[2015] UKFTT 0601 (TC)

TC04745

Appeal numbers: TC/2010/05505
TC/2010/05506
TC/2010/05508
TC/2010/05509

PROCEDURE – Costs – Whether appellants acted unreasonably in not withdrawing appeals sooner – No – Whether evidence of "without prejudice" documents and negotiations admissible in resisting respondents application – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE LEASING NUMBER 1 PARTNERSHIP
THE LEASING NUMBER 2 PARTNERSHIP **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Fox Court, Brooke Street, London EC1 on 15 September 2015

Jolyon Maugham QC, instructed by Berwin Leighton Paisner LLP, for the Appellant

Aparna Nathan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an application by HM Revenue and Customs ("HMRC") for their costs following the withdrawal by the appellants (the "Partnerships") of their appeals on 7 May 2015 which had been listed for a ten day hearing between 11 and 22 May 2015. Although the appeals had been allocated to the "complex" category they were excluded from potential liability to costs under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Procedure Rules"). Therefore, in order to succeed, in their costs application under rule 10(1)(b) of the Procedure Rules, HMRC must establish that the Partnerships have acted unreasonably in the conduct of the proceedings .

2. In essence Ms Aparna Nathan, who appeared on behalf of HMRC, contends that the Partnerships could have withdrawn from the proceedings at a significantly earlier stage than they did and that it was unreasonable for them not have done so sooner. Mr Jolyon Maugham QC, for the appellants, contends that on the facts of the case "it is not sensibly open" for HMRC to establish that the conduct of the Partnerships was unreasonable and in any event it is not unreasonable to keep an appeal open whilst there were ongoing "substantial and meaningful" settlement discussions between the parties.

3. Although HMRC accepted that the parties had been engaged in negotiations and that correspondence had passed between them Ms Nathan submitted that this was on a "without prejudice" basis and should not be admitted as evidence in this costs application. It was therefore necessary, to first consider the "without prejudice" issue to determine whether the Partnerships were able rely on the negotiations and correspondence to demonstrate the reasonableness of their behaviour.

Without Prejudice

4. The general principle in civil proceedings is that written or oral communications which are made for the purposes of a genuine attempt to compromise a dispute between parties may not be admitted in evidence. As Lord Griffiths said in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299:

> "The "without prejudice rule" is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, 306:
>
> > 'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes,

> of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. In *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

5. In *Unilever v Proctor & Gamble* [2000] 1 WLR 2436 Robert Walker LJ set out the following exceptions to the without prejudice rule, at 2444-2446:

"(1) As Hoffmann LJ noted in the first passage set out above, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378 is an example.

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052). Examples (helpfully collected in *Foskett's Law & Practice of Compromise*, 4th ed, para 9-32) are two first-instances decisions, *Finch v Wilson* (8 May 1987) and *Hawick Jersey*

International v Caplan (The Times 11 March 1988). But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, 338, noted this exception but regarded it as limited to "the fact that such letters have been written and the dates at which they were written". But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.

(6) In *Muller*'s case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in *Rush & Tomkins*, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parties in deciding questions of costs). There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts v Head* Fox LJ said (at p.316)

> ‘what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to use in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after’.

(8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation: see Re D [1993] 2 AER 693, 697, where Sir Thomas Bingham MR thought it not

> ‘fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with 'without prejudice'

> privilege, seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 602, 610 [1978] AC 171 at 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage.'"

6. Ms Nathan submitted that the correspondence and discussions between the parties in order to reach a settlement was conducted on a without prejudice basis and did not fall within any of the exceptions identified by Robert Walker LJ. She made it clear that HMRC did not consent to the admission of such evidence for costs purposes or otherwise referring to the observation of Judge Newy QC in *Simaan General Contracting Co v Pilkington Glass Ltd* [1987] 1 WLR 516 at 520, that:

> "To allow one party to give evidence of "without prejudice" communications without the consent of another would be in direct conflict with the general rule excluding such evidence and with the public policy which supports it."

7. Mr Maugham contended that the circumstances of this case fell within the fifth of the exceptions of Robert Walker LJ as such evidence would explain the delay, which HMRC allege was unreasonable, by the Partnerships in withdrawing their appeals.

8. It is clear that the discussions and correspondence between HMRC and the Partnerships were a serious and genuine attempt to compromise the dispute between them and therefore was on a without prejudice basis. It is also clear that there was no agreement between the parties that such evidence be admitted as is often the case, as recognised by the seventh exception, in respect of costs (although whether this was because the Partnerships had opted out of the costs shifting regime under rule 10 of the Tribunal Procedure Rules was not addressed).

9. However, given the obvious restriction on the ability of the Partnerships to demonstrate their reasonableness in not withdrawing their appeals sooner if they were prohibited from relying on negotiations and correspondence between them and HMRC and that this evidence was sought to be adduced to explain delay I considered that it did fall within the fifth exemption in *Unilever* and directed that although such evidence could be admitted it should be limited to the fact that there had been correspondence and negotiations between the parties and the dates, but not the content, of such correspondence and negotiations.

Costs Application

Background

10. The Partnerships are limited liability partnerships and their appeals concerned capital contributions made by members to each of the Partnerships (the "Partners") funded by a mixture of borrowing and cash. Using these contributions, together with further borrowings, the Partnerships purchased lease books from a third party. They also entered into transaction with the Bank of Scotland under which they would pay early year surpluses of rents arising from that lease book over interest to the Bank and

receive corresponding payments in later years. The Partnerships were tax transparent and the Partners had claimed in their personal tax returns that they were entitled to set their respective shares of the Partnerships losses sideways and also claim interest relief on their borrowings.

5 11. Following the issue of closure notices, on 16 June 2010, by HMRC concluding that the Partnerships made no trading losses they appealed to the Tribunal. It is apparent from HMRC's original Statement of Case, dated 6 October 2010, that the appeal raised the following issues:

(1) Whether the Partnerships transactions amounted to a trade;

10 (2) The character of the payment by the Partnerships of their surpluses ie were they of a capital nature;

(3) The accounting treatment adopted by the Partnerships; and

(4) Whether the Partners were entitled to set their losses sideways.

HMRC recognised in the Statement of Case that the fourth issue was "not a matter for 15 determination in these partnership appeals" but indicated that they would invite the Tribunal to make findings in regard to this, a course of action to which the Partnerships consented.

12. On 13 July 2011 HMRC wrote to some or all of the Partners referring to the dispute with the Partnership and in August 2012 the Partnerships raised with HMRC 20 the question of whether a Partner appeal should be joined with that of the Partnerships. However, on 4 October 2012, in an email to the Partnerships then advisers, HMRC stated that, having taken advice from counsel regarding the Partner appeals, it was still intended to ask the Tribunal to offer a view on "view to profit" and "commerciality" but did not intend to seek a direction for a Partner to be joined in 25 the appeal.

13. Such an approach was in accordance with the decision of the Special Commissioner (Edward Sadler) in *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293, a case which involved the issue of whether a limited liability partnership ("LLP") was trading. Although this was of "little significance or even 30 indifference" to the LLP concerned, it was a question that arose in respect of the partners' tax position which also raised the issue of whether that trade was carried on with view to a profit. Notwithstanding the absence of any partner appeal and the "view to a profit" issue not arising in the LLP appeal the Special Commissioner nevertheless did consider the "view to a profit" as:

35 > "21. … Mr Hagan [of HMRC] admitted, in cross-examination, that he was pursuing the enquiry in relation to the Applicant's tax return effectively as a convenient alternative to pursuing an enquiry on the same matter of each of the 240 or so members, for whom it is a matter of great significance. In the course of the hearing that gave rise to two 40 concerns in my mind: first, in taking account of the balance referred to above in dealing with the Applicant's application, how did one give weight to the interest of the Applicant (put bluntly, why should the

> Applicant be concerned to bring the enquiry to an end?); and secondly, would directing a closure notice simply be a meaningless formality when (since it would not of itself bring to an end the enquiry automatically opened into the returns of the members) the matter would remain an issue to be explored in the continuing enquiry made of the members?
>
> 22. Taking this second point first, in the course of the hearing Miss Wakefield [counsel for HMRC], having taken instructions on the point, was able to confirm that any conclusions reached in a closure notice issued in relation to the Applicant's tax return on the question of the Applicant's trading status would be applied on the same terms on the eventual closure of the enquiries into the tax returns of each member. I am prepared to accept her assurances on that point. As to the first point, given the relationship between a partnership and its partners (and the particular features of that relationship where the partnership, as a limited liability partnership, is a separate legal entity from its members, but may be fiscally transparent) a pragmatic approach is required, recognising an alignment or correspondence, in a broad sense, of the interests of the partnership with those of its partners or members."

14. Returning to the present case, the Partnerships appeal was listed for a hearing on 1 July 2013 but was adjourned on the application of the Partnerships (which was opposed by HMRC). Directions were given following a case management hearing on 1 July 2013.

15. These included the production and exchange of expert accountancy evidence, a meeting of experts and the production of a joint experts' report. In accordance with these directions HMRC provided the Partnerships with the reports of their expert accountant, Mr Charles Roger Bath, the last of which on 23 January 2014.

16. Following a case management hearing on 4 April 2014, further directions were given by the Tribunal (Judge Sinfield) on 17 April 2014 and, in accordance with those directions, on 24 April 2014 the parties agreed the issues between them that arose on the appeal:

(1) Whether the Partnerships carried on a trade in the relevant periods ("Issue 1");

(2) Whether the payments made by the Partnerships under a purported interest swap was deductible in computing profits ("Issue 2");

(3) Whether the financial statements of the Partnerships for the relevant periods were prepared in a manner compliant with UK GAAP and if not how those financial statements should have been prepared in a manner compliant with UK GAAP ("Issue 3").

HMRC subsequently contended that the Partnerships accounts contained arithmetical errors ("Issue 4").

17. In addition and alongside the formal progress of the dispute there had been separate settlement negotiations between HMRC, the Partnerships and the Partners.

This included meetings on 10 July 2014 and 2 April 2015 following which the Partnerships offered to accept the accounting treatment proposed by Mr Bath and to abandon their sideways loss relief claims without any concession in relation to the issue of interest relief on the Partners borrowings (under s 362 Income and Corporation Taxes Act 1988 ("ICTA")), at least in respect of the Partners although not the Partnerships.

18. In April 2015 a settlement proposal was placed before HMRC's Anti-Avoidance Board which, despite being acknowledged as meriting "serious consideration", was not accepted. Also, at around this time (as is clear from an email dated 14 April 2015 between the Partnerships advisers) HMRC raised the issue of whether s 787 ICTA (which restricts relief for payment of interest) should be applied to all Partner borrowings.

19. In the circumstances, on 27 April 2015 the Partnerships solicitors sent HMRC, by email, a draft of a letter on which they were seeking and expected to receive their clients' authority to send. The draft letter referred to Issues 1 to 4 (see paragraph 16, above) and stated that, having considered Mr Bath's reports, the Partnerships did not propose to challenge Issues 2, 3 and 4.

20. The draft letter continued:

> That leaves the relevance of the question whether the Partnership is trading. In the light if the above [the concession on Issues 2-4], even leaving aside the question of special leasing it seems that the only relevance of this question is to the partners. For the years under appeal the partners claimed relief under section 353 and 362 ICTA 1988 in respect of borrowings used to make contributions to the Partnerships and in later years claimed interest relief under the rewritten provisions of sections 383 and 398 ITA 2007. A condition to be satisfied is, of course, that the money is used for the purposes of a trade carried on by the Partnership.
>
> It had previously seemed to our clients that if, in the Appeal, the Tribunal were to find that the Partnerships were trading, there would be little difficulty in agreeing with HMRC the consequential relief available to the partners in respect of such interest.
>
> Over the years there has been very substantial correspondence and, particularly recently, face to face discussion concerning the correct tax consequences of the activities of the Partnerships including in relation to the personal tax positions of the partners. But it is only very recently, indeed only in the last few days, that HMRC has suggested that the anti-avoidance provisions of section 787 ICTA 1988, and as rewritten section 809ZG ITA 2007, had or might have application to disallow relief in respect of the interest paid by the partners.
>
> In the light of that assertion, even if the Partnerships were trading, and this were determined to be so in the current Appeal, this will not resolve this question of interest relief for the partners. Further, given that our clients accept in their entirety the conclusions in the closure notices, and the consequential amendments to the tax returns of the

> Partnerships, the Partnerships no longer have any interest in the outcome of the appeals.
>
> BLP [the Partnerships solicitor] is not instructed by the Partners individually – there is no extant appeal to the Tribunal at Partner level – but in principle it would seem to make more sense for the issue of trade, if HMRC continues to contend that the Partnerships were not trading, to be determined alongside your new section 787/section 809ZG contention in the appeal of an agreed representative partner concerning his claim for interest relief in all relevant tax years. That, however, is an issue in respect of which our clients, being the Partnerships, have no interest.

21. Although a final version of the draft letter was not, in the end, sent to HMRC, on 8 May 2015 the Tribunal was given a "Notice of Withdrawal" signed on behalf of the Partnerships and HMRC which stated:

> 1. This Notice is given under Rule 17 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.
>
> 2. The Partnerships hereby give notice that they withdraw their appeals against the following closure notices with the following effects …
>
> 3. HMRC consent to these withdrawals.
>
> 4. In withdrawing their appeals the Partnerships do not concede that they were not carrying on a trade in the relevant periods and in consenting to the withdrawal HMRC do not concede that the Partnerships were carrying on a trade in the relevant periods.

Law

22. The ability of the Tribunal to make an order in respect of costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA") which provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

As is clear from s 29(3) TCEA, the power of the Tribunal to award costs is also subject to Tribunal Procedure Rules.

23. Insofar as it applies to cases, such as the present where the appellants have opted out of the costs shifting provisions, rule 10 of the Tribunal Procedure Rules provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;…
>
> (c) …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

24. However, as Judge Brannan cautioned in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] rule 10(1)(b) of the Tribunal Procedure Rules should not become a "backdoor" method of costs shifting.

25. In *Shahjahan Tarafder v HMRC* [2014] UKUT 0362 (TCC) the Upper Tribunal (Judge Berner and Judge Powell) considered the approach to be taken when deciding an application under rule 10(1)(b) of the Tribunal Procedure Rules stating, at [34]:

> "In our view, a Tribunal, faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from an appeal should pose itself the following questions: -
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

26. The Upper Tribunal (Judge Berner and Judge Powell) in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 0012 (TCC) ("*MORI*") observed that:

> "15. The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.
>
> 16. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of discretion, but a matter of a value judgment. An appeal against such a judgment, on a question of law, needs to e approached with appropriate caution. As Jacob LJ observed in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, at [7], it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error, for example by reaching a perverse finding or failing to make a relevant finding or (misconstruing the statutory test) it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffman said in Biogen v Medeva [1997] RPC 1, at p45:
>
>> 'Where the application of a legal standard such as negligence or obviousness involves no question of

> principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation'"

27. Also, having referred to them above, it is also convenient to set out the material parts of ss 362 and 787 ICTA.

28. Section 362 ICTA which is headed "Loan to buy into partnership" provides:

> (1) Subject to sections 363 to 365, interest is eligible for relief under section 353 if it is interest on a loan to an individual to defray money applied—
>
> (a) in purchasing a share in a partnership; or
>
> (b) in contributing money to a partnership by way of capital or premium, or in advancing money to a partnership, where the money contributed or advanced is used wholly for the purposes of the trade, profession or vocation carried on by the partnership; …

29. Section 787, ICTA which is headed "Restriction of relief for payments of interest" provides:

> (1) Relief shall not be given to any person under any provision of the Tax Acts in respect of any payment of interest if a scheme has been effected or arrangements have been made (whether before or after the time when the payment is made) such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid was the obtaining of a reduction in tax liability by means of any such relief.
>
> …
>
> (2) In this section "relief" means relief by way of deduction in computing profits or gains or deduction or set off against income or total profits.

Discussion and Conclusion

30. Adopting the approach in *Tarafder* it is first necessary to identify the reason for the Partnerships withdrawal of their appeals shortly before they were due to be heard; whether, having regard to that reason, the appeals could have been withdrawn sooner; and, if so, whether it was unreasonable not to have done so.

31. For HMRC, Ms Nathan contends that, as is apparent from the draft letter sent to HMRC on 27 April 2015, the appeals were withdrawn on the basis of the content of Mr Bath's reports in relation to Issues 2 – 4 which the Partnerships no longer challenged. In the circumstances, she submits, Issue 1, the "trading" issue, was academic, as indeed the draft letter noted the Partnerships had "no interest" in it. Therefore, even after allowing a reasonable time for consideration of Mr Bath's reports she submits that the Partnerships should have withdrawn their appeals much sooner than 7 May 2015 and their failure to do so was unreasonable.

32. Mr Maugham, who accepts that the draft letter sets out the thought processes of the Partnerships, submits that it was not Mr Bath's reports but HMRC's late introduction of the s 787 ICTA issue that led to the withdrawal of the appeals. He contends that the "trading" issue, which remained "live" notwithstanding the withdrawal, could have been dealt with in the Partnerships appeals without the need for a separate Partner appeal. If this had happened the decision of the Tribunal on this issue could then have been applied to the Partners, as it had in *Eclipse*, something which the draft letter considered could be achieved with "little difficulty" but, he contends, this was no longer the case once the application of s 787 ICTA to the Partners had been raised by HMRC.

33. However, as Ms Nathan emphasised, the withdrawn appeals were those of the Partnerships only, not the Partners, and the s 787 ICTA issue concerned the Partners and not the Partnership. Also, as the draft letter states, the Partnerships had "no interest" in Issue 1, the trading issue, and had, by accepting Mr Bath's report which was received in January 2014, effectively conceded Issues 2 – 4. It is therefore necessary to consider whether, in such circumstances, it was unreasonable for the Partnerships not to have withdrawn their appeals sooner.

34. While I accept that the withdrawn appeals were clearly not those of the Partners but the Partnership, I cannot agree with Ms Nathan's submission that the position of the Partners is not relevant to that of the Partnerships and their withdrawn appeals. There is undoubtedly an inextricable link between the Partners and Partnerships and while there was a possibility that the "trading" issue, Issue 1, could be determined in the Partnerships appeal, as it had in *Eclipse*, I do not consider that it was unreasonable for the Partnerships not to withdraw the appeal before they did despite the content of Mr Bath's reports especially as settlement negotiations were continuing.

35. These negotiations were described as "substantial and meaningful" by Mr Maugham, but if there were any doubt as to their nature I consider that it can be dispelled by the fact that a settlement proposal which "merited serious consideration" was placed before HMRC's Anti-Avoidance Board in April 2015.

36. As HMRC have not, in my judgment, established that the Partnerships have acted unreasonably and met what the Upper Tribunal in *MORI* called the "the threshold condition" in rule 10(1)(b) of the Procedure Rules it must follow that their application cannot succeed and is therefore dismissed.

Appeal Rights

37. 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 BROOKS

5

TRIBUNAL JUDGE
RELEASE DATE: 06/10/2015