TC03849

Appeal number: TC/2010/05696 & TC/2012/10690

PROCEDURE – categorisation of appeals – application of Rule 11 (appointing and giving notice of appointment of a representative) to the respondents – failure to provide a statement of case on time – application to bar respondents from taking further part in the proceedings – failure to help the tribunal to further the overriding objective – costs sanction

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN ELDER **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in North Shields on 25 and 26 March 2014

Mr Zafar Rezvi of Cornelian Lawyers and Mediators appeared for the Appellant

Mr Brendan Hone of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This decision contains my reasons for dealing with various applications made by the Appellant. In the light of those applications I have made various directions which are released at the same time as this decision.

2. The procedural background to these appeals has become complicated. It is summarised in a decision of Judge Michael Tildesley OBE released on 29 April 2013. There is little point in my repeating that summary for present purposes, but it should be treated as incorporated into this decision.

3. The appeals and procedural matters in connection with the appeals had been dealt with by Judge Tildesley until April 2013. Judge Tildesley no longer sits in the Tax Chamber and the Appellant's applications were therefore listed before me.

4. The applications before me may be summarised as follows:

(1) An application to re-categorise the appeals as complex cases.

(2) An application to strike out the Respondents' case in the second appeal or to debar them from defending the second appeal on the basis that they have failed to comply with Rule 11 of the Tribunal Rules (appointing and giving notice of the appointment of a representative).

(3) An application to vary the directions released by Judge Tildesley on 19 February 2013 so that the time for the Respondents to serve their Statement of Case in the second appeal should not be extended. The effect of that application, if granted, would be to debar the Respondents from taking further part in the second appeal.

(4) A direction that the Respondents pay the Appellant's costs of the hearing on 15 February 2013.

5. The Appellant has also identified some 8 preliminary issues which it was intended should be considered at the hearing before me. In the event it was not possible to deal with the preliminary issues.

6. I shall deal with the applications in the order I have set them out above. The submissions I have received and considered in relation to those applications, both in writing and orally, have been extensive. In particular those of the appellant. By way of illustration I have been provided with 12 volumes of documentation, much of which comprises written submissions. I was also given 5 volumes of authorities. I have only found it necessary to refer to a small number of those authorities. The sheer volume of the submissions has been, in my view, disproportionate to the nature of the issues being addressed. I shall deal with the substance of the submissions in this decision.

Categorisation

7. It is clearly necessary for me to say something about the nature of the substantive issues in the two appeals before considering categorisation.

8. The appellant was a director of Topcars (Taxis) Limited ("the Company"), a company registered in the BVI. During the course of an enquiry into the appellant's tax affairs the respondents considered that certain sums deposited into offshore bank accounts were remuneration of the appellant from the Company. The appellant denies that the sums were remuneration.

9. In December 2009 the respondents issued discovery assessments against the appellant. At first sight it is surprising that those assessments showed nil tax due. It is those assessments which were the subject matter of the first appeal. By this time the Company had been struck off the register of companies in the BVI.

10. At or about the same time as issuing the discovery assessments the respondents also indicated to the appellant that they would seek a direction under Regulation 72 of the Income Tax (Pay As You Earn) Regulations 2003 ("the PAYE Regulations"). The intention of the respondents was to seek recovery of the alleged unpaid tax from the appellant.

11. When the first appeal came on for hearing on 1 December 2011 no direction under Regulation 72 had been made. The appeal was therefore limited to the nil assessments notified to the appellant. The procedural issues described in Judge Tildesley's decision have arisen since that date. Evidence was heard on that occasion but the first appeal was adjourned part heard.

12. A direction under regulation 72 was not issued until 5 April 2012. It is through that direction that the respondents seek to recover tax which they say ought to have been deducted by the Company from payments said to have been for the benefit of the appellant. The tax amounts to some £149,000. As at March 2014 the interest on the tax would be some £83,000. The sum in issue in these appeals is therefore approximately £232,000. The respondents have also suggested that they may issue penalties against the Appellant although to date none have been issued.

13. The reason no direction under Regulation 72 was issued until April 2012 appears to have been be because the officer dealing with the matter misconstrued HMRC's guidance. The guidance said that no Regulation 72 direction should be issued until the assessments were finalised. The officer apparently took that to mean that any appeal in relation to the assessments had also been finalised.

14. I now turn to the relevant provisions of the PAYE Regulations. I should not be taken to express any view in this decision as to how those provisions are properly to be construed.

15. Regulation 72 provides for recovery from an employee of tax not deducted by an employer. In particular it provides as follows:

" (1) This regulation applies if—

(a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met.

(2) In this regulation … —

"the deductible amount" is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

"the amount actually deducted" is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

"the excess" means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the employer satisfies the Inland Revenue—

(a) that the employer took reasonable care to comply with these Regulations, and

(b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.

(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.

(5A) Any direction under paragraph (5) must be made by notice ("the direction notice"), stating the date the notice was issued, to –

(a) the employer and the employee if condition A is met;

(b) the employee if condition B is met.

…

(6) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted for self-assessments and other assessments) in relation to the employee.

(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with regulation 82 (interest on tax overdue)…"

16. Regulation 72A makes provision for an employer to request HMRC to issue a direction where it contends that condition A is satisfied. Regulations 72B and 72C make provision for an employee to appeal against a direction notice issued on the basis that conditions A and B respectively are satisfied.

17. Regulation 188 makes provision for assessments of tax payable by an employee. In particular it provides as follows:

*" (1) In this regulation, "assessment" means an assessment other than one under section 9 of TMA(**1**) (self-assessment).*

(2) The tax payable by the employee is—

$$A - (B - C)$$

where

A is the tax payable under the assessment;

B is the total net tax deducted in relation to the employee's relevant payments during the tax year for which the assessment is made, adjusted as required by paragraph (3); and

C is so much, if any, of B as is subsequently repaid.

(3) For the purpose of determining the tax payable by the employee, and subject to paragraphs (4) and (5)—

(a) add to B any tax which—

(i) the employer was liable to deduct from relevant payments but failed to do so, or

(ii) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

(b) make any necessary adjustment to B in respect of any tax overpaid or remaining unpaid for any tax year; and

(c) make any necessary adjustment to B in respect of any amount to be recovered as if it were unpaid tax under section 30(1) of TMA(2) (recovery of overpayment of tax etc) to the extent that —

(i) HMRC took that amount into account in determining the employee's code, and

(ii) the total net tax deducted was in consequence greater than it would otherwise have been.

(4) No direction tax is to be included in calculating the amount of tax referred to in paragraph (3)(a).

(5) If a direction is made after the making of the assessment, the amount (if any) shown in the notice of assessment as a deduction from, or a credit against, the tax payable under the assessment is to be taken as reduced by so much of the direction tax as was included in calculating the amount of tax referred to in paragraph (3)(a).

(6) Instead of requiring payment by the employee, the Inland Revenue may take the tax payable by the employee into account in determining the employee's code for a subsequent tax year.

(7) In this regulation—

"direction" means a direction made under regulation 72(5) … in relation to the employee in respect of one or more tax periods falling within the tax year in question;

"direction tax" means any amount of tax which is the subject of a direction;

"tax payable under the assessment" means the amount of tax shown in the assessment as payable without regard to any amount shown in the notice of assessment as a deduction from, or a credit against, the amount of tax payable."

18. It is not necessary or desirable for present purposes for me to make any observations as to the operation of these regulations. As appears below, the appellant raises issues as to the interaction of regulations 72 and 188.

19. There is obviously a factual issue as to whether the sums credited to offshore accounts are remuneration from the Company. This involves the operation of what is alleged by the appellant to be a trust account for the benefit of the Company's drivers. In addition the appellant has raised various other issues which it seeks to have determined as preliminary issues. I can summarise those issues as follows:

(1) The appellant sought to take advantage in 2007 of what was described as an "Offshore Disclosure Facility" ("the OSD Facility"). As I understand it,

having made a disclosure the OSD Facility provided that by 30 April 2008 HMRC would either accept the disclosure or open an enquiry. The respondents sought to open an enquiry by letter dated 25 April 2008 but it is alleged this was not received by the appellant until 2 May 2008. The appellant contends that the OSD Facility gave rise to a contract and that the respondents are prevented from relying on an enquiry notice which fell outside the terms of the OSD Facility. Questions as to the jurisdiction of the tribunal may also arise in relation to this issue.

(2) Whether the nil assessments issued in December 2009 are assessments at all. The appellant contends that an assessment must specify an amount of tax falling due and that in the circumstances of the present appeals a nil assessment is meaningless. The proper charging provision is said to be a direction under Regulation 72. In addition it is said that the assessments were issued for a collateral or tendentious purpose, in order to obtain findings in the first appeal which would then bind the appellant in any appeal against a Regulation 72 direction.

(3) The respondents' "claim" under Regulation 72 ought to have been brought at the same time as the assessments. As such, and if the first appeal is struck out, the respondents' defence of the second appeal ought to be struck out as an abuse of process. Reliance is placed on *Henderson v Henderson (1843) 3 Hare 100*.

(4) Whether the respondents require permission to amend their Statement of Case in the first appeal in order to bring or maintain the Regulation 72 claim. In reality it is submitted that this is one set of proceedings.

(5) Whether in the second appeal the burden of proof is on the respondents to establish knowledge on the part of the employee that the employer had wilfully failed to deduct tax.

(6) Whether the Regulation 72 direction is supported by a valid assessment so as to engage the deeming provision in Regulation 188(5). If the nil assessments are invalid, then it is suggested there are no valid assessments to support the Regulation 72 direction.

(7) Whether it was an abuse of process by the respondents to seek to establish liability as against the appellant as a company officer in the first appeal and then to proceed to establish liability as an employee in the second appeal.

(8) Even if the nil assessments were valid, they did not show any credit for tax under Regulation 72. As such, an issue is said to arise as to whether the deeming provision in Regulation 188(5) engaged.

20. The appellant has identified these issues as preliminary issues. Subject to the other applications I must deal with, it is questionable whether it is now appropriate to determine all or any of them as preliminary issues. Consideration should be given by the parties, and in due course by the tribunal as to whether in the present circumstances of these appeals it would be better and more expeditious to determine all issues at the final hearing of the appeals. I have already indicated to the parties a view that some of these issues will require evidence and findings of fact to be made.

21. Turning directly to the question of categorisation, re-allocation of a case as complex may be made at any time pursuant to Rule 23(3) of the Tribunal Rules. Rule 23(4) provides as follows:

> " *The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case—*
>
> *(a) will require lengthy or complex evidence or a lengthy hearing;*
>
> *(b) involves a complex or important principle or issue; or*
>
> *(c) involves a large financial sum.*"

22. I was referred to the decision of the Upper Tribunal in *Capital Air Services Ltd v Revenue & Customs Commissioners [2010] UKUT 373 (TCC)* and of the First-tier Tribunal in *Dreams Plc v Revenue & Customs Commissioners [2012] UKFTT 614*. I have had regard to the guidance set out in those decisions.

23. It is clear that where one or more of sub-paragraphs (a) to (c) are satisfied ("the gateways") the tribunal has discretion to allocate an appeal as complex. I must first consider whether the appeal passes through one or more of the gateways.

24. Mr Rezvi submitted that the evidence was complex, and would involve exploring what was described as a trust account alleged to have been operated by the appellant on behalf of the company's drivers. I was not referred directly to the evidence relevant to this issue and I am not satisfied on the basis of what I have seen that this is a complex case evidentially.

25. Both parties agreed that the appeal would take an estimated 2 days for the preliminary issues, if they are determined as such, and a further 4 days for the substantive hearing if necessary. In addition there were 1½ days of substantive hearing in December 2011. In total therefore both parties agreed that the time necessary for the substantive hearing of this appeal should be taken as 7½ days.

26. I do not regard a hearing of 7½ days in the context of a case where allegations of dishonesty are being made and issues of law arise as at all out of the ordinary. In my view it cannot be said that this appeal involves a lengthy hearing for the purposes of Rule 23(4)(a).

27. The next question is therefore whether the appeal involves a complex or important principle or issue. I have set out above in summary form the issues which arise in this appeal, in particular those that have been described as preliminary issues.

28. Issues as to the status of the OSD will, to some extent, engage arguments as to legitimate expectation and the jurisdiction of the Tribunal. Such arguments have been considered by the High Court and the Upper Tribunal in *Oxfam v Revenue & Customs Commissioners [2009] EWHC 3078 (Ch)* and *Abdul Noor v Revenue & Customs Commissioners [2013] UKUT 071 (TCC)* respectively. They were also considered recently by the F-tT in *Rotberg v Revenue & Customs Commissioners [2014] UKFTT*

657 (TC). To that extent they are not new arguments and I am not satisfied that they involve any complex or important principle. By important I mean important generally, rather than simply important to the appellant.

29. I do not regard the interaction of Regulation 72 and Regulation 188 as complex or important. It is the sort of question of statutory construction which this tribunal is frequently called upon to consider. Nor do I consider that the other issues of abuse of process raised by the appellant fall within Rule 23(4)(b).

30. I must also consider whether the combination of issues raised by the appellant brings the appeal within Rule 23(4)(b). It is unlikely that where issues taken individually are not complex they might still be described as involving complex or important principles when taken together. In my view the issues raised in the two appeals do not involve complex or important principles, either individually or taken together.

31. The third gateway is whether the appeal involves a large financial sum. The total sum in issue is approximately £232,000 including interest. I cannot take into account the possibility of a penalty assessment which has not yet been made. In the context of appeals to this tribunal generally, I cannot say that this appeal involves a large financial sum.

32. In the light of my conclusion that the appeals do not pass through any of the gateways I have no discretion to categorise the appeals as complex.

Alleged Failure to Comply with Rule 11

33. The appellant alleges that officers representing the respondents in the second appeal have been doing so without authority or proper instruction to do so. As such the second appeal ought to be struck out.

34. Rule 11 provides as follows:

> "*(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.*
>
> *(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.*"

35. On 6 August 2010 Mr Musgrove, an Inspector of Taxes, wrote to the appellant's accountant to introduce himself as the caseworker for the first appeal. The decision-making officer in relation to the assessments had been a Mr Charles Bell. The first appeal proceeded to a hearing on 1 December 2011 at which Mr Musgrove and Mr Bell were present before the Tribunal.

36. The second appeal was lodged with the tribunal on 26 November 2012. On 4 December 2012 the tribunal wrote to Mr Musgrove and RHK, the appellant's

accountants. The tribunal's reference on that letter was to the first appeal and it said as follows:

> "*Judge Tildesley has requested that a directions hearing be held involving the new appeal made by the Appellant and the present appeal.*"

37. The letter invited details of availability to be provided for a directions hearing which Judge Tildesley wanted to take place in January 2013.

38. On 6 December 2012 the tribunal in Birmingham acknowledged receipt of the second appeal to RHK and stated that case management had been transferred to Manchester.

39. On 18 December 2012 Mr Hone wrote to the tribunal acknowledging receipt of the letter dated 4 December 2012 addressed to Mr Musgrove. Mr Hone stated that responsibility for "this appeal" had passed to him on 7 December 2012 and he provided his dates to avoid for the directions hearing.

40. There were issues before me as to the disclosure by the respondents of some of this correspondence which I need not detail here.

41. The hearing before Judge Tildesley took place on 15 February 2013 and Mr Hone appeared on behalf of the respondents. Following that hearing there was correspondence between the parties relating to the appointment of Mr Hone.

42. Mr Rezvi submitted that the letter dated 18 December 2012 was a defective notice for the purposes of Rule 11. It is said to be defective because:

(1) Mr Hone was not validly appointed to represent the respondents.

(2) The notice should have been given by the party and not by Mr Hone. For these purposes the party should be identified as Mr Bell who had issued the Regulation 72 direction.

(3) It was not copied to the appellant.

43. The appellant raised similar issues in relation to the first appeal.

44. Mr Rezvi described Mr Hone as "effectively an in-house lawyer". That is not an apt description of Mr Hone's position. He is an officer of HMRC who told me, and I accept, was tasked by his line manager to take responsibility for conducting the appeals.

45. Section 2(1) Commissioners for Revenue and Customs Act 2005 ("CRCA 2005") provides that the Commissioners may appoint staff to be known as officers of Revenue & Customs. Contrary to Mr Rezvi's submission, not all employees of HMRC are officers of Revenue & Customs. Only those who are appointed as such.

46. Section 2(4) CRCA 2005 provides that "*anything (including anything in relation to legal proceedings) begun by or in relation to one officer of Revenue and Customs may be continued by or in relation to another*". Section 13(1) provides that

"*an officer of Revenue and Customs may exercise any function of the Commissioners*". Mr Hone is seeking to continue defending the first appeal on behalf of the respondents and to defend the second appeal.

47. Tribunal Rule 1(3) defines a "party" as an appellant or respondent in proceedings before the Tribunal. A "respondent" is defined, for present purposes as "HMRC", that is "Her Majesty's Revenue and Customs". Section 4 CRCA 2005 provides that "the Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs".

48. In the light of these provisions it is clear that an officer of Revenue and Customs may conduct tribunal proceedings on behalf of the Commissioners. The officer does not do so as a representative, for the purposes of Rule 11. He does so as a party to the proceedings. The respondent to the appeals is HM Revenue and Customs which as section 4 CRCA provides is the Commissioners and the officers of Revenue and Customs together.

49. Mr Hone is an officer of Revenue & Customs. I have no reason to doubt that in his conduct of the first and second appeals he is doing so as an officer of Revenue and Customs. The tribunal is not concerned with any internal management decisions whereby Mr Hone was tasked to conduct these proceedings. His authority flows from his position as an officer of Revenue and Customs exercising the Commissioners' function of defending the appeals.

50. In those circumstances I accept Mr Hone's submission that Rule 11 does not require the Commissioners to give notice of his name and address. He has not been appointed as a representative of the Commissioners in the same way that they might appoint an external firm of solicitors to act on their behalf. That is how the rule has been interpreted generally by the Tribunal.

51. Mr Rezvi relied on section 25 CRCA 2005 as authority for the proposition that Mr Hone was a representative for the purposes of Rule 11. That section provides as follows:

> "*(1) An officer of Revenue and Customs or a person authorised by the Commissioners may conduct civil proceedings, in a magistrates' court or in the sheriff court, relating to a function of the Revenue and Customs.*
>
> *(2) A solicitor member of the Commissioners' staff may act as a solicitor in connection with civil proceedings relating to a function of the Revenue and Customs.*
>
> *(3) A legally qualified member of the Commissioners' staff may conduct county court proceedings relating to a matter specified in section 7.*
>
> *(4) A court shall grant any rights of audience necessary to enable a person to exercise a function under this section.*"

52. Mr Rezvi submitted that there would be no need for section 25(1) if an officer of Revenue and Customs stood in the shoes of the Commissioners as a party in the proceedings.

53. I do not accept that submission. Section 25 is clearly directed towards the conduct of civil proceedings with a view to ensuring that appropriate rights of audience are granted in courts and tribunals. That is why section 25(1) specifically identifies civil proceedings in a magistrates' court or in the sheriff court. It is a pre-cursor to section 25(4) by which those courts are directed to grant rights of audience to officers conducting proceedings in those courts.

54. In contrast, the authority of Mr Hone to conduct proceedings in this Tribunal derives from sections 2(4), 4 and 13(1) CRCA 2005 and from Tribunal Rule 1(3).

55. In the circumstances I do not accept that there has been any breach of Rule 11 by the respondents in the present appeals.

56. Even if there had been a breach, in all the circumstances I would have waived the requirement of Rule 11 pursuant to the power in Rule 7(2)(a) of the Tribunal Rules. It is not a breach which would have justified debarring the respondents from defending the appeal.

Application to Vary the Directions Released on 19 February 2013

57. A directions hearing in relation to both appeals took place on 15 February 2013. During that hearing Mr Rezvi drew attention to the fact that the respondents had failed to serve their statement of case. According to Rule 25(1)(c) this ought to have been served within 60 days of the Tribunal sending notice of the second appeal to the respondents. Mr Rezvi did not at that hearing appreciate that he might have been able to make an application to bar the respondents from taking further part in the proceedings as a result of the breach.

58. In his directions released on 19 February 2013 Judge Tildesley directed that the respondents should serve their statement of case in the second appeal no later than 1 April 2013. The appellant seeks to vary that direction and applies to bar the respondents from taking further part in the second appeal.

59. Mr Hone did not take any issue in relation to the fact that the tribunal had already extended time in the direction released on 19 February 2013. He was content that the appellant's application to bar the respondents should be dealt with on its merits.

60. From the documentation provided by the parties and from my review of the tribunal file the chronology is as follows. On 28 November 2012 the appellant notified the second appeal to the tribunal. The tribunal sent notice of the proceedings to the respondents on 6 December 2012. In the ordinary course such a notification from the tribunal would identify that the respondents had 60 days from the date of the letter to provide their statement of case. On this occasion however the notification did not include that information. It may be that was because the second appeal, when it

was processed at the Tribunal Centre in Birmingham, was identified as being connected to the first appeal.

61. On 30 November 2012 the existence of the new appeal was brought to the attention of Judge Tildesley.

62. On 4 December 2012 tribunal sent the letter referred to above to RHK and Mr Musgrove. The parties were given 14 days to provide availability for a directions hearing. On 18 December 2012 RHK emailed the tribunal and Mr Bell and Mr Musgrove of HMRC suggesting that a directions hearing may be premature and suggesting draft directions that might be made. The email suggested "*if necessary, a directions appointment might then be held once the statements of case have been filed*".

63. The draft directions provided as follows:

> "*5. By [ ] [28 days from date of this order or by such other date that the judge considers appropriate], the respondent indicate in writing to the tribunal and the appellant whether:*
>
> *5.1 he (the respondent) wishes to file and serve a stand-alone reg 72 appeal statement of case; or*
>
> *5.2 he is content to stand as the respondent's reg 72 appeal statement of case the documents mentioned at para 15, box 7 continuation sheet, appellant's reg 72 notice of appeal form.*
>
> *6. If the respondent wishes to file a stand-alone reg 72 appeal statement of case:*
>
> *6.1 Such statement of case be filed and served by [ ] [60 days from the date of this order or by such other date that the judge considers appropriate…*"

64. The appellant's email also invited the respondents to agree the draft directions or provide reasons why they were not agreed within 28 days, that is by 15 January 2013.

65. On 18 December 2012 Mr Hone sent the letter to the tribunal described above.

66. By letter dated 19 December 2012 the Tribunal notified a listing of the directions hearing on 11 January 2013. However this had not taken into account the parties' availability.

67. On 2 January 2013 the tribunal emailed Mr Hone in relation to the date of the directions hearing. That email was copied to RHK and included the following paragraph:

"*Judge Tildesley has also requested that, if possible, HMRC do serve their Statement of Case in the [second appeal] prior to the revised hearing date.*"

68. Neither party referred me to this email, nor does it appear in the hearing bundles. I became aware of it from the Tribunal File. I can assess its significance without hearing further submissions from the parties.

69. On 23 January 2013 the tribunal notified the parties that the directions hearing would take place on 15 February 2013.

70. According to the Tribunal Rules, the respondents' statement of case ought to have been delivered to the Tribunal and the appellant on or before 4 February 2013.

71. Following the hearing on 15 February 2013, the respondents served their statement of case on 27 March 2013. This was in compliance with Judge Tildesley's direction extending time for service of the statement of case.

72. I have no doubt that RHK were acting entirely reasonably in seeking to agree directions with the respondents in order to avoid the necessity of a directions hearing at that stage of the proceedings. Having said that I do not think it was ever likely that the tribunal would have directed anything other than what RHK described as a "stand-alone statement of case" in the second appeal.

73. The real question at that time as far as the statement of case was concerned ought to have been whether there should be a separate statement of case for the second appeal or a consolidated statement of case covering both appeals. Judge Tildesley however had made known to the respondents that "if possible" he wanted a statement of case for the second appeal prior to the directions hearing. By using that phrase, it seems to me that Judge Tildesley was not implicitly extending the time for service of the statement of case. He would still have expected an application supported by reasons to extend the time for service of the statement of case.

74. It is notable from the chronology that Mr Hone did not respond to the appellant's suggested directions sent to Mr Bell and Mr Musgrove on 18 December 2012. Nor did he respond to the tribunal's indication that Judge Tildesley wanted a statement of case before the hearing.

75. In a written response to the appellant's present application the respondents relied on the following matters to explain, if not justify, their failure to serve a statement of case on or before 4 February 2013:

(1) It appeared from the correspondence referred to above that the tribunal was proposing a directions hearing prior to the service of the statement of case. The respondents delayed producing the statement of case until after the directions hearing which, in the circumstances was a reasonable decision.

(2) The respondents did not respond to the appellant's proposed directions for the same reason. Further, the tribunal did not ask the respondents to respond to the appellant's proposed directions.

(3) The delay between 4 February 2013 and the hearing on 15 February 2013 was just 11 days which in the context of the appeals as a whole was insignificant.

76. On any view these reasons provide no justification for failing to engage with the appellant and seeking to agree directions. Both parties have a duty to help the tribunal to further the overriding objective of dealing with cases fairly and justly (Rule 2(4)). It is clear that that duty extends to seeking to agree directions to avoid unnecessary hearings. In ***Dorset Healthcare NHS Foundation Trust v M H [2009] UKUT 4 (AAC)***, at [13] the Upper Tribunal stated:

> " *[The rules] impose an express obligation upon the parties to assist in the furtherance of the objective of dealing with cases fairly and justly, which includes the avoidance of unnecessary applications and unnecessary delay. That requires parties to cooperate and liaise with each other concerning procedural matters, with a view to agreeing a procedural course promptly where they are able to do so, before making any application to the tribunal. This is particularly to be expected where parties have legal representation. Parties should endeavour to agree disclosure issues without the need for the tribunal to make a ruling. However, even where a direction from the tribunal may be required …..it will assist the tribunal to further the overriding objective if the parties can identify any directions they are able to agree, subject to the approval of the tribunal. Where they are unable to agree every aspect, this liaison will at least have the advantage of crystallising their positions, and more clearly identifying the issue(s) upon which the tribunal will have to rule.*"

77. The appeals were allocated to Mr Hone on 7 December 2012. He received the email from RHK on 18 December 2012. Mr Hone said and I accept that it took him time to get up to speed in relation to the appeals. I can well understand that would be the case. He frankly stated in his oral submissions that that was the real reason why he left matters to the directions hearing. Pressure of work meant that he could not properly consider the appeals until the directions hearing. Mr Hone said that he attended the directions hearing with a view to listening to and being guided by Judge Tildesley.

78. I respect Mr Hone's candour, but it does mean that what was previously said in writing purporting to explain why there had been no engagement by the respondents prior to the directions hearing was, at best, misleading.

79. Mr Rezvi's submissions as to whether the respondents ought to be barred from taking further part in these proceedings were based, in large measure, on the decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537*. Since hearing those submissions the Court of Appeal has handed down its judgment in *Denton v TH White Ltd & others [2014] EWCA Civ 906* on 4 July 2014. I have decided in the light of that judgment that no real purpose would be served in inviting the parties to make further submissions on this application. In taking that course I am conscious of the time and expense incurred by both parties to date in dealing with the present applications. The parties have identified and made submissions on all the relevant factors. Denton is concerned with the proper approach

to be taken in granting relief from sanctions, and the weight to be given to various factors.

80. I should say immediately that the present application is not concerned with relief from any sanction. The respondent was in breach of Rule 25(1) in failing to serve its statement of case by 4 February 2013. Rule 25 makes no provision for any sanction in the event of a failure to comply.

81. I must consider on what basis the appellant is inviting me to debar the respondents from taking further part in the proceedings. The application itself is expressed to be made pursuant to Rule 7(2)(d) which states as follows:

> "*If a party has failed to comply with a requirement in these Rules … or a direction, the Tribunal may take such action as it considers just, which may include –*
>
> *(a) waiving the requirement;*
>
> *(b) requiring the failure to be remedied;*
>
> *(c) exercising its power under rule 8 (striking out a party's case);*
>
> *(d) restricting a party's participation in proceedings; or*
>
> (e) *exercising its power under paragraph (3).*"

82. It is not clear and I did not have any submissions as to whether Rule 7(2)(d) encompasses a power to effectively strike out a case, which is what barring the respondents from taking further part in the proceedings would involve. I would be inclined to the view that it does not because the grounds for striking out are comprehensively set out in Rule 8. In particular Rule 8(1) provides for automatic striking out for breach of a direction which stated that the appeal would be struck out in the event of non-compliance. Similarly, Rule 8(3)(a) provides for discretionary striking out for failure to comply with a direction which stated that non-compliance could lead to the striking out of the proceedings. There is no equivalent in the Tribunal Rules to CPR 3.4(2) which gives a court discretionary power to strike out a claim where there has been failure to comply with a rule.

83. Rule 7(2)(d) may be directed at some more limited form of restriction on participation in the proceedings falling short of striking out. Alternatively, at some exceptional circumstances which do not for some reason fall within the ambit of Rule 8. See for example the decision of Morgan J sitting in the Upper Tribunal in *Foulser v Commissioners of Revenue & Customs [2013] UKUT 038 (TCC)* (not cited).

84. Neither party invited me to make any more limited order than a barring order.

85. I am not minded to resolve issues as to the relationship between Rule 7 and Rule 8 in the context of the present application in the absence of detailed submissions. However what is clear is that if I have jurisdiction to bar the respondents from taking

further part in the proceedings it would be a matter of discretion and the Court of Appeal's guidance in Denton would be directly relevant.

86. Mr Hone's short submission was essentially that the application to debar the respondents was draconian in nature and that the circumstances did not justify such a measure.

87. Mr Rezvi's submissions based on Mitchell and associated authorities may be summarised as follows:

(1) The respondents' failure to comply with the time limit for service of the statement of case was deliberate.

(2) The respondents like any party have an obligation to conduct proceedings efficiently and in compliance with the Rules.

(3) The breach was not trivial and it was against a background where the respondents had failed to co-operate in agreeing directions.

(4) There was no good reason for the breach.

(5) Particular regard should be paid to the requirement to conduct litigation efficiently and the need to enforce compliance with the rules.

(6) The breach has wasted substantial resources of the tribunal in dealing with the present application.

(7) The respondents are in breach of other rules.

(8) The statement of case itself discloses a weak case that is not properly particularised, especially in light of the fact that the respondents effectively allege dishonesty against the appellant.

(9) There is significant prejudice to the appellant in that the breach has resulted in substantial delay.

(10) These factors outweigh any prejudice to the respondents.

88. There were other breaches relied on by Mr Rezvi to support his application. In particular he relied on a failure by the respondents to serve its list of documents in the second appeal. There was disagreement between the parties as to whether any direction was made on 15 February 2013 in relation to lists of documents. If so, it was inadvertently omitted from the written directions. If not, then Tribunal Rule 27 would require service within 42 days from the date of service of the statement of case.

89. The appellant also criticises the content of the statement of case and alleges that it is deficient. In particular it does not address quantum issues that had been raised during review of the decision to issue the Regulation 72 directions and which were part of the grounds of appeal. There is some merit in this criticism.

90. I have assessed all these factors and the circumstances generally in the light of the Court of Appeal decision in Denton. Mr Rezvi cited a large number of cases relevant to the question of relief from sanctions. However it is now clear from Denton

(at [24] and [82]) that in light of the Court of Appeal's guidance reference to earlier authorities ought to be unnecessary.

91. I have considered the guidance given by the Court of Appeal in Denton to the application of CPR 3.9. At [24] the court set out a 3 stage approach as follows:

(1) Identify and assess the seriousness and significance of the breach (discussed at [25]-[28] of the judgment).

(2) Consider why the default occurred (discussed at [29]-[30] of the judgment).

(3) Evaluate all the circumstances of the case so as to deal justly with the application (discussed at [31]-[38] of the judgment).

92. In the first stage the focus is not on whether the breach has been trivial, but on whether it has been serious or significant. Whether a breach imperils future hearing dates or otherwise disrupts the conduct of the litigation may well be a useful measure of whether it has been serious or significant. The first stage does not involve consideration of unrelated failures which are better considered at the third stage.

93. At [28] the court said this:

" *If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.*"

94. The second stage is important, particularly where the breach is serious or significant. The court or tribunal should consider why the default occurred. Mitchell gave examples of good and bad reasons. Plainly pressure of work will rarely be a good reason.

95. The third stage involves consideration of all the circumstances of the case. The need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules are of particular importance in the third stage and should be given particular weight. It is also necessary to take account of the seriousness and significance of the breach and the reasons for it (stages 1 and 2). At [35] and [36] the court said this:

" *35. …The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.*

36. But it is always necessary to have regard to all the circumstances of the case…"

96. Applying this guidance, I consider that the respondents' failure to serve its statement of case prior to the directions hearing on 15 February was not serious or

significant. The statement of case was due to be served by 4 February 2014. As at the directions hearing it was 11 days late. That is not a significant delay in the context of appeals generally, or in the context of the first and second appeals in the present case. That is not to say that such delays are to be in any way encouraged. However it did not imperil a future hearing date. Nor should it have disrupted the conduct of these appeals or other appeals.

97. In the light of that finding I can deal with the second and third stages relatively briefly.

98. There was no good reason for the respondents not to seek an extension of time for service of the statement of case. Whilst I can sympathise with Mr Hone as the person tasked with taking conduct of these appeals on behalf of the respondents at relatively short notice, I cannot sympathise with the respondents themselves. There is no good reason why they should not make adequate resources available to deal with such situations.

99. As regards the circumstances generally, the breach did not imperil a future hearing date and it did not disrupt the conduct of these appeals or other appeals. Those factors therefore do not point towards a refusal of relief. It is relevant that the respondents had failed to engage with the appellant in seeking to agree directions and that the statement of case itself does not adequately deal with quantum. Apart from these aspects, I am not satisfied that any other breaches would be significant to the exercise of my discretion.

100. Taking into account all the circumstances I am satisfied that Judge Tildesley's direction extending time for service of the statement of case should remain effective and I dismiss the application to vary it. It is not appropriate to debar the respondents from taking further part in these proceedings.

Wasted Costs

101. At [15] of his direction released on 19 February 2013 Judge Tildesley directed the respondents to show cause why a wasted costs order should not be made in respect of the appellant's costs incurred at the hearing on 15 February 2013.

102. A wasted costs order is generally made against a representative. Mr Rezvi confirmed that he was simply seeking a costs order against the respondents. It appears that the reason this direction was made was because the respondents had failed to serve their statement of case and had failed to engage with the appellant in order to agree directions which might have obviated the need for a directions hearing.

103. On 22 February 2013 the appellant served a schedule of his costs of and incidental to that hearing. He sought a direction that those costs be assessed on an indemnity basis.

104. On 27 February 2013 the respondents lodged their submissions as to why there should be no costs order setting out a chronology of events in relation to the second appeal from 4 December 2012 to 15 February 2013.

105. On 28 March 2013 the appellant lodged a reply to the respondents' submissions on wasted costs. The reply also updated the costs schedules previously served to reflect "further relevant attendances" and also the costs of the application to vary Judge Tildesley's direction extending time for service of the statement of case. There is no direction for such costs to be paid and I do not propose to make one in the light of my decision on that application.

106. As I have already found, the respondents failed to engage with the appellants with a view to agreeing directions for the conduct of the appeals. I am satisfied that in the words of the appellant "*HMRC seemed to be content just to sit back and let the appellant and the judge do all the work*". Ironically, if HMRC had engaged, it would likely have had the benefit of an agreed extension to the time for service of its statement of case. The issues would have been narrowed and the tribunal and the parties could possibly have dealt with more contentious matters at the hearing on 15 February 2013, such as categorisation of the appeals as complex.

107. In my judgment the respondents failure to engage amounted to unreasonableness for the purposes of Rule 10(1)(b). That rule states that the tribunal may make an order in respect of costs if it considers that a party has acted unreasonably in conducting the proceedings. I will therefore direct the respondents to pay the appellant's costs thrown away by the hearing on 15 February 2013. The circumstances do not justify assessment on an indemnity basis. I shall make a summary assessment of those costs in due course.

Generally

108. I am not satisfied at present that it would be expeditious to deal with the issues identified by the appellant as preliminary issues. I will direct a case management hearing at the earliest opportunity to consider this and any further directions necessary to bring these appeals on for hearing as soon as possible. The parties should of course seek to agree directions in the meantime.

109. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2014