[2014] UKFTT 917 (TC)

TC04031

Appeal number: TC/2013/4669

PROCEDURE – application to lift barring order – principles to be applied – Rules 8(5) and (7)(b) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BPP UNIVERSITY COLLEGE OF PROFESSIONAL STUDIES LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 12 September 2014

Mr Sam Grodzinski QC, instructed by Simmons & Simmons LLP for the Appellant

Miss Jessica Simor QC and Mr Sarabjit Singh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By a direction released on 1 July 2014 the Tribunal (Judge Mosedale) barred the Respondents ("HMRC") from taking any further part in the proceedings relating to this appeal pursuant to Rules 8(7) and (3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). The direction was accompanied by full written reasons for the decision ("the Decision").

2. The barring order was made following a hearing of an application made by the Appellant ("BPP") in which BPP contended that HMRC had failed to provide further and better particulars of their Statement of Case in sufficient detail to comply with a direction of Judge Hellier to that effect, that direction having specified that failure to comply with it may lead to HMRC being barred from taking further part in the proceedings.

3. By application dated 25 July 2014 HMRC applied pursuant to Rule 8(5) and 8(7)(b) of the Rules to lift the bar on the basis that the Tribunal exercised its powers unlawfully (and therefore the Decision should be set aside) and in any event relief from the barring sanction is in all the circumstances necessary and appropriate.

4. In the same application HMRC also applied for permission to appeal to the Upper Tribunal against the Decision with the FTT also being invited to undertake a review of its decision under Rule 41 of the Rules and set it aside on the grounds that the Decision was erroneous in law.

5. At the hearing of HMRC's application on 12 September 2014 I indicated that I was minded to grant permission to appeal on the grounds that it was arguable that the Decision disclosed errors of law as to whether the Tribunal applied the correct test in deciding whether or not to exercise its discretion under the Rules to bar HMRC from defending the appeal. Accordingly on 15 September 2014 a decision notice was released to that effect but, as the decision notice records, I decided not to undertake a review of the Decision as I was not satisfied that there was an error of law in the Decision.

6. I gave an oral decision (with brief reasons) after the hearing on 12 September dismissing HMRC's application to lift the barring order. This document now sets out full findings of fact and reasons for that decision.

Factual Background

7. Paragraphs 2 to 36 of the Decision set out the background to the substantive appeal and the issues that remain in dispute in the proceedings as well as the events which led BPP to seeking the barring order. I did not take the parties to have any issues concerning the accuracy of the matters stated in those paragraphs and I need not repeat them here.

The Decision

8. Judge Mosedale found that HMRC had not complied with the following direction of Judge Hellier released in January 2014:

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

9. Judge Mosedale considered the material provided by HMRC in purported compliance with this Direction. This material was referred to in the Decision as the "Reply".

10. Judge Mosedale made the following findings in paragraphs 53 and 54 of the Decision:

> "53. In my view the Reply (so far as Notes (2) and (3) were concerned) contained no facts at all; and even if the Reply incorporated the letter of 29 November 2012, that letter contained *all* the facts known to HMRC and failed to identify those on which HMRC relied. One was too much and the other too little. In any event the letter predated the SOC and the Direction: if the letter was an adequate statement of HMRC's position then HMRC should not have agreed to provide the Reply and the Tribunal would not have issued the Unless Order which it did.
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> 54. I find that the Reply did not comply with the Directions of Judge Hellier. It failed to identify each and every matter on which HMRC intended to rely in support of their argument that the supply of printed matter by LM was 'connected with' the supply of education services by Holdings, within the meaning of Notes 2 and 3. HMRC were in breach of Judge Hellier's directions."

11. Judge Mosedale then went on to consider what was the appropriate sanction, if any, in relation to the non-compliance that she had found.

12. The Appellant sought to justify a barring order as the appropriate sanction, relying on the case of *Mitchell v News Group Newspapers* [2013] EWCA 1537 and the Upper Tribunal case of *McCarthy & Stone* [2014] UKUT 196 TCC which indicated a strict approach to the giving of relief from sanction for a breach of time limits following the implementation of new CPR 3.9 and in particular paragraphs (a) and (b) of the rule which require regard to be had to the need for litigation to be conducted efficiently and at appropriate cost and to enforce compliance with rules, practice directions and orders. At the time the application was heard, *Mitchell* had not been clarified by *Denton v TH White Ltd* [2014] EWCA Civ 906 and the Upper Tribunal had not released its decision in *Leeds City Council v Commissioners of Customs and Excise* [2014] UKUT 350 (TCC), recently affirmed by the President of

this Tribunal in *Kumon Educational UK Company Limited v HMRC* [2014] UKFTT 772. In those latter two decisions Judge Bishopp held that Judge Sinfield had erred in *McCarthy and Stone* in applying the dicta of the Court of Appeal in *Mitchell* to an application for an extension of time for a notice of appeal.

13. In considering whether the *Mitchell* line of authority was relevant to the exercise of her discretion to make a barring order Judge Mosedale stated at paragraphs 61 to 65 of the Decision:

> "61. I consider, however, while *Mitchell* is not strictly relevant, nevertheless it contains some useful guidance that when considering the overriding objective of dealing with cases fairly and justly.
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> 62. At §45 of *Mitchell* Lord Dyson said that the court must proceed on the assumption that the sanction was properly applied and the applicant must justify its claim for relief. That guidance is obviously inapplicable to this situation. No sanction has yet been applied and I must not assume that barring is the appropriate sanction for the breach of the Unless Order.
>
> 63. But I consider that the guidance in *Mitchell* is relevant in this appeal in so far as it stresses that in consideration of the overriding objective, significant weight should be given to the factors (a) and (b) of CPR 3.9 to ensure fair and just hearings.
>
> 64. What did he mean by this? While Lord Dyson at [36] & [37] said these two factors were of 'paramount importance' and that other circumstances should be 'given less weight' nevertheless, even where CPR 3.9 was concerned, it was clear he did not mean that these two factors would always outweigh other factors as CPR 3.9 itself said all relevant factors must be considered.
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> 65. I conclude that in considering whether to grant the appellant's application to bar HMRC from further participation in this appeal I must consider all relevant factors. I will include in my consideration factors (a) and (b) from CPR 3.9 and accord them significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly."

14. Judge Mosedale considered the following relevant factors.

15. First, she considered the effect of HMRC's non-compliance and concluded that in fact HMRC had now cured the default through the medium of Mr Singh's skeleton argument filed in support of HMRC's opposition to the barring application. She found at paragraph 72 of the Decision:

> "72. Mr Singh's skeleton argument served shortly before this hearing does contain a statement of HMRC's case on the Notes (2) and (3) case. It is the fist and only time HMRC has listed the facts and matters on which they rely to support their case on Notes (2) and (3) in this appeal. Mr Singh says that all the points made in the 16 or so paragraphs of his Skeleton which set out HMRC's case on Notes (2) and (3) can be found at various points in letters from HMRC. However, he only showed a few examples of this, so I am unable (without conducting a time wasting trawl of a large bundle) able to assess whether this is right. In any event, it is no answer even if true.

As HMRC accept, the appellant was entitled to have a single statement of HMRC's case. They needed to know which of the points made in voluminous correspondence were still a part of HMRC's case. They did not get this until Mr Singh's skeleton was served."

16. Secondly, she considered the prejudice to BPP caused by the late compliance. She found in paragraph 74 of the Decision:

"74. It accepts that, since Mr Singh's skeleton was served, it now knows HMRC's case, but it knows it very late. So the real prejudice to the appellant is in the delay. Only now can the parties proceed to exchange list of documents and witness statements. While the Directions were issued in January, they were issued to correct a failure in the SOC. The SOC was due on 2 October 2013, so it is in my view fair to say that HMRC's continued failure to make a proper statement of their case has delayed the progress of this appeal by about 8 months."

17. Thirdly, she considered the reason for the default. She concluded in paragraph 80 of the Decision:

"80. … I do not know the reason why the default occurred; I presume that whatever the reason was, it was not one which could even partly justify the default."

18. Fourthly, she considered other defaults on the part of HMRC in the ongoing administration of the appeal. Her conclusions are set out in paragraphs 81 and 82 of the Decision:

"81. I find that HMRC have not shown a great respect of time-limits in this appeal. The SOC was delivered late. The disclosure statement and list of documents was delivered late. HMRC only applied for an extension of time for compliance when prompted by the Tribunal.

82. While none of these other delays are particularly significant, HMRC does not appear in this appeal to have appreciated the importance of adhering to directions."

19. Fifthly, she took account of the fact that barring is a draconian remedy. She set out her conclusions on this issue in paragraphs 83 to 86 of the Decision:

"83. Barring is a draconian remedy. The difficulty for the Tribunal is that it is virtually the only sanction that the Tribunal has. No one suggests in this case that costs would be an adequate remedy. The case has been unnecessarily delayed by 8 months due to HMRC's failure to properly state its case. Costs won't compensate the appellant.

84. Mr Singh did not suggest that there was an alternative sanction: his solution is that (now HMRC have provided a full statement of their case) that the appeal should simply be allowed to proceed. Indeed, HMRC's view was that barring was too draconian remedy and therefore the Tribunal could not apply it, even in the circumstances when the Tribunal has not been given a good reason for the default.

85. Indeed Mr Singh suggested that the Tribunal should only bar HMRC where the breach was incapable of remedy or had not been remedied. I agree with Mr Grodzinski

that this is not the right test, before or after *Mitchell.* Very few breaches are irremedial and an inability to bar litigants other than where the breach was irremedial would be a licence for any litigant to drag on proceedings for years.

86. I consider the fact that the breach was remedial and was in fact eventually remedied does not preclude the Tribunal from barring HMRC."

20. Sixthly, she considered the fact that HMRC stressed the importance of the case as a test case. Her conclusion on this factor is set out in paragraph 89 of the Decision:

"89. I can't accept that. Firstly, if HMRC are barred it is open to them to concede the appeal so that a reasoned ruling is never issued and then to bring on another case as the test case. Secondly, if they do not chose to concede the appeal so that the appellant has to appear and raise a prima facie case, any decision of the Tribunal (assuming it favours the appellant) will be considerably less persuasive than otherwise on a later FTT hearing a different case as it will be clear that the first tribunal did not have the benefit of argument from the respondents."

21. Finally, she considered the fact that Judge Hellier only imposed a Rule 8(3) Unless Order (discretionary strike out for non-compliance) rather than the Rule 8(1) Unless Order (automatic strike out for non-compliance) that BPP had sought. Her conclusion on this factor is set out in paragraph 94 of the Decision:

"… I consider the fact that the appellant unsuccessfully applied for a Rule 8(1) Unless Order is an irrelevant factor when considering whether to exercise my discretion under Rule 8(3). What matters is that Judge Hellier did impose a Rule 8(3) Order. He did not consider it appropriate to impose a Rule 8(1) Unless Order but that does not carry any kind of an implication that he did not intend the Tribunal to strike out HMRC under Rule 8(3) if there was non-compliance. He intended the Tribunal to have a discretion; and that discretion is what I exercise."

22. In her overall conclusion, Judge Mosedale recognised that her duty was to weigh all the factors and that if she was in any doubt she should err on the side of not barring HMRC: see paragraph 95 of the Decision. She referred to her objective in exercising the discretion as the overriding objective of dealing with cases fairly and justly. Her overall conclusion is set out in paragraphs 96 to 100 of the Decision:

"96. While the factors identified in *Mitchell* are not directly relevant, for the reasons I have given, I have to give significant weight when considering the overriding objective to the importance of compliance with directions of the tribunal and avoiding unnecessary delays and expense. On any view the delay here is 5 months; in reality it was a delay of 8 months in HMRC giving a proper statement of its case. Moreover the appellant has been put to some expense (various letters and two hearings) in chasing HMRC to deliver a proper statement of its case.

97. This delay was significant. I have to take account of the reason for it. But I do not know the reason for it so I assume that it was not one that might be advanced as justification for the default.

98. I have to consider the extent to which HMRC has respected the rules of the Tribunal. And I agree that while this is by far the most serious breach, it is not the only

one. Moreover, HMRC were given a very clear warning by the Unless Order that a failure to comply with the directions might lead to them being barred. They can scarcely complain having failed to comply that they did not know they were at risk of being barred. They had more than one opportunity to correct their failure and I find it very difficult to understand why the 16 paragraphs of so contained in Mr Singh's skeleton could not have been delivered to the appellant in January when HMRC were clearly on notice that their SOC was inadequate.

99. On the other hand this is not a case where HMRC have ignored the Tribunal entirely. HMRC did submit its Reply and on time. But the Reply did not come even close to complying with the Unless Order.

100. I have come to the conclusion that HMRC should be barred. There has been unnecessary delay and expense. Tribunal directions have been breached. There is clear prejudice to the appellant in having to wait 8 months for a proper statement of HMRC's case and not barring HMRC would leave the appellant a remedy for this prejudice. There was no good reason for the delay in stating its case, the failure lasted for a significant period of time, and HMRC were clearly on notice from January that a failure to comply might lead to a barring order yet they did not correct the position for another 5 months. Barring is the appropriate sanction."

HMRC's criticisms of the Decision

23. Both HMRC's application of 25 July and the submissions that Miss Simor made to me set out detailed grounds on which HMRC contends that the Decision discloses errors of law, which grounds it uses to support both the application to lift the bar and the application for permission to appeal. In general, HMRC contend that imposition of the barring order involved an unreasonable exercise of the FTT's discretion and was contrary to the overriding objective of dealing with cases fairly and justly; it was unnecessary, disproportionate and unjust. Its detailed submissions to support this contention can be summarised as follows:

(1) The Tribunal erred in finding HMRC had failed to comply with Judge Hellier's direction, taking an overly-formalistic approach to that direction in paragraphs 52 to 54 of the Decision: HMRC contend that the FTT should have looked at the substance of what had been provided to determine whether BPP had been given sufficient information to understand why HMRC said that the supply of printed material by LM was "connected to" the supply of educational services by BPP PE and if that exercise had been carried out it would have been shown that sufficient information had been provided.

(2) The Tribunal failed to apply the overriding objective of dealing with cases fairly and justly and the particular need to ensure, so far as practicable, that the parties are able fully to participate in the proceedings (Rule 2(2)(c)) the need to avoid unnecessary formality (Rule 2(2)(b)) and the need to take into account the "resources of the parties" (Rule 2(2)(a)). HMRC contend that the Tribunal had no regard to:

(a) The public interest, including the wider rule of law issues, which require the continued participation of HMRC in this case. The

Tribunal failed to appreciate the obligations of HMRC to ensure that taxpayers are taxed according to the law and treated in the same way. It is not permissible for HMRC simply to concede cases, irrespective of the correct legal position as suggested in paragraph 89 of the Decision.

(b) The relative merits of the parties' cases, and the strength of HMRC's defence to the substance of the appeal;

(c) The lack of any prejudice to BPP caused by the alleged default, there being no risk to the timetable laid out in the case management directions and there being nothing in the agreed statements of facts and issues sent to the Tribunal shortly before the release of the Decision that BPP had not been fully aware of since at the latest November 2012;

(d) Whatever the length of delay (and HMRC contend that the Tribunal's findings on its length were incorrect) caused no prejudice to the potential fairness of the hearing and did not put at risk the hearing dates in the case management directions;

(e) There was no financial or potential financial prejudice to BPP as a result of the delay. BPP have charged VAT on their supplies of relevant printed matter since 19 July 2011. Only on 28 May 2014 did BPP submit a claim for 'over-declaration errors' in the region of £4.9 million on VAT returns submitted since that date. Their customers have paid VAT so even if BPP succeeded in their claims there would be questions of unjust enrichment; and

(f) The Tribunal was wrong to consider in paragraph 83 of the Decision that it did not have any other sanction available to it in respect of the alleged default and that costs could not have been an adequate sanction, ordering HMRC to pay DPP's costs of their application would have been a proportionate response.

(3) The Tribunal's approach to the issues identified in (2) above was based on an incorrect view that whilst not strictly applicable in the case, it could nevertheless draw guidance from the principles set out in the *Mitchell* line of authority; had it been correct to apply rules of civil procedure by analogy the relevant analogy would have been with the rules and principles applicable to the striking out of Statements of Case for non-compliance with court orders, rules or time limits.

(4) Even if *Mitchell* had any potential relevance, the Tribunal applied the principles set out in that case wrongly. The Tribunal considered that it should give significant weight to the factors in (a) and (b) of CPR Rule 3.9 in deciding whether or not to bar. The way it did that was to decide that absent a good reason for the alleged default, it should bar HMRC, irrespective of the seriousness or significant of the breach or the wider circumstances of the case. *Denton* makes it clear that that approach was

not correct. That case made it clear that in deciding whether or not to 'grant relief from sanctions' the Court must:

(a) First identify and assess the seriousness of the "failure to comply with any rule, practice direction or court order". If the breach is neither serious nor significant the court is unlikely to need to spend much time on the second and third stages.

(b) Secondly, consider why the default occurred. This is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.

(c) Thirdly, the court must evaluate "all the circumstances of the case so as to enable it to deal justly with the application, including factors (a) and (b)." Accordingly, courts should not refuse relief from sanction simply on the basis that the breach was either not 'trivial' or no good reason existed for it. They must have regard to all the circumstances so as to deal with the case justly. The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it. Where the breach is not serious or significant relief is likely to be granted.

HMRC contend that the Tribunal applied precisely the approach criticised by the Court of Appeal in *Denton*. It considered neither the seriousness nor significance of the breach, both of which were negligible as explained above. Rather, it considered the lack of any ascertainable reason for the breach to be very important in its decision. It did not evaluate properly all the circumstances of the case.

(5) In any event, *Leeds City Council* demonstrates that it was erroneous to apply the *Mitchell* line of authority to an exercise of a discretionary power to bar or strike out for a breach of any rule, direction or order. In particular, no weight should have been given to the factor set out in CPR 3.9(b). The correct approach was to apply the overriding objective set out in Rule 2(1) and (2) of the Rules.

(6) The Tribunal failed to have regard to the fact that by applying for a barring order BPP was guilty of legal opportunism by seeking to obtain a windfall strike out or other litigation advantage.

The correct approach on an application for the lifting of a barring order

24. As I have indicated in paragraph 23 above, HMRC advances the same arguments in support of its application to lift the barring order as it does in support of its application for permission to appeal.

25. The decision to bar HMRC was made pursuant to the discretionary power in Rule 8(3)(a) which provides:

> "(3) The Tribunal may strike out the whole or part of the proceedings if –
>
> (a)the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them."

By virtue of Rule 8(7) the reference to "strike out" is to be read as a reference to the barring of HMRC from taking further part in the proceedings.

26. Rule 8(5) sets out the power to reinstate proceedings which have been struck out under Rule 8(3)(a) as follows:

> "(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3), the appellant may apply for the proceedings, or part of them, to be reinstated."

Again, by virtue of Rule 8(7) the reference to "reinstated" is to be read as a reference to lifting of the bar on HMRC from taking further part in the proceedings.

27. It should be observed that the Tribunal most commonly receives applications to reinstate proceedings which have been struck out in circumstances where there has been before the strike out no argument as to why the non-compliance occurred and no reasons before the Tribunal as to why it has occurred. The usual scenario is that without explanation the party concerned fails to comply with directions and despite warnings being given as to the consequences of further non-compliance, a strike out order is made. For example, it could be the case that a party has been incapable of responding through illness and only becomes aware of the strike out when he recovers. The party concerned then in his application for reinstatement will for the first time set out the reasons for non-compliance and why in the circumstances it is appropriate to exercise the power to reinstate.

28. It is therefore easy to see why that situation should be dealt with by way of an application to the Tribunal to reinstate, where for the first time the Tribunal will have before it all the relevant facts and circumstances and be able to consider whether, taking account of the overriding objective in rule 2, it is in the interests of justice to reinstate the proceedings. In these circumstances clearly an appeal against the decision to strike out is an appropriate course to pursue in order to reverse the decision; there will have been no error of law in the decision being made but merely a case where the full circumstances were not known to the Tribunal when it made its decision.

29. The situation in this case is entirely different. There has been full argument before the Tribunal on the merits of the application to bar and Judge Mosedale has issued a comprehensive and fully reasoned decision. As set out above, HMRC makes a large number of points as to why in its view the Decision discloses numerous errors of law. The question arises as to whether in these circumstances an application to lift the bar can properly be made. It is clear to me that HMRC's application and Miss Simor's submissions in support of that application, except in one respect, consist of

points that were made before Judge Mosedale and dealt with in the Decision. The one exception is the fact that *Denton* and *Leeds City Council*, the latter decision clarifying the impact of *Mitchell* line of authority on compliance with Tribunal Rules, were released after the decision was issued to the parties.

30. Mr Grodzinski submits that in the circumstances of this case, even taking account of the development of the jurisprudence since *Mitchell*, the proper course in order to challenge the Decision is through an appeal. In his submission, by applying to have the barring order lifted in circumstances where a sanction was not automatically imposed or in circumstances where there has been the exercise of judicial discretion having taken into account all relevant circumstances, HMRC are attempting to have a "second bite of the cherry" and this is not envisaged in Rule 8(5). Where a judge has formed a view as to the merits of an application another tribunal at the same level cannot make up its own mind afresh. In his submission unless there has been a change in factual circumstances or a clearly fatal error of law in the original decision, there is no basis on which it should be set aside and the appropriate course is to seek to appeal against any errors of law which HMRC believe to have occurred.

31. Miss Simor, by contrast, submits there is nothing in the Rules that indicates that it should be narrowly construed in the manner suggested by Mr Grodzinski. In her submission the Tribunal should be guided solely by the obligation to give effect to the overriding objective when it exercises any power under the rules and that would clearly be the case where it was considering whether to reinstate or lift a barring order under Rule 8(5). Therefore, in considering whether to lift the bar the Tribunal should consider, among other things, the requirement to avoid unnecessary formality and to seek flexibility in the proceedings and to deal with the application in a proportionate way, avoiding any unnecessary delay.

32. I accept Miss Simor's submission that the Tribunal must give effect to the overriding objective when considering whether to exercise the discretion under Rule 8(5). Nevertheless, in my view in so doing it is entitled to consider the purpose of the rule and the framework of the Rules as a whole, including the circumstances in which decisions may be set aside otherwise than through the medium of an appeal.

33. As I have indicated above, in my view the primary focus of Rule 8(5) is to deal with situations where strike out or barring decisions are made without the full participation of a party or where the full circumstances were not before the Tribunal when the decision was made. I therefore agree with Mr Grodzinski that where there has been a change of factual circumstances since the relevant decision was made, then setting a barring order aside may be appropriate.

34. With regard to the question as to whether an error of law in the decision should justify it being set aside, the Rules only deal with this situation explicitly in Rule 41, when taken together with section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2007 ("the Act").

35. Rule 41 of the Rules provides that the Tribunal may only undertake a review of a decision:

> "(a) pursuant to Rule 40(1) (review on application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision."

36. Section 9(4)(c) of the Act provides that where the First-tier Tribunal reviews a decision it may also set the decision aside.

37. As is clear from its wording, Rule 41 only applies in the context of an application for permission to appeal. Nevertheless, in my view by analogy it would be appropriate to exercise what is in effect a power to set aside a previous decision under Rule 8(5) where the Tribunal was satisfied that there was an error of law in the decision. Being "satisfied" that there was an error of law means in my view that it was obvious to the Tribunal that the decision disclosed an error of law, such that any appeal was bound to succeed. That would apply for instance, if a relevant case directly on point or a clear statutory provision had been overlooked or ignored. The Tribunal would also, applying the overriding objective, have to be satisfied that it was in the interests of justice to set aside the decision. Therefore in my view it would not be appropriate to set aside a decision merely because the Tribunal considered that it was merely arguable that the Tribunal had made errors of law in the relevant decision; in those circumstances the appropriate course (which I have followed in this case) is to grant permission to appeal.

38. On the basis of this analysis, the correct approach to be taken in this case is to lift the bar and thereby set aside Judge Mosedale's decision only if either of the following apply:

(1) Factual circumstances have changed since Judge Mosedale's decision; or

(2) There was an obvious error of law in the decision.

Application of Rule 8(5) in this case

39. There is no suggestion of a change of circumstances in this case. With regard to the errors of law that Miss Simor contends the Decision discloses, in my view none of them meet the criteria I set out in paragraph 37 above. Turning to the six principal submissions made by Miss Simor which are summarised in paragraph 23 above:

(1) The question as to whether Judge Mosedale wrongly found non-compliance with Judge Hellier's direction is clearly open for argument. It cannot be said the Judge was obviously wrong and she gave full reasons for her findings.

(2) It is clear that Judge Mosedale had the overriding objective in mind when exercising her discretion: see paragraph 65 of the Decision. The question as to whether she applied her discretion correctly is again a matter for

argument on appeal but it is clear that Judge Mosedale gave consideration to all of the factors identified by HMRC.

(3)(4) (5) and (6) Although it may be arguable that because of the development of the *Mitchell* line of authority since the Decision was released, Judge Mosedale wrongly put emphasis on the factors identified in CPR 3.9, in my view it is not clearly the case that the Decision cannot be justified. It is clear that Judge Mosedale did not regard *Mitchell* as strictly relevant; she only considered CPR 3.9 alongside all other relevant factors (see paragraph 65 of the Decision) and said that they should be given significant weight rather than attaching paramount importance to them. In my view it is not obvious that had Judge Mosedale considered *Leeds City Council* and *Denton*, and having considered the effect of those cases and the other factors and circumstances she identified, she would have come to a different decision.

40. I therefore conclude that there is no proper basis on which I should lift the barring order and I dismiss HMRC's application.

41. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 25 September 2014