Neutral Citation: [2022] UKFTT 192 (TC)

Case Number: TC08517

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/00557

PROCEDURE – abuse of process – jurisdiction – Foulser v HM Revenue & Customs [2013] UKUT 038 and Hackett v HM Revenue & Customs [2020] UKUT 212 considered – conduct of HMRC during enquiry and prior to the appeal proceedings – inordinate and inexcusable delay on the part of HMRC – no prejudice to a fair hearing – application dismissed

Heard on: 21 February 2022
Judgment date: 06 May 2022

Before

TRIBUNAL JUDGE CANNAN

Between

ANDREW NUTTALL

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Alistair Webster QC instructed by way of direct access

For the Respondents: Edward Waldegrave of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

BACKGROUND

1. By an application dated 25 April 2021 ("the Application"), the appellant ("Mr Nuttall") made an application that the respondents ("HMRC") be barred from taking further part in the proceedings and that his appeal be allowed on the grounds of abuse of process. The alleged abuse is unconscionable delay on the part of HMRC in their enquiry into Mr Nuttall's self-assessment return for 2003-4. It is said that the delay has caused prejudice to Mr Nuttall in pursuing his appeal and that the only appropriate remedy is to allow the appeal.

2. HMRC objected to the Application in a response dated 14 May 2021. They did not seek to explain or justify the delay relied upon by Mr Nuttall. Rather, they argued as follows:

(1) Mr Nuttall required permission to amend his grounds of appeal to rely upon delay during the course of the enquiry.

(2) Any such application should be refused.

3. Mr Nuttall provided a note by way of reply to HMRC's response. He contended that it was not necessary for him to seek to amend his grounds of appeal to rely on the procedural remedy he was seeking. If he was wrong on that, he applied for permission to amend his grounds of appeal.

4. At that stage there was also an issue between the parties as to whether the Application ought to be dealt with as a preliminary issue. In the event, and for various practical reasons, the Application was heard on 21 February 2022, with the appeal being heard on 23 and 24 February 2022. The appeal was heard together with the appeals of two other taxpayers who had not made applications for their appeals to be allowed on the grounds of abuse of process.

5. For the reasons which follow I have refused the Application.

6. This decision is being released at the same time as my decision on Mr Nuttall's appeal ("the Decision"). It should be read together with the Decision which provides a detailed account of the nature of the issues, the circumstances in which they arise, the evidence by reference to which I have determined those issues and the basis on which I have determined those issues. I shall not repeat those matters in this decision, but I can briefly summarise the position together with other relevant background facts which I find for the purposes of this decision as follows:

(1) In August and September 2003 Mr Nuttall purchased shares in Readybuy in connection with a flotation of that company's shares on AIM.

(2) Mr Nuttall gifted 328,000 shares in Readybuy to charity on 8 September 2003 and claimed gift relief in his self-assessment return for 2003-04. Tax relief of £174,660 was claimed based on a market value of the shares at the date of gift of 53.25p per share.

(3) HMRC opened an aspect enquiry into Mr Nuttall's return on 15 June 2005. The enquiry was into gifts of qualifying investments to charities. At the same time information was requested from Mr Nuttall including evidence of the gift, details of how the value of the shares was determined, and other evidence in connection with the acquisition and gifting of the shares.

(4) A closure notice was issued on 28 September 2017. HMRC assessed Mr Nuttall to tax based on a market value of the shares of 14.66p per share. The effect of the closure notice was to reduce the relief available to Mr Nuttall from £174,660 to £48,084.

(5) Mr Nuttall appealed the conclusions in the closure notice by letter dated 20 October 2017. His ground of appeal was as follows:

> The grounds for my appeal are that I disagree with the valuation methodology adopted by HMRC with regard to my Readybuy shares.

(6) The closure notice was upheld following a statutory review and Mr Nuttall notified his appeal to the Tribunal on 19 January 2018. The ground of appeal was essentially a challenge to the valuation used by HMRC in the closure notice.

7. It can be seen from the background facts that HMRC's enquiry into Mr Nuttall's claim for relief took more than 12 years. That is the delay relied upon by Mr Nuttall, between June 2005 and September 2017.

8. There was an issue between the parties as to whether and if so to what extent the Tribunal has jurisdiction to allow an appeal for abuse of process based on delay in the enquiry before the appeal was notified to the Tribunal. I shall first consider the nature and extent of my jurisdiction, before considering whether any abuse of process has been made out and if so what remedy ought to be applied.

JURISDICTION IN RELATION TO ABUSE OF PROCESS

9. Mr Waldegrave accepted that in certain circumstances the Tribunal does have jurisdiction to allow an appeal on the basis of delay amounting to an abuse of process. However, he submitted that there was no jurisdiction in the present circumstances in relation to what was described as "pre-litigation conduct".

10. The relevant principles in this area have been considered by the Upper Tribunal in two cases. The first was a decision of Morgan J in *Foulser v HM Revenue & Customs* [2013] UKUT 038 (TCC). The facts of that case were unusual. On the morning of the taxpayers' hearing before the FTT, HMRC arrested the taxpayer's adviser who was representing them in the appeal. The hearing was adjourned and the appeal stayed pending an application by the taxpayers for HMRC to be debarred from participating in the proceedings on the grounds of abuse of process. The FTT struck out that application on the grounds that it did not have jurisdiction to grant the relief sought. On appeal to the Upper Tribunal, it was argued that the FTT did have jurisdiction to prevent an abuse of process, implied by reference to its general case management powers and the duty when exercising those powers to give effect to the overriding objective of dealing with the case fairly and justly.

11. The Upper Tribunal referred to the Administrative Court decision in *R (on the application of Ebrahim) v Feltham Magistrates' Court, Mouat v DPP* [2001] EWHC Admin 130 where Brooke LJ distinguished two categories of abuse of process in the context of criminal cases as follows:

> [18] The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are; (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried…
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> [19] We are not at present concerned with the second of these two categories (which we will call "Category 2" Cases), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction (see *ex p Watts*, per Buxton LJ (at 195)).
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> [20] In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutor's conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutor's behaviour than to the fairness of any eventual trial. Although it may well

> be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all …
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> [24] The first category of case (see para 18 above: we will call these "Category 1" cases) is founded on the recognition that all courts with criminal jurisdiction, including magistrates' courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court's process and a breach of art 6 of the European Convention of Human Rights. In these cases the focus of attention is on the question whether a fair trial of the defendant can be had.

12. Having quoted that passage, Morgan J addressed the jurisdiction of the FTT in relation to abuse of process as follows:

> [35] I consider that there is much in these authorities to support the distinction I earlier drew, based on first principles. I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority.

13. Morgan J went on to review the express powers of the FTT in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273 ("the 2009 Rules") and to consider by reference to authorities what implied powers there may be. He concluded as follows:

> [50] I consider that the relevance of these authorities in the present case is as follows. If Mr and Mrs Foulser contend that the events of 29 September 2010 have made a fair hearing of the tax appeal impossible or that safeguards against possible unfairness must now be provided, then the FTT can deal with that contention and can exercise the express powers conferred by the 2009 Rules to deal with possible unfairness or to provide safeguards. It seems to me that the width of the express powers conferred by the 2009 Rules, to which I have referred, ought to be sufficient for these purposes. If it should turn out that the express powers conferred by the 2009 Rules are not sufficient, then the FTT can consider whether it has, and whether it ought to exercise, some implied power which might exist to enable it to achieve fairness in its procedures and/or to observe the rules of natural justice. Conversely, if the FTT considers that the events of 29 September 2010 do not make a fair hearing of the tax appeal impossible, with or without further safeguards, then any contention that HMRC acted unlawfully in public law must be put forward by way of an application for judicial review and such an application is not within the jurisdiction of the FTT.

14. The FTT in Foulser had determined the application on the basis that what was being alleged was not conduct which made a fair hearing of the appeal impossible. It became apparent before the Upper Tribunal that such an allegation was being made. In the circumstances the matter was remitted to the FTT to determine the issue.

15. The same distinction between categories of abuse was recently recognised by the Upper Tribunal in *Hackett v HM Revenue & Customs* [2020] UKUT 212 (TCC). Before discussing that case, it is convenient to consider a decision of the FTT in *Alway Sheet Metal Limited v HM Revenue & Customs* [2017] UKFTT 198 (TC) ("ASM"). In *ASM*, Tribunal Judge Richards (as he then was) took the view that the FTT had jurisdiction to provide a remedy for excessive delay by HMRC on the ground that the delay amounted to an abuse of process. He summarised his findings in relation to jurisdiction as follows:

> 101. Mr Hackett's argument relating to "abuse of process" is somewhat different. In the course of his oral submissions he clarified that he was not asking the Tribunal, in determining the appellants' appeals under s31 TMA 1970 or paragraph 34(3) of Schedule 18, to discharge the assessments on the grounds of excessive delay in making them. Rather, he was asking the Tribunal to exercise its case management powers to make appropriate directions (which may include barring HMRC from resisting the appeal) on the grounds that HMRC's delay in making the assessments means that the Tribunal will not be able to deal with the appeal fairly and justly. I agree with Mr Hackett that the decision of the Upper Tribunal in *Foulser v HMRC* [2013] UKUT 38 means that I have jurisdiction to consider whether it is possible to deal with this appeal fairly and justly and, if I cannot, to make appropriate directions.
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> …
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> 105. As I have noted, I consider that I do have jurisdiction to consider this argument. It amounts to an invitation that, if I consider HMRC's delay means this appeal cannot be dealt with fairly and justly, I should use my case management powers to make appropriate directions (which may include barring HMRC from defending the appeal). I will not, however, make any such directions.
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> 106. The Tribunal has case management powers to regulate the conduct of litigation that is before it. Yet Mr Hackett is not making any complaint as to how HMRC have conducted the litigation from the point at which the appellants notified their appeals to the Tribunal. He is, therefore asking the Tribunal to punish HMRC for what the appellants consider to be unacceptable delay before Tribunal proceedings were commenced. I do not consider that would be a proper exercise of case management powers. The authorities that Mr Hackett showed me dealt primarily with delay after proceedings were commenced and, although *Foulser* was not focused on questions of delay, it dealt with a situation where HMRC were argued to have taken certain prejudicial actions while proceedings before the Tribunal were current.

16. It does not appear that the distinction in *ASM* between conduct prior to commencement of the Tribunal proceedings and conduct after the commencement of the Tribunal proceedings had previously been identified in the authorities. *Foulser*, and the authorities to which it referred, distinguished conduct which meant there could not be a fair hearing and conduct which did not directly affect the fairness of a hearing, but the result of which was that it would be unlawful in a public law sense for the hearing to proceed.

17. In any event, Judge Richards was not satisfied that HMRC had been guilty of inordinate delay in relation to the enquiry so as to justify the sanction of debarring HMRC from defending the appeal.

18. The Upper Tribunal in *Hackett* (Trower J and Judge Herrington) was concerned with an appeal against a personal liability notice issued to the taxpayer. HMRC issued a deliberate inaccuracy penalty to a company and thereafter a personal liability notice to the taxpayer who

was a director of the company on the ground that the inaccuracies were attributable to the taxpayer. The taxpayer contended that it was an abuse of process for HMRC to proceed by way of personal liability notice, where the civil standard of proof and different rules of evidence applied, instead of a criminal prosecution.

19. It was common ground in *Hackett* that the scope of the jurisdiction in relation to abuse of process was as set out in *Foulser*, and that the taxpayer would have to establish that the alleged abuse directly affected the fairness of the hearing and fell within the first category of cases. The Upper Tribunal considered the decision of the FTT is *ASM* and analysed it as follows:

> [43] Although the FTT did not say so explicitly, in our view the decision of the FTT not to exercise its powers in that case could also be justified on the basis that the complaint against HMRC in effect amounted to a complaint as to how it had exercised its investigatory and decision-making powers, in other words an allegation that HMRC had abused its power to make an assessment, a matter which fell outside the scope of the jurisdiction of the FTT and which had to be addressed through judicial review proceedings.

20. The Upper Tribunal was not satisfied that the jurisdiction was engaged in relation to HMRC's decision to proceed by way of a personal liability notice. It summarised its reasons as follows:

> [46] None of Mr Burton's [the taxpayer's counsel] submissions persuade us that the abuse of process argument run by Mr Hackett directly affects the fairness of the hearing before the FTT. However skilfully Mr Burton sought to frame his arguments otherwise, his submissions in essence amount to a contention that HMRC acted unlawfully in exercising its discretion to bring civil penalty proceedings in this case. That contention falls squarely within the second category of case identified by Morgan J in *Foulser*. As was the position in *Alway Sheet Metal*, the matters complained of in this case occurred before the proceedings were instituted in the FTT and do not relate to any alleged abuse of the FTT's own proceedings.

21. The decision of the Upper Tribunal appears to endorse the approach of Judge Richards in *ASM* that conduct complained of before tribunal proceedings are commenced cannot support an argument that the FTT should provide a remedy for abuse of process.

22. If that is the width of the principle to be derived from *Hackett,* then I am bound by it. However, in my judgment what the Upper Tribunal in *Hackett* said at [43] and in the last sentence of [46] was clearly not part of its reasoning. On the facts of *Hackett*, the conduct complained of was within the second category of abuse cases described in *Foulser* and not the first category. The Upper Tribunal said so in terms.

23. The allegation of abuse of process in the present appeal does not simply rely on what is described as inordinate and unjustifiable delay on the part of HMRC. It also relies on an allegation that as a result of that delay certain relevant evidence will not be available to the tribunal. If established, that fact could clearly have implications for the fairness of the hearing. Put briefly, it is said that because of HMRC's delay, Mr Nuttall has been prejudiced in pursuing his appeal because relevant evidence has been lost. It is difficult to see why that should not amount to an abuse of process for which the FTT can give an appropriate remedy. If, for example, HMRC had lost relevant and material evidence then in my judgment it should not matter for the purposes of an abuse application whether it did so before the appeal to the tribunal or afterwards. Either way, the hearing could be unfair to the taxpayer without some remedy from the tribunal.

24. I understand there are no examples of a category 1 case where the conduct pre-dates the commencement of the proceedings. However, Mr Waldegrave accepted that as a matter of

principle, conduct complained of before the proceedings commenced could in an appropriate case give rise to an abuse of process falling within category 1.

25. Mr Webster suggested various potential remedies during the course of his submissions including staying the appeal, barring HMRC from defending the appeal, excluding HMRC's expert evidence and allowing the appeal.

26. On that basis I shall consider whether there has been inordinate and inexcusable delay on the part of HMRC which, if it results in any prejudice to Mr Nuttall, requires a remedy to ensure a fair hearing.

DELAY

27. I can deal with the question of delay very briefly. I have set out above the period of delay identified by Mr Nuttall. It is a period of more than 12 years. As noted, HMRC have not sought to explain or justify that delay by way of evidence or submissions for the purposes of this application. From Mr Nuttall's perspective, very little was happening in relation to the enquiry, beyond statements from HMRC that it was taking steps to obtain valuations of the shares of Readybuy and of other companies where similar issues were being considered by HMRC. There were also indications that "test cases" were being identified. In fact, it appears that no valuation in relation to Readybuy was obtained by HMRC until the Sofola Report. The Sofola Report was not dated, but a copy was sent to Mr Nuttall in February 2017. Throughout the enquiry there were long periods in which there was a complete lack of communication from HMRC to Mr Nuttall. The conduct of the enquiry was, on the evidence before me, wholly unacceptable.

28. It is difficult to conceive of any justifiable reason which might excuse such delay on the part of HMRC. The delay was variously described in submissions as egregious and outrageous. As Mr Webster submitted, the adjective used to describe the delay does not really matter. I have no hesitation in finding that the delay between June 2005 and September 2017 can fairly be described as inordinate and inexcusable and capable of supporting the present application.

29. I am satisfied that HMRC were culpable for that delay. Mr Waldegrave made the point that Mr Nuttall could have stopped the delay at any point if he had made an application to close the enquiry pursuant to section 28A Taxes Management Act 1970. That is certainly true, but I do not think it in any way excuses the delay or affects HMRC's culpability for the delay. It might in theory be a factor which could be taken into account in deciding what if any remedy ought to be available to Mr Nuttall.

30. The real question is whether HMRC's delay has led Mr Nuttall to suffer any prejudice in pursuing his appeal.

PREJUDICE

31. The prejudice said to arise from HMRC's delay is that evidence which would otherwise have been available to support Mr Nuttall's case on valuation is no longer available. In particular it is said as follows:

> (1) Evidence from the Nomad, WH Ireland is no longer available because the relevant individual, Mr Youngman left the firm some years ago and a box set of files had been mislaid by the firm's data storage provider.
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> (2) Three ring binders of files obtained by HMRC from Zeus have not been retained by HMRC.
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> (3) Memories of witnesses will have faded, including a witness from Brewin Dolphin who acted on behalf of Mr Chisnall and others in managing their share portfolios.

32. Mr Nuttall engaged HMRC in email correspondence in March 2021 in relation to the evidence available from WH Ireland and Zeus. It was apparent from that correspondence that HMRC had contacted both firms in connection with their enquiry and had obtained documents from them. Documents obtained from WH Ireland in 2007 included the Offer, the Prospectus, the long form report and the Working Capital Report, all of which are referred to in the Decision. HMRC also accepted that they had received documents from Zeus which they did not retain. It was said that a note in HMRC's records indicated that they were not relevant to valuation of the shares.

33. Mr Webster submitted that evidence from WH Ireland was relevant because it would establish why the launch price was set at 48p per share. Further, the note in HMRC's records that the Zeus documents were not relevant to valuation was unsubstantiated and could not be taken at face value. He submitted that HMRC had a duty to secure and retain the documents they had obtained during the enquiry and had failed to do so.

34. At the time of the Application, it appeared to be HMRC's case as set out in the Statement of Case that the flotation of Readybuy was part of a tax avoidance scheme whereby individuals could obtain relief on gifts of shares to charity at a value more than the shares were actually worth. If that allegation had been pursued, I would certainly have been satisfied that relevant evidence may have been lost because of HMRC's delay. In the event, it was not pursued, as recorded in the Decision.

35. Mr Webster submitted that the evidence referred to above might be expected to include evidence as to "market sentiment" including the perceived effect on valuation of the involvement of Zeus, the injection of capital into the business, the strong brand, the experience of the new management and the nature of the market in 2003. It was said that employees of WH Ireland connected with the flotation would have been able to give evidence as to these matters. Such evidence might have included discussions between the WH Ireland, Zeus and independent financial advisers such as Berkley Morgan who were identifying potential investors. That evidence was now lost.

36. I do not accept that submission. I am not satisfied that any financial information in the hands of Zeus, WH Ireland, or Brewin Dolphin, beyond what was contained in the Offer and the Prospectus would have been available to the reasonably prudent purchaser. As such, it could not be relevant to the valuation issue in the appeal.

37. In many cases, a delay of the magnitude seen in this case might be expected to cause prejudice. For example, in *ASM* it was noted that the delay led to memories of witnesses fading and emails and correspondence being lost. In this case however I have heard and accepted evidence from HMRC's expert witness, Mr Strickland who said that no additional facts about the business beyond what was in the Prospectus would be available to the reasonably prudent purchaser because of the risk of market abuse.

38. For the sake of completeness, I should refer to an argument of HMRC that Mr Nuttall had himself failed to obtain and secure evidence relevant to the issues. I do not accept that argument. Mr Nuttall was aware that there was an enquiry into his return and that there was an issue in relation to valuation and whether the gift of shares was part of a tax avoidance scheme. Beyond that, he had no knowledge of the nature of the valuation issue or what evidence it might be necessary for him to obtain to support any subsequent appeal, if indeed an appeal was subsequently necessary. Without an understanding of precisely what HMRC enquiries were being made, Mr Nuttall cannot be blamed for failing to secure evidence from WH Ireland or Zeus. For example, it may have been that there was a technical issue about the valuation of goodwill in Readybuy's accounts. Mr Nuttall was not to know that the issue was the valuation of the shares generally.

39. For the reasons given above, I do not consider that HMRC's delay has affected the fairness of the hearing. Having reached that conclusion, it is clear that I have no jurisdiction to provide any remedy for HMRC's delay in conducting the enquiry.

OTHER ISSUES

40. Given my findings as to jurisdiction, it is not necessary for me to consider whether or not the Application should have been by way of an amendment to the grounds of appeal, and if so whether or not permission to amend should be granted. If I did have jurisdiction, I would have been minded to say that it did not require any amendment to the grounds of appeal, but in so far as it did I would have been minded to grant permission. The application sought a procedural remedy from the Tribunal and did not amount to a substantive ground of appeal against the decision. If that is wrong, then it would have been just and fair to allow Mr Nuttall to amend his grounds of appeal. There would have been no prejudice to HMRC in allowing the amendment.

CONCLUSION

41. For the reasons given above, I cannot bar HMRC from defending the appeal or provide any other procedural remedy for HMRC's inordinate and inexcusable delay in conducting their enquiry. The only remedy available to Mr Nuttall would appear to be through the Adjudicator, now that the appeal has been determined.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 13 MAY 2022