my view it is open to me to remake the decision by allowing ECC's appeal on Issue 1 (a).

77. In my view, it is appropriate to give effect to that decision by determining the matter as a preliminary issue on the appeal before the Upper Tribunal and my decision is therefore made on that basis. I agree with Mr Brinsmead-Stockham that the effect of my decision determining Issue 1(a) in favour of ECC by deciding it as a preliminary issue is that ECC should be regarded as having effectively succeeded in its appeal before the FTT.

78. Although the alternative procedural basis does, as Mr Brinsmead Stockham submitted, reflect the reality of the position which is that in substance HMRC will proceed in the substantive hearing before the Upper Tribunal as the appellants, it does create the complication that as its appeal would have been allowed in full before the FTT, ECC would be entitled to repayment of the VAT in issue pending the hearing, which, in the circumstances, would not be appropriate.

79. Therefore, although it may be odd that the appeal before the Upper Tribunal will proceed on the basis that in substance it is only the formal respondents to the

appeal who are seeking to challenge the FTT's decision, the circumstances in which the parties find themselves are unusual and it does not appear that there will be any practical implications for the conduct of the appeal.

80. If the parties are of the view that I need to make further directions to give effect to this determination, they have liberty to apply.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 18 February 2019