[2015] UKFTT 481 (TC)

TC04647

Appeal number: LON/2007/0062
LON/2007/0061

APPEALS – procedure – directions – costs in transitional cases – whether pre-2009 costs regime should apply – no – whether open to apply for appeals to be allocated to Complex category – consideration of Appellants' application for disclosure – refused – application by HMRC to re-amend Statement of case – additional ground proposed – consideration of factors – amendment agreed – other amendment to add first limb of Kittel test – amendment agreed – directions adjusted to take account of medical treatment of Appellants' director

FIRST-TIER TRIBUNAL
TAX CHAMBER

JUST BEER LIMITED
GEMPOST LIMITED **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 2 September 2015

Andrew Young of Counsel, instructed by Vincent Curley & Co Ltd, for the Appellants

John McGuinness QC and George Rowell of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION: REASONS FOR DIRECTONS

1. The Appellants’ application dated 5 June 2014, served again on 17 October 2014 with the addition of reasons for the application, related to costs and matters of disclosure. The listing of the hearing to consider the application was notified to the parties by letter dated 13 January 2015. The parties were directed to provide to each other and to the Tribunal an outline of the arguments that they would put at the hearing of the application.

2. A delay occurred in relation to subsequent correspondence sent in by the parties to the Tribunal. On 17 August 2015 the Tribunal office wrote to the parties apologising for the delay, and commenting on the correspondence; it also reminded the parties of the listed hearing and the direction to exchange skeleton arguments and serve them on the Tribunal by no later than 26 August 2015.

3. On 18 August 2015 the Respondents (“HMRC”) applied to amend their case and file new evidence.

4. On 24 August 2015, the Appellants applied to vacate the hearing and to stand over all matters for a period of ten weeks. The grounds were that the director of Gempost Ltd and the manager of both businesses, Mr J Singh Jabble had been admitted to hospital with cardiac problems. An email from his consultant was attached; the advice was that Mr Jabble should not be subjected to stress for a period of eight to ten weeks, and should not attend the hearing.

5. HMRC resisted that application, which I considered and refused. I did not consider it necessary for Mr Jabble to attend the hearing. I agreed with HMRC’s submission that the medical evidence was in email form and was not sent from an official address.

6. The Appellants renewed their application, and in support provided an official letter from Mr Jabble’s consultant indicating that Mr Jabble was due to be admitted for heart bypass surgery on 2 September 2015 and that after the surgery he should not be put under any stress to his heart for a further three to four months. I confirmed my previous decision that the hearing should proceed.

7. After I had given my decisions at the hearing on 2 September and agreed the terms of Directions in the light of those decisions, Mr Curley requested that I should set out my reasons in writing, so that Mr Jabble would be able to consider them once he was in a position to do so. The Directions have since been released to the parties, and accordingly they are not set out in this decision. Although I had indicated at the hearing that this decision would be relatively brief, it has proved necessary for it to be much more detailed than I had anticipated.

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The Appellants' applications

8. The Appellants applied for the costs regime set out in Rule 29 of the Value Added Tax Tribunal Rules 1986 to apply to the whole proceedings. They also applied for directions that HMRC should deliver up documents concerning visits reports, returned materials relating to due diligence, and assessments made against missing traders. In addition they requested the provision by HMRC of information relating to the involvement of three officers, and information concerning disclosure of materials by the disclosure officer.

(a) The costs application

9. The parties accepted that the "New Costs Regime" set out in Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules") applied, subject to the transitional provision in para 7 of Schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009 (SI 2009/56) (referred to in this decision as "para 7"). The effect of this was to enable the Tribunal to direct, in relation to "continuing proceedings", that the previous costs regime under the 1986 Rules ("the Old Costs Regime") should apply. (In this decision, references to any Rule are to the 2009 Rules except where stated.)

10. Mr Young referred to HMRC's submission in their skeleton argument that, following the decision of the Upper Tribunal in *Atlantic Electronics Ltd* v *Revenue and Customs Commissioners* [2012] UKUT 45 (TCC), [2012] STC 931, the Tribunal had a discretion to disapply the New Costs Regime in favour of the Old Costs Regime, and that unreasonable delay on the part of the party making such an application would be a powerful factor militating against the exercise of that discretion.

11. Mr Young argued that the relevant question was whether the Appellants had made their application sufficiently promptly. In *Atlantic Electronics*, Warren J had indicated that parties who wait and see how a case develops before making an application for the exercise of the Tribunal's discretion under para 7 should not ordinarily expect their application to succeed.

12. Mr Young submitted that this was not the position in the Appellants' case. HMRC had only just provided the Appellants with voluminous materials, received in electronic form on 27 August 2015 at 16.21. For the Appellants, Mr Curley had requested on 28 August 2015 that these documents be served in hard copy form, and had informed HMRC that his office would be closing at 17.00 for the bank holiday weekend. As a result, these had not been received until the day before the hearing.

13. In addition, HMRC had made their second application to amend their Statement of Case. The Appellants did not know whether the Tribunal would agree with HMRC's arguments and grant the application, and therefore they were uncertain as to the nature of the case against them. Accordingly, this was not a "wait and see" case.

14. The appeals were complex, and the disclosure issues were complex. Costs were a problem for the Appellants, until they knew on what basis the appeals would be

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heard. The view expressed by Warren J in *Atlantic Electronics* was predicated on HMRC making a decision and being clear. The position on the para 7 costs application should be examined from the date of any change in the nature of the case against the Appellants.

15. Thus the Old Costs Regime should apply. If the Tribunal were to accept HMRC’s application to amend their Statement of Case, the matter should be treated as starting afresh. Mr Young submitted that the appeals should be classified as Complex cases.

16. For HMRC, Mr McGuinness emphasised that the Appellants’ para 7 application had been made long before they had become aware of HMRC’s application to re-amend their Statement of Case. The para 7 application could have been made at any time before April 2009; no reason had been advanced for the application not having been made earlier. On 5 July 2013, Judge Raghavan had directed that the parties could make such an application, and indicated that it had to be made no later than 3 August 2013. The Appellants’ application had been made on 5 June 2014; on the face of it, that application was barred by the terms of the 2013 Direction. There was no reason why the Appellants’ application had been made ten months out of time; no application for the extension of the time limit had been made. The Appellants’ October 2014 version of their application, setting out reasons as requested by the Tribunal, contained the same wording concerning the para 7 application as in the June 2014 version. Thus the reasons were not expanded upon between June and October 2014.

17. If, despite the terms of Judge Raghavan’s Direction, the Tribunal were to be willing to entertain the Appellants’ para 7 application, Mr McGuinness submitted that the Appellants’ reasons for their application lacked merit, on the following grounds:

(1) The Appellants referred to the size of the assessments as a justification for the Old Costs Regime to apply. There was no authority for the proposition that the Old Costs Regime should apply merely on account of the assessment in issue.

(2) HMRC’s allegations of knowledge or means of knowledge of fraud were also given by the Appellants as a ground for the Old Costs Regime to apply. No reasoning for this was given by the Appellants, and in any case it was contrary to the Tribunal’s decision in *Hewlett Packard Ltd v Revenue and Customs Commissioners* [2013] SFTD 409, in which the First-tier Tribunal rejected a para 7 application for substantially the same reasons as those given by the Upper Tribunal in *Atlantic Electronics Ltd*. Mr McGuinness emphasised that in the version of their Statement of Case current at the time of the Appellants’ para 7 application, HMRC did not allege actual knowledge of fraud on the part of the Appellants, although HMRC were now applying to re-amend their Statement of Case to bring in this allegation.

(3) The Appellants contended that mounting their appeal would be costly. Mr McGuinness commented that incurring significant legal costs was a very common feature of any complex litigation. It could not, in itself, amount to a reason for the Old Costs Regime to apply.

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(4) It was alleged that HMRC had been slow to comply with their disclosure obligations. HMRC had long since complied in full with all disclosure obligations. The relevance of previous disclosure issues to the present application was not explained.

18. Looking at the appeals more generally, Mr McGuinness referred to *Atlantic Electronics Ltd* and *Hewlett Packard* and to the facts of those cases. Here, the Appellants' allocation was made over five years after the introduction of the New Costs Regime, and no explanation for this very long delay had been given. In these circumstances, the principles set out in *Atlantic Electronics Ltd* and *Hewlett Packard Ltd* applied *a fortiori*.

19. Having considered the parties' submissions on the para 7 application, and Mr Young's further submissions based on the complexity of the case, disclosure being a major element of that complexity, I announced my decision on that application. My conclusion was that the application should be refused.

20. My reasons for refusal were:

(1) The Appellants had not shown sufficient reason for their failure to make the application within the time limit set out in Judge Raghavan's Direction dated 5 July 2013, and their failure to make any application for the extension of that time limit. As a result, I did not consider it open to the Appellants to make their para 7 application.

(2) Although I considered that this determined the result of the application, I went on to consider the merits of the application. I accepted the submission made by Mr McGuinness for HMRC that the size of the assessments was not a justification for the Old Costs Regime to apply.

(3) On the question of knowledge or means of knowledge of fraud, I do not consider that this amounts to a reason for the Old Costs regime to apply. I accept the submission from Mr McGuinness that such reasoning is contrary to the decision of Judge Mosedale in *Hewlett Packard Ltd*. In particular, I take into account her comments in her decision at [18]-[19] concerning the relevance or otherwise of an allegation of fraud. In that context, I acknowledge the careful submission by Mr McGuinness, made in connection with one of HMRC's applications, that cases of this nature do not as such involve an allegation of fraud on the part of the taxable person; they involve an allegation that a person had knowledge or means of knowledge of fraud, or to use the phraseology of the CJEC in *Kittel*, ". . . a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT . . ." (I also take into account the fact that at the time of the application, HMRC had not included in their Statement of Case allegations of knowledge on the part of the Appellants.)

(4) I accept the submission made by Mr McGuinness that the cost of litigation is not in itself a reason for the Old Costs Regime to apply.

(5) I do not consider that the question of disclosure and compliance with previous directions relating to disclosure is a factor relevant to the question

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whether the Old Costs Regime should or should not apply to the Appellants’ appeals.

(6) On the question of delay in making the application, I find that the delay is very much more substantial than that under consideration in *Atlantic Electronics Ltd*, or the three year period in *Hewlett Packard*. I agree with the submission by Mr McGuinness that the Appellants’ para 7 application was made long before HMRC applied to re-amend their Statement of Case, and that therefore the question of delay should be considered without reference to that requested amendment.

(7) It follows that, even if I did not consider the Appellants’ para 7 application to be barred by the Direction of Judge Raghavan dated 5 July 2013, I would refuse that application on the grounds set out above.

(8) The Appellants’ para 7 application is therefore refused, and as a result the New Costs Regime applies to both appeals.

21. When I announced my decision, Mr Young indicated that he wished to apply on the Appellants’ behalf for the appeals to be allocated to the Complex category. He referred to the possibility under Rule 10(1)(c)(ii) of the Appellants “opting out” of the Rule 10(1)(c)(i) regime for costs in Complex cases. I indicated that I was unable to decide at the hearing what should happen about the classification of these appeals.

22. Mr McGuinness intervened to refer to the decision of the then President, Sir Stephen Oliver QC, in *Surestone Ltd v Revenue and Customs Commissioners* [2009] UKFTT 352 (TC), TC00290. A copy of this decision was not available at the hearing, but I have since considered it again (as I had previously done in the case referred to below). At [18] the President stated:

> “For completeness, it was put to me (in response to a possible argument for the Appellant) that a costs award could only be made after 1 April 2009 where the Tribunal had already allocated the appeal to the complex category under rule 23(1) of the 2009 Rules and the Appellant had not “opted out” under rule 10(1)(c) of those Rules. I do not think this is correct. Rule 23 and the allocation of appeals and “application notices” has no application to “current proceedings”; it applies only to appeals or appeal notices (e.g. to extend time for appealing) that have been made from 1 April 2009 onwards. There is no power in paragraph 7(3) of Schedule 3 to the TTF Order to make rule 23 apply in order to enable an allocation of an appeal to the complex category. In any event, the Tribunal’s power to make any costs award after 1 April 2009 is constrained by paragraph 7(7) of Schedule 3.”

23. I indicated that in my view, the question involved complicated issues, and referred to my decision in *Babergh District Council v Revenue and Customs Commissioners* [2011] UKFTT 341 (TC), [2011] SFTD 709. I told the parties that I would consider the question in detail and include my decision on the question of allocation in my written decision setting out my reasons for the Directions which I proposed to make in relation to the appeals.

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24. In *Babergh District Council*, I considered the President’s decision in *Surestone*, and in particular his comments at [18] as set out above. In *Babergh* at [14]-[23], I considered the self-contained regime relating to costs, and its relevance to decisions taken as to the inability to allocate “current proceedings” cases under Rule 23. My conclusion at [29]-[30] was that, in the context of an application under Rule 28 for a case to be considered for transfer to the Upper Tribunal, it was open to the Tribunal to designate a pre-1 April 2009 appeal as Complex. In arriving at that conclusion, I saw no reason to express any views concerning the decisions on the question whether allocation could be directed for the purpose of the only other possible consequence referred to in Rule 23(5), namely the application of Rule 10(1)(c).

25. I continue to regard the regime relating to costs in “continuing proceedings” cases as self-contained. The President’s decision in *Surestone* takes into account the nature of that regime; he had been involved in the process of constructing a particular costs regime for the Tax Chamber of the First-tier Tribunal, as the original regime proposed for all tribunals from 1 April 2009 had been that there would be no provision for costs in any cases.

26. In *Atlantic Electronics Ltd*, Warren J (as President of the Upper Tribunal Tax and Chancery Chamber) said at [14] that the decision in *Surestone* might have come as a surprise to some people. Whether it was right or wrong did not matter in the context of Atlantic’s appeals, because these had not been allocated as Complex cases, nor did he need to express a view on the question whether it was right or wrong.

27. In *Hewlett Packard*, Judge Mosedale considered an argument put by the appellant in that case that a transitional case could not be categorised as Complex and thereby be in an open costs regime. She did not consider that the appellant had been deprived of the opportunity to apply for the open costs regime under the 1986 Rules. She continued:

> “[14] And I make the comment in passing that I consider that transitional cases could be categorised as Complex for the reasons given by Judge Clark in *Babergh DC v Revenue and Customs Comrs* [2011] UKFTT 341 (TC), [2011] SFTD 709. And I note that that has happened in order to permit a case to be referred to the Upper Tribunal: *John Wilkins (Motor Engineers) Ltd v Revenue and Customs Comrs* [2009] UKUT 175 (TCC), [2009] STC 2485. However, apart from the very rare situation where it is appropriate for a case to be heard in first instance by the Upper Tribunal, I can see no reason why a transitional case would be categorised as Complex. If the intention is to apply an open costs regime, the right course is simply to apply for a direction to apply r 29.”

28. I consider this to be the definitive answer to the question whether it is appropriate to direct that a transitional case should be allocated to the Complex category where the application is made purely to take advantage of Rule 23(5)(a), ie to bring the proceedings within Rule 10(1)(c) and thus apply the costs-shifting regime (subject to the 28 day “opt-out” provision in Rule 10(1)(c)(ii)).

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29. My decision on the question of the present Appellants’ application for their appeals to be allocated to the Complex category is that such application must be refused on the grounds that it is not open to me to make a direction to that effect in circumstances where the application has been made on the grounds of costs alone. The Appellants have made their application under para 7(3), and I have refused it. Judge Mosedale’s comments make clear that such an application is the only way of seeking an open costs regime.

30. In arriving at that decision, I have taken into account the submissions of Mr Young that the nature of the proceedings is complex. However, as Warren J emphasised in *Atlantic Electronics* at [14]:

> “. . . what can be said is that a case which falls within the criteria for allocation as a Complex case does so whether or not it is capable of actually being allocated as a Complex case.”

This makes clear that complexity on its own is not sufficient; the other requirement is that the case meets the criteria for allocation to the Complex category. The authorities to which I have referred prevent the Appellants’ cases from doing so.

31. Thus the only costs orders which the parties to these two appeals may seek, if these become appropriate, are those under Rule 10(1)(a) (wasted costs) and Rule 10(1)(b) (where the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings). The position is therefore comparable to that for an appeal made on or after 1 April 2009 and not allocated to the Complex category, or such an appeal allocated to the Complex category where the appellant has made a written request to the Tribunal within 28 days of that allocation “opting out” of the costs regime applicable under Rule 10(1)(c)(i).

(b) The disclosure application

32. The Appellants applied for various documents specified in their application to be produced to them by HMRC, or for HMRC to set out in a witness statement why they were unable to do so.

33. Mr Young referred to this application, and explained that as the additional materials had so recently been received from HMRC, the Appellants and their advisers had had no opportunity to examine them. He stated that the Appellants had disclosed everything that they had. It was not possible to say much more on the issue of disclosure at this stage.

34. Mr McGuinness commented that the Appellants had given the impression that the material provided by HMRC had only been disclosed during the summer vacation. What had been disclosed in August was HMRC’s application to re-amend their Statement of Case and the fourth witness statement of Mahendra Gajjar, together with the materials referred to in that fourth statement. It was surprising that the Appellants said that they had not seen the other materials, as HMRC had already conducted a

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series of unusually detailed disclosure exercises in relation to previous applications made by the Appellants.

35. There was nothing in the Appellants’ notice of application that identified any particular gaps in the disclosed documents, or even indicated that the Appellants’ representatives had read and analysed them in any detail. If the Appellants considered that HMRC’s disclosure was inadequate, it was necessary for them to state what they thought was missing. Mr McGuinness referred in detail in his skeleton argument to paragraphs of the Appellants’ application, and gave information as to what had previously been disclosed. He argued that the Appellants had had between two and five years to deal with the materials previously produced to them by HMRC. Despite the direction given in January 2015, the Appellants had produced no skeleton argument for this hearing. He submitted that the Tribunal should deal with and dismiss the Appellants’ application for disclosure.

36. My conclusion on the Appellants’ application for disclosure was that their case for disclosure had not been made out. My concern was that there were not sufficient reasons. In the version of their application served on 17 October 2014, in which they had been required to set out reasons for their applications made on 5 June 2014, they appended the following wording:

> “The reasons for the application are that the materials sought relate to issues in the appeal.”

37. I do not consider this an adequate explanation of the Appellants’ reasons for requiring HMRC to produce the various materials specified in this section of the Appellants’ application for disclosure. At the hearing, Mr Young emphasised his inability, without instructions from the Appellants and given the short period available since the production of the further materials by HMRC, to make further comments concerning disclosure. Without further justification, I see no grounds on which it would be appropriate for me to grant the Appellants’ applications set out in section B of their document served on 17 October 2014.

38. In relation to the applications made by the Appellants in section C of that document, I note that a little further explanation was included. However, the comments made on HMRC’s behalf by Mr McGuinness in his skeleton argument indicate that the Appellants would need to provide further information in order to show justification for seeking the information referred to in the context of these applications. I am therefore not satisfied that there is reason to allow the applications, and I therefore refuse them also.

39. I made clear at the hearing that if, after considering the additional materials provided to them by HMRC, the Appellants could show sufficient reasons, it would be open to them to make a further application. However, I should emphasise that the Tribunal considering such a further application will require full and detailed argument in support of the application.

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HMRC’s applications

40. On 18 August 2015, HMRC gave notice of application for a direction that:

(1) They be permitted to file re-amended Statements of Case;

(2) They be permitted to adduce the fourth witness statement and exhibits of Officer Mahendra Gajjar.

41. Mr McGuinness explained that the existing amended Statements of Case defended the assessments in question on two grounds. The first was that the invoices relating to certain of the assessed transactions were invalid (“the Invalid Invoice Ground”). The second was that the Appellants should have known that the assessed transactions were connected with the fraudulent evasion of VAT (“the *Kittel* Ground”).

(a) Application in respect of Non-payment Ground and Officer Gajjar’s Statement

42. HMRC now sought permission to add a third ground. This was that the Appellants did not pay the consideration due to their suppliers in respect of certain of the assessed transactions and failed to repay the input tax credit relating to those transactions within six months as required by s 26A of the Value Added Tax Act 1994. This new requested ground was referred to as “the Non-payment Ground”, and applied to £2,759,534 of the assessments relating to Gempost Limited and £3,466,653 of the assessments relating to Just Beer Limited.

43. The basis of this ground was the complete lack of any accounting or bookkeeping evidence that the Appellants purchased certain supplies. Mr McGuinness provided details of the steps which HMRC had taken in relation to the Appellants to seek information concerning gaps in the payment-related evidence and to give the Appellants opportunity to supply further evidence in this connection. HMRC had been asking the Appellants since 2006 for supporting documents; the Appellants had indicated that they paid for most of their supplies in cash. An indication had been given to the Appellants in February 2015 that, in the absence of disclosure of relevant materials, HMRC might seek to amend their Statement of Case by adding this further ground of their defence to the assessments. It had not been until around May 2015 that the Appellants had provided material, and this had been provided in a piecemeal fashion.

44. Mr Gajjar’s fourth witness statement had been produced by way of analysis of the materials provided to HMRC, and indicated that (apart from those cases where he was satisfied with the information provided) for the vast majority of transactions, there were no records amounting to supporting evidence of purchase transactions. The statement was based entirely on material provided by the Appellants. Thus although the application (and supporting materials) had been served only during the month prior to the hearing, HMRC contended that the application should be allowed.

45. HMRC sought to rely on the Non-payment Ground only in relation to the transactions that had always been in issue in the appeals; the proposed re-amended

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Statements of Case expressly ruled out the possibility of applying the Non-payment Ground to any transactions not already subject to the assessments.

46. HMRC had written to the Appellants on 12 June 2015 to put them on notice that HMRC intended to apply to re-amend their Statements of Case to include the Non-payment Ground, and to file a further witness statement from Officer Gajjar.

47. No final hearing of the appeals had yet been listed. The Appellants would therefore have sufficient time to consider and respond to the proposed re-amended Statements of Case and additional evidence.

48. Mr McGuinness submitted that in these circumstances there could be no question of the Appellants now being taken by surprise or otherwise being unfairly prejudiced by HMRC’s application to add the Non-payment Ground.

49. HMRC contended that it was in the interests of justice and in accordance with the Overriding Objective in Rule 2(1) of the Tribunal Rules for them to be permitted to re-amend their Statements of Case in respect of the Non-payment Ground and to adduce Officer Gajjar’s fourth statement and exhibits.

50. Mr McGuinness accepted that the Appellants’ director was currently in hospital, but the application hearing had been listed for a long time. HMRC asked that the application be allowed and that sufficient time should be granted for the Appellants to respond to the evidence.

51. Mr Young emphasised that the appeals had been made nearly ten years ago. He questioned whether it could be right to amend Statements of Case so long after the appeals had been lodged.

52. In contrast, it had been less than ten working days since HMRC’s further materials had been served on Mr Curley as the Appellants’ agent. This period would have been far too short, even if the Appellants’ director Mr Jabble had not been incapacitated. Subject to any instructions which the Appellants might give once Mr Jabble was in a position to consider the matter with his advisers, it might prove necessary for Mr Curley to instruct forensic accountants to consider the materials provided by HMRC in relation to the appeals.

53. Mr Young made submissions in the context of the other element of HMRC’s application to re-amend their Statements of Case, which I consider below; some of those submissions also related to this element, but to avoid repetition, I do not set them out here.

54. In reply, Mr McGuinness suggested that if a forensic accountant was to be instructed, this could proceed while Mr Jabble was in hospital. If the question was deferred, Mr Curley as the Appellants’ agent would not know whether he could give such instructions. In subsequent discussion, Mr Young pointed out that while Mr Jabble was incapacitated, including the period while he was recommended to avoid stress, it would not be possible for the Appellants to agree that a forensic accountant should be instructed.

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55. In relation to the question of prejudice, Mr McGuinness explained that HMRC had been asking for the documents for a number of years, and had only been provided with them during the present year. It would have been inappropriate for HMRC to argue the Non-payment Ground without knowing about all the documents relevant to the transactions which were the subject of the assessments.

56. Having considered the position in the light of the parties' arguments, I concluded that HMRC's application to re-amend the Statements of Case to include the Non-payment Ground should be allowed. I considered that it was in the interests of justice to do so, given the importance of the need to establish for the purposes of input tax recovery that consideration has been paid for the goods or services in question. In particular, I accepted that it had not been possible for HMRC to satisfy themselves as to the basis for the Non-payment Ground until they considered that they had been provided with all the materials thought to be relevant to the transactions in question in these appeals.

57. I accepted that account would need to be taken of the need to take instructions from the Appellants' director, and that appropriate allowance for this needed to be made in drafting the relevant directions to be made following the hearing.

58. I also agreed that the fourth witness statement of Mahendra Gajjar and the exhibits thereto should be admitted in evidence for the purpose of these appeals.

(b) Application in respect of Kittel Ground

59. Mr McGuinness explained that HMRC sought to re-amend their Statements of Case to contend that both limbs of the *Kittel* test were satisfied, namely that the Appellants knew or should have known of the connection between the transactions the subject of the assessments and fraudulent evasion of VAT. When HMRC had first framed their case, they had relied only on the "should have known" limb of the test. In view of the evidence and case law as it then stood, the focus of HMRC's concerns had been what they considered to be the Appellants' clear failure to take reasonable precautions to ensure the *bona fides* of their suppliers.

60. HMRC had re-assessed the position in the light of all the evidence obtained throughout the proceedings and the guidance provided by the Court of Appeal in *Mobilx Ltd (in Administration) and Others v Revenue and Customs Commissioners* [2010] EWCA Civ 517, [2010] STC 1436], at [81]-[85] in particular. Mr McGuinness referred to two particular factors arising from the evidence which HMRC had considered, on the basis of which HMRC considered that in all the circumstances the Appellants must have known that their transactions were connected with fraud rather than being part of any kind of legitimate trade. HMRC therefore sought permission to rely on the "actual knowledge" limb of the *Kittel* test in addition to their existing contentions on the "should have known" basis.

61. HMRC submitted that it was clearly in the interests of justice for them to be permitted to re-amend their Statements of Case to this effect. In HMRC's view, the amendments were relatively minor in scope, the Appellants were already familiar with

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the evidence on which they were based, and the Appellants would have adequate time this application to prepare their case in response. There was no question of any disruption to an existing trial listing. Mr McGuinness submitted that the Appellants would have time to prepare further evidence in response to this amendment.

62. Mr Young commented that the proposed amendment was saying that the Appellants knew of fraud. Allegations of fraud were extremely serious. He referred to the Bar Code of Conduct, which emphasised the serious nature of such allegations. There had been no opportunity for a conference with the Appellants' director to take instructions on this issue.

63. There was a question of prejudice. Why had HMRC not made this application nine or even seven years ago? Mr Young referred to the six year time limit on obligations to retain materials. This might well cause prejudice to the Appellants, but this was a matter on which he had no instructions from them. While he acknowledged that the appeals required case management directions, this should not be rushed; to do so would offend against the overriding objective set out in the 2009 Rules. The Appellants should be given time to file evidence concerning prejudice.

64. I intervened to draw attention to the wording of the Appellants' Application served on 5 June 2014, in which they stated:

> "The Respondents are asserting that the Appellants either had knowledge or means of knowledge of fraud thereby making them accomplices in circumstances where the burden of proof rests upon the Respondents."

65. Mr Young emphasised that the proposed re-amendment to the Statements of Case had only been notified to the Appellants ten days before the hearing. There was no good reason why the application had been made so late. None of this was new; what was the reason for the delay? A party should be able to rely on the pleadings against it. It might be appropriate to look at case law to see the more general approach to late applications. The Appellants' position in response to this application was not unreasonable. The Appellants were not able to give instructions.

66. In reply, Mr McGuinness pointed out that the above wording in the Appellants' Application had been considered in his skeleton argument in the context of costs, since that had been the basis of the Appellants application for the Old Costs Regime to apply. He suggested that it was no surprise that the Appellants were faced with the proposed re-amendment, as the wording showed that it was in their minds in June 2014.

67. Mr McGuinness commented on Mr Young's reference to fraud. The principle set out in *Kittel* was not an allegation that the Appellants were involved in fraud; this limb of *Kittel* had a life of its own. The limb was very precise, namely that the Appellants knew of the connection.

68. In contrast, if actual fraud was pleaded, far more particulars would be needed. The words in *Kittel* were "knew or should have known".

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69. Mr Young responded that he did not disagree with that analysis, but *Kittel* made it clear that anyone who had knowledge of fraud participated in fraud. If someone was caught by the “knew” limb of *Kittel*, this was so serious that this ought to be put to the client for the latter to provide a response.

70. I considered the position in the light of the parties’ arguments. I took note of the wording of the Appellants’ Application dated 5 June 2014, although I accepted that formal notice of HMRC’s proposed re-amendment was not given until August 2015. On balance, I found the arguments for HMRC persuasive, and I considered it to be in the interests of justice for the Statements of Case to be re-amended to include the words “knew or” before the words “should have known” in each case, and for the other minor drafting amendments to be made.

71. As with the other re-amendments to the Statements of Case, I accepted that account would need to be taken of the need to take instructions from the Appellants’ director, and that appropriate allowance for this needed to be made in drafting the relevant directions to be made following the hearing.

Right to apply for permission to appeal

72. 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 Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 22 SEPTEMBER 2015