[2019] UKUT 7 (TCC)

Appeal number: UT/2016/0161

***PROCEDURE – right of third party to appeal - procedural fairness - whether FTT should have given notice to appellant's director of intention to find director not a fit and proper person to hold WOWGR – whether FTT required to give notice – whether cross-examination sufficient notice - the FTT's decision should not be remade or amended - appeal dismissed.***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**BETWEEN:**

**PIERHEAD DRINKS LIMITED**

**Appellant**

**- and –**

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

**Respondents**

**Tribunal: Judge Greg Sinfield**
**Judge Ashley Greenbank**

**Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 5 February 2018**

**Geraint Jones QC, counsel, instructed under Direct Access, for Ian Hercules, director of the Appellant**

**Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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## DECISION

### Introduction

1. This is an unusual appeal. Although nominally an appeal by Pierhead Drinks Limited ('Pierhead'), it was not represented at the hearing. Mr Geraint Jones QC made clear that he only represented Mr Ian Hercules, a director of Pierhead. Pierhead appeals, with permission of this tribunal, not against the decision of the First-tier Tribunal (Tax Chamber) ('FTT') to dismiss Pierhead's appeal but against the FTT's findings to the effect that Mr Ian Hercules was not a fit and proper person to be a director of a company that was registered under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ('WOWGR').

2. Notwithstanding that permission was given to Pierhead, we have approached this appeal as an appeal made by Mr Ian Hercules. We have set out at paragraphs 27 to 34 below, the basis on which Mr Ian Hercules might be permitted to appeal. This was also the basis on which the parties argued the case before us. As we have mentioned at paragraph 1 above, Mr Jones appeared for Mr Ian Hercules and not for Pierhead.

3. For reasons given below, we have concluded that the FTT were entitled to make the finding that Mr Ian Hercules was not a fit and proper person to be the director of a company with a WOWGR registration in the decision and this appeal must be dismissed.

### Background

4. The background to this appeal can be stated quite shortly. In December 2013, the Respondents ('HMRC') issued a decision refusing an application by Pierhead to be registered under the WOWGR to trade in duty suspended excise goods. Pierhead appealed to the FTT against the refusal.

5. The FTT (Judge Mosedale and Tribunal Member Sharp) heard the appeal by Pierhead and that of another company, Euro Trade and Finance Limited ('Euro Trade'), over nine days in April and May 2015 with further submissions in writing from the parties between May 2015 and February 2016. The two companies' appeals were heard together because they had facts and witnesses in common. The sole director of both Pierhead and Euro Trade at the relevant time was Mr Ian Hercules. His father, Mr Richard Hercules, was alleged to be the 'guiding mind' of both companies. HMRC's decision to refuse Pierhead's application for WOWGR registration was based on their view that Mr Richard Hercules was not a fit and proper person and also in part on the fact that Euro Trade had traded in breach of its own WOWGR registration conditions which led HMRC to revoke Euro Trade's registration.

6. In a decision released on 25 April 2016 with neutral citation [2016] UKFTT 286 (TC) ('the Decision'), the FTT concluded that HMRC's decision to refuse Pierhead's application for WOWGR status was the only reasonable course of action open to HMRC and dismissed Pierhead's appeal. The reasons for the FTT's decision were, in summary, that Mr Richard Hercules was the 'guiding mind' behind Pierhead and he was not a fit and proper person to be in such a position in relation to a company with a WOWGR registration. In the Decision, the FTT also found that Mr Ian Hercules was not a fit and proper person to hold a WOWGR registration. In addition, the FTT dismissed Euro Trade's appeal against the revocation of its WOWGR registration on the ground that it had traded in breach of the conditions under which the WOWGR registration had been

granted. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

7. Pierhead applied for permission to appeal to the Upper Tribunal ('UT') against the Decision. Permission was refused by the FTT and the UT on the papers. Pierhead applied for the refusal to be reconsidered by the UT at an oral hearing. At the hearing, Mr Jones who had not appeared in the FTT, stated that Pierhead no longer challenged the FTT's decision to uphold HMRC's refusal to grant Pierhead a WOWGR registration on the basis of the FTT's findings in relation to Mr Richard Hercules. Nor did Pierhead challenge the FTT's finding that Mr Richard Hercules was the guiding mind behind Pierhead and was not a fit and proper person to be the guiding mind behind a company with a WOWGR registration. That meant that the FTT's decision to dismiss Pierhead's appeal must stand.

8. However, that was not the end of the application for appeal. At the reconsideration hearing, Mr Jones stated that the FTT had not alerted Mr Ian Hercules of its intention to make a finding that he was not a fit and proper person to be registered under WOWGR or be a director of a company with a WOWGR registration. Accordingly, Mr Ian Hercules had never had an opportunity to address that issue. Mr Jones submitted that the failure to put Mr Ian Hercules on notice meant that the FTT erred in law when it found that Mr Ian Hercules was not a fit and proper person. Mr Jones said that the objective of Pierhead's appeal was that the Decision should be remade with the FTT's negative findings about Mr Hercules' fitness and propriety removed. Pierhead was not seeking a positive finding that Mr Ian Hercules was fit and proper to be a director of a company with a WOWGR registration but was content that the matter would be left open and subject to further scrutiny should there be a further application for WOWGR registration by a company of which Mr Ian Hercules was a director.

9. The UT (Judge Herrington) accepted that it was arguable that the failure to give Mr Ian Hercules the opportunity of making representations on the question of his fitness and propriety prior to the FTT making a determination to that effect was a procedural irregularity which amounted to an error of law. Relying on comments by Dyson LJ in *Uphill v BRB (Residuary) Limited* [2005] 1 WLR 2070 at [24(3)], Judge Herrington concluded that there was a compelling reason to grant permission to appeal in this case, notwithstanding that Pierhead's appeal to the UT had no prospects of success in the sense that there was no challenge to the outcome in the Decision only to comments made by the FTT in reaching that decision. Judge Herrington's reasoning was that if permission were not granted then there was no other process to provide a remedy if there had been a breach of natural justice in relation to Mr Ian Hercules. Accordingly, Judge Herrington granted Pierhead permission to appeal for the limited purpose of determining whether the FTT's finding that Mr Ian Hercules was not a fit and proper person to be the director of a company with a WOWGR registration should stand.

**The Decision**

10. The FTT set out the background facts in relation to Pierhead's appeal at [27] – [30]. In those paragraphs and in this decision, 'PPL' refers to Pierhead Purchasing Limited, a company of which Mr Richard Hercules was a director.

> "27. [Pierhead] started trading in 2012, although in fact traded for only one month. It traded in wine which it was accepted did not require a WOWGR. Ian Hercules was its director from its inception in April

> 2012. He owned 80% of the shares; his partner, Ms Amanda Nokes, owned the other 20%.
>
> 28. [Pierhead] applied for a WOWGR on 31 July 2013. It had a pre-credibility visit from HMRC on 23 September 2013. On 13 December 2013 it was notified its application for a WOWGR was refused.
>
> 29. HMRC's case was that [Pierhead] was a 'phoenix'. While the appellants did not like that term, they accepted (and had always made plain to HMRC) that [Pierhead] was intended to take over PPL's business. We find Euro Trade applied for an unrestricted WOWGR, and [Pierhead] was incorporated very shortly after, the withdrawal of PPL's MTIC appeal. While it seems Richard Hercules had not anticipated the loss of PPL's WOWGR following on from the withdrawal of that appeal, he had anticipated that PPL was unlikely to be able to pay the debt and might therefore cease trading. He intended to preserve PPL's business, built up since 1976, by transferring it to Euro Trade and/or to [Pierhead]. To do so, those companies needed WOWGRs. [Pierhead] was incorporated as 'Pierhead Drinks Ltd' in order to preserve the goodwill in the Pierhead name.
>
> 30. We find as a fact that [Pierhead] was intended to take on the whole or part of the trade in duty suspended alcohol formally carried on by PPL. In practice, it never did so as it was never given a WOWGR."

11. Mr Jones said that Mr Hercules made no complaint about the FTT's findings of fact in [27] – [30]. The same was true of [43] – [47] in which the FTT described the pre-credibility check visit on 23 September 2013 and [64] which set out the FTT's finding that Mr Richard Hercules would have been as much involved with Pierhead as he was with Euro Trade if Pierhead's application for a WOWGR registration had been granted.

12. The FTT's findings in relation to Mr Ian Hercules are at [99] – [105] and were as follows:

> "**Was Ian Hercules a fit and proper person to be a director of a company with a WOWGR?**
>
> 99. Ian Hercules was bookkeeper for Cellars from 2002 to 2008 and, from 2008, for PPL. He become [sic] a director of PPL in 2011.
>
> 100. Richard and Ian Hercules agreed that Ian was only a bookkeeper at Cellars and had no operational responsibilities and in particular did not deal with excise matters and was not responsible for any failures at Cellars. We accept that; it was not really challenged by HMRC and in any event it was consistent with other evidence in particular that Richard Hercules dealt with excise matters for Euro Trade, led in the two meetings with HMRC on excise matters and that Ian Hercules' knowledge of excise matters was weak (discussed below).
>
> 101. We do find that Ian Hercules' knowledge of excise compliance matters was weak. He appeared to accept this. Although originally in cross examination he started from the position that his knowledge of excise matters was sufficient by March 2013, he soon pointed out that he was able to rely on employees to help him with such matters. (These employees would of course be PPL employees as neither Euro Trade nor [Pierhead] had any). He ultimately accepted in cross examination that his level of excise knowledge was insufficient to enable him to run an excise registered business, but considered that with the help of

knowledgeable employees he was able to do so. It was also clear from questions directed to him that he was not familiar with a number of matters to do with excise control that the Tribunal would have expected him to understand.

102. Ian did not place the orders that were in breach of Euro Trade's WOWGR. Indeed, he implied he did not even authorise the purchases. But he accepted he knew at least when he paid for them that they were purchased duty suspense. So we consider he ought to have known they were in breach of Euro Trade's WOWGR as he was clearly aware of the conditions on the WOWGR, and he knew from whom the goods were purchased and that they were in duty suspense. Indeed, he accepted that he did know this. In cross examination he accepted that he misled [HMRC OFFICER] Ms C Ames in January 2013 by giving her a list of 'intended suppliers' while knowing (from having paid the bills) that Euro Trade had over at least the preceding three months already taken supplies from these suppliers.

103. In conclusion, we do not consider that HMRC could reasonably have considered Ian Hercules to be a fit and proper person to hold a WOWGR. There are two significant concerns with him:

> (1) While we accept he had no responsibility for Cellars' non-compliance, that was because he was just a bookkeeper at Cellars and did not acquire the knowledge necessary to run an excise business. Nor had he acquired this knowledge by the time of the hearing.
>
> (2) While he was sole director of a WOWGR company, the company flouted the conditions on its WOWGR.

104. We consider that either of these matters individually would mean that HMRC could not consider him as a fit and proper person to hold a WOWGR. Even if we were to decide that the conditions on the WOWGR were unlawful, we would still consider on the evidence in front of us that because of item (1) Mr Ian Hercules was not a fit and proper person to hold a WOWGR.

105. In so far as Ian's lack of experience was concerned, while, as Mr Singh [the HMRC officer who made the disputed decisions] indicated, HMRC might nevertheless grant a WOWGR to a company with a director who did not have the requisite experience, that would only be where they were satisfied that compliance would be the responsibility of another person, a director or key employee, with appropriate experience and otherwise a fit and proper person to hold a WOWGR. We consider that there was no such person for Euro Trade or Drinks. Amanda Nokes, we were told, would be that person for Drinks. But we heard no evidence from her. We were therefore unable to be satisfied as to her level of knowledge. Moreover, while she had no responsibility for Euro Trade's breaches, her claim to excise experience rested at least in part on her duties at Cellars, a company with a history of non-compliance. In any event, at the time of the application she was on leave and clearly not at the time a key employee of Drinks. While we consider Richard Hercules was at the least a key worker, and more likely than not a shadow director, of Euro Trade, he was not a fit and proper person, so again his involvement with Drinks could not have justified the grant of a WOWGR to it."

13. Mr Jones made no particular complaint about [99] and [100] and was prepared to accept that, having been canvassed in cross-examination, the matters discussed in [101] were legitimate matters for the FTT to deal with. Mr Jones focussed his criticisms on the FTT's findings in [102] - [105] that Mr Hercules was not a fit and proper person. We consider these findings and the parties' submissions further below.

14. In [263] – [266], the FTT considered whether HMRC's decision to revoke Euro Trade's WOWGR registration was reasonable. The FTT concluded that it was a reasonable decision for HMRC to take in the circumstances, i.e. because Euro Trade had traded in breach of the conditions of its registration. The FTT also observed in [265] that, even if the conditions were unlawfully imposed, HMRC must still have revoked Euro Trade's WOWGR registration because HMRC ought to take all relevant matters into account, and those matters were those that the FTT had found they should have taken into account in the case of Pierhead, namely that Mr Richard Hercules was the 'guiding mind' behind Euro Trade and he was not a fit and proper person to be in such a position and Mr Ian Hercules was not a fit and proper person to be the director of a company with a WOWGR registration.

15. Having decided that it was reasonable for HMRC to refuse Pierhead's application for a WOWGR registration because Mr Richard Hercules was the 'guiding mind' behind Pierhead and he was not a fit and proper person to be in such a position in relation to a company registered under WOWGR, the FTT added at [275]:

> "… we have found that Ian Hercules was not a fit and proper person to hold a WOWGR so even if Mr Singh had concluded that Richard Hercules' involvement was less than it was, we do not consider that his conclusion could reasonably have been any different."

16. Accordingly, the FTT dismissed Pierhead's and Euro Trade's appeals. In this appeal, there is no challenge to the FTT's conclusion that HMRC were entitled to refuse Pierhead's application for a WOWGR registration. The only challenge is to the FTT's finding (at [103]) that Mr Ian Hercules was not a fit and proper person to hold a WOWGR authorisation.

**Issue**

17. The issue for decision in this appeal is whether, in all the circumstances of the case, the FTT were entitled to find that Mr Ian Hercules was not a fit and proper person to be the director of a company registered under WOWGR.

**Overarching submissions**

18. Mr Jones's overarching submission was that the FTT failed to apply the rules of natural justice in relation to Mr Ian Hercules. In particular, Mr Jones submitted that the FTT acted in breach of their duty of fairness when they:

(1) failed to alert Mr Ian Hercules to the fact that they intended to make a finding on his fitness and propriety;

(2) failed to afford him an opportunity to adduce evidence relevant to that issue; and

(3) found that he was not a fit and proper person without giving him (or his representative) an opportunity specifically to address that issue.

19. In support of his arguments that Mr Ian Hercules had a right of appeal and a remedy, Mr Jones relied on Article 8 of the European Convention on Human Rights ('ECHR') and the decision of the Court of Appeal in *Re W (A Child) (Care Proceedings: Non Party Appeal)* [2016] EWCA Civ 1140, [2017] 1 WLR 2415. Mr Jones submitted that *Re W* was an accurate and authoritative summary of the law which showed that Mr Ian Hercules had a right to appeal to the UT and a remedy under Article 8 of the ECHR. Mr Jones accepted that it was not necessary to look outside McFarlane LJ's judgment in *Re W*. Because of the importance of that case, it is necessary to examine it in some detail.

**Article 8 ECHR**

20. Article 8 of the ECHR provides:

> "**Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

21. Article 8 extends to the protection of reputation provided that it is sufficiently serious. In *Axel Springer v Germany* (2012) 55 EHRR 6 at [83], the European Court of Human Rights held that:

> "In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life … The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence".

This passage was applied by Warby J in *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB).

22. Mr Brendan McGurk, who appeared for HMRC, accepted that Article 8 of the ECHR was potentially engaged but submitted that there had been no infringement of Mr Ian Hercules's rights under Article 8 in the circumstances of this case. Clearly, Judge Herrington considered that it is arguable that Mr Ian Hercules's Article 8 rights had been breached or he would not have granted permission to appeal.

**Re W**

23. *Re W* raised two points and it will be immediately obvious why the case is relevant to this appeal. Those points were:

> (1) Can a witness in proceedings, who is the subject of adverse judicial findings and criticism, and who asserts that the process in the lower court was so unfair as to amount to a breach of his/her rights to a personal and private life under Article 8 of the ECHR, challenge the judge's findings on appeal?

(2) If so, on what basis and, if a breach of Article 8 is found, what is the appropriate remedy?

24. The proceedings in *Re W* were care proceedings in the Family Court but much of the discussion in the judgment of McFarlane LJ applies equally to other proceedings, including appeals in the FTT. In *Re W*, a judge issued a judgment in which he found that certain allegations of sexual abuse had not been proved. In the judgment, the judge made a range of criticisms and findings as to the actions of the local authority, the wider group of professionals involved and, in particular, an individual social worker and an individual police officer, both of whom the judge proposed to name. The comments in the judgment, described by McFarlane LJ as "very substantial and professionally damning criticisms", came out of the blue, appearing for the first time in the judge's oral "bullet point" judgment given at the conclusion of the hearing and not having been put forward by the parties or the subject of comments by the judge during the hearing. As in this case, there was no challenge to the judge's substantive decision. Instead, the local authority and the two named individuals sought a remedy from the Court of Appeal that would prevent the adverse and extraneous findings being included in the final judgment that had yet to be handed down formally and published.

25. In his judgment in *Re W*, McFarlane LJ sets out and defuses the "substantive and procedural legal landmines" that littered the appellants' route to a remedy. The first landmine was whether the two named individuals, who were neither the appellant nor the respondent before the Family Court, were entitled to appeal. The second procedural hurdle was whether an appeal is possible where the outcome, in this case the decision of the FTT on the appeal, is not challenged but only certain subsidiary findings by the judge in the decision.

26. In *Re W*, the relevant provision governing appeals to the Court of Appeal, section 31K of the Matrimonial and Family Proceedings Act 1984, permitted "any party to [the] proceedings in the Family Court" to appeal. On a narrow reading of that provision, if the two individuals were not or could not be regarded as parties to the proceedings in the Family Court, they had no right of appeal. The same issue arises in this appeal since the appellant in the appeal in the FTT was Pierhead. Mr Ian Hercules was a director of the appellant and a witness at the hearing. Section 11(2) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') provides that "any party to a case" has a right of appeal to the UT.

27. In *Re W*, McFarlane LJ held that the two named individuals were, as a matter of procedure, entitled to seek to appeal to the court for three reasons. The first was that the individuals had achieved 'intervenor' status and were, therefore, additional 'parties' to the proceedings. The second was that, although they did not have that status during the proceedings, the individuals had become 'parties' by virtue of making an application to make submissions in relation to specific findings in the judgment which was refused. At that point, they became parties to the application and would have a route to appeal against the refusal of the application. Neither of those routes is applicable to Mr Ian Hercules in this case as he did not participate in the proceedings before the FTT other than as a witness, he was not an intervenor and he did not make any application to the FTT to make submissions about the findings in the Decision which, if it were refused, he could seek to appeal.

28. The third reason given by McFarlane LJ in *Re W* was that, applying the interpretation of CPR 52.1(3)(d) adopted by the Court of Appeal in *MA Holdings Ltd v George Wimpey UK Ltd and Tewkesbury Borough Council* [2008] EWCA Civ 12, it was unnecessary to establish with certainty the precise procedural status of the two named individuals in the lower court in order to determine whether or not they could be appellants for the purposes of the CPR. In *MA Holdings*, the Court of Appeal had held that, for the purposes of CPR Part 52, 'appellant' in rule 52.1(3)(d) did not require that the person seeking to appeal was a party in the proceedings in the lower court. That was based on the fact that CPR r.52.1(3)(d) provides that "'appellant' means a person who brings or seeks to bring an appeal" and that definition did not require that the person seeking to appeal was a party in the proceedings in the lower court. The effect was that the court had discretion to permit a person who had not been a party to the proceedings before the lower court to appeal. That discretion had to be exercised in a manner consistent with the overriding objective to deal with cases justly.

29. That reasoning does not appear to assist Mr Ian Hercules in this case because the CPR do not apply to the FTT and UT and, as stated above, the right of appeal to the UT in section 11(2) of the TCEA is restricted to a party to a case and Mr Ian Hercules was not a party to the proceedings in the FTT.

30. In paragraph 12 of *MA Holdings*, Dyson LJ stated that before the CPR came into force, the court could, in the exercise of its inherent jurisdiction, have allowed a person who had an interest in the outcome of proceedings to appeal. Mr Jones submitted that, by virtue of section 25 TCEA, the UT had the same inherent jurisdiction as the High Court and should exercise it in favour of allowing Mr Ian Hercules to appeal. We consider that there are two difficulties with this submission. The first is that the UT does not have the same inherent jurisdiction as the High Court in this case. The relevant parts of section 25 TCEA provide that the UT has the same powers, rights, privileges and authority as the High Court in relation to the following matters:

> "(a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions."

The matters in (a) and (b) clearly relate to the hearing of appeals, references and applications by the UT. In our view, the other incidental matters in (c) are similarly limited to the UT's functions in relation to proceedings that are properly before it. If the UT does not have jurisdiction, e.g. because a person who is not a party has no standing to bring an appeal, then section 25 TCEA does not apply. Section 25 TCEA does not confer the High Court's inherent jurisdiction on the UT generally or in all circumstances but is a more restricted provision that allows the UT to exercise the powers of the High Court in relation to matters over which the UT has jurisdiction under other provisions such as section 11 TCEA (right of appeal).

31. If we are wrong and the UT does have the same inherent jurisdiction as the High Court then we must consider whether that would provide Mr Ian Hercules with a right to appeal in the present case. It is clear from paragraph 12 of *MA Holdings* that the person must have an interest that, at least, gave him or her the possibility of being joined as a party to the proceedings in the court below. The appellate court could then grant them leave to appeal even where no such application to be joined had been made or, if it had been, it was likely to have been refused. Rule 9(2) of the Tribunal Procedure (First-tier

Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') provides that the FTT may give a direction adding a person to proceedings as a respondent. In our view, it is unlikely that the FTT would exercise the power to add a person as a respondent unless the person had a direct financial interest in the outcome of the appeal that requires, in accordance with the overriding objective of the FTT Rules, that they be permitted to take part in the proceedings. In this case, Mr Ian Hercules only had an indirect financial interest as shareholder in and director of Pierhead and was in no different position to many other persons who are shareholders and directors of companies that have appeals in the FTT. Whether to add a person as a party is a case management matter within the discretion of the FTT. In a case such as this, the FTT could have taken the view that, as he was a director of the appellant and a witness in the appeal, nothing would be achieved by adding Mr Ian Hercules as a respondent. Nevertheless, it might be argued that the potential effect on his reputation and ability to conduct business of adverse findings by the FTT about his fitness and propriety would give Mr Ian Hercules a sufficient interest. Accordingly, we conclude that, if the UT had the same inherent jurisdiction as the High Court, then we would have to consider whether this would be an appropriate case in which to exercise such jurisdiction to allow Mr Ian Hercules to appeal. In doing so, we would have regard to the matters that we discuss below. In view of our conclusions on those matters and that the UT does not have the inherent jurisdiction of the High Court in this case, we do not need to make a decision on this point.

32. There is one other way that Mr Ian Hercules might gain the status of appellant before us. Section 3 of the Human Rights Act 1998 ('HRA 1998') provides that, so far as it is possible to do so, primary legislation and subordinate legislation, whenever enacted, must be read and given effect in a way which is compatible with the Convention rights in the ECHR. Section 1 of the HRA 1998 defines the Convention rights as including Article 8 of the ECHR.

33. In paragraph 42 of *Re W*, McFarlane LJ held:

> "… if, for some reason, an individual fails to achieve the status of an 'appellant' either by a straight-forward application of the rules and s 31K, or via the more flexible route of *MA Holdings Ltd*, in circumstances where it is established that an individual's rights under ECHR, Art 8 have been breached by the outcome of the proceedings in the lower court, then this court has a duty under HRA 1998, s 3 to read down s 31K and the court rules in such a manner as to afford that individual a right of appeal."

34. We consider that this means that, if we are satisfied that Mr Ian Hercules's rights under Article 8 of the ECHR were infringed in this case then the UT has a duty under section 3 of the HRA 1998 to read and apply section 11 TCEA and/or the Tribunal Procedure (Upper Tribunal) Rules 2008 in such a manner as to provide him with a right of appeal and, we infer, the means to exercise it. We consider whether Mr Ian Hercules's rights under Article 8 of the ECHR were infringed at [49] – [58] below.

*Is an appeal possible?*

35. The second hurdle for the would-be appellants in *Re W* was whether an appeal was possible where the only subject of the appeal was the subsidiary internal findings of the judge set out in his judgment and the order that he made was unchallenged. In *Re W*, McFarlane LJ found that, in limited circumstances, it was possible for an appeal to be made against significant findings made by the judge in a lower court where those findings

had serious legal consequences and were made in a manner which failed to meet the basic requirements of fairness established under Article 8 ECHR and/or common law.

36. As regards the circumstances in which such an appeal may be permitted, at paragraph 59, McFarlane LJ appeared to accept the submission by counsel for the local authority that:

> "… there should be a threshold test triggering a right of appeal based on the question 'are the facts found within the four corners of the case and was it necessary for the judge to make those findings in order to fulfil the judicial task in the case?'. If so, it would be unlikely that a witness who is criticised in the course of those findings would have a right of appeal. If not, then the court should consider:
>
> a) Whether the process was procedurally fair; and
>
> b) The significance of any legal consequences that may flow for the potential appellant as a result of the findings."

(This paragraph informs the structure of McFarlane LJ's judgment and his conclusions on these issues at paragraphs 97 to100.)

37. Three points can be derived from paragraph 59 of *Re W*. The first point to consider is whether the FTT's finding that Mr Ian Hercules was not a fit and proper person was within the four corners of Pierhead's appeal and whether it was necessary for the FTT to make that finding in order to fulfil the judicial task in the case. If the answer is 'yes' then, in our view, Mr Ian Hercules, who was a witness in the case, cannot complain that the FTT carried out its proper judicial function and made relevant findings of fact. If the answer is 'no', we must consider whether the process was procedurally fair and, if not, what consequences flow from it.

*Was the issue of Mr Hercules' propriety within the four corners of the appeal?*

38. The appeal was an appeal under section 16(4) of the Finance Act 1994 which provides that the FTT's jurisdiction is limited to considering whether HMRC's decision should be set aside because it was unreasonable in the sense that no HMRC officer acting reasonably could have reached it or that the decision was wrong in law or that the HMRC officer who made the decision took into account irrelevant matters or failed to take relevant matters into account. The relevant decision was contained in the decision letter dated 13 December 2013 written by Mr Singh. The letter was addressed to Mr Ian Hercules. The letter began by observing that:

> "You [Mr Ian Hercules] advised me that you and your advisor [Mr Richard Hercules] had substantial Excise experience in the past from operating an Excise approved general storage and distribution warehouse."

39. HMRC accepted that, as Judge Herrington observed, the decision letter of 13 December 2013, did not refuse Pierhead's WOWGR application on the basis that Mr Ian Hercules was not a fit or proper person. That appears also to have been the view of the FTT which observed at [276] that Mr Singh's conclusions that Mr Richard Hercules was the 'guiding mind' behind Pierhead and was not a fit and proper person showed that the only reasonable decision that HMRC could make was to refuse Pierhead's application to be registered under WOWGR. The FTT also held that, even if Mr Singh had concluded that Mr Richard Hercules' involvement was less than it was, the decision to refuse

WOWGR registration was inevitable because Mr Ian Hercules was not a fit and proper person.

40. Mr Jones submitted that the FTT's finding that Mr Ian Hercules was not a fit and proper person was unnecessary to the appeal by Pierhead and was outside the four corners of the issue to be determined. That issue was whether HMRC's decision was reasonable and that necessarily involved considering whether Pierhead was a fit and proper person to hold a WOWGR registration. Mr Jones accepted that, if a company had said that it was fit and proper because its business was conducted by certain individuals and those individuals were fit and proper persons then an enquiry into the fitness and propriety of those persons would be relevant and within the four corners of any appeal. That was not this case. The FTT could have found that Pierhead was not a fit and proper person to hold a WOWGR licence on the basis of Mr Ian Hercules' lack of experience but the FTT did not do so.

41. Mr Jones said that, in [102], the FTT would have been entitled to find that Mr Ian Hercules knew or ought to have known that Euro Trade was in breach of its WOWGR and that he had misled Ms Ames. That could properly have fed into a finding that Pierhead was not a fit and proper person but, he submitted, that would not lead to a finding that Mr Ian Hercules was not a fit and proper person.

42. Mr Jones submitted that the error was shown in [103] where the FTT said that HMRC could reasonably have considered that Mr Ian Hercules was not fit and proper but the only issue in the appeal was whether Pierhead was fit and proper. Mr Jones accepted that the FTT could look at facts in existence at the time (see *Gora and others v Customs and Excise Commissioners* [2004] QB 93 per Pill LJ at paragraphs 38(e) and 39) and that one of the facts was that Mr Ian Hercules was a director and that he did not have sufficient experience.

43. Referring us to Lord Sumption's discussion of the expression "piercing the corporate veil" at [16] et seq of *Pest v Petrodel Resources Limited* [2013] 2 AC 415, Mr Jones submitted that courts and tribunals should not elide companies and their directors.

44. In relation to this first point, Mr McGurk submitted that the FTT's findings in relation to the fitness and propriety of Mr Ian Hercules were within the four corners of the case before the FTT. He further submitted that the findings were justified and necessary because the FTT was entitled, in the circumstances of Pierhead's appeal, to make a finding that Mr Ian Hercules was not a fit and proper person.

45. We do not consider that, properly understood, any question of "piercing the corporate veil" arises in decisions refusing to grant WOWGR registered status or appeals relating to such decisions. As is stated in Public Notice 196 (see, in particular, section 3.2), the relevant considerations are whether

> "… the business is a genuine enterprise which is commercially viable, with a genuine need for authorisation and that all key persons are fit and proper to carry on such a business …"

46. Companies can only operate through or by the agency of natural persons. The fitness and propriety of a company to hold a WOWGR registration is, in the circumstances, indistinguishable from the fitness and propriety of the key personnel of

that company. It is artificial in a case such as this to ignore the fact that Pierhead was no more than a vehicle for its directors and employees or others who act in its name.

47. In our view, the fitness and propriety of Mr Ian Hercules was plainly an appropriate matter for the FTT to consider and make findings about in this case.

> (1) First, it seems clear from Mr Singh's letter of 13 December 2013, quoted in paragraph 38 above, that Mr Ian Hercules had put himself (as well as his father) forward as a fit and proper person to operate an excise warehouse. In the decision letter, Mr Singh referred to the fact that Mr Ian Hercules was a bookkeeper for Euro Cellars Limited, a company with a history of non-compliance, and a director of Euro Trade which had traded in breach of the conditions of its own WOWGR registration. In [267], the FTT identified those facts as two of the three reasons for HMRC's decision to refuse the WOWGR registration although they were not the primary reason.
>
> (2) In the circumstances, it would be artificial of the FTT to consider the fitness and propriety of Pierhead without reference to the fitness and propriety of Mr Ian Hercules as well as Mr Richard Hercules. The fact that the FTT concluded that Mr Richard Hercules was not a fit and proper person and that alone was sufficient to justify HMRC's decision does not mean that the FTT was not entitled or (we would say) bound to consider the status of Mr Ian Hercules in the alternative.
>
> (3) In our view, the FTT could not conclude that Pierhead was not a fit and proper person without considering the knowledge and conduct of its directors and attributing that to the company. Only if the FTT were satisfied that Mr Ian Hercules and Mr Richard Hercules were both fit and proper persons could the FTT be satisfied that HMRC's decision that Pierhead was not a fit and proper person was unreasonable. We do not consider that the fact that the decision letter does not say in terms that Mr Ian Hercules was not a fit and proper person constrains the FTT from considering the point when it so clearly arises in the appeal.

48. For the reasons set out in the immediately preceding paragraphs, we have concluded that the FTT's finding that Mr Ian Hercules was not a fit and proper person was not outside the four corners of Pierhead's appeal but was a necessary part of the process of determining the appeal. Accordingly, Mr Ian Hercules has no ground for complaint and the appeal must be dismissed. Although, given our decision, it is not necessary for us to consider the other issues that arise, we do so briefly in case our decision on this point is wrong.

*Was the process procedurally fair?*

49. Assuming that the question whether Mr Ian Hercules was a fit and proper person was not within the four corners of Pierhead's appeal, we must then consider whether the process was procedurally fair. In the context of this case (as in *Re W*), it is necessary to consider what elements of procedural fairness are required by Article 8 of the ECHR. McFarlane LJ addressed this in paragraphs 95 and 96 of *Re W*:

> "95. Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:

> a) Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;
>
> b) Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;
>
> c) Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.
>
> 96. In the present case, once the judge came to form the view that significant adverse findings may well be made and that these were outside the case as it had been put to the witnesses, he should have alerted the parties to the situation and canvassed submissions on the appropriate way to proceed. One option at that stage, of course, is for the judge to draw back from making the extraneous findings. But if, after due consideration, it remains a real possibility that adverse findings may be made, then the judge should have established a process that met the requirements listed in paragraph 95 above."

50. In *Re W*, McFarlane LJ had no difficulty in finding that the named individuals' rights under Article 8 of the ECHR would be breached if the judgment were published with the criticisms and adverse findings in it. He summarised his reasons for reaching this conclusion in paragraph 97. McFarlane LJ held that, at its core, fairness requires the individual who would be affected by a decision to have the right to know of and address the matters that might be held against him before the decision-maker makes his decision. He also found that it was manifestly unfair to make criticisms and adverse findings in relation to the individuals about matters that fell entirely outside the issues that were properly before the court in the proceedings and had been litigated during the hearing when those matters of potential adverse criticism had not been mentioned at all during the hearing by any party or by the judge.

51. We consider the question of procedural fairness on the basis that, contrary to our conclusion above, the issue of whether Mr Ian Hercules was a fit and proper person was outside the four corners of the appeal.

52. Mr McGurk submitted that, at the hearing before the FTT, HMRC cross-examined Mr Ian Hercules in detail as to:

(1) his involvement in Euro Cellars Limited;

(2) his role and involvement in Euro Trade;

(3) his responsibility for the breach of Euro Trade's WOWGR through ordering goods from suppliers who he knew were not authorised to supply Euro Trade;

(4) his knowledge and experience of the excise trade and the regulation of those granted a licence to trade in duty suspended goods;

(5) his knowledge that Mr Richard Hercules had been regarded by HMRC as not fit and proper; and

(6) his decision to involve Mr Richard Hercules and to rely upon him in the running of Pierhead notwithstanding his knowledge that Mr Richard Hercules was not fit and proper.

53. There was no transcript of the hearing before the FTT and Mr Jones did not appear in those proceedings so he could not say what was or was not put to Mr Ian Hercules in cross-examination. Mr Jones submitted that the issue was whether the points had been adequately put to the witness. We agree. It is clear from *Re W* that the central question for us is whether the case in support of the adverse finding that he was not a fit and proper person was adequately put to Mr Ian Hercules in circumstances where he had an appropriate opportunity to respond to that case.

54. In the circumstances of the present case, it was therefore necessary for HMRC to make clear to Mr Hercules, as a witness for the appellant, that it was part of HMRC's case that he was not a fit and proper person. We do not consider that it was necessary for HMRC to state in terms to a witness that he or she is not fit and proper if that is the only conclusion that can be reasonably drawn by that witness from the matters put to him or her in cross-examination. Where HMRC has done so, we do not consider that it is necessary for the FTT to tell the witness or anyone that it may make adverse findings outside the four corners of the appeal provided that those findings are consistent with the matters put by HMRC.

55. In the absence of a transcript, we should look at the Decision and what it records. We consider that we are also entitled to take account of the matters that, according to Mr McGurk, were put to Mr Ian Hercules in cross-examination. We consider that those matters should have alerted Mr Ian Hercules to the fact that HMRC did not regard him as a fit and proper person to hold a WOWGR registration or be the director of a company that was registered under WOWGR. Specifically, questions about his involvement with Cellars and Euro Trade, his knowledge and experience and his decision to involve his father in Pierhead appear to us to be obviously aimed at Mr Ian Hercules' fitness and propriety. The FTT states, in [101], that Mr Ian Hercules was asked a number of questions in cross-examination about his knowledge and experience of excise matters. The FTT relied on his answers to those questions to conclude in [103] - [105] that Mr Ian Hercules was not a fit and proper person. In [102], the FTT referred to the fact that Mr Ian Hercules accepted in cross-examination that he had misled a HMRC officer, Ms Ames, but that did not form any part of the FTT's reasons for concluding that he was not a fit and proper person.

56. We consider that the details in the Decision show that the matters which formed the basis for the finding by the FTT that Mr Ian Hercules was not a fit and proper person were based on the answers that he gave to questions in cross-examination and that, accordingly, those matters were adequately put. As a director of Pierhead, all of the evidence on which HMRC based its case (and on which the FTT relied in reaching its findings) was available to Mr Ian Hercules before he was cross-examined. This is a very different situation from that in *Re W* where, as McFarlane LJ records in paragraph 92, the substantial criticisms eventually made by the judge formed no part of the challenges in cross-examination and were not suggested by the parties or the judge at any stage before the judgment.

57. Mr Jones also submitted that the fact that Mr Ian Hercules was cross-examined about certain things did not put him on notice that the FTT intended to make an adverse finding against him personally when such a finding had no relevance to the overall

outcome of the appeal. That would require the FTT to have told Mr Ian Hercules that it might conclude that he was not a fit and proper person. We do not accept that the FTT is under a duty to issue the equivalent of a 'Salmon letter' or otherwise give advance notice to persons who will be subject to criticism in the FTT's decision. Salmon letters are official letters sent out by public inquiries to people who will be subject to criticism when their reports are released. The FTT is not a public inquiry and there is nothing in *Re W* to suggest that courts and tribunals are required to adopt the same practice. We consider that the FTT is required to implement the procedures described in *Re W* to ensure that the rights of appellants and witnesses under Article 8 of the ECHR are not breached.

58. For those reasons, our view is that, even if we had decided that the FTT had strayed outside the four corners of Pierhead's appeal when it decided that Mr Ian Hercules was not a fit or proper person, the process was procedurally fair. Accordingly, Mr Ian Hercules's rights under Article 8 ECHR were not infringed.

*Consequences of procedural unfairness*

59. If we had concluded that procedural unfairness had been established, we would be required to consider the consequences of the finding and the potential effect on Mr Ian Hercules. We can deal with this point very briefly. Mr McGurk submitted that, if there was any interference with Mr Hercules's Article 8 rights then such interference was not sufficiently serious to require a remedy. Mr Jones contended that if Article 8 of the ECHR was engaged then *Re W*, which had similar facts, showed what remedy was required.

60. McFarlane LJ held, at paragraphs 119 and 120 of *Re W*, that where:

> (1) adverse findings have been made as a result of a wholly unfair process, and
>
> (2) the consequences for those who are criticised in those findings are both real and significant,

it is incumbent on the court (and, therefore, on the UT) to provide a remedy and, so far as possible, correct the effect of the unfairness that has occurred.

61. In *Re W*, the remedy was not simply to remove words from the judgment but to set aside the judge's findings on those matters so that they no longer stood or had any validity for any purpose. Mr Jones said that Mr Ian Hercules sought the same remedy. He was not seeking relief in the form of any positive finding that he was a fit and proper person (plainly there was no basis for that) but rather that there should be a revised judgment, excised of the negative findings so that the matter would be "left open and subject to further scrutiny should there be a further application by a company of which Mr Ian Hercules was a director for a WOWGR." Mr Jones submitted that "labels stick" and a finding by the FTT that he was not fit and proper could have adverse consequences. Indeed, he said that the adverse finding about him had already been used by HMRC to justify refusing to grant Pierhead registration under the Alcohol Wholesaler Registration Scheme.

62. We agree with Mr Jones on this point. If we had found that the FTT's findings were outside the four corners of the case and if we had found that the process was procedurally unfair, the appropriate remedy would be for the FTT's findings on this matter to be set aside and for a revised version of the Decision to be produced without the negative finding.

**Disposition**

63. For the reasons given above, this appeal is dismissed.

**Costs**

64. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**Judge Greg Sinfield**

**Judge Ashley Greenbank**

**Release date: 23 January 2019**