[2017] UKFTT 853 (TC)

TC06248

Appeal number: TC/2016/04094

PROCEDURE – appeal against amendment to partnership return in respect of claim to Business Premises Renovation Allowances – application for stay pending outcome of another appeal to Tribunal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

WAVERTON PROPERTY LLP **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 6 November 2017

Roger Thomas QC, instructed by Pinsent Masons LLP, for the Appellant

Jonathan Davey QC and Ruth Hughes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The substantive appeal in this case is against an amendment to the appellant's partnership return for 2011-12. The primary issue in the appeal relates to a claim by the appellant for Business Premises Renovation Allowances ("BPRA") under Part 3A of the Capital Allowances Act 2001 in respect of a proposed development of a property in Birmingham to create a data centre. BPRA is a form of capital allowance, which in general terms allows taxpayers to claim 100% allowances in relation to certain types of capital expenditure on the conversion or renovation of unused buildings for business use where the building is located in a designated "disadvantaged area" and certain conditions are met.

2. HMRC allowed the appellant's claim in part but amended the return in a way that substantially restricted the amount of the claim. HMRC also disallowed a property income loss claimed in respect of legal and professional costs. The total losses claimed for the period were approximately £71 million, of which HMRC disallowed around £65.5 million.

3. To date, HMRC has provided a Statement of Case, which was served on 3 November 2016. The Tribunal issued directions in a standard form on 18 November 2016, but no further substantive progress has been made. In December 2016 the Tribunal was notified that the appellant had changed their representatives to Pinsent Masons LLP. The appellant sought and obtained a three month stay to allow Pinsent Masons to review the papers.

4. Following the expiration of this stay Pinsent Masons requested that HMRC agree that the proceedings should again be stayed, this time until after the First-tier Tribunal issues a decision in another appeal, *London Luton Hotel BPRA Property Fund LLP v HMRC*, appeal reference TC/2015/05860 ("*Luton*"). The reason given for this request was that the *Luton* appeal would deal with a number of key arguments in respect of BPRA that would affect the outcome of this appeal, and would therefore shape the issues to be considered. It was also considered that a stay would save time and costs for both parties and for the Tribunal. HMRC disagreed that there should be a further stay.

5. The hearing on 6 November 2017 was listed as a case management hearing, but the primary issue for decision was whether the appellant's application to stay the proceedings should be granted. Draft directions were also produced by the appellant. Directions 1 and 2 of this draft provided that all further steps should be stayed until 45 days after the First-tier Tribunal has issued its decision in *Luton*, and that within 28 days of the stay being lifted the appellant would serve a Statement of Case in response to HMRC's Statement of Case. HMRC objected to these two directions but indicated that they had no substantive objection to the remaining directions (although there is one point related to the exchange of skeleton arguments to which I will return). I should also clarify that there is no dispute between the parties that the appellant should serve a Statement of Case in response. The only real dispute over directions 1 and 2 is whether the pre-trial preparation should be put on hold pending the decision in *Luton*.

The relevant legal principles

6. The Tribunal has power to stay proceedings under its case management powers. This is specifically acknowledged in rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). Under rule 2(3) the Tribunal must, when exercising of its powers, seek to give effect to the overriding objective set out in rule 2, namely to deal with cases fairly and justly. It is worth setting out the relevant parts of rule 2 in full:

> 2 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules …
>
> …"

7. There was no dispute that the proper approach to take is the one succinctly described in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 at [22], namely that a tribunal or court may stay (or sist) proceedings against the wishes of a party:

> "… if it considered that a decision in another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so."

8. This test is discussed further in two First-tier Tribunal cases that I was referred to, *Coast Telecom Limited v HMRC* [2012] UKFTT 3017 (TC) and *Peel Investments UK Limited* [2013] UKFTT 404 (TC). In *Peel Investments* Judge Herrington said this at paragraphs [9] to [12]:

> "9. The parties were agreed that the proper approach to be adopted as regards an application for a stay in the absence of agreement between the parties in a case in this Tribunal was that set out in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where Judge Berner stated at paragraph 5:
>
> > "I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider

> that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so."
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> The Court of Session in *RBS Deutschland Holdings* had held at paragraph 22 of its judgment as follows:
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> > "Furthermore, at page 8 of the decision, the Tribunal made a pronouncement to the effect that it would sist proceedings against the wish of one of the parties pending a decision in another court only where that decision would be determinative of the issues before the Tribunal. We do not recognise that proposition as one reflecting normal practice in relation to the exercise of a discretion to sist. As we would see it, a Tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it was expedient to do so."
> >
> > 10. The Tribunal in *Coast Telecom* went on to stress that it was not enough that another court's determination might provide answers of relevance and that this put the test in *RBS Deutschland* too low (at paragraph 21):
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> > > "The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance."
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> > > 11. The Tribunal also considered that different factors can apply to a fact-finding Tribunal as referred to in paragraph 22 of its decision:
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> > > > "Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings. But the same does not hold good where the facts remain to be determined. Many of the questions raised in the references are themselves fact-specific. Accordingly, I do not consider that it would be expedient to order a stay in circumstances where the facts remain to be found by the first instance tribunal."
> > > >
> > > > 12. It is important to note that *Coast* was an MTIC case with complex factual issues to determine and witnesses on both sides where it is fair to say that the findings of fact are paramount. …"

9. In summary, therefore, the test is not whether a decision in another case would be necessarily determinative, but whether it would be of material assistance, and whether the grant of a stay would be expedient. The fact that another case may be relevant is not enough. There is also a distinction between cases raising pure legal issues and those which will involve a material fact-finding exercise.

10. These principles were applied by the First-tier Tribunal in *Degorce v HMRC* [2016] UKFTT 429 (TC) to refuse a stay of the appellant's appeal in relation to his

2007-08 return behind his own appeal to the Court of Appeal in relation to his 2006-07 return, even though both appeals related to the same appellant and what were described at [16] as "structurally identical" transactions, on the basis that whilst the Court of Appeal decision might be of assistance the Tribunal was not convinced that it would provide sufficient material assistance to justify a stay.

The evidence

11. The evidence included witness statements from Alison Brister for the appellant, and Katherine Nash for HMRC. Ms Brister is a director of various corporate members of the appellant as well as being an individual member of it, and is a partner of Harcourt Capital LLP, which has day-to-day responsibility for overseeing the management of the building project relating to the property the subject of the dispute. (A Harcourt group company was also one of the promoters of the arrangements.) The purpose of Ms Brister's witness statement was to describe the project since April 2012. Her witness statement was taken as read and she was not cross-examined. Ms Nash provided a short witness statement and was cross-examined. Ms Nash is an officer of HMRC working in their Counter Avoidance Directorate, whose current role is technical and litigation lead in respect of what HMRC consider to be avoidance schemes relating to BPRA claims. I accept both witnesses' evidence in respect of matters of fact.

12. Documentary evidence included the Information Memorandum produced by Harcourt Capital for proposed investors in the appellant, certain of the contractual documentation entered into, correspondence between the parties and the Statement of Case for the *Luton* appeal as well as the Statement of Case for this appeal.

The relevant facts

13. The dispute relates to arrangements entered into by the appellant in the tax year ended 5 April 2012 in relation to a building in Birmingham. The Information Memorandum describes a proposed development of an existing warehouse building into a new "state of the art" data centre benefiting from 100% allowances under the BPRA regime, and targeting high-quality corporate tenants. The data centre was to employ a new "pod-based" concept. I understood this to mean that the data centre would effectively comprise a series of mini data centres or "pods", such that development could occur incrementally as individual pods were constructed. The Information Memorandum states that at maximum capacity the data centre would consist of 15 pods, but the modular nature of the design would allow it to be constructed in stages between 1 and 15. How many pods were fitted out would depend on the level of investment in the LLP. An attractive level of rental income was expected.

14. The Information Memorandum describes the availability of BPRA and how the LLP structure would allow a loss arising from the claim to allowances to be offset by members against their general income by claiming property loss relief, either in the current year (2011-12) or the following year. It states that for a 50% taxpayer the tax relief should result in 109.1 pence for every 100 pence of capital contribution (or 102.8 pence at the minimum subscription level).

15. Individual investors were invited to make capital contributions to the appellant. The structure involved a further capital contribution by a corporate member of the LLP which was funded by borrowing. The intention was that the total raised would be expended prior to the end of the 2011-12 tax year. The total amount sought was £145.3 million, comprising £58.1 million from individual investors and £87.2 million from the corporate member. The minimum total subscription was £67.4 million. The partnership was structured with a view to the allowances being available to the individual investors rather than to the corporate member. The corporate member's contribution was designed to be 1.5 times the contributions made by individual investors (or 60% of the total).

16. The property itself was originally constructed in the 1980s as a warehouse. It obviously became vacant at some point, but was marketed for a new tenant in October 2011 on the basis that it had been refurbished. The appellant was incorporated in January 2012, together with certain other entities including a company that was to become the corporate member of the appellant. The Information Memorandum was released on 30 January 2012 and some initial documentation was entered into on the date.

17. In the event the amount raised from individual investors was around £31 million. The corporate member's contribution was around £47 million, funded by a loan from a bank. The arrangements included security for the loan, apparently in the form of cash collateral. On 4 April 2012 the appellant acquired a long leasehold interest in the site, and on the following day granted a sublease to one of the entities that had been incorporated for the purposes of the arrangements. A management agreement was entered into with Harcourt Capital LLP, and on 5 April 2012 a development agreement was entered into between the appellant and, among others, an LLP called Aggmore Developments (Midlands) LLP as developer ("Aggmore"). The developer was also a specially incorporated entity.

18. Under the development agreement Aggmore agreed to carry out work involving the conversion of the property into a data centre comprising a number of pods. The works were to be phased, phase 1 being the construction and installation of a single pod. The obligation to undertake any additional phase was conditional among other things upon any necessary refinancing being put in place. The contract price was £68,499,407 (exclusive of VAT) which was to be paid immediately. The arrangements between the parties included a requirement for £38,330,347 of the contract price to be placed in a separate bank account referred to as the Phase 2 Account, and for additional sums to be placed in certain other accounts. These included an amount of £8,785,559 described as the Developer Deposit, deposited by the developer at the lending bank in an account labelled as the Security Account.

19. Some works have been undertaken at the property. These include infrastructure for an initial pod and a further demonstration pod. Discussions were conducted with various potential users but did not reach a successful conclusion. The property remained empty and was broken into on two occasions. Earlier this year Aggmore was replaced as developer by another entity and the existing sublease was assigned to a new third party data centre operator. At the date of the hearing the property remains vacant, but Ms Brister's evidence was that the first tenants were scheduled to take

space in December 2017, with initial enabling works for the next phase of works planned to start in the first quarter of 2018, depending on the requirements of users and how swiftly capacity is taken up.

20. The appellant filed a partnership return for 2011-12 on 17 July 2012, and an enquiry was opened on 1 August. A closure notice was issued by Ms Nash on 1 March 2016. The return included a claim to a property income loss of £4,490,744 (arising in respect of professional fees) which Ms Nash amended to £16,036 on the basis that most of the fees amounted to capital expenditure, and a claim to BPRA of £66,474,977 which Ms Nash amended to £5,505,188 (revised following a review to £5,966,657). The amount of the restriction on the BPRA claim reflected amounts which HMRC considered had been deposited in various accounts under the arrangements in such a way that the sums never left the control of the bank and the developer was not able to draw on them. In addition, the remaining amount was restricted because HMRC took the view that some of the expenditure did not qualify for BPRA.

21. Ms Nash's witness statement confirmed that no other cases are stayed behind *Luton*. There were only four BPRA cases in which closure notices have been issued, being *Luton*, this case and two Scottish cases. Those two other cases are being progressed and the primary issue in those cases is one which does not arise either in the present appeal or in *Luton*. All open enquiries were progressing. To Ms Nash's knowledge the structure of the Waverton scheme and the more recent events described by Ms Brister are not similar to any of the other current enquiries.

22. In cross examination Ms Nash said that there were more than 60 BPRA cases under enquiry, generally relating to 2011-12. She disputed a suggestion that she had previously indicated that these other cases were not being proceeded with because of resourcing issues at HMRC, although she accepted that there were issues with resources.

23. Although I saw no evidence to support this, both parties proceeded on the basis that the hearing in the *Luton* case is currently due to commence on 30 April 2018.

Submissions

24. Mr Thomas, for the appellant, submitted that it would make good sense for the appeal to be stayed behind *Luton* since a significant number of the issues which will be considered in each case are the same. This could be seen by a schedule which Mr Thomas attached to his skeleton argument comparing the two Statements of Case. Whilst Mr Thomas accepted that this appeal raises issues which do not arise in *Luton*, he submitted that the vast majority of the legal issues in dispute are not only common or related, but that HMRC's arguments will be precisely the same.

25. *Luton* was estimated to take 19 days and a similar amount of time was likely to be needed for this appeal. It would be a waste of the Tribunal's time and resources, which could be deployed to other cases, to hear the appeal in this case without waiting for a decision in *Luton* which would in all likelihood allow the time needed to hear the appeal to be reduced because some issues could fall away. That decision could also

make one or other party reconsider its position because it would ventilate the issues and allow the strength and weakness of different aspects of the case to be assessed. It was no answer to say that, on the current timing, a decision in the *Luton* case was likely to be released in advance of a hearing of the appeal even if there is no stay. By that stage a significant amount of work would have been done on the evidence and other aspects of case preparation, which would potentially be proved to have been the wrong work to do.

26. Further, differently constituted Tribunals hearing both cases at around the same time could reach different answers, leading to difficulty and confusion: the *MG Rover* litigation was a recent clear example of this ([2016] UKUT 434 (TCC)). A decision in *Luton* would clearly be of material assistance to the judge in this case. It was made clear in *288 Group and others v HMRC* [2013] UKFTT 659 (TC) at [39] that it did not matter that this appeal raised additional issues that are not present in *Luton*.

27. As far as expedience was concerned, Mr Thomas submitted that there was no practical advantage in an early hearing. HMRC had served accelerated payment notices (presumably, strictly, partner payment notices) on members of the appellant and payment had been made, so there was no risk to HMRC. This was also not a case where the recollection of witnesses, and therefore the risk of memories fading, was a key concern. In particular, unlike some cases the evidence of HMRC witnesses was likely to relate to the enquiry and the physical state of the building, and was unlikely to be affected by any delay. Witnesses for the appellant would be individuals who have worked to a significant extent on the project, and their memories will be fixed and focused.

28. Mr Davey (for HMRC) submitted that, whilst there were some common elements at a high level, the present appeal and the *Luton* case involve different factual settings. The facts mattered. The *Luton* case involves the conversion of a disused flight simulator centre to a hotel. HMRC has accepted that more than 50% of the £12 .5 million claim to BPRA in that case is allowable. The property has also been running as a hotel for a number of years. In contrast, in this case a commercial property which had been marketed as refurbished as recently as 2011 was taken off the market and purportedly made the subject of more than £68 million of expenditure to convert it into a property that is to a substantial extent void and which has not attracted a single tenant. In HMRC's view under 10% of the claim should be allowed.

29. Mr Davey also submitted that substantial witness statements had been served in the *Luton* case (there were 10 witnesses of fact) and a number of expert witnesses had been instructed. The length of the hearing was to cater for the considerable fact finding exercise required. The present appeal would be similarly fact sensitive and on that basis, and taking account of the risk of memories fading or witnesses becoming unavailable, a stay was not appropriate. In addition, the present appeal raises a number of substantial issues which are not present in the *Luton* case and in respect of which it would provide no assistance. These include a dispute over the deductibility of some £4.5 million of fees, an issue in relation to funds placed in the Phase 2 Account (which HMRC contend cannot be treated as qualifying expenditure) and a more general argument as to whether the appellant incurred expenditure at all. Fact specific valuation issues also arise. More generally, the absence of a Statement Case from the

appellant meant that it was simply not possible to discern with any real confidence the true extent of any overlap with the *Luton* case. A decision in the *Luton* case was also likely to be unavailable for a number of months, so the delay could be significant. However, if the Waverton appeal was not stayed it was still likely that a decision in *Luton* would be available before the appeal was heard, because this was unlikely to occur before mid-2019. Finally, the present appeal had attracted press attention, possibly due to the amounts at stake and the identity of some of the individual investors. There was a public interest in the outcome of the appeal.

Discussion

30. I indicated at the hearing that I was not minded to grant a stay in this case. The further consideration I have now given the matter has not changed my view.

31. I agree with Mr Thomas that a number of the legal issues raised appear to be similar. However, the word by word comparison that Mr Thomas undertook between HMRC's outline of its case in the two Statements of Case is in my view somewhat misleading as to the real extent to which the *Luton* case might assist the judge hearing the Waverton appeal. It is quite obvious that in both cases a very significant fact finding exercise will be required, and that the facts in each case are – or may well prove to be – very different. Most of the time at the hearing of this appeal, as with *Luton*, is likely to be taken up with this fact finding exercise. And many of the legal issues are likely to prove to be mixed issues of law and fact. The fact that HMRC have framed their legal arguments on particular points in the same way in each Statement of Case is hardly surprising (it merely indicates, as one would hope is the case, that a consistent approach is being taken). It does not demonstrate that a conclusion reached by a judge in one of the cases will necessarily indicate the conclusion that should be reached in the other, on what may well be different facts. A number of the points made by Mr Thomas effectively assume that the underlying factual issues are the same. This rather prejudges the position.

32. Some of the textual similarities Mr Thomas identified between the two Statements of Case, for example a description of the concept of "qualifying expenditure" for BPRA purposes by reference to the legislation, and the need to adopt a realistic view of the facts, do not appear to be particularly controversial. From my reading of the comparison, the most significant contentious issues that are clearly common to the two cases are (a) whether and to what extent it is possible to go behind the stated contract price and (b) whether that price can be challenged on the basis that it may have been based on an expected valuation of the renovated building, rather than by reference to the cost of the works. Issues that arise in the Waverton appeal that do not arise in the *Luton* case are (a) whether a revenue deduction is available for the professional fees and (b) a broader argument about whether a very substantial proportion of the expenditure was incurred at all. There are also clear differences in the facts, including that there was no corporate member and borrower in the *Luton* transaction, and (of course) the project has been completed in that case. Although Mr Thomas's position was that these factual distinctions were not material, I do not think it is possible to conclude that that is the case in the absence of detailed findings of fact.

33. Beyond these points, there are a number of areas where Mr Thomas submits that the issues are substantially the same but it is much less clear to me that that is the case. For example, each case raises detailed arguments about whether particular categories of expenditure in relation to the property, such as work on a car park and other external work, and expenditure on particular items which HMRC claim were not fixtures, qualify for allowances. Although it is possible that *Luton* might provide some guidance, these points must be very fact specific. Another, very significant, example relates to the funds lodged in various accounts, in particular the Phase 2 Account and the Security Account. Mr Thomas submitted that these raised the same issues as raised in *Luton* in respect of an amount of £2 million which was placed in a blocked account. Although I can see that HMRC's general approach is similar, again I think that any decision on these aspects will depend very much on the facts. For example, and quite apart from a very significant difference in scale, HMRC's position is that funds in the Phase 2 Account related to works that would only take place on a contingency, for which there was no analogue in *Luton.*

34. Even to the extent that there are common issues, I do not think it is realistic to proceed on the basis that a First-tier Tribunal decision in *Luton* would really enable the legal issues to be narrowed down for the purposes of the Waverton appeal or that it would shorten any hearing to a material extent and save resources for either party, or for the Tribunal. In reality I expect that issues would only be narrowed down if HMRC dropped or modified some of the arguments that they are currently running. Given the amounts involved and the number of outstanding enquiries in relation to BPRA schemes it seems highly unlikely that HMRC would be prepared to do this on the basis of one First-tier Tribunal decision, even if that aspect of the decision was not appealed. There is also a significant likelihood that either or both parties could appeal a decision in *Luton* to the Upper Tribunal or beyond. It would be a brave litigant in another BPRA appeal who chose not to prepare their case on the basis that some or all of the conclusions of the First-tier Tribunal in *Luton* could be proved wrong. So I do not accept that waiting for that decision is really likely to save resources by cutting down the evidence that has to be prepared.

35. As Mr Davey has pointed out it is also likely that a decision in the *Luton* case will be available to the judge hearing the Waverton appeal. If there is an unexpected delay then there would be nothing to prevent a further application for a stay if the circumstances at that time indicated that a short further stay would be justified (although this should not be taken to indicate any suggestion on my part that I consider that it would be). In contrast a stay at this stage will probably lead to a delay in case preparation of around a year. This is significant, bearing in mind that there has already been a material delay since HMRC served its Statement of Case in November 2016.

36. Whilst I accept that there may be a lower risk of witness evidence becoming stale than in some cases, I do not think that the risk of a deterioration of evidence should be ignored. No witnesses were identified to me but it must be likely that there will be a significant number of them. I was informed that there are expected to be 10 witnesses of fact in the *Luton* case. Memories do fade, even for individuals who have been heavily involved in a project, and witnesses can become unavailable. It was not suggested to me that witness evidence would not be material. I also consider that,

even if the risk of deterioration is in practice likely to be a greater issue for the appellant's witnesses rather than for HMRC's in this case, that could still be prejudicial to the effectiveness of cross examination.

37. The specific factors referred to in rule 2(2) of the Tribunal rules support the conclusion that the appeal should not be stayed. The Waverton case will clearly be an important one, raising complex issues, and should be dealt with accordingly. Large sums are involved. Rule 2(2)(e) specifically refers to "avoiding delay, so far as compatible with proper consideration of the issues". In my view these objectives are best achieved by proceeding with orderly case preparation now, and not permitting an additional significant delay.

38. Mr Thomas stressed that a stay could save the Tribunal resources, which could be deployed to other cases. I have already explained that I do not consider that a stay is likely to shorten the hearing to any material extent, so at best the utilisation of resources would be deferred. In any event, however, I am not persuaded that this is a material consideration to take into account in this case in relation to the overriding objective to deal with the case fairly and justly.

39. I should briefly deal with the First-tier Tribunal cases referred to by Mr Thomas, namely the *288 Group* case referred to at [26] above, *Coast Telecom, Peel Investments* (see [8] above), and also *Milltown Limited & another v HMRC* [2016] UKFTT 0640 (TCC). In *Coast Telecom* Judge Berner refused a stay pending certain decisions by the ECJ in circumstances where a significant fact-finding exercise was required and the Tribunal was bound by a Court of Appeal decision on the legal issues. In *Peel Investments* a stay was granted pending a binding decision in the *Rangers* (*Murray Group Holdings*) litigation (which at that stage had only been heard by the First-tier Tribunal). Judge Herrington drew a distinction at [31] and [32] between the significant fact-finding exercise required in *Coast Telecom* and the more limited exercise required in that case, largely involving drawing inferences from primary facts, and concluded that this would be more profitably carried out against settled legal principles, contrasting the fact that there was already a binding decision that would apply in *Coast Telecom*. Clearly each of these cases turned on their facts, and to some extent on the nature of the fact-finding exercise required, but it is also notable that in *Peel Investments* Judge Herrington clearly contemplated that a stay would be granted pending full resolution of the applicable legal issues in the form of binding authority, and in *Coast Telecom* Judge Berner relied on the fact that binding authority was already available. In contrast, in this case the proposed stay would not result in any binding authority being available. The only way in which that would be achieved would be by extending the stay further, potentially by a considerable period, which could of course result in additional prejudice to the evidence.

40. The *288 Group* case related not to an application for a stay (a stay had already been granted by consent) but to an application for a direction under rule 18 of the Tribunal Rules, which relates to lead cases. Judge Mosedale agreed that a direction should be made. She commented that the existence of issues not raised in the lead case did not necessarily make a direction inappropriate, because the purpose of rule 18 included shortening the length of hearings and decreasing the risk of multiple tribunals deciding the same issues, and in particular the risk of coming to different

conclusions on the same issue (paragraph [39]). I agree with Mr Davey that *288 Group* does not provide much assistance. Clearly the existence of additional issues does not by itself justify refusing a stay, any more than it justifies refusing a rule 18 direction, but the corollary also applies: the fact that there are common issues does not necessarily mean that a stay is necessarily appropriate. It is also worth noting that *288 Group* related to a number of taxpayers who had all received supplies of services from Royal Mail which had wrongly been treated as exempt. The factual overlap was pretty clear. Judge Mosedale rightly pointed out the undesirability of different tribunals reaching different conclusions on the same issues, but as already discussed a decision in *Luton* is likely to be available in advance of any hearing in this case and therefore capable of being given due consideration.

41. *Milltown* related to an application to stay an appeal in relation to an SDLT scheme pending final resolution of the *Project Blue* case. A stay was granted even though the appeal raised legal issues that did not arise in *Blue*, and the factual context was not on all fours. My reading of this decision is that Judge Raghavan decided that it was appropriate to wait for a Supreme Court decision in *Blue* because he considered that the authoritative guidance that the Supreme Court decision was likely to give would provide material assistance, and also because there was little to indicate that the fundamental issues in dispute would be resolved by matters of oral evidence (so that the assistance from a Supreme Court decision outweighed the prejudice caused by delaying the proceedings), see paragraphs [19] to [23]. He did note at [23] that the decision might in any event be available by the planned date of the hearing, but the hearing date could then be compromised by restructuring of evidence and pleadings required by the decision.

42. There is a significant distinction between granting a stay pending a Supreme Court decision which is expected to provide authoritative guidance in a case where oral evidence is not likely to be significant, and a stay to await a First-tier Tribunal decision which, as already explained, is unlikely to be regarded as finally resolving any material disputes of law in this case and so in reality is less likely to require any major restructuring of evidence. It is also likely that any decision on the *Luton* case would be available before counsel need to prepare their skeleton arguments in this appeal.

43. Both parties mentioned the publicity surrounding this case and public interest issues. I heard no witness evidence about this, although the documentary evidence included an article from The Times newspaper about Waverton. I do not think I need to comment on this aspect beyond saying that in my view any such issues do not support the case for a stay. In particular, I do not consider that any concerns about publicity relating to individual investors provide any justification for a stay. Rather, the public interest in the proper operation of the tax system would point towards a stay not being expedient.

44. I also agree with Mr Davey that HMRC's actions (or any inaction) in other ongoing enquiries into BPRA schemes, which was the subject of Mr Thomas's cross examination of Ms Nash, is irrelevant. In any event I should add that I saw nothing to support the suggestion made that the appellant was in some way being singled out.

45. In summary, I am not persuaded that a decision of the First-tier Tribunal in *Luton* would be of material assistance to the parties' preparation for this appeal, and in any event do not consider that a stay would be expedient.

The directions

46. In addition to the question the question of a stay, the parties disagreed about one particular aspect of the draft directions, relating to the exchange of skeleton arguments. The appellant's draft provided for a simultaneous exchange 14 days before the start of the hearing, which Mr Thomas justified on the basis that HMRC would have the benefit of the appellant's Statement of Case, so that the normal approach of the appellant serving their skeleton first need not apply. He also said that if a sequential exchange was directed then the appellant should have more than 14 days to consider HMRC's response. Mr Davey requested a sequential exchange, with the appellant serving its skeleton argument 28 days before the hearing and HMRC serving its skeleton 14 days before the hearing.

47. I agree with Mr Davey. A sequential exchange of skeleton arguments would be more useful to the tribunal than a simultaneous exchange, for the obvious reason that HMRC's skeleton can then properly reflect points raised in the appellant's. In addition, I see no reason why the appellant should need more than 14 days prior to the hearing to consider HMRC's skeleton, which is the same period of time it would have had under the appellant's own draft directions. By that stage the appellant will not only have the benefit of HMRC's Statement of Case but also all the witness statements and any expert reports.

Conclusion

48. The appellant's application for a stay is refused. I am issuing case management directions which will provide for the appellant to produce a Statement of Case and deal with other matters including the exchange of skeleton arguments.

49. 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 Rules. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 30 NOVEMBER 2017