Trinity Term
[2017] UKSC 55
On appeal from: [2016] EWCA Civ 121

JUDGMENT

BPP Holdings Ltd and others (Respondents) *v* Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

26 July 2017

Heard on 27 June 2017

Appellant	*Respondents*
Jessica Simor QC Nicholas Gibson (Instructed by HMRC Solicitor's Office)	Sam Grodzinski QC (Instructed by Simmons & Simmons LLP)

LORD NEUBERGER: (with whom Lord Clarke, Lord Sumption, Lord Reed and Lord Hodge agree)

1. The issue ultimately to be determined on this appeal is whether the First-tier Tribunal ("Ft-T") was entitled to make an order debarring the Commissioners for HM Revenue and Customs ("HMRC") from defending an appeal concerning liability for VAT brought by three companies in the BPP Group of companies (to which, save where it is important to distinguish between those companies, I shall refer generically as "BPP").

The factual and procedural background

2. Between 1999 and 2006, BPP Holdings Ltd supplied education and books to students. Following a corporate rearrangement in 2006, one company, BPP Learning Media Ltd, supplied books and another company, BPP University College of Professional Studies Ltd, supplied education. BPP took the view that there were now two separate supplies by separate companies, one of education (which is standard rated for VAT purposes), and the other of books (which is zero-rated). Accordingly, BPP did not account for VAT on the supplies of books. However, HMRC did not agree with this and contended that BPP's analysis was flawed, or in the alternative that the changes made in 2006 represented an abuse. (The law has been changed by section 75 of the Finance Act 2011).

3. In November 2012, HMRC issued two VAT assessments, prepared on the basis that BPP should have accounted for VAT at the standard rate on the supplies of books from 2006. Pursuant to a request from BPP, HMRC also issued a decision to that effect on this issue in December 2012, which related to the VAT treatment of BPP's supplies from 19 July 2011.

4. In May 2013, BPP raised appeals to the Tax Chamber of the Ft-T against the two assessments and the decision. Following directions from the Ft-T, HMRC served its statement of case on 21 October 2013, which was 14 days late, and applied for an extension of time, which BPP did not oppose. Disclosure was ordered for 17 December and HMRC provided it a few days late.

5. Meanwhile, BPP considered that HMRC should provide further information of their case, and made a request to that effect on 11 November 2013. After some written and telephone exchanges between the parties, BPP applied to the Ft-T on 22 November for an order that HMRC supply the information in 14 days from the

making of the order, failing which BPP's substantive appeals should be allowed. HMRC then offered to supply the information by 31 January 2014, but, because they would not agree to the sanction sought by BPP, there was a hearing of BPP's application (together with a directions hearing) on 9 January 2014. At that hearing Judge Hellier made an order which included the following directions in relation to BPP's application:

> "UPON the respondents having agreed to provide by 31 January 2014 replies to each of the questions identified in the appellants' request for further information dated 11 November 2013;
>
> AND UPON hearing Counsel for the parties, the following Directions are made:
>
> > 1. If the respondents fail to provide replies to each of the questions identified in the appellants' request for Further Information by 31 January 2014, the respondents may be barred from taking further part in the proceedings …"

The order also included directions for the future conduct of the appeals including an order for the filing of disclosure statements and lists of documents by 30 April, and a provision for a seven day hearing.

6. On 31 January 2014, HMRC served a response to BPP's request. On 14 March, the same day as it served its response to HMRC's statement of case, BPP issued an application for an order barring HMRC from taking further part in the proceedings ("a debarring order") on the ground that the 31 January response did not in fact reply to "each of the questions identified in [BPP's] request for further information".

7. On 24 April 2014, HMRC informed BPP that they were withdrawing the two assessments and therefore conceding two of BPP's three appeals, but, as they were not withdrawing the decision, the third appeal proceeded. Meanwhile, HMRC supplied a defective disclosure statement and list of documents some eight days late on 8 May, and did not apply for an extension of time in that connection until four weeks later; they subsequently agreed to give a new list of documents.

8. BPP maintained its claim for a debarring order in relation to the surviving appeal, and its application came before Judge Mosedale on 23 June 2014. In a

reserved judgment given on 1 July 2014, Judge Mosedale granted BPP's application and made a debarring order - [2014] UKFTT 644 (TC). Following a further hearing in July, in a judgment given on 25 September 2014, Judge Herrington refused HMRC's application to lift the debarring order, but gave HMRC permission to appeal against Judge Mosedale's decision - [2014] UKFTT 917 (TC). That appeal was heard by Judge Bishopp in the Tax and Chancery Chamber of the Upper Tribunal ("UT") in October; after a two-day hearing he allowed HMRC's appeal for reasons given in a judgment on 3 November 2014 - [2015] STC 415. Following the grant to BPP of permission to appeal against his order, the Court of Appeal (Moore-Bick V-P, Richards and Ryder LJJ) allowed BPP's appeal and restored Judge Mosedale's debarring order for reasons given by Ryder LJ, who is the Senior President of Tribunals - [2016] 1 WLR 1915.

The issue to be decided

9. The case comes before this Court as an appeal from the Court of Appeal, but the ultimate issue for us is whether Judge Mosedale's decision to make a debarring order can be justified. Accordingly, it is unnecessary to address all the criticisms of the reasoning of the UT and of the Court of Appeal, which have been raised by Ms Simor QC in her careful argument on behalf of HMRC. In those circumstances, it is right to record that, while, for the reasons given below, we agree with the conclusion reached by the Court of Appeal, we should not be taken as approving all its reasoning.

10. The procedures of the various chambers of the Ft-T are governed by rules, and it is common ground that the relevant rule for present purposes is rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). This rule (which appears to be in the rules which apply to at least some of the other chambers of the Ft-T) provides, so far as relevant:

> "(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> …
>
> (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;
>
> …
>
> (5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
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> …
>
> (7) This rule applies to a respondent as it applies to an appellant except that -
>
> (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
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> (b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.
>
> …"

11. It will be noted that by its application of 22 November 2013 BPP sought an order which substantially reflected the terms of rule 8(1) read together with rule 8(7)(a), whereas the order made by Judge Hellier in the Ft-T on 9 January 2014 reflected the terms of rule 8(3)(a) read together with rule 8(7)(a).

The reasoning of Judge Mosedale

12. The reasons for Judge Mosedale's decision are self-evidently best appreciated by reading her careful judgment, but it is right to summarise its contents in order to explain our decision on this appeal.

13. In paras 2 to 36 of her judgment, Judge Mosedale set out the facts more fully than I have done. In the course of doing so, she said in para 22 that HMRC's statement of case made hardly any "reference to facts, so far as the third appeal was concerned", so it followed that she concluded that BPP's request of 11 November 2013 was justified. In paras 33 to 36, she referred to the earlier failures of HMRC to comply with time limits. In paras 37 to 54 of the judgment she then addressed the question whether HMRC were in breach of their obligation to "comply with the Unless order", ie to provide the further information which they were recorded as having agreed to provide in the Order of 9 January 2014. Judge Mosedale concluded that they were. In effect, she said, by the end of January 2014 hardly any further information had been supplied by HMRC.

14. Judge Mosedale then turned to consider "the appropriate sanction". She analysed the guidance given in the Court of Appeal case of *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, which she said had been held to be applicable by analogy to the Tribunals in the UT decision, *Revenue and Customs Comrs v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC); [2015] STC 973 and in the Ft-T decision, *Compass Contract Services UK Ltd v Revenue and Customs Comrs* [2014] UKFTT 403 (TC). However, in paras 59 to 60, she accepted the submission on behalf of HMRC that "[s]trictly" those cases were not in point as they concerned cases where, as in *Mitchell*, the order under consideration stated that the party concerned will be debarred if he did not comply. By contrast, as she said, the order in this case was that HMRC may be debarred if they did not comply (ie they were rule 8(1) cases - or their equivalents in the court system - rather than rule 8(3) cases, as in the instant case). In other words, she accepted that HMRC were not applying to be relieved from a debarring order which had automatically come into effect as a result of the earlier order: rather BPP was seeking to have a debarring order imposed, when such an order had been foreshadowed by the earlier order.

15. Nonetheless, she concluded in para 61 that "while *Mitchell* is not strictly relevant, nevertheless it contains some useful guidance that when considering the overriding objective of dealing with cases fairly and justly". She concluded that:

> "[I]n considering whether to grant the appellant's application to bar HMRC from further participation in this appeal I must consider all relevant factors. I will include in my consideration

> factors (a) and (b) from CPR 3.9 and accord them significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly."

CPR 3.9 is a rule which applies in the courts of England and Wales and it provides that, when considering an application for relief from sanctions (such as relief from a debarring order) the court would "consider all the circumstances of the case, so as to enable it to deal justly with the application", including the need "(a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders".

16. In paras 67 to 72, Judge Mosedale then concluded that HMRC had, at least arguably, finally provided the information required by the unless order in the skeleton argument prepared by counsel, Mr Singh, for HMRC, "served shortly before this hearing", but the fact remained that, until that point, HMRC had not provided the information ordered. In para 73, she described the "prejudice to the appellants" as "very clear", as BPP had the right to "be put in the position so that it can properly prepare its case". In the following paragraph, she explained that "the real prejudice to the appellant is in the delay" in that "HMRC's continued failure to make a proper statement of their case has delayed the progress of this appeal by about eight months".

17. In paras 75 to 80, Judge Mosedale then turned to the "reason for default" and said that she had no "clear understanding of why this default had occurred" and added that "it should have been obvious to a lawyer that the Reply delivered on the due date did not comply with Judge Hellier's Order". She was unimpressed with HMRC's suggestion that "it ought not to have been required to state *every* fact and matter on which it relied", not least because "the Reply failed to state any fact or matter on which HMRC relied". In paras 81 and 82, she said that "HMRC does not appear in this appeal to have appreciated the importance of adhering to directions".

18. Judge Mosedale then turned to the proposed debarring order which she described in para 83 as "a draconian remedy", but added that it was "virtually the only sanction that the Tribunal has", because "[n]o one suggests in this case that costs would be an adequate remedy". In para 85 she rejected Mr Singh's submission that debarring order should only be made "where the breach was incapable of remedy or had not been remedied" as the wrong test "before or after *Mitchell*".

19. In paras 88 to 90, Judge Mosedale rejected the contention that the importance of the case to HMRC was a relevant factor: if it was a test case, they could for instance, concede the appeal, and fight another case, and, even if it proceeded and HMRC lost, the authority of the decision would be weakened by the fact that it was

unopposed. In paras 91 to 93, she rejected as irrelevant the contention that the case should be allowed to proceed as the unfairness of a wrongly adverse decision would mean that it could be relied on as *res judicata* by BPP in relation to every claim, while expressly leaving open the premise for that contention. In para 94, she rejected as irrelevant the fact that Judge Hellier had thought it right to make a rule 8(3) order rather than the rule 8(1) order sought by BPP.

20. Judge Mosedale then reached her "Conclusions". She started in para 95 by saying that she "must simply weigh all the factors", and if in doubt should not make a debarring order, and added that the "objective in exercising my discretion is the overriding objective of dealing with cases fairly and justly". In the following paragraph, she said that she had "to give significant weight when considering the overriding objective to the importance of compliance with directions of the tribunal and avoiding unnecessary delays and expense". She then referred to the delay caused by HMRC's default, the absence of any reason for it, the existence of previous less serious breaches of the Tribunal rules in these proceedings, although "this is not a case where HMRC have ignored the Tribunal entirely". At para 100, she said that she had "come to the conclusion that HMRC should be barred", and explained:

> "There has been unnecessary delay and expense. Tribunal directions have been breached. There is clear prejudice to the appellant in having to wait eight months for a proper statement of HMRC's case and not barring HMRC would leave the appellant without a remedy for this prejudice. There was no good reason for the delay in stating its case, the failure lasted for a significant period of time, and HMRC were clearly on notice from the first that the appellant did not consider their [statement of case] satisfactory, and clearly on notice from January that a failure to comply might lead to a barring order yet they did not correct the position for another five months. Barring is the appropriate sanction."

Discussion

21. This was a full and very carefully considered judgment. However, it would nonetheless be appropriate for an appellate court to interfere with it, if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached. Ms Simor has argued that there were a number of errors in the judgment, and also that the ultimate decision was outside the bounds of what a reasonable tribunal could have decided.

22. First, it was said that the Judge approached the issue before her as if the order made by Judge Hellier was an order under rule 8(1) rather than under rule 8(3). I do not agree. As Ryder LJ said in para 29 of his judgment in the Court of Appeal, Judge Mosedale "was careful to identify (at para 60) that she was making a decision about whether barring should be applied as a sanction rather than considering whether to grant relief from a sanction already applied. Furthermore, she did not equate a rule 8(3) conditional order with a rule 8(1) unless order". She was plainly aware of the rule which applied. And she was right when she said in para 94 that the fact that Judge Hellier had refused to make a rule 8(1) order took matters no further so far as the issue before her was concerned.

23. Secondly, it is said that Judge Mosedale's reliance on the Court of Appeal's reasoning in *Mitchell* was unsound as the reasoning has subsequently been modified by the Court of Appeal in *Denton v T H White Ltd* [2014] 1 WLR 3926. This inferentially raises an important point in relation to the interpretation and application of the rules of the Ft-T and the UT. The jurisdiction of many of these tribunals is not limited to England and Wales, but extends to the whole of the United Kingdom, and even where that is not so, the applicable rules may be the same in the different jurisdictions. In any event, it is highly desirable, particularly in a field where the law is the same throughout the United Kingdom (as in tax), that tribunals, or at any rate tribunals in the same field, apply the same, or (at least in some cases) even similar, rules in the same way throughout the UK. In these circumstances, all tribunals and appellate courts above the level of the UT should be wary of applying or relying on the procedural jurisprudence of the English and Welsh courts without also taking into account that of the Scottish and Northern Irish courts. As Lord Rodger memorably said in *Mucelli v Government of Albania* [2009] 1 WLR 276, para 11, in relation to the interpretation of a statute with UK-wide application,

> "In Scotland, the people still walk in darkness and upon them hath the light of the CPR not shined. So there can be no question of interpreting the terms of the statute in the light of the CPR - or of the Scottish or Northern Irish rules, for that matter."

Further, while it would be both unrealistic and undesirable for the tribunals to develop their procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic, the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue.

24. In this case, when considering the proper approach to the making of a debarring order in the Ft-T, the Ft-T, and indeed the UT, the Court of Appeal, and counsel before us, concentrated on recent English cases, particularly *Mitchell* and

Denton, but also *Durrant v Chief Constable of Avon and Somerset Constabulary (Practice Note)* [2014] 1 WLR 4313. These cases provide a salutary reminder as to the importance that is now attached in all courts and tribunals throughout the UK to observing rules in contentious proceedings generally, but they are directed to, and only strictly applicable to, the courts of England and Wales, save to the extent that the approach in those cases is adopted by the UT, or, even more, by the Court of Appeal when giving guidance to the Ft-T.

25. Such guidance to tribunals on tax cases was given by Judge Sinfield in the UT in *McCarthy & Stone*. In para 43, after referring to differences and similarities between the CPR and the tribunal rules, in that case the Tribunals Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), he accepted that "the CPR do not apply to tribunals" but added that he did not "accept that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR". The same view was expressed by Ryder LJ in paras 37 and 38 in the Court of Appeal in this case, including this: "I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals", and added that "[i]t should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's".

26. It is not for this Court to interfere with the guidance given by the UT and the Court of Appeal as to the proper approach to be adopted by the Ft-T in relation to the lifting or imposing of sanctions for failure to comply with time limits (save in the very unlikely event of such guidance being wrong in law). We have twice recently affirmed a similar proposition in relation to the Court of Appeal's role in relation to the proper approach to be taken in such cases by first instance judges - see *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 and *Thevarajah v Riordan* [2016] 1 WLR 76. The guidance given by Judge Sinfield in *McCarthy & Stone* was appropriate: as Mr Grodzinski QC, who appeared for BPP pointed out, it is "an important function" of the UT to develop guidance so as to achieve consistency in the Ft-T: see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48, para 41, per Lord Carnwath. And, by confirming that guidance in this case, the Senior President, with the support of Moore-Bick V-P and Richards LJ, has very substantially reinforced its authority. In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach.

27. Such an approach was adopted by Judge Mosedale, as demonstrated by the passages in her judgment cited in paras 15 and 20 above. As Ryder LJ rightly said at para 32 of his judgment:

> "Judge Mosedale did not directly apply the CPR or the subsequent authorities that give guidance on CPR 3.9. She was

> careful to make it clear that her consideration of the same was limited to whether the guidance contained in them was relevant by analogy to the application of the overriding objective in the tax tribunal rules … Most importantly, she distinguished the guidance before applying a nuanced version of it to the overriding objective in the tax tribunal rules."

28. Turning to the specific points raised by Ms Simor, I would reject the argument that Judge Mosedale's decision was vitiated because it relied on the reasoning in *Mitchell*, on the ground that the approach laid down in that case was significantly cut down in the subsequent case of *Denton*. In the first place, the approach adopted by Judge Mosedale did not rely on a detailed analysis of *Mitchell*. She ultimately approached the issue she had to decide on the basis which she explained in the passages quoted in paras 15 and 20 above, and that approach involved carrying out the unexceptionable balancing exercise which she described.

29. Secondly, in *Denton*, para 24, the Court of Appeal described the guidance given in *Mitchell* as "remain[ing] substantially sound" and suggested an approach which involved three stages, which it then went on to expound. The refinements which the Court of Appeal then made to what had been said in *Mitchell* were largely clarifications (see paras 26 and 32). Unless it appears that Judge Mosedale misinterpreted the guidance given in *Mitchell*, the decision in *Denton* would not therefore represent a reason for upsetting her decision, and I can see no basis for saying that she did misunderstand the guidance given in *Mitchell*. Thirdly, it was contended that in her "Conclusions" in paras 95ff of her judgment, the Judge only considered the delay caused by HMRC, the lack of explanation or excuse, and the prejudice caused to BPP. There was no consideration, it is said, of the disadvantage to HMRC and the arguably disproportionate benefit to BPP. If one confines oneself to the contents of Judge Mosedale's "Conclusions" in paras 95 to 101 of her judgment, that point has force. However, it seems to me that that involves an unrealistic approach to the judgment. In the preceding 28 paragraphs, Judge Mosedale considered all the relevant factors, and it appears to me to be fanciful to suggest that she did not take them into account when reaching her conclusion. The worst that can be said in this connection is that the Judge should have said in terms in her "Conclusions" that she had taken all the matters she had discussed in paras 67 to 94 into account, but in my view it is clear that she did so: otherwise, one may rhetorically ask, why did she bother to consider those other matters, and so carefully.

30. Fourthly, Ms Simor argued that the Judge should have accepted the relevance of, and taken into account, the fact that the debarring order in this case prevents HMRC from discharging its public duty and could lead to the public interest being harmed in that VAT which should be paid may not be recovered. I consider that it would set a dangerous precedent if that point were accepted, as it would discourage public bodies from living up to the standards expected of individuals and private

bodies in the conduct of litigation. It seems to me that there is at least as strong an argument for saying that the courts should expect higher standards from public bodies than from private bodies or individuals. In fairness, it should be said that this point was more attractively developed by Ms Simor when she said that it justified a more relaxed approach to all parties by tribunals than that adopted by the courts. Nonetheless, I find that unconvincing: there is no good reason to have different rules for public law cases. I consider that Moore-Bick V-P in *R (Hysaj) v Secretary of State for the Home Department (Practice Note)* [2015] 1 WLR 2472, paras 41 to 42 was right to reject a similar point in relation to public law cases in the courts.

31. Fifthly, Ms Simor argued that it was disproportionate of BPP to have sought a debarring order in the present case rather than proceeding to a hearing in accordance with Judge Hellier's directions. She pointed to the fact that, had BPP taken that course, the issue raised by its substantive appeal could well have been determined by the time the present appeal came on for hearing in the Supreme Court. That is true, but it is a point which can only be made because HMRC chose to challenge the decision of Judge Mosedale to make a debarring order that these proceedings have lasted beyond 1 July 2014. More importantly, the order made on 9 January 2014 specifically envisaged a debarring order being made unless HMRC complied with their disclosure obligation recited in the order by 31 January, and it is not suggested that it was somehow culpable or unfair for BPP to have allowed some six weeks to elapse after that date before applying for a debarring order.

32. Sixthly, it was pointed out that a debarring order represents an unjustified windfall for BPP. It is true that the debarring order will either improve BPP's prospects of success in the substantive surviving appeal (if the appeal goes ahead unopposed) or result in BPP succeeding on the appeal when it might not otherwise have done so (if HMRC concede the appeal). However, that point can always be made by a party facing a debarring order, and to give the point any weight, save perhaps in exceptional circumstances, would appear to me to undermine the utility of the sanction of a debarring order. I can see no exceptional circumstances in the instant case.

33. Finally, it was said that, bearing in mind all the circumstances, a debarring order was outside the scope of what a reasonable judge in the position of Judge Mosedale could have ordered, even if she made no specific errors. I accept that the decision to make a debarring order against HMRC was tough, and I also accept that some Ft-T judges may not have made that decision. However, the issue whether to make a debarring order on certain facts is very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified. In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, para 33:

> "[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable. HMRC cannot in my view cross that high hurdle in this case.

34. That is not to say that an appellate tribunal cannot interfere in a case where a debarring order has been imposed or confirmed. The decision to impose a debarring order (unlike case management decisions of a more routine nature) can often have the effect of determining the substantive case. Further, as already mentioned in para 27 above, an important function of the UT and the Court of Appeal is to ensure a degree of consistency of approach among Ft-T judges. In the context of court decisions, this concern was plainly in the mind of the Court of Appeal in *Mitchell* and *Denton*. There must be a limit to the permissible harshness (or indeed the permissible generosity) of a decision relating to the imposition or confirmation (or discharge) of a debarring order. It may well be that this case is not far from that limit (a view which obviously draws support from Judge Bishopp's careful judgment in the UT). However, I do not consider that it was on the wrong side of the line, given the combination of the nature and extent of HMRC's failure to reply to BPP's request, the length of the delay in rectifying the failure and the length of the consequential delay to the proceedings, the absence of any remedy to compensate BPP for the delay, and the absence of any explanation or excuse for the failure, coupled with the existence of other failures by HMRC to comply with directions.

Conclusion

35. Ms Simor's fourth and fifth points prompt the thought that it may be worth considering whether tribunals should be accorded additional sanction powers to those which they currently have. As Judge Mosedale explained, she was faced with a binary question, involving two unpalatable choices. Making the debarring order, which she described as draconian, or not making the order, which, to use the vernacular, would have meant that HMRC effectively would have got away with it. There may be force in the notion that the tribunal rules should provide for the possibility of more nuanced sanctions, such as a fine or even the imposition of some procedural advantage. Experience suggests that such ideas, while attractive in theory, can often be difficult to formulate or to apply satisfactorily in practice, so I mention the point with some diffidence.

36. However, for the reasons I have given, HMRC's appeal must be dismissed.