TC07986

PROCEDURE – HMRC application for further and better particulars – whether to strike out the appeal – appeal not struck out – sufficient information already provided and Application refused – directions issued for the ongoing progress of the appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07871

BETWEEN

DARREN BRADFORD **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal decided HMRC's Application for further and better particulars on the papers, having taken into account the correspondence and submissions provided by Henton & Co LLP for the Appellant and by Ms Sophie Rhind, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. Mr Bradford appealed to HM Revenue & Customs ("HMRC") against a decision that he was not entitled to loss relief, and on 5 December 2018, his then agent, Henton & Co LLP ("Hentons"), submitted a Notice of Appeal to the Tribunal on behalf of Mr Bradford. On 15 January 2019, the Tribunal directed HMRC to provide a Statement of Case within 60 days.

2. On 14 February 2019, HMRC applied for Mr Bradford to provide further and better particulars of his grounds of appeal ("the Application"). On 18 March 2019, Hentons objected to the Application and provided further information. Further correspondence ensued. Finally, on 21 September 2020 Judge Bailey directed that the Tribunal decide the Application on the papers, and should also decide whether the appeal should be struck out.

3. For the reasons set out in the main body of this judgment, I have decided that the appeal is not struck out; that HMRC already have sufficient information to provide a Statement of Case, and the Application is therefore refused. I refer the parties to the citation from *British Airways Pension Trustees Ltd v Sir Robert McAlpine* (1994) 72 BLR 26; 45 ConLR1, set out at §63.

4. At the end of this judgment I have given directions for HMRC to provide a Statement of Case. I have also directed that the parties co-operate in considering whether this appeal should be stayed behind that of another appellant, Miss Joanna Wild.

Evidence

5. The Tribunal had the following documents: Mr Bradford's Notice of Appeal, which attached the HMRC review decision against which he was appealing; the correspondence between the parties, and that between the parties and the Tribunal.

6. I make the findings of fact set out below on the basis of that evidence. For the avoidance of any possible doubt, these findings are made only for the purposes of this decision and do not bind any future Tribunal deciding Mr Bradford's substantive appeal.

Findings of fact

7. On 12 December 2012, Mr Bradford subscribed to a syndicate called "African Teak Syndicate No 3". His investment was stated to be made up of a capital contribution and a loan from a firm called Mere Contracting Ltd; the manager of the plantation was Mere Environmental Ltd.

8. On 7 January 2014, Mr Bradford's 2012-13 tax return was submitted to HMRC. It included self-employment losses from a "Teak Plantation" of £340,997, of which £174,249 was claimed as sideways loss relief in the same tax year, and £176,748 was carried back to the previous tax year.

9. On 9 December 2014, HMRC opened an enquiry into Mr Bradford's return under Taxes Management Act 1970 ("TMA") s 9A. On 3 May 2018, HMRC closed the enquiry under TMA s 28A(1B), and issued a decision letter refusing the claimed loss relief on the further/alternative bases that:

(1) Mr Bradford was not carrying on a trade;

(2) if there was a trade, it was not carried out on a commercial basis with a view to the realisation of profits;

(3) if there was a trade, and it was on a commercial basis, Mr Bradford was carrying on that trade in a "non-active" capacity as defined by Income Tax Act 2007 ("ITA"), s 74C, and thus sideways loss relief could not exceed the statutory maximum of £25,000 as provided by ITA s 74A;

(4) the deductions claimed for loan finance and professional fees were not wholly and exclusively for the purposes of any trade; and

(5) the accounts on which the claimed loss was based were not prepared in accordance with UK GAAP and so did not represent the true position.

10. On 9 November 2018, HMRC carried out a statutory review of that decision. Mrs Harrison, the HMRC review officer, considered each of the points listed in the previous paragraph, and under each of those headings, set out Hentons' submissions as previously provided to HMRC, and her own conclusions. She rejected Hentons' submissions and upheld the decision.

11. On 5 December 2018, Hentons submitted a Notice of Appeal to the Tribunal on behalf of Mr Bradford. Under "grounds of appeal" Hentons stated that:

> "Our client's grounds for appealing are that losses claimed from his sole trade business and the amount claimed reflects an accurate assessment of the trading losses incurred in the activity. We would ask that you review the decision."

12. Hentons' covering email said that the firm were aware that another case with similar facts was also before the Tribunal, namely Miss Joanna Wild (TC/2018/06522) and asking that Mr Bradford's case be stayed behind that of Miss Wild.

13. The Tribunal categorised the appeal as "standard" under Rule 23 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009 (the "FTT Rules"). On 15 January 2019, the Tribunal directed HMRC to provide a Statement of Case within 60 days.

14. On 14 February 2019, HMRC said that they were unable to do so because the Appellant "had not provided properly particularised grounds of appeal", and had failed to address any of the points in the decision letter, namely those at §9 above.

15. On 5 March 2019, the Tribunal wrote to the parties saying that the Application was allowed unless the Appellant objected within 14 days.

16. On 18 March 2019, Hentons objected to the Application, but also set out their response to each of the points in HMRC's decision, by providing:

(1) detailed submissions on the nature and extent of Mr Bradford's activities with reference to the case law on the nature of a trade;

(2) information to support their submission that the activity was on a commercial basis;

(3) a statement that Mr Bradford carried out "an average of 10 hours per week personally conducting his teak trading business" and that the firm had already given HMRC "a body of evidence" on this issue which was "likely to be used at the Tribunal";

(4) a statement that the fees had been incurred for the purposes of the trade and that the business had agreed to "unconditional loan financing" from Mere Plantations Ltd, and while this "may not have entirely been incurred at this stage" it had been correctly accrued in the accounts; and

(5) the accounts were prepared by a firm of Chartered Accountants who diligently complied with the relevant rules.

17. Hentons also repeated their application for Mr Bradford's case to be stayed behind that of Miss Wild.

18. On 15 April 2019, the Tribunal wrote to the parties saying that HMRC were to file and serve their Statement of Case by 16 June 2019, unless they objected to the Appellant's response within 14 days. The Tribunal also referred to Hentons' application for Mr Bradford's case to be stayed behind that of Miss Wild.

19. On 24 May 2019, HMRC objected, saying (with reference to the points in the decision letter set out at §9 above) that they did not consider the further and better particulars provided to be sufficient in relation to issues (3) to (5), for the following reasons:

(3) In relation to whether Mr Bradford was acting in a "non-active" capacity Hamptons had not said "what activities [he] carried out; the period in which he carried them out and how long it took him to carry them out" but had simply asserted that it was for at least 10 hours a week. HMRC added that they "of course accepted that the detail of the activities is a matter of evidence".

(4) Hentons had said that the loan finance expense "may not have entirely been incurred at this stage" but had failed to explain whether it had been incurred; HMRC added that "only incurred expenditure can potentially be an allowable deduction".

(5) Hentons' statement that the accounts were prepared correctly because they had been prepared by a diligent firm of Chartered Accountants was a mere assertion.

20. In the same letter, HMRC also:

(1) applied for the Appellant to provide "amended grounds of appeal which particularise in reasonable detail all of the arguments upon which the Appellant relies in support of the appeal and the outline facts which, in his submission support such arguments", and

(2) said they could not consent to a stay of Mr Bradford's appeal because "until further information is provided, it is not possible to assess the extent to which the appeal raise similar issues" to that of Miss Wild.

21. On 16 August 2019, on the instruction of Judge Mosedale, the Tribunal wrote to direct that within 14 days the Appellant was to "provide further and better particulars as requested by HMRC and in particular respond to the points made in HMRC's letter of 24 May 2019", or that the Appellant object, with reasons.

22. No response was received from the Appellant, and on 23 September 2019, the Tribunal wrote again, giving the Appellant further 7 days to reply. Again, there was no response, and on 18 October 2019 Judge Morgan issued an order stating that unless the Appellant confirmed in writing by 1 November 2019 that he wished to continue with his appeal, and also complied with the direction given on 16 August 2019, the appeal "may be struck out" ("the Unless Order").

23. On 29 October 2019, Hentons responded, confirming that Mr Bradford intended to proceed with his appeal, and providing "grounds for appeal against refusal of loss relief" which set out a list of reasons why Mr Bradford believed he was entitled to that relief, namely that:

(1) he had acquired his interest in the plantation with a view to realising a profit;

(2) a third party had recently signed a contract to purchase the thinnings, and so Mr Bradford would shortly be declaring a profit on his tax return;

(3) he had used subcontractors in Ghana to grow the trees from seed, but had engaged in an "overview of the business and its development"; and

(4) he had obtained finance to enable the development, which will be repaid when the timber was sold.

24. I understood this to be a response to HMRC's request that the Appellant provide "amended grounds of appeal…and the outline facts which, in his submission support such arguments", although I note that it appears to be additional to the detailed information previously provided on 18 March 2019 rather than a replacement for those particulars.

25. On 17 January 2020, Mr Bradford changed his representative to Mr Gary Clarkson.

26. On 24 February 2020, the Tribunal wrote to the parties under the direction of Judge Morgan. She noted that Mr Bradford had not answered the questions posed by HMRC's letter of 24 May 2019 and directed that he do so within seven days, and then said:

> "if no response or an inadequate response is received, the Tribunal may organise a hearing to consider whether the appeal should be struck out on the basis that it has no real prospect of success according to the appeal grounds provided,"

27. Judge Morgan's reference to "whether the appeal should be struck out on the basis that it has no real prospect of success" was to Rule 8(3)(c) of the FTT Rules. The relevant provisions of Rule 8 are set out in the next part of this judgment.

28. The Appellant did not respond, and on 13 March 2020, HMRC asked for a hearing to decide whether to strike out the appeal for the reason suggested by Judge Morgan, and also asked the Tribunal to consider in the alternative whether the appeal should be struck out, under Rule 8(3)(b) of the FTT Rules on the basis that the Appellant had failed to co-operate with the Tribunal to such an extent that it could not deal with the proceedings fairly and justly. HMRC provided representations on both issues.

29. On 21 September 2020, Judge Bailey reviewed Mr Bradford's file and noted that he had not responded to the Tribunal's letter dated 24 February 2020 and that "it is clear that HMRC's application of 14 February 2019 should now be determined".

30. Judge Bailey went on to say Judge Morgan had warned that the Tribunal might list a hearing to decide "whether this appeal should be struck out on the basis that it has no real prospect of success on the basis of the appeal grounds provided". In other words, she referred only to Rule 8(3)(c) and not to Rule 8(3)(b). She then directed that Mr Bradford provide any further submissions on the Application within 21 days, to include considering whether his appeal should be struck out, and that if no submissions were provided within that time, the Tribunal would "assume that the right to make submissions is not being exercised".

HMRC were directed to provide any further submissions within 42 days, following which the Tribunal would decide the Application on the papers.

31. No submissions were received from the Appellant, and on 2 November 2020 HMRC provided further submissions. On 12 November, these were followed with links to the case law on which reliance was placed, together with a single page headed "African Teak Syndicate 3 Profit and Loss 2012/13" ("the P&L account"). The Application was listed before me to decide on the papers.

The FTT Rules

32. Rule 2 of the FTT Rules provides:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (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;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (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; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

33. Rule 5 of the FTT Rules is headed "Case management powers" and provides, so far as relevant:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction…
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party."

34. Rule 8 of the FTT Rules is headed "Striking out a party's case" and paragraphs (3) and (4) read:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs…(3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

35. Rule 20(2)(g) states that an Appellant must provide "the grounds" for his appeal and at para (3) requires that he attach "a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that [he] has or can reasonably obtain".

36. Rule 25 is headed "Respondent's Statement of Case" and it says, again so far as relevant to this decision:

"(1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received—

(c) in a Standard or Complex case…,within 60 days after the Tribunal sent the notice of appeal.

(2) A statement of case must—

(a) in an appeal, state the legislative provision under which the decision under appeal was made; and

(b) set out the respondent's position in relation to the case."

Whether the Application has already been decided

37. HMRC submitted that the Application had already been allowed, because:

(1) on 16 August 2019, the Tribunal had directed that within 14 days the Appellant was to "provide further and better particulars as requested by HMRC and in particular respond to the points made in HMRC's letter of 24 May 2019", or that they object, with reasons; and

(2) the Appellant did not provide the particulars, or object with reasons.

38. In HMRC's submission, it therefore "appeared that the Application had been allowed". However:

(1) as HMRC themselves acknowledged, this was not the view of the Tribunal, which first sent a chaser letter to the Appellant, followed by an Unless Order, to which the Appellant responded;

(2) the Tribunal's letter of 16 August 2019 did not state that the Application would be allowed by default if the Appellant failed to respond; and

(3) the Appellant had already objected to the Application by its letter of 18 March 2019.

39. The Application therefore remains to be determined.

Whether the appeal should be struck out under Rule 8(3)(b)

HMRC's submissions

40. HMRC submitted that the appeal should be struck out on the basis that the Appellant had failed to co-operate with the Tribunal to such an extent that it cannot deal with the proceedings fairly and justly, because:

(1) The grounds of appeal contained only the brief statement at §11, and "HMRC were entirely unclear what the Appellant's grounds of appeal were".

(2) Although the Appellant had provided further information on 18 March 2019 when directed to do so, that response was "inadequate".

(3) The Appellant did not comply with the Tribunal's direction of 16 August 2019 that the Appellant either (a) respond to HMRC's letter of 24 May 2019, or (b) make an objection, and the Appellant also did not respond to the chasing letter from the Tribunal dated 23 September 2019.

(4) On 18 October 2019, Judge Morgan issued the Unless Order to which the Appellant responded, but that response did not address the issues in HMRC's letter of May 2019.

(5) The Appellant then changed his representative, but Mr Clarkson did not respond to the Tribunal's letter of 24 February 2020.

(6) HMRC submitted that the Appellant has therefore four times failed to respond to the Tribunal's direction that it provide a response to HMRC's letter of 24 May 2019, and thus according to the principles set out in *Denton v White* [2014] EWCA Civ 906, the appeal should be struck out.

(7) The Appellant has not provided any submissions following Judge Bailey's directions of 21 September 2020.

Discussion of failures to comply

41. My starting point is that the Appellant *did* comply with the Tribunal's direction of 5 March 2019, and *also* complied with (a) the part of the Unless Order requiring confirmation that he wished to continue with the appeal and (b) the request for amended grounds of appeal and related facts, albeit by providing what appears to be additional material. He was not required to provide submissions for the purposes of this case management decision, so there has been no related failure to comply.

42. The failures were as follows:

(1) he did not respond to the Tribunal's direction of 16 August 2019;

(2) in addition to the points within the Unless Order with which he complied, he was also required either to answer HMRC's questions at §16(3-5) or object with reasons;

(3) he did not reply to the direction issued by letter on 24 February 2020 that he answer the questions posed by HMRC on 24 May 2019.

43. HMRC submit that as a result of the failures, the *Denton* principles apply, and that the appeal should be struck out in accordance with that approach. I have not set out those principles in this decision: they are well known. However, I do not agree that they apply here for the following reasons:

(1) In relation to the directions issued on 16 August 2019, the Tribunal subsequently decided to exercise its case management powers to issue a Unless Order, to which the

Appellant did reply. Although he did not answer HMRC's questions or explicitly object to them, he provided amended grounds which included further information. Having considered the nature and quality of the response, the Tribunal then exercised its discretion not to strike out the appeal. It is not in the interests of justice for me to revisit that decision.

(2) In relation to the direction issued 24 February 2020, the Tribunal set out the consequences of a failure to comply as being that there may be a hearing to consider whether "the appeal should be struck out on the basis that it has no real prospect of success according to the appeal grounds provided". Given that the Tribunal clearly specified the consequences of non-compliance, it is not in the interests of justice for me to apply a different sanction by striking out his appeal.

(3) I also take into account that on 21 September 2020 Judge Bailey directed that the Application should be decided on the papers, with reference only to Judge Morgan's earlier warning about a possible strike out under Rule 8(3)(c). It is only in HMRC's submissions that the possibility of a strike out under Rule 8(3)(b) and/or under the *Denton* principles has been put forward.

44. Even if HMRC were right that *Denton* applies, so that there has been a serious, significant and unexplained failure to comply with the directions given by the Tribunal on 16 August 2019 and 24 February 2020, I would have to resolve that issue by considering "all the circumstances of the case". These include the following:

(1) the previous case management decisions of the Tribunal summarised above did not warn the Appellant that the appeal might be struck out if he failed to comply, but instead either explicitly or implicitly set out other consequences, and it would be unfair for the Tribunal to strike out the appeal for a new and different reason;

(2) there would be significant prejudice to the Appellant if his appeal were struck out. I note in particular that HMRC no longer appear to be arguing that insufficient information has been provided in relation to the Appellant's case on whether there is a trade, or on the commerciality of the trade; and

(3) although particular weight must be given to the need for litigation to be conducted efficiently and at proportionate cost, Hentons objected to the Application as long ago as 18 March 2019 at the same time as they provided further information. HMRC have been in a position to prepare a Statement of Case since at least 18 March 2018, see my decision on the Application itself at §55ff, so the delays in this appeal do not lie only at the door of one party.

45. I therefore find that it is not in the interests of justice to strike out the appeal for failure to comply with the Tribunal's directions.

Strike out under Rule 8(3)(b) other than for Denton?

46. It is of course true that the Tribunal has a broad case management discretion to strike out appeals under Rule 8(3)(b) and that this discretion is not limited to cases where *Denton* applies. In *Nutro v HMRC* [2014] UKFTT 971 ("*Nutro*"), Judge Berner decided to strike out the appellant's case under that Rule because of a "persistent litany of defaults" and because of dishonesty; I took a similar position in *Vimalsawaran v HMRC* [2019] UKFTT 2019, after the appellant's representative made untrue statements at the hearing.

47. Those cases indicate that the threshold for striking out under that Rule is high, and appropriate for cases where the Tribunal cannot use other discretionary powers, such as costs

orders. In the Appellant's case there has not been a persistent litany of defaults comparable to those in *Nutro*, and neither has there been dishonesty. Although he has not respond to HMRC's three questions, it is also relevant that by the time HMRC asked those questions, the Appellant had already objected to the Application..

48. I find that the Appellant has not failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. In any event, Rule 8(4) provides that an appeal cannot be struck out under Rule 8(3)(b) unless a party has had "an opportunity to make representations in relation to the proposed striking out". In this case, the Appellant was given the opportunity to make representations about a possible strike out under Rule 8(3)(c) and not Rule 8(3)(b); the only mention of that Rule is in HMRC's submissions.

The case law on striking out an appeal under Rule 8(3)(c)

49. In *HMRC v Fairford Group plc* [2014] UKUT 329, the Upper Tribunal ("UT") held at [41] that:

> an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24)."

50. The same approach was followed in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 0396.

51. The relevant principles were set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five* [2009] EWCA Civ 1098 as follows:

> "(i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts

of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

The submissions and discussion

52. HMRC submit that the Appellant has failed to set out his "factual and legal case" and his appeal should therefore be struck out in its entirety.

53. That submission does not, however, engage with the case law set out above. The following points emerge from my findings earlier in this decision:

(1) What is in issue here is not "a short point of law or construction", but the Appellant's entire appeal – whether he is carrying out a trade, whether it is on a commercial basis, whether he is "non-active", whether the claimed expenditure is allowable, and whether the accounts are under UK GAAP.

(2) HMRC originally raised five issues, but no longer appear to be arguing that insufficient information has been provided in relation to the Appellant's case on whether there is a trade, or on the commerciality of the trade. Yet they have nevertheless asked that the appeal be struck out in its entirety.

(3) The only evidence with which I have been provided is the single page P&L account (see §31). This is clearly well below the threshold which would allow me to be "satisfied" that I have "all the evidence necessary for the proper determination" of Mr Bradford's appeal, especially as I am required to "take into account not only the evidence actually placed before [me] on the application…, but also the evidence that can reasonably be expected to be available at trial". In particular:

(a) The first issue in relation to which HMRC now say the grounds are inadequate is the extent and nature of the Appellant's involvement in the teak plantation. As HMRC themselves acknowledged, this is a matter of evidence, and the normal position is that this is provided by way of witness statements during the preparation for the appeal.

(b) The second issue was costs. HMRC know what those costs are, as they have the accounts and Mr Bradford's tax return. In their letter of 18 March 2019, Hentons said that the loan amounts had been accrued and HMRC responded by saying that only costs "incurred" are allowable for tax. HMRC do not explain the

basis for that submission, or how such a requirement fits with UK GAAP. Whether the Appellant can provide the evidence to support his case on costs does not need to be decided before a Statement of Case can be prepared.

(c) The last issue was the accounting treatment. The Appellant's accounts were prepared by a firm of Chartered Accountants, so whether they comply with UK GAAP will also be a matter of evidence, possibly expert evidence. It is not a matter I can decide on the basis of the material before me, which does not even include the accounts in question.

(4) As a result, it is plain that "reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

(5) Even if that evidence were to be provided, I could not fairly consider it without conducting a "mini-trial".

54. For all those reasons, I refuse to strike out the appeal under Rule 8(3)(c).

The Application

HMRC submissions

55. HMRC said that the Application should be allowed because there is "complete uncertainty as to what the Appellant is asserting its [sic] ground are, let alone whether they are sufficiently detailed" and "it is impossible for a Statement of Case to be provided as there is no certainty as to what grounds are relied on".

56. They relied on *Rapid Brickwork v HMRC* [2015] UKFTT 190 (TC), an earlier decision of mine. I said at [60]:

> "Rule 21(2)(g) of the Tribunal Rules specifies that grounds must be provided when an appeal is made to the Tribunal, and that is for the very good reason that these are the starting point for the proceedings. HMRC's Statement of Case is a response to those grounds, and if they are not properly particularised, the appeal cannot proceed because HMRC does not know what arguments the Appellant is seeking to make before the Tribunal."

57. HMRC also relied on *Unicorn Shipping v HMRC* [2017] UKFTT 464 (TC), a decision of Judge Mosedale, where she said:

> "[5] It is the appellant's appeal. To lodge an appeal, an appellant must have grounds of appeal and moreover, it must have grounds of appeal which on their face are arguable. This is so because litigation should not be by ambush: the defendant must know what is alleged against it. Moreover, the defendant needs to be in a position to judge whether the appeal has any real prospects, so that if it does not, the defendant can apply to have it struck out without incurring the costs of a full appeal hearing.
>
> [6] Therefore, it follows that grounds of appeal must be sufficiently detailed to enable the defendant to understand the case and prepare a statement of case in answer to it. This is required by authority in any event, such as *British Airways Pension Trustees Ltd v Sir Robert MacAlpine and Sons Ltd* (1994) 72 BLR 26 at [33-34]."

Discussion and decision

58. I begin by noting that the position in both of the cases relied on by HMRC was significantly different from that of Mr Bradford. In *Rapid Brickwork* the appellant had

initially said that HMRC would know his grounds of appeal as his arguments were "well documented throughout more than six years of correspondence and the Respondent need only refer to that correspondence". I held that "it is not sufficient to refer in general to all the grounds that have been raised in previous correspondence". The appellant subsequently said it was appealing on the grounds that "each and every one of the reasons stated by HMRC in its letters dated 23 November 2012 and 1 October 2013 why the decisions were incorrectly claimed was wrong". Simply saying "HMRC is wrong" is plainly inadequate.

59. In *Unicorn Shipping,* the appellant had not provided any grounds of appeal at all, but had instead applied for the normal procedure to be reversed, so that HMRC would supply a Statement of Case before the appellant provide grounds of appeal. Judge Mosedale held that there was no basis for departing from the normal procedure.

60. Turning back to Mr Bradford, I agree that the grounds in the Notice of Appeal are brief. However, the following points are also relevant:

(1) Those grounds cross-refer to Mrs Harrison's review decision, which sets out point by point the Appellant's reasons for disagreeing with HMRC.

(2) The Application asks for further and better particulars of the five issues set out at §9 of this judgment, but these are the self-same issues about which Hentons had already provided submissions to HMRC at the time of the statutory review.

(3) In contrast to *Rapid Brickwork,* the Notice of Appeal to the Review Decision was not a general reference to all the grounds that had been raised in years of previous correspondence, but was specific to the review letter and to the Appellants' arguments as considered by Mrs Harrison.

(4) In any event, if HMRC were in any doubt about the Appellant's position, Hentons provided further information on 18 March 2019.

61. HMRC nevertheless remained of the view that the grounds remained insufficiently particularised, and asked for further specific information in relation to the three points listed at §19. In relation to those points, as already noted:

(1) The extent and nature of the Appellant's involvement is the type of evidence normally provided by way of witness statements during the preparation of the appeal.

(2) The Appellant's position is that the costs are allowable for tax. HMRC knows what those costs are because they have already been provided with the accounts. Whether the Appellant can provide the evidence to support his case is a matter to be decided at the substantive hearing.

(3) Whether the accounts comply with UK GAAP will also be a matter of evidence to be considered at that hearing, and may include expert evidence.

62. In my judgment HMRC have sufficient information on the Appellant's grounds of appeal to provide a Statement of Case. It is not in the interests of justice for them to seek to identify, before they provide a Statement of Case, every detailed piece of his evidence and all the nuts and bolts of his arguments. HMRC could have filed and served a Statement of Case after they received Hentons' letter of 18 March 2018, rather than asking further specific and detailed questions about Mr Bradford's evidence.

63. I am reinforced in that conclusion by the decision of the Court of Appeal in *British Airways Pension Trustees Ltd v Sir Robert McAlpine* (1994) 72 BLR 26; 45 ConLR1 to

which Judge Mosedale referred in *Unicorn Shipping,* at the end of the citation relied on by HMRC. The passage comes from the leading judgment of Saville LJ, with which Beldam and Neil LJJ both agreed, and it reads (my emphasis):

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject matter and circumstances."

64. In my judgment, this is a case where HMRC has continued to insist on particularisation "when it is not really required"; that approach has led to delay and "interlocutory battles" when "in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it".

65. Once HMRC have provided a Statement of Case, and subject to §66 below, the parties can then follow the normal procedural steps of exchanging documents and witness evidence in preparation for a substantive hearing. It is not in the interests of justice to require that exchange of evidence *before* the service of a Statement of Case.

The Joanna Wild case

66. The Appellant has twice asked for this appeal to be stayed behind that of Miss Wild. My understanding from a brief review of the Tribunal's files is that Miss Wild may have entered into similar arrangements to Mr Bradford (see *Joanna Wild v HMRC* [2018] 06522) but that her case may be more advanced. I also note that Miss Wild and Mr Bradford are both represented by Mr Clarkson, and that the same HMRC litigator (Ms Rhind) is handling the two appeals.

Directions

67. By 30 days from the date of issue of this decision, in accordance with Rule 2(4), the parties are to co-operate with each other with the aim of making a joint application (with reasons) that:

(1) this case be stayed behind that of Miss Wild; or

(2) Miss Wild's case be stayed behind this case; or

(3) there are sufficient differences of fact and/or law between them, so that it is in the interests of justice for both to proceed; or

(4) there is some other good reason why the Appellant's case should proceed irrespective of Miss Wild's position.

68. If the parties are unable to agree on a joint application, by the same date they are separately to put forward their submissions as to why a stay of this case is, or is not, appropriate.

69. Whether or not this case is stayed behind that of Miss Wild, HMRC is to provide a Statement of Case for this appeal within 60 days. This direction is given with the aim of avoiding future delays should any such stay be lifted.

Right to apply for permission to appeal

70. 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.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 6 JANUARY 2021