UT Neutral citation number: **[2024] UKUT 00183 (TCC)**

UT (Tax & Chancery) Case Number: UT/2022/000103

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 12, 13 March 2024
Judgment date: 20 June 2024

Value Added Tax – withdrawal of an appeal to the FTT against a VAT assessment recovering input tax credit – subsequent claim for repayment of the input tax – application by HMRC to strike out the appeal – whether the FTT erred in finding that HMRC were not estopped from making that application – whether the FTT erred in striking out the appeal on the basis of cause of action estoppel, issue estoppel and abuse of process

Before

MR JUSTICE MICHAEL GREEN
JUDGE JONATHAN CANNAN

Between

TELENT TECHNOLOGY SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Jones KC, instructed by PwC LLP

For the Respondent: Ben Elliott, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 3 May 2022 ("the Decision"). In the Decision, the FTT struck out the appeal of telent Technology Services Limited ("TTSL") against a decision of HM Revenue & Customs ("HMRC") refusing its claim for repayment of VAT. The circumstances in which HMRC made its strike out application are succinctly summarised by the FTT at [3] – [8] of the Decision:

> 3. The telent group provides network, transport, telecommunications and infrastructure services. In 2006, it placed a sum in escrow ("the Escrow Account") to provide comfort to the Pensions Regulator as to the future funding of its occupational pension scheme. In 2014, telent Ltd informed HMRC that it had been recovering input tax on fees paid to investment advisers for the Escrow Account. At that time, telent Ltd was the representative member of the telent group.
>
> 4. On 17 November 2014, HMRC issued telent Ltd with an assessment to recover VAT for the periods 11/10 through to 05/14, a sum of £1,146,598.93 ("the Assessment"). On 10 September 2015, following a statutory review, telent Ltd appealed the assessment to the Tribunal ("the Assessment Appeal"). In March 2016, the Assessment Appeal was withdrawn.
>
> 5. Later that year, telent Ltd changed its professional advisers to PriceWaterhouseCoopers LLP ("PwC"). On 30 September 2016, PwC made a claim in the name of telent Ltd to recover VAT on the investment management services relating to the Escrow Account of £1,312,309 for periods 08/12 to 08/16 ("the Claim"). The Claim thus included eight VAT periods ("the Overlap Period") which had also come within the Assessment Appeal; the related VAT totalled £855,754.
>
> 6. HMRC refused the Claim by writing to Telent Technology Service Ltd ("TTSL"), the new representative member of the telent VAT group. TTSL appealed that refusal to the Tribunal. In their Statement of Case, HMRC made no reference to the Assessment Appeal or to estoppel.
>
> 7. In July 2021, HMRC informed PwC that they were minded to concede the substantive issue, but also said "Telent is procedurally barred" from recovering the VAT for the Overlap Period, and inviting settlement on that basis. The parties failed to agree, and HMRC applied for the Tribunal to strike out of the part of the appeal relating to the Overlap Period; they conceded the remaining part of the appeal.
>
> 8. HMRC's strike out application rested on Value Added Taxes Act 1994 ("VATA"), s 85(1) and (4), which state that where a person has withdrawn its appeal, the parties are deemed to have agreed that "the decision under appeal should be upheld without variation" and the Tribunal is deemed to have determined accordingly. In Mr Elliott's submission, the effect of those subsections was that, when telent Ltd withdrew the Assessment Appeal, the parties were deemed to have come to an agreement with HMRC that input tax on the investment management services for periods 08/12 to 05/14 was not allowable, and the Tribunal was deemed to have determined that this was the case. As a result, there had been a judicial determination that the VAT was irrecoverable, and the principles of cause of action estoppel, issue estoppel and/or abuse of process prevented relitigation.

2. We shall adopt the same abbreviations as the FTT in this decision. We also refer to TTSL's appeal in relation to the Claim for the Overlap Period as "the Claim Appeal". HMRC's application to strike out the Claim Appeal relied on section 85 VATA 1994 and cause of action estoppel, issue estoppel and/or abuse of process. TTSL contended that HMRC were themselves estopped from striking out the Claim Appeal because they had acquiesced in TTSL bringing that appeal. In the alternative, TTSL contended that section 85 did not give rise to any cause of action estoppel, issue

estoppel or abuse of process. The overall findings of the FTT may be summarised for present purposes as follows, with references to relevant paragraphs in the Decision:

> (1) HMRC were not estopped from applying to strike out the Claim Appeal (at [72] to [107]).
>
> (2) The effect of section 85 was that on withdrawal of the Assessment Appeal, the FTT was deemed to have determined that input tax on investment management services for the Overlap Period was not allowable (at [108] to [185]).
>
> (3) Cause of action estoppel applied as an absolute bar to the Claim Appeal (at [186] to [193]).
>
> (4) HMRC's application to strike out therefore succeeded (at [193]).
>
> (5) In the alternative, TTSL would be barred by issue estoppel from making the Claim Appeal (at [194] to [224]).
>
> (6) In the further alternative, TTSL was not seeking to raise any new issues relating to the Overlap Period and the Claim Appeal should be struck out as an abuse of process (at [225] to [238]).

3. On this appeal, the parties rely on broadly the same arguments that were put to the FTT. TTSL appeals with permission of the FTT and its grounds of appeal are as follows:

> **Ground 1** – the FTT erred in law in concluding that HMRC had not acquiesced in TTSL bringing the appeal, or were not otherwise estopped from raising their procedural objections.
>
> **Ground 2** – the FTT erred in law in its determination of the meaning and effect of section 85 VATA 1994.
>
> **Ground 3** – the FTT erred in law in concluding that TTSL was subject to cause of action estoppel.
>
> **Ground 4** – the FTT erred in law in concluding that TTSL was subject to issue estoppel.
>
> **Ground 5** - the FTT erred in law in concluding that TTSL was barred by abuse of process.

4. It would normally be logical to consider cause of action estoppel before issue estoppel. However, Ground 4 stands or falls with Ground 2 in that it is only if the FTT was right in its determination as to the meaning and effect of section 85 that there could be any issue estoppel. TTSL accepts that if the FTT was right on section 85 then there would be an issue estoppel. We shall therefore adopt the same approach as the parties and deal with Grounds 2 and 4 together before considering cause of action estoppel under Ground 3.

5. We are grateful to both counsel for their comprehensive and helpful submissions, both in writing and orally, and for the work of those instructing them. We have also been assisted by the obvious care which the FTT applied to the Decision. For the reasons which follow we have decided to dismiss TTSL's appeal.

The FTT's findings of fact

6. We are not concerned for the purposes of this appeal with the change in the representative member from telent Limited to TTSL. For the sake of simplicity, we shall refer to both as TTSL. The FTT made detailed findings about the circumstances in which TTSL came to withdraw the

Assessment Appeal, to make the Claim and to appeal HMRC's refusal of the Claim, which included but was not limited to the Overlap Period.

7. The HMRC officer who made the Assessment was Mr Boobyer. Whilst it was not recorded by the FTT, it is not disputed that the notification of the Assessment states that the reasons for making it are set out in a letter dated 17 November 2014. It is clear from that letter that the Assessment was made to recover input tax claimed by TTSL in relation to the Escrow Account which HMRC considered had been claimed incorrectly.

8. The Assessment was confirmed by HMRC in a statutory review letter dated 12 August 2015. The FTT did not refer to the contents of the review letter but the letter identified that the point at issue between the parties was input tax recovery on fund management fees for the Escrow Account. TTSL appealed the Assessment to the FTT by notice of appeal dated 10 September 2015. The grounds of appeal were not identified in the Decision but for reasons which follow we consider they are relevant and included the following:

> 5. Her Majesty's Revenue and Customs ("the Respondents") have issued an assessment, notified to the Appellant by letter dated 17 November 2014, on the basis that the Appellant is not entitled to recover the VAT so charged ("the Contested Decision"). The reasoning provided in the Contested Decision is that the services provided to the Appellant by fund managers are directly and immediately linked to exempt supplies. The Respondents upheld the Contested Decision on review, notified to the Appellant in a letter dated 12 August 2015.
>
> …
>
> 10. The Appellant contends that the services provided to it by the fund managers are services which were used exclusively in making taxable supplies within the meaning of Regulation 101(1).
>
> 11. In the alternative, the supplies were used both in the making of taxable supplies and in making other supplies of a description falling within Group 5 of Schedule 9 of the Act, those being supplies that are incidental to the Appellant's business activities. If the alternative position were to be found then the Appellant would be entitled to recover the VAT so charged in full in accordance with the terms of Regulation 101 (2)(d).

9. On 9 March 2016 KPMG, who were then acting for TTSL, lodged a notice of withdrawal of the Assessment Appeal with the FTT. It simply stated:

> **TAKE NOTICE THAT** the Appellant **HEREBY WITHDRAWS** this appeal.

10. At some stage thereafter, TTSL changed adviser to PwC and on 30 September 2016 PwC made the Claim on behalf of TTSL. PwC stated that the "direction of travel" of recent case law, including a reference to *University of Cambridge v HM Revenue & Customs* [2015] UKUT 305 (TCC), meant that a person who has a fund should be able to recover input tax on investment management costs where those costs are a general overhead of the business. Mr Boobyer wrote to PwC on 3 November 2016. He made some comments on the technical arguments relevant to input tax recovery and then added:

> I would draw your attention to the fact that your client accepted in a previous appeal relating to this same subject (TC/2015/05402) that telent's escrow activity was a business or 'economic' activity (this view was confirmed in a letter that was dated 28 May 2015). The appeal progressed on that basis until it was withdrawn prior to being heard…

> There is one further point I should make about the claim: it includes periods 08/12 to 05/14 inclusive, the various amounts claimed for those periods totalling £855,754. These amounts are identical to the amounts previously assessed by HMRC, forming part of the tax in dispute in the previous appeal, from which, as I have mentioned, your client withdrew. In these circumstances, I can confirm now that, if any repayment were made in advance of the Court of Appeal's decision in the University of Cambridge case, it would exclude the amount of £855,754. Moreover, in the event that the final decision were in telent's favour, repayment of the £855,754 would be a matter for HMRC's discretion, given that the tax in question had been subject to an appeal process from which your client had formally withdrawn.

11. PwC responded in a letter dated 5 December 2016 arguing that there was no restriction on the Overlap Period being contained in the Claim, relying on *Matalan Retail Limited v HM Revenue & Customs* [2009] EWHC 2046 (Ch) ("*Matalan*"). It was said that the unilateral withdrawal of an appeal cannot be said to restrict further consideration of the relevant periods at a later date. Mr Boobyer replied on 12 April 2017 stating that HMRC had decided not to repay the Claim. In relation to the Overlap Period, he stated that he had changed his view as to the effect of TTSL's withdrawal of the Assessment Appeal:

> In my letter of 3 November I suggested that any repayment HMRC may eventually be required to make in connection with this matter should be restricted to £456,556, the amount that had not been part of the tax at stake in the previous appeal. I have since considered the relevance of the High Court's judgment in *Matalan* (as per PwC's letter of 5 December) and now accept that, if it is ultimately determined that a repayment should be made, that repayment should be of the full claim in the sum of £1,312,309.

12. PwC requested a statutory review and HMRC's review letter dated 18 January 2018 from a Mr Bennett upheld the decision not to repay the Claim. It also addressed the "previous assessment action" as follows:

> On 17 November 2014, an assessment was raised in respect of the input tax related to the escrow funds in question for VAT periods 11/10 to 05/14. You queried this assessment, but the decision was upheld on review. I understand that telent submitted but subsequently withdrew an appeal to the Tribunal. The issue for this period is therefore considered by HMRC to be closed.
>
> A review was offered at the time under VAT Act 1994 Section 83A, and this review was performed as requested. There is no allowance in law for a second review of a matter, and indeed VATA Section 83A (3) specifically states that the offer of a review does not apply to the notifications of the conclusions of a review. Furthermore, Section 83C(4) states that HMRC shall not review a decision if the matter has been appealed to the Tribunal.
>
> I therefore regret that I am unable to review the part of the claim relating to VAT periods 08/12 to 05/14, on the grounds that these periods have already been subject to review. I agree that there is no impediment to you discussing the issue further with HMRC. However, if you wish to reinstate the claim for these earlier periods then, in the absence of the withdrawal of the assessment, your only option is to apply to the Tribunal for a reinstatement of the appeal submitted in 2015. Reinstating an appeal is at the discretion of the Tribunal, and HMRC will be asked whether there is any objection to such action. This issue is outside of the scope of my review.
>
> Although your claim dated 30 September 2016 covers all VAT periods from 08/12 to 08/16, I am, for the reasons given above, only able to review the claim as it relates to VAT periods 08/14 to 08/16.

13. TTSL notified its appeal against refusal of the Claim to the FTT on 15 February 2018. The grounds of appeal made reference by way of background to the correspondence with Mr Boobyer about the Overlap Period and what was said in the statutory review about the Assessment Appeal. HMRC filed its statement of case on 25 May 2018, setting out why it considered that TTSL was not

entitled to any repayment in respect of the Claim. HMRC did not take any point in the statement of case that withdrawal of the Assessment Appeal prevented TTSL from claiming a repayment in relation to the Overlap Period. The statement of case was entirely silent on that issue.

14. The Claim Appeal proceeded towards a hearing in the normal way, and on 8 June 2021 the FTT gave notice that the hearing would take place on 7 – 9 December 2021.

15. On 15 July 2021, HMRC wrote to PwC saying that following a further review they wished to "revisit" a "jurisdictional issue". The issue was whether TTSL could make a claim for the Overlap Period. HMRC stated that although Mr Boobyer had previously agreed on the basis of *Matalan* that a claim could be made for the Overlap period, they were no longer of that view. Their view was that TTSL was procedurally barred from making a claim for the Overlap Period. HMRC indicated that they were minded not to proceed with the substantive argument and offered to settle the dispute on the basis that the Appellant conceded that part of the Claim which related to the Overlap Period.

16. PwC on behalf of TTSL refused to concede the Overlap Period, but in any event HMRC withdrew their case on the substantive issue by notice dated 14 October 2021. At the same time, HMRC issued a strike out application based on what the parties have referred to as the procedural issue, namely: HMRC's case that the Claim Appeal was barred by cause of action estoppel, issue estoppel and/or was an abuse of process. That application included an application to amend their statement of case to reflect their new position on the substantive issue and to raise the procedural issue "to the extent necessary". HMRC also applied to vacate the hearing in December 2021.

17. The FTT gave directions for the parties to provide submissions on HMRC's applications and it heard the strike out application on the dates previously set aside for the substantive hearing in December 2021. HMRC accepted that they ought to have raised the procedural issue in their statement of case. TTSL opposed the strike out application but did not object to HMRC amending their statement of case. The FTT struck out the Claim Appeal.

Ground 1 – Acquiescence and estoppel

18. Ground 1 concerns TTSL's contention that the FTT was wrong in law in not finding that HMRC had acquiesced in TTSL bringing the Claim Appeal. Alternatively, TTSL says that HMRC were otherwise estopped from raising their procedural or jurisdictional objections to the Claim Appeal. In support of this, TTSL relied heavily on the decision of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Gore Wood*").

19. In considering whether HMRC were estopped from applying to strike out the Claim Appeal, the FTT considered that *Gore Wood* could be distinguished on its facts. HMRC had taken no procedural issue in their original statement of case dated 25 May 2018, but changed their view and did take the procedural issue in their letter dated 15 July 2021. The FTT regarded this as a matter of case management rather than acquiescence or estoppel. It held at [101] that there was no case management reason why HMRC should not be permitted to change their legal arguments. In any event, in relation to estoppel, the FTT considered that TTSL was required to show detriment to establish an estoppel and concluded that there was no detriment.

20. Mr Michael Jones KC appearing on behalf of TTSL submitted that, by 15 July 2021, when HMRC "revisited" the jurisdictional issue, they had acquiesced in TTSL bringing the Claim Appeal. He relied in particular on the correspondence with Mr Boobyer, including Mr Boobyer's acceptance in his letter dated 12 April 2017 that withdrawal of the Assessment Appeal did not affect TTSL's entitlement to pursue the Claim. He also relied on the absence of any reference to the procedural issue in HMRC's statement of case or at any time up to 15 July 2021. Mr Jones KC

submitted that the FTT was wrong to distinguish *Gore Wood* and to treat the matter as being purely a question of case management.

21. We agree with Mr Jones KC that the FTT was wrong to treat the issues of acquiescence and estoppel raised by TTSL as issues of general case management. We consider that, in the context of a strike out application based on estoppel and abuse of process, the lateness of the application could give rise to a substantive defence based on acquiescence or estoppel. Case management issues might arise from the lateness of an application but TTSL did not take any case management issue here. It did not object to HMRC amending the statement of case.

22. In *Gore Wood*, Mr Johnson and his business, Westway Homes Ltd ("W Ltd") had potential claims in negligence against the firm Gore Wood & Co ("GW"). GW had been instructed in relation to a property purchase. W Ltd's claim against GW was settled at trial in 1992. At that time, Mr Johnson had been willing in principle to negotiate an overall settlement of W Ltd's claim together with his personal claim, that had not yet been brought. However, GW's solicitor stated that the personal claim "*would be a separate claim and it would really be a matter for separate negotiation in due course*". The settlement agreement limited the amount of any claim by Mr Johnson for loss of income as a shareholder in W Ltd to £250,000, but expressly stated that it did "*not limit any other of Mr Johnson's rights against [GW]*". Mr Johnson commenced his personal action against GW in 1993 and, between 1993 and 1997, the parties pleaded and re-pleaded their cases. In 1997, GW applied to strike out the action as an abuse of process. Mr Johnson contended that GW was estopped from contending that his claim was an abuse of process.

23. At first instance, on the trial of various preliminary issues, Pumfrey J held that GW was estopped by convention from contending that Mr Johnson's action was an abuse of process. He found that there was a common assumption that the personal claim would be made and entertained by the court and that it was unconscionable for GW to allege that the personal claim was an abuse of process.

24. The Court of Appeal held that there was no estoppel by convention, but that there was an abuse of process by Mr Johnson pursuant to the rule in *Henderson v Henderson* (1843) 3 Hare 100. In short, the Court of Appeal considered that Mr Johnson should have pursued his claim at the same time as the claim of W Ltd.

25. The House of Lords were unanimous that there was no abuse of process by Mr Johnson. Lord Bingham conducted an extensive review of the authorities on abuse of process and the rule in *Henderson v Henderson*. He noted, in the well-known passage at p 31A:

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an

> approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

26. In relation to estoppel by convention, Lord Bingham cited at p33D the familiar passage from Lord Denning MR's judgment in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law —whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.

27. Lord Bingham went on to find at p33G that Mr Johnson and GW had proceeded on the basis of an underlying assumption that a personal action by Mr Johnson would not be an abuse of process and that it would be unfair or unjust to allow GW to go back on that assumption. He then stated at p34C:

> If, contrary to my view, GW is not estopped by convention from seeking to strike out Mr Johnson's action, its failure to take action to strike out over a long period of time is potent evidence not only that the action was not seen as abusive at the time but also that, on the facts, it was not abusive…

28. Lord Bingham stated his overall conclusion at p 34G:

> In my opinion, based on the facts of this case, the bringing of this action was not an abuse of process.

29. Lord Goff agreed with Lord Bingham that there was no abuse of process by Mr Johnson. However, he did not agree that estoppel by convention prevented GW from contending that Mr Johnson's action was an abuse of process. He set out his view at pp 40 and 41 that an estoppel by convention required an agreed assumption as to facts. Mr Johnson was arguing that GW was estopped from contending that the personal claim was an abuse of process because both parties assumed that the personal claim could be made. That related to a matter of law and not fact. He did however consider that there could be an estoppel by representation:

> … It could, however, be appropriate subject matter for an estoppel by representation, whether in the form of promissory estoppel or of acquiescence, on account of which the firm is, by reason of its prior conduct, precluded from enforcing its strict legal rights against Mr. Johnson (to claim that his personal proceedings against the firm constituted an abuse of the process of the court). Such an estoppel is not, as I understand it, based on a common underlying assumption so much as on a representation by the representor that he does not intend to rely upon his strict legal rights against the representee which is so acted on by the representee that it is inequitable for the representor thereafter to enforce those rights against him. This approach, as I see it, is consistent with the conclusion of my noble and learned friend

> Lord Millett, who considers that the firm would be so precluded by virtue of its acquiescence in the manner in which Mr. Johnson had conducted the litigation hitherto. In the context of the present case, moreover, I can see no material difference between invoking promissory estoppel or acquiescence as the ground on which the respondent firm should be precluded from asserting that the appellant had abused the process of the Court… In the end, I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them.

30. Lord Cooke and Lord Hutton both agreed with Lord Bingham on the subject of abuse of process. They made no observations on estoppel, although on one view their agreement with Lord Bingham on abuse of process might be said to extend to what he said in relation to estoppel by convention.

31. Lord Millett conducted his own review of the authorities on abuse of process starting with *Henderson v Henderson*. At pp 60H to 61F, he rejected GW's contention that there was an abuse of process by Mr Johnson and considered in the alternative whether GW were estopped from asserting an abuse of process:

> Accordingly, I would reject the firm's contention that it was an abuse of process for Mr. Johnson to bring his action after the Company's claim had been resolved. Even if this were not the case, however, I agree with the trial judge that it would be unconscionable for the firm to raise the issue after the way in which it handled the negotiations for the settlement of the Company's action. I would not myself put it on the ground of estoppel by convention. Like the Court of Appeal, I have some difficulty in discerning a common assumption in regard to a matter about which neither party thought at all. This is not to say that estoppel has no part to play in this field. I would regard it as operating in the opposite way. Given that Mr. Johnson was entitled to defer the bringing of his own proceedings until after the Company's claims had been resolved, it would have been unconscionable for him to have stood by without disclosing his intentions and knowingly allowed the firm to settle the Company's action in the belief that it was dealing finally with all liability arising from its alleged negligence in the exercise of the option. To bring his own claim in such circumstances would, in my opinion, amount to an abuse of the process of the Court. But nothing like this took place.
>
> This makes it unnecessary to deal with Mr. Johnson's submission that it is too late for the firm to raise the issue. If necessary, however, I should have regarded the delay as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiescence…
>
> But the premise in the present case is that Mr Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiescence.

32. We have cited these passages at length because Mr Jones KC relied on what was said by Lord Goff and Lord Millett as authority for the proposition that GW was precluded by virtue of acquiescence from alleging abuse of process on the part of Mr Johnson. He submitted that the FTT ought to have treated the passages as authority for that proposition and ought to have applied the same reasoning to the facts of the present appeal. HMRC, by defending on the merits, had acquiesced in TTSL bringing the Claim Appeal. They ought to have taken steps to make their objection known at the time, or shortly after the appeal was lodged. He submitted that if it was necessary to show unconscionability, then in the present case it was unconscionable for HMRC to raise the procedural issue and seek to strike out the appeal.

33. The Supreme Court has recently considered the question of estoppel in the context of tax proceedings in *Tinkler v HM Revenue & Customs* [2021] UKSC 39 ("*Tinkler*"). It held that an estoppel by convention arose that prevented Mr Tinkler from alleging that an enquiry into his self-assessment return had not been validly opened. That finding was reached on the basis that there was a common assumption that a valid enquiry had been opened. It endorsed the principles set out by Briggs J, as he then was, in *HM Revenue & Customs v Benchdollar Ltd* [2019] EWHC 1310 (Ch) ("*Benchdollar*"), as approved subject to one qualification by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023. The fifth principle at [52] of *Benchdollar* requires detrimental reliance:

> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

34. We were also referred to the judgment of Carnwath LJ, as he then was, in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353 ("*ING*") at [55] – [73] where he accepted the requirement for detrimental reliance in the context of estoppel by convention – see in particular [64(v)].

35. The Supreme Court in *Tinkler* considered the role of unconscionability in relation to estoppel by convention at [64]:

> 64. What about unconscionability? This was mentioned as part of the fifth of Briggs J's principles in *Benchdollar*; and in other leaner formulations - such as that of Lord Steyn in *The Indian Endurance* - it has been put forward as playing an even more central role. In most cases, in line with Briggs J's statement of principles, unconscionability is unlikely to add anything once the other elements of estoppel by convention have been established and, in particular, where it has been established that the estoppel raiser has *detrimentally* relied on the common assumption. However, one can certainly envisage exceptional cases where unconscionability may have a useful additional role to play. For example, even if all the other elements of estoppel by convention can be made out, fraudulent conduct by the estoppel raiser would rule out estoppel by convention … But such examples are likely to be rare. Even though HMRC was primarily at fault on the facts of this case - by carelessly sending the notice of enquiry to the wrong address and its consequent misrepresentation to BDO - I agree with the approach in *Amalgamated Investment*, *The Amazonia* and *Benchdollar* so that that does not amount to unconscionable conduct barring the establishment of estoppel by convention.

36. In relation to estoppel by acquiescence, Mr Jones KC relied upon the decision of the House of Lords in *Republic of India v India Steamship Co* [1998] AC 878, (the "*Indian Endurance*" – it is *The Indian Endurance* referred to in *Tinkler*). In that case, the Court of Appeal held that the plaintiffs were debarred from bringing the action because they had obtained a judgment on part of the claim in India. It also held that the defendants were not estopped by convention or acquiescence from seeking to debar the plaintiff. The House of Lords upheld that decision, Lord Steyn stating at pp 913 and 914:

> That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co. Ltd.* v. *A Twitchings* [1977] A.C. 890. Lord Wilberforce said, at p. 903, that the question is:
>
> > "whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known ..."

> Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence. The question was debated whether estoppel by convention and estoppel by acquiescence are but aspects of one overarching principle. I do not underestimate the importance in the continuing development of the law of the search for simplicity. I, also, accept that at a high level of abstraction such an overarching principle could be formulated. But Mr. Rokison, for the defendants, persuaded me that to restate the law in terms of an overarching principle might tend to blur the necessarily separate requirements, and distinct terrain of application, of the two kinds of estoppel.

37. All their lordships in *Gore Wood* found that the circumstances in which Mr Johnson made his personal claim did not amount to an abuse of process. In so far as necessary Lord Bingham, and possibly Lord Cooke and Lord Hutton, held that there was in any event an estoppel by convention which would have precluded GW from alleging an abuse of process. Mr Jones KC disclaimed any reliance on estoppel by convention, accepting that there was no common assumption as between TTSL and HMRC that HMRC would not seek to strike out the Claim Appeal as an abuse of process. That was why Mr Jones KC relied on estoppel by acquiescence. His case was that positive acts on the part of HMRC indicated to TTSL that HMRC had no procedural objections to the Claim Appeal arising from the prior Assessment Appeal which had been withdrawn.

38. We do not accept Mr Jones KC's submission that an estoppel by acquiescence could arise on the facts of the present case. The FTT at [102], under the heading "*No Detriment*", rejected Mr Jones KC's submission that he was not relying on estoppel by convention. It went on to find that TTSL had suffered no detriment and therefore could not rely on estoppel by convention, which was Issue Two before the FTT:

> *No detriment*
> 102. In relation to the parties' submissions about detriment, I begin by rejecting Mr Jones's argument that the Appellant was not relying on estoppel by convention, but instead on estoppel by representation. As Mr Elliott said, the Appellant's case on Issue Two rested on *Gore Wood,* in which the leading judgment was given by Lord Bingham. As set out later in this decision, see §226, Lord Bingham held that estoppel by convention applied, and in *Tinkler*, the Supreme Court referred only to Lord Bingham's judgment. Mr Jones relied on *dicta* from the minority judgments of Lord Goff and Lord Millett*,* which are plainly of less authority.
>
> 103. As a result, to succeed on Issue Two, the Appellant has to meet all the requirements in *Benchdollar,* including that:
>
> > "Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."
>
> 104. In considering whether there had been detriment, I asked myself what would have happened if HMRC had always maintained that the VAT for the Overlap Period was not recoverable. It seemed to me that there were the following possible outcomes:
>
> > (1) the Appellant would have made the same appeal, on the same basis, because they had been advised they would succeed;
> >
> > (2) the Appellant would have reduced the Claim so as to exclude the Overlap Period; or
> >
> > (3) the Appellant would not have made the Claim at all, because the cost to risk ratio made it unattractive.
>
> 105. Of these three options:
>
> > (1) The most probable is the first: the Appellant would have continued with the appeal on the same basis. I come to this conclusion because of PwC's clear view that HMRC was wrong to

think that the Claim could not include the Overlap Period: see their letter of 5 December 2016 which relied on *Matalan,* and their repetition of this reliance in their Grounds of Appeal to the Tribunal.

(2) However, even if the Appellant had instead taken the second option, its legal costs were unlikely to have been any less: the dispute was unrelated to quantum or to the number of VAT periods; moreover there was also no related evidence to support such a submission.

(3) Had the Appellant not have appealed at all, as Mr Elliott said, it would have lost the £456,555 it will now receive for the later periods.

106. It follows from the above that the Appellant has not shown it has suffered detriment by way of costs or otherwise. I also considered Mr Jones's submission that HMRC had acted unconscionably. However, as Lord Burrows said in *Tinkler*, this is the position only in "rare or exceptional cases", and Mr Jones did not explain why this was such a case, and I could think of no basis on which it satisfied those requirements.

39. The FTT had recorded at [72] and [82] Mr Jones KC's submission that HMRC had acquiesced in TTSL bringing the appeal. It is not clear to us why the FTT then sought to re-characterise Mr Jones KC's submission as being based on estoppel by convention. Be that as it may, the FTT made a clear finding of fact that TTSL had suffered no detriment as a result of HMRC changing its position on the Claim Appeal and seeking to raise the procedural issue in July 2021.

40. Mr Elliott rightly acknowledged that estoppel by acquiescence is a recognised form of estoppel. He referred to a decision of Blair J in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm) which treated it as a sub-set of estoppel by convention. The case was determined on different grounds, but Blair J noted at [127] that in a contractual context, silence on the part of a party can only amount to acquiescence where there is a duty to speak. Mr Elliott submitted that in the present context there was no duty to speak and there could be no estoppel by acquiescence. Mr Jones KC disagreed and submitted that there was a duty to speak, in the sense that HMRC were obliged to state their case in full.

41. In the event, it is not necessary for us to resolve that issue or to determine whether HMRC can be said to have acquiesced in TTSL pursuing the Claim Appeal by failing to make their strike out application until July 2021. That is because we are satisfied that it is a necessary ingredient of estoppel by acquiescence, as for any estoppel by representation, that the party claiming the benefit of the estoppel has suffered detriment. The FTT made a clear finding that TTSL had not suffered any detriment and it has not appealed that finding.

42. Mr Jones KC submitted that in the *Indian Endurance* there was no reference to a requirement for detrimental reliance when setting out the test for estoppel by acquiescence. Nor, so he said, was there any reference to a requirement for detrimental reliance in the speeches of Lord Goff and Lord Millett in *Gore Wood* when they were dealing with acquiescence. However, as Lord Goff said, estoppel by acquiescence is a form of estoppel by representation, like promissory estoppel and estoppel by convention, all of which have a requisite element of detriment. Indeed it is implicit that there is such a requirement in Lord Goff saying, as quoted above, that the representation or acquiescence must have been "so acted on by the representee that it is inequitable for the representor thereafter to enforce those rights against him".

43. Furthermore Lord Steyn in the *Indian Endurance* referred to the debate as to whether estoppel by convention and estoppel by acquiescence are aspects of one overarching principle. Whilst he did not seek to identify an overarching principle, there is no suggestion in that case or in any of the other authorities that estoppel by acquiescence does not require detrimental reliance.

44. Mr Jones KC submitted that detriment is simply a facet of unconscionability, and that detriment is not the only route to establishing that it would be unconscionable for HMRC to rely on abuse of process. He said that HMRC's conduct in the present case was similar to GW's conduct in *Gore Wood*. In particular, he said that it was unconscionable for HMRC to have indicated to TTSL that its appeal could proceed without procedural objection, and to state, in effect, that they would meet the claim in full if TTSL succeeded on the substantive issue, only then to reverse their position shortly before trial, having conceded the substantive issue.

45. In the light of *Tinkler* at [64] and *ING* at [64(v)], we do not accept that submission. We are satisfied that detrimental reliance is a requirement of both estoppel by convention and estoppel by acquiescence, both being different forms of estoppels by representation.

46. At one stage, Mr Jones KC submitted that if detriment was a requirement, then there was detriment to TTSL on the facts. He said that we could not rely on the FTT's finding that there was no detriment because it was considering the wrong estoppel. If we have to re-make the decision then we should, if necessary, make a finding of detriment.

47. We do not accept that submission. The FTT considered that no detriment arose from HMRC's conduct in raising the procedural issue late in the day. On the facts of this case, that finding does not depend on whether TTSL was relying on an estoppel by convention or an estoppel by acquiescence. It was a finding of no detriment in the circumstances of this case and given that there is no appeal from that finding, we cannot overturn it.

48. We therefore reject Ground 1 of the appeal.

Grounds 2 and 4 – Section 85 VATA 1994

49. Grounds 2 and 4 both concern the effect of section 85(1) and (4) VATA 1994 which provide as follows:

> **85 Settling appeals by agreement**
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and,
> before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated —
>
> (*a*) as upheld without variation, or
> (*b*) as varied in a particular manner, or
> (*c*) as discharged or cancelled,
>
> the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.
>
> …
>
> (4) Where —
>
> (*a*) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and

(*b*) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn,

the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation.

50. In this case, TTSL gave notice that it was withdrawing the Assessment Appeal. That notice fell within section 85(4) so that TTSL and HMRC were deemed to have come to an agreement that the decision under appeal should be upheld without variation. Section 85(1) was therefore engaged. It is common ground on the facts of this case that the "decision under appeal" was the Assessment. TTSL's position is that it is only the Assessment which is deemed to have been upheld and there has been no deemed determination by the tribunal of the underlying substantive issue of whether TTSL was entitled to input tax credit on supplies of investment management services. HMRC say that the effect of section 85(1) is that there has been a deemed determination that TTSL was not entitled to such input tax credit.

51. Mr Jones KC accepted that an express agreement within section 85(1) could give rise to a deemed decision extending beyond an assessment being upheld, depending on the terms of the agreement. He gave, as examples, the section 85(1) agreements entered into in *Littlewoods Retail Ltd v HM Revenue & Customs* [2014] EWHC 868 (Ch) ("*Littlewoods*"). We shall refer to this case in more detail in relation to Ground 3 and cause of action estoppel.

52. There was an issue before the FTT as to whether the Assessment was made pursuant to section 73(1) or (2) VATA 1994. The FTT concluded that the Assessment was made pursuant to section 73(1) and that conclusion is not challenged on this appeal. Section 73(1) provides:

73 Failure to make returns etc

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

.

53. Further, it was common ground before the FTT that TTSL brought the Assessment Appeal pursuant to section 83(1)(p) VATA 1994, whilst the Claim Appeal was made pursuant to section 83(1)(c) VATA 1994:

83 Appeals

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters —

…

(*c*) the amount of any input tax which may be credited to a person;

…

(*p*) an assessment —

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
(ii) under subsections (7), (7A) or (7B) of that section; or
(iii) under section 75;

or the amount of such an assessment;

54. The FTT summarised its conclusions on the extent of the deeming under section 85 at [149]:

> 149. For the reasons set out above, I find that:
>
> (1) the Assessment was issued under s 73(1) and in accordance with HMRC's best judgement, it was made on the basis that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable.
>
> (2) the Appellant appealed against the Assessment under s 83(1)(p) on the grounds that the input tax was allowable, there was no dispute about quantum;
>
> (3) the Appellant withdrew the appeal under s 85, the purpose of which is to prevent relitigation; and
>
> (4) the Appellant was deemed by s 85 to have come to an agreement with HMRC that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable and the Tribunal was deemed to have determined that this was the case.

55. TTSL says that the FTT was wrong in law in concluding that the deemed determination under section 85(1) extended to the technical analysis of HMRC on which the Assessment for the Overlap Period was based. All that should be treated as being upheld was the Assessment itself. If that is right, then the FTT was wrong when it found at [222] that TTSL would be barred from appealing by issue estoppel, which is Ground 4.

56. The FTT referred at [194] and [195] to Lord Keith's description of issue estoppel in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 ("*Arnold*") at p105 and the exception to its application at p109:

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.
>
> …
>
> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.

57. It is also worth pointing out at this stage that the FTT correctly recognised at [199] that issue estoppel has a more limited role in tax appeals, following the Privy Council judgment in *Caffoor v Income Tax Commissioner* [1961] AC 584. In the context of certain taxes, liability for tax in one period may be treated as a different issue to liability for that tax in another period. This is known as the "*Caffoor* principle" to which we return below.

58. The question on this appeal is whether TTSL's entitlement to input tax credit in the Overlap Period was a necessary ingredient in its cause of action in the Assessment Appeal. That depends on

the extent of the deeming prescribed in section 85. The approach to construing deeming provisions was considered by the Supreme Court in *Fowler v HMRC* [2020] UKSC 22 where Lord Briggs gave the only judgment and set out at [27] the following guidance:

> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:
>
> > "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

59. The FTT considered the purpose of section 85 at [136] – [142]. It is agreed that the purpose of the section is to prevent re-litigation where the parties have reached an agreement in relation to the decision under appeal, and where an appellant withdraws an appeal. The area of dispute is whether that purpose extends to preventing re-litigation in the circumstances of this case. TTSL's case is that the effect of section 85 is that TTSL could not challenge the Assessment in a new appeal against the Assessment. The FTT considered that such a limited construction denudes the section of having any real effect and could open the gates to re-litigation on the same issue where an appellant withdrew its appeal against an assessment.

60. In finding that the deemed determination under section 85 extended to the reasons for the decision under appeal, the FTT distinguished two types of appeals at [130] – [135]: first, VAT appeals in which only the quantum of an assessment is in dispute; and second, appeals in which it is said that HMRC have wrongly assessed a supply which is not subject to VAT. The FTT said as follows:

> 132. Where a trader appeals only the amount of the assessment, and then withdraws the appeal, the decision under appeal must have related only to quantum. Section 85(4) provides that on a withdrawal, the parties are deemed to have agreed that the decision under appeal should be upheld without variation, in other words, that the quantum of that assessment was correct. By s 85(1), the Tribunal is therefore deemed to have determined that the quantum was correct.
>
> 133. However, where a person has appealed only against something other than quantum, the appeal is not about "the amount of such an assessment", but about the reasons for making the assessment. When such an appeal is withdrawn, the decision upheld without variation is HMRC's decision to assess the trader to VAT, and that must import the reasons for that decision.

61. Mr Jones KC submitted that the FTT's conclusion that the decision upheld must import the reasons for the decision was wrong. He submitted that all that was treated as being upheld under section 85 was the Assessment. The effect of that deeming was simply that HMRC could collect the

tax due pursuant to the section 73(9) without any further challenge. Section 73(9) provides as follows:

> (9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

62. We do not see that the FTT's distinction between an appeal against quantum and an appeal against liability to VAT assists in construing section 85 and identifying the extent of the deeming on withdrawal of an appeal. It appears that the FTT drew this distinction in response to its understanding of an argument by Mr Jones KC that the deeming effect of section 85 extends only to the quantum of an assessment. But that is not how we understand Mr Jones KC's argument, which is that all that is treated as being upheld is the assessment, so that HMRC could collect the tax due under the assessment. However, it seems to us that the consequences which inevitably flow from an assessment being upheld without variation at least include that the appellant's grounds of appeal have been rejected by the tribunal. Parliament certainly intended that section 85 would prevent re-litigation, and we see no reason why Parliament would not want to prevent re-litigation of any issues which were raised in the appeal before it was withdrawn.

63. It is not clear why the FTT concluded that when an appeal is withdrawn, the effect of section 85(1) is that the decision is upheld and that "*must import the reasons for that decision*". In our view, what is deemed to be determined are the grounds of appeal relied on by the appellant which have implicitly been rejected. As Mr Elliott submitted, the sole issue in the Assessment Appeal was whether input tax was allowable on the investment management services. The FTT's overall conclusion that, on the facts of this case, issue estoppel prevented TTSL from re-litigating its entitlement to input tax credit remains good. TTSL's grounds of appeal in the Assessment Appeal were that input tax credit was available to TTSL.

64. Mr Jones KC submitted that the scheme of section 73, including section 73(9), is that an incorrect return can lead to an assessment. If there is no appeal against the assessment, then the amount of the assessment is deemed to be an amount of VAT due from the taxpayer. If there is an appeal, then the assessment stands unless the taxpayer shows that it is wrong. The burden of establishing that the assessment is wrong or overstated lies on the taxpayer.

65. That is true as far as it goes (see *Tynewydd Labour Working Men's Club and Institute v HM Customs & Excise* [1979] STC 570 at 580 d-f and *Grunwick Processing Laboratoruies Ltd v HM Customs & Excise* [1987] STC 357). Mr Jones KC further submitted that, as a consequence, there is no need for a tribunal to determine anything on an appeal against an assessment for the assessment to be upheld. If an appellant does not satisfy the tribunal that the assessment is wrong or overstated then it will be upheld. It is not relevant to know what grounds of appeal were put forward. The proviso within s.73(9), that the VAT is deemed to be due "subject to the provisions of this Act as to appeals" exists simply to ensure that the taxpayer's ability to challenge an assessment is not nullified. Mr Jones KC submitted that the fiction created in this case by section 85 was that the Assessment had been upheld without variation. It does not flow inevitably from that fiction that the underlying merits of the Assessment have been determined.

66. Ingenious though they are, we do not accept those submissions. A tribunal must at least make a finding that the appellant has not satisfied it that the assessment is wrong or overstated. That finding does in our view "inevitably flow from the fiction being real". In order to make that finding, the tribunal must consider the grounds of appeal to see if the appellant has made out its grounds. If the

tribunal is not satisfied that the appellant has made out one or more of its grounds of appeal then the appeal will be dismissed and the assessment will stand. Translated into section 85, where an appeal is withdrawn, the consequences must include that the appellant has failed to make out its grounds of appeal, whether those grounds relate to quantum, liability to output tax or entitlement to input tax credit. The FTT rejected TTSL's submissions on section 73(9) at [126] – [129]. We consider that it was right to do so, albeit our reasons differ from those of the FTT.

67. Mr Jones KC submitted that there would be difficulties in practice with the construction put forward by HMRC and accepted by the FTT. For example, HMRC's assessment might not have been based on any considered technical reasons. HMRC might not have been in a position to know the underlying facts. There might be issues which neither side appreciated at or before the time of withdrawal. However, we do not see any difficulty if the extent of the deeming is governed by and limited to the grounds of appeal relied on by the appellant.

68. Mr Jones KC submitted that there would be difficulties if HMRC gave alternative reasons for an assessment and the grounds of appeal challenged those alternative reasons. That is not the case here, and if such a case were to arise then it would be necessary to work out exactly how far the deeming extended on the particular facts. The sole basis for the Assessment in the present case was that input tax credit was not available in relation to the supplies of investment management services. The parties well understood that was the issue as identified in TTSL's grounds of appeal in the Assessment Appeal.

69. Mr Jones KC submitted that there is nothing in the wording of section 85 which takes the effect of the deeming further than section 73(9). In response, Mr Elliott submitted that the effect of section 85(1) is that it is deemed "*for all purposes*" that the tribunal had determined the Assessment Appeal by upholding the Assessment without variation. He emphasised the reference to all purposes, not just for the purposes of section 73(9). We agree with Mr Elliott that this statutory language supports our construction of section 85.

70. We consider that Parliament intended that section 85 could give rise to an issue estoppel. There is no reason it should not do so, subject to the exception described in *Arnold*. We consider it likely that Parliament would have had issue estoppel in mind in enacting section 85 and providing that the deeming takes effect for all purposes.

71. Mr Jones KC submitted that his interpretation of section 85 in the context of a withdrawal was consistent with the decision of the High Court in *Matalan,* which concerned the customs classification of swimwear product lines. The FTT considered *Matalan* in detail at [152] – [176], but concluded that it was not authoritative on the meaning and effect of section 85. We agree with that conclusion. Very briefly, the trader in *Matalan* claimed repayment of duty on items of swimwear and also applied for a binding tariff information ("BTI") for a specific product line. HMRC issued a BTI for a sub-heading which gave rise to a higher rate of duty than that sought in the taxpayer's application. The BTI was confirmed on review and the taxpayer appealed to the tribunal. Shortly before the hearing, HMRC withdrew the disputed decision, the BTI, and at the same time invited the taxpayer to withdraw its appeal. The taxpayer did withdraw its appeal.

72. Thereafter, the taxpayer made another claim for repayment of duty, but HMRC only agreed to repay duty on the single product line for which it had given the original BTI. That decision was confirmed in a statutory review, in which HMRC stated that the taxpayer was required to establish its claim for each separate product line. The taxpayer contended that there had been an agreement within section 85 in relation to the first appeal, and as a consequence there was a deemed decision that classification at the lower rate of duty was correct. The VAT Tribunal held that there was no

agreement within section 85 because HMRC had unconditionally withdrawn the disputed decision. Clarke J, as he then was and sitting in the High Court, agreed that there was no issue estoppel and no abuse of process by HMRC. Neither party argued that the taxpayer's withdrawal of the first appeal engaged section 85. We agree with the FTT in the present appeal at [176] that that was probably because it was considered that once HMRC had withdrawn the disputed decision there was no "decision under appeal" on which the deeming provision could operate. In the circumstances, we do not consider that *Matalan* provides any assistance in construing section 85.

73. We should also add that there is nothing unjust, absurd or anomalous in concluding that the effect of section 85 in the present case is that the tribunal is deemed to have determined the sole issue raised in the Assessment Appeal, that input tax on the investment management services was not allowable; rather this is simply an inevitable corollary of the deemed state of affairs and is consistent with (i) the purpose of section 85 and (ii) the reality that, by withdrawing the Assessment Appeal, TTSL was conceding the issue. It is a sensible conclusion on the facts of this case where TTSL is clearly seeking to re-litigate the same issue that arose in the Assessment Appeal. Indeed, we consider it would be absurd if TTSL could withdraw the Assessment Appeal and then make a claim for repayment of the very sums which had been assessed.

74. We are satisfied therefore that the FTT was right to find at [222] that if there was no cause of action estoppel, then TTSL was barred by issue estoppel from bringing the Claim Appeal. The consequence of that finding is that the FTT was right to strike out the Claim Appeal and this appeal must be dismissed.

Ground 3 – Cause of action estoppel

75. In the light of our findings on Grounds 2 and 4 it is not strictly necessary for us to determine Ground 3. However, having had full argument, we shall set out our views, although relatively briefly.

76. TTSL says that the FTT was wrong in law to find that cause of action estoppel applied to bar it from pursuing the Claim Appeal.

77. The FTT referred to the familiar description of cause of action estoppel set out by Lord Keith in *Arnold* at p104:

> Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened…

78. The FTT's conclusion on cause of action estoppel appears at [191] – [193]:

> 191. The Assessment Appeal and the Overlap part of the Claim Appeal have identical subject matter and are between identical parties or their privies. Those are the conditions set out in *Arnold* for cause of action estoppel to apply.
>
> 192. I reject Mr Jones's submission that there are two different causes of action because there were two HMRC decisions: the *dicta* on which he relied from the Tribunal judgment in *Durwin Banks 2* cannot displace the authoritative and binding judgment in *Arnold* which was reaffirmed in *Virgin.*

> 193. I thus find that cause of action estoppel applies and operates as an absolute bar to the Overlap Part of the Claim. That is sufficient to allow HMRC's strike out application, but in case there is an onward appeal, and because it was fully argued, I have also considered whether the Appellant is also blocked by issue estoppel and/or by abuse of process.

79. The FTT described at [186] what is meant by a "*cause of action*", for the purposes of civil litigation governed by the civil procedure rules. Namely, "the fact or combination of facts which gives rise to a right of action". That definition was derived from Osborn's Concise Law Dictionary, and neither party has taken issue with the definition. The dispute arises in translating that definition into the context of VAT disputes in the FTT.

80. Mr Jones KC submitted that the FTT was wrong to conclude that in the present case the two appeals concerned the same cause of action. In the context of VAT, it is HMRC's decision which gives the taxpayer a right to bring an appeal under section 83 VATA 1994 and the decision is the cause of action. A subsequent decision giving rise to a further right of appeal is a different cause of action. In the present case, the Assessment Appeal was against a decision to assess and was brought under s.83(1)(p) VATA 1994. The Claim Appeal was against HMRC's decision to refuse the claim for repayment and was brought under s.83(1)(c) VATA 1994. The subject matter of each appeal is different and the appeals involve different causes of action.

81. We note that there is some overlap between the various rights of appeal under section 83(1) VATA 1994. Hence, the amount of input tax which may be credited to a person may be relevant to an appeal under section 83(1)(c) and an appeal under section 83(1)(p). It is not surprising therefore that the Claim Appeal was in fact expressed to be made pursuant to sections 83(1)(c) and (p) VATA 1994, amongst other sub-paragraphs.

82. Mr Jones KC relied on the VAT Tribunal decision in *Durwin Banks v HM Revenue & Customs* (2008 VAT Decision 20695) ("*Durwin Banks*"). The tribunal in that case at [40] quoted Lord Keith's description in *Arnold* of issue estoppel as involving the same issue but a different cause of action. The tribunal then said:

> Clearly a decision giving rise to a right of appeal is analogous to a cause of action. A further decision gives rise to a further right of appeal.

83. *Durwin Banks* involved issue estoppel and not cause of action estoppel and there was no argument as to what constituted a cause of action. In the circumstances, we do not gain much assistance from what the VAT Tribunal said in passing about what constitutes a cause of action.

84. Mr Jones KC argued that the basic foundation of the FTT's decision on cause of action estoppel at [191] was incorrect. Appeals having the same subject matter and between identical parties do not necessarily give rise to cause of action estoppel. He submitted that *Arnold* itself illustrates that proceedings involving the same subject matter and the same parties as previous proceedings do not necessarily involve the same cause of action. The parties were a landlord and tenant who had disputed the true construction of a rent review clause in a lease. The same dispute arose between them on a subsequent rent review which involved the same rent review clause in the same lease as the earlier proceedings. Nevertheless, as Lord Sumption observed in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [20], *Arnold* was treated as a case of issue estoppel and not cause of action estoppel. He stated as follows:

> 20. …The case before the committee was treated as one of issue estoppel, because the cause of action was concerned with a different rent review from the one considered by Walton J. But it is important to appreciate that the critical distinction in Arnold was not between issue estoppel and cause of action

> estoppel, but between a case where the relevant point had been considered and decided in the earlier occasion and a case where it had not been considered and decided but arguably should have been. The tenant in Arnold had not failed to bring his whole case forward before Walton J. On the contrary, he had argued the very point which he now wished to reopen and had lost. It was not therefore a *Henderson v Henderson* case. The real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the committee agreed, held that it did.

85. In response, Mr Elliott for HMRC relied on the judgment of Henderson J, as he then was, in *Littlewoods*, which concerned compound interest on repayments of VAT. The FTT very briefly summarised what is a complicated case at [177] of the Decision. We do not need to set out the facts, or to describe the decision in any detail. It suffices to say that Littlewoods was claiming compound interest on certain overpayments of VAT. As we have mentioned, the history of the proceedings involved two different section 85 agreements and HMRC were seeking to withdraw certain admissions as to the VAT treatment of the underlying supplies. There was also a previous decision of the Court of Appeal dealing with the VAT treatment of the supplies. Littlewoods contended that issue estoppel prevented HMRC from raising new contentions as to the correct VAT treatment of the underlying supplies, and in any event the application amounted to an abuse of process.

86. Henderson J held that issue estoppel could not apply because the previous proceedings had related to the substantive tax liability and the proceedings before him related to interest (applying *King v Walden (Inspector of Taxes)* [2001] STC 822). However, if he were wrong in that conclusion, he went on to consider issue estoppel. He conducted an exhaustive analysis of the authorities and policy issues in relation to the *Caffoor* principle in the context of VAT. He accepted that it applied in relation to appeals against VAT assessments and that no issue estoppel arose in the circumstances of that case, subject to potential arguments based on abuse of process.

87. In a considerably oversimplified sense, Henderson J found that the *Caffoor* principle applied to VAT such that on an appeal concerning interest on VAT, HMRC were not prevented from arguing that VAT was due even though there were previous determinations and agreements that it was not due. That was HMRC's submission in its wider form in that case. If that was wrong, Henderson J found that any estoppel would be limited to interest on VAT in the specific quarterly periods covered by the determinations and agreements. His conclusions were stated as follows:

> [207] I will now state my conclusions on this issue:
>
> (1) In the light of my review of the law, I accept HMRC's second overriding contention in its broader form. I consider that the *Caffoor* principle applies to the underlying determinations of VAT and s 85 agreements in the present case, and that no issue estoppel can arise in relation to the separate claims for interest now advanced by the claimants so as to prevent HMRC from arguing that the VAT was in fact due as a defence to the claims. The position is in my judgment similar in all essential respects to that considered by Jacob J in *King v Walden*, which I respectfully think was correctly decided.
>
> (2) If the above conclusion is wrong, I would accept HMRC's contention in its alternative, narrower, form, and hold that HMRC are not estopped from arguing that the VAT was in fact due save in relation to the specific quarterly periods and the specific companies covered by the earlier determinations and s 85 agreements.
>
> (3) For the avoidance of doubt, my conclusion in either its broader or its narrower form still leaves open the question whether it would be an abuse of process to permit HMRC to argue that the VAT was due. Although Mr Swift appeared at times to question this proposition, he rightly accepted in his closing

submissions that issue estoppel and abuse of process are analytically separate issues. His point was, rather, that if issue estoppel did in principle apply, but the case fell within the *Arnold* exception, then the question of abuse of process should also be decided in HMRC's favour for substantially the same reasons as brought the case within the *Arnold* exception.

(4) I have already held that the *Arnold* exception would not apply, if and to the extent that I am wrong in my view that issue estoppel is excluded by the *Caffoor* principle. Before coming on to abuse of process, however, I must first deal as briefly as I can with the technical arguments on issue estoppel which were addressed to me, on the footing that (contrary to what I have now held) the doctrine of issue estoppel applies in the usual way and is not excluded by the *Caffoor* principle.

88. Henderson J went on to consider abuse of process. He concluded that there would be an abuse of process and gave a further summary of the outcome at [252]:

252. In bare outline, my conclusions on this complex part of the case are as follows:

(1) There is no scope for issue estoppel to operate, because (a) the *Caffoor* principle applies, and (b) the present claims are all for interest, which is not an issue which has previously been determined.

(2) Alternatively, the *Caffoor* principle applies so as to prevent the operation of issue estoppel save in relation to the claims for interest on the particular amounts of VAT which were determined to have been overpaid, by specific companies for specific periods, in (a) *Littlewoods (CA),* (b) the 10% Commission Appeal, and (c) so much of the GMAC Appeal as was settled by the 2008 s 85 Agreement.

(3) If I am wrong about the application of the *Caffoor* principle, HMRC would be issue-estopped from defending all of the present claims on the ground that the VAT was due, and the *Arnold* exception to issue estoppel would not apply.

(4) Littlewood's separate contractual estoppel argument in relation to the 2008 s 85 Agreement must be rejected.

(5) Whether or not issue estoppel applies, it would in any event be an abuse of process if HMRC were permitted to defend the present claims on the ground that the VAT was due.

89. In the course of considering issue estoppel, Henderson J identified the causes of action and the issues capable of giving rise to issue estoppel as follows:

(*d*) *Issue estoppel: the technical issues*

(i) The same issue

208. As I have explained (see at para [152] above), it is a requirement if an issue estoppel is to arise that the same question, or issue, should previously have been decided in proceedings between the same parties (or their privies). But what is meant by 'the same issue', bearing in mind the distinction between cause of action estoppel and issue estoppel? The answer, as it was put by Lord Keith in *Arnold* ([1991] 3 All ER 41 at 47, [1991] 2 AC 93 at 105) (quoted at para [153] above), is that issue estoppel may arise 'where a *particular* issue forming a *necessary* ingredient in a cause of action" (my emphasis) has been previously litigated and decided. It is therefore not enough that the issue was only incidental or collateral to the earlier cause of action.

209. The point was made with typical clarity by Diplock LJ in *Thoday v Thoday* [1964] P 181 at 198:

> "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish

> his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."
>
> 210. Translated into the context of VAT, the relevant causes of action in the earlier litigation may in my judgment be identified as:
>
> > (a) the VAT treatment under the Sixth Directive of the 2.5% element of TPP commission taken in goods by agents (i.e. the question in dispute between the parties in the proceedings which culminated in *Littlewoods (CA)*);
> >
> > (b) the VAT treatment under the Sixth Directive of the 10% element of TPP commission, whether taken in goods or in cash (that being the issue in the 10% Commission Appeal, which was settled by the 2004 section 85 Agreement); and
> >
> > (c) the VAT treatment under the Second Directive of the 10% element of TPP commission taken in goods before 1978 (i.e. the subject matter of the 2008 section 85 Agreement).
>
> 211. The issues which HMRC now seek to re-open are identical to the issues which arose in (b) and (c) above, although they wish to rely on them as defences to a different cause of action (namely the claims for interest on overpaid tax). Furthermore, one of the issues decided by the Court of Appeal in *Littlewoods (CA)*, as a fundamental part of its reasoning, was that the entirety of TPP commission taken in goods (and not just the 2.5% element) is properly to be treated as a reduction in the consideration paid by the agent for secondary goods, and is not consideration for services provided by the agent. This, too, is an issue which HMRC now wish to re-open in the light of *Grattan (ECJ)*.
>
> 212. It seems to me, therefore, that all of the issues which HMRC now wish to reargue are the same as ones which were determined in the earlier proceedings, either as a necessary and fundamental part of the reasoning of the Court of Appeal in *Littlewoods (CA)* or by virtue of the two section 85 Agreements. The first of the three requirements of issue estoppel is therefore satisfied.

90. Mr Jones KC observed that claims for repayment of overpaid VAT under section 80 VATA 1994 could only be upheld if there was an overpayment and the tax paid was not in fact due. In contrast, an assessment stands good unless the taxpayer establishes that it is bad. We have already dealt with that submission in the context of issue estoppel.

91. HMRC endorse the reasoning of the FTT and rely particularly on what Henderson J said in *Littlewoods* at [210]. TTSL say there was no debate or discussion in *Littlewoods* about what amounts to a cause of action. It was all about issue estoppel. As such, we should not regard it as authoritative or indeed persuasive. Certainly *Littlewoods* concerned issue estoppel and not cause of action estoppel. However, Henderson J will have had the difference well in mind and referred to cause of action estoppel at [153] and [154]. In our view, the observations of Henderson J are persuasive and we respectfully consider that he was right in his identification of the causes of action in that case.

92. In the present case, we agree with Mr Elliott and the FTT that TTSL's cause of action in the Claim Appeal was the same cause of action as in the Assessment Appeal. The cause of action was TTSL's claim to be entitled to input tax credit on fees paid to investment advisers in relation to the

Escrow Account. The FTT was therefore right to strike out the appeal on the grounds of cause of action estoppel, and we reject Ground 3 of the appeal.

93. Overall, that is not a surprising result. It would be surprising if TTSL had the right to assert entitlement to input tax credit twice in relation to the same input tax in the same VAT period, either because of a narrow interpretation of section 85 or on the basis that there is no cause of action estoppel. In substance TTSL was making the same claim arising out of the same facts. Whilst it is true that the first decision being challenged was an assessment and the second decision was the refusal of a claim, they were based on exactly the same facts and matters. If cause of action estoppel does not apply, then one would expect issue estoppel to apply.

Ground 5 – Abuse of process

94. The FTT set out at [225] the well-known passage from the judgment of Lord Bingham in *Gore Wood* in relation to abuse of process which we have cited above. It then referred to various other authorities and concluded at [238] that if cause of action estoppel did not apply, and by inference issue estoppel, then it would still be an abuse of process for TTSL to re-litigate the question of whether it was entitled to recover input tax in the Overlap Period. The FTT's reasoning is set out at [234] – [237] as follows:

> 234. I have already found that:
>
> > (1) the purpose of VATA s 85(4) read with subsection (1) is to prevent relitigation, and the Tribunal's deemed determination of the Assessment Appeal was a decision that the VAT on the investment management fees was irrecoverable, see Issue Three; and
> >
> > (2) by including the Overlap Period in the Claim, the Appellant was relitigating the same cause of action, see Issue Five.
>
> 235. It is clear from *Virgin* at [26] that where cause of action estoppel applies because an identical point has previously been decided, this creates an absolute bar to allowing the new case to proceed.
>
> 236. Even if that were not the position, so that there was no absolute bar, it is only possible to exercise the "broad, merits-based judgment" referred to by Lord Bingham in *Gore Wood* where a party is raising a new point. Even that will be abusive if the new point is one which should have been put forward in the earlier proceedings, see *Gore Wood* and *Kaza.*
>
> 237. In this case, as with the "*Arnold* exception" to issue estoppel, Mr Jones did not argue that the Claim was based on any new or different points from those set out in the Grounds of Appeal against the Assessment. As noted at §223-224, although PwC referred in the Claim to the UT judgment in *University of Cambridge*, this was issued in June 2015, before the Assessment was appealed to the FTT, and *prima facie* should therefore have been raised in those earlier proceedings. I was unable to identify any other arguably new points from the correspondence, and none were referred to in submissions.
>
> *Conclusion on abuse of process*
> 238. The Appellant is barred by cause of action estoppel from proceeding with the part of the Claim which relates to the Overlap Period. As a result, it is unable to argue that there was no abuse of process. Even were I to be wrong on cause of action estoppel, so that a more flexible approach were to be possible, the absence of any factual or legal new point means that relitigation would be an abuse of process.

95. The FTT's reasoning on whether there was abuse of process is brief, which possibly reflects the fact that it had already found that TTSL was estopped from appealing either because of cause of

action estoppel or issue estoppel. It is not clear to us what the FTT meant at [236] where it said that it is only possible to exercise the "broad, merits-based judgment" where a party is raising a new point. Certainly the FTT did not embark upon a broad merits-based approach to the question of whether, if there was no estoppel, TTSL's appeal amounted to an abuse of process. It may have been the FTT's view that, even if there was no estoppel, TTSL should have argued the issue of entitlement to input tax credit in the Assessment Appeal and in the words of Lord Bingham in *Gore Wood*: "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all".

96. We have heard submissions from both parties as to whether the FTT's failure to take a broad merits-based approach amounted to an error of law, and if so, how we should re-make the decision. We have decided that, in circumstances where abuse of process is only relevant if we are wrong on Grounds 2 – 4, we should not embark upon a hypothetical examination of whether there would be an abuse of process. The reason why there was no issue estoppel or cause of action estoppel could be a relevant factor in that examination.

Conclusion

97. For the reasons given above we do not consider that the FTT made any error of law in the Decision in concluding:

> (1) that HMRC were not barred by acquiescence or otherwise estopped from applying to strike out the Claim Appeal; and
>
> (2) that TTSL was estopped, either by way of issue estoppel or cause of action estoppel, from bringing the Claim Appeal.

98. The FTT was therefore right to strike out the part of TTSL's appeal which related to the Overlap Period and we dismiss this appeal.

MR JUSTICE MICHAEL GREEN
JUDGE JONATHAN CANNAN

RELEASE DATE: 20 June 2024