[2016] UKFTT 509 (TC)

TC05258

Appeal number: TC/2015/05047
TC/2015/05049

PROCEDURE – application to bar the Respondents from taking further part in the proceedings – rule 8(3)(b), rule 8(7) and rule 8(8) Tribunal Procedure First-Tier Tribunal (Tax Chamber) Rules 2009 – use of without prejudice material disclosed during ADR hearing – HMRC delay – application refused – application for hearing of one ground of appeal to be deferred – application refused – application for Appellant to be awarded costs of the application on the grounds of HMRC's unreasonable actions in conducting the proceedings – rule 10(1)(b) Tribunal Procedure Rules 2009 – application granted in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM BILLY RITCHIE **Appellant**

- and -

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

HAZEL RITCHIE **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Fox Court, London on 20 June 2016
Mr Keith Gordon, Counsel, instructed by Rodgers Weir & Co, accountants for the Appellant
Mr Brendan Hone, officer of HM Revenue and Customs, for the Respondents

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DECISION

1. These applications relate to two separate appeals made by each of Mr and Mrs Ritchie concerning capital gains tax in respect of a property which they jointly owned and which they disposed of in the tax year ended 5 April 2007. The Tribunal has ordered that both appeals should be heard together by the same Tribunal. These applications are therefore also being heard together.

2. The appellants have made two unconnected applications. At the hearing, the appellants made a further application for the Tribunal to order that HMRC should pay the appellants' costs relating to the hearing and the preparation for the hearing on the basis that HMRC has acted unreasonably in its conduct of the proceedings.

3. The first application relates to the use by HMRC in its statement of case of without prejudice material obtained as part of an unsuccessful alternative dispute resolution ("ADR") process carried out in 2015. The application is either for HMRC to be barred from taking further part in the proceedings on the basis that it has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly and that, as a result, the Tribunal should summarily determine all issues against the respondents (see Tribunal Procedure Rules 8(3)(b), 8(7) and 8(8)) or that the respondents be ordered to withdraw their statement of case and, within 28 days, issue one that does not reveal without prejudice material.

4. The second application relates to the last of four grounds of appeal. The application is for a direction that the determination of the fourth ground of appeal be deferred as a subsidiary issue, to be resolved following determination of the first three grounds of appeal.

Background

5. As a result of an enquiry into the appellants' partnership tax return relating to their fish and chip restaurant business for the tax year ended 5 April 2007, HMRC queried whether the gain arising on the disposal of their house in Moneymore, County Londonderry qualified for full exemption from capital gains tax as a result of principal private residence relief. The enquiries have been ongoing since 2010.

6. The appellants persuaded HMRC to enter into ADR discussions. These discussions took place in 2015 but ultimately were unsuccessful.

7. The appellants appealed to the Tribunal in August 2015.

8. In relation to principal private residence relief, there are two main areas of disagreement:

(1) whether a garage/outbuilding situated some 80 metres from the main house forms part of the "dwelling house";

(2) the extent of the "permitted area" and in particular whether, on the facts of the case, an area of more than 0.5 hectares should be allowed.

The application to bar HMRC from further participation in the proceedings

Evidence and facts

9. The Tribunal had before it the Tribunal's file, some selected documents and correspondence produced by each party and a witness statement made by Mr Clifford Rodgers. Mr Rodgers is an accountant based in Belfast. His firm has represented the appellants since November 2012.

10. Mr Rodgers was cross-examined by Mr Hone at the hearing.

11. Although Mr Hone had not provided a witness statement, his actions (as will be seen from the discussion below) were clearly relevant to the application and Mr Gordon had come prepared to cross-examine Mr Hone. I therefore allowed Mr Hone to give oral evidence.

12. I found both Mr Rodgers and Mr Hone to be honest and credible in the evidence they each gave.

13. Based on the evidence before the Tribunal, I find the following facts. As Mr Gordon made certain submissions relating to HMRC's conduct during the course of their enquiries and prior to the appellants' commencement of these proceedings, those findings include events taking place before the Tribunal's involvement.

14. Mr and Mrs Ritchie carried on a fish and chip restaurant business in Moneymore, County Londonderry in partnership until sometime during the tax year ended 5 April 2007 when they ceased to carry on the business as a result of Mrs Ritchie's continuing struggle with cancer.

15. On 25 May 2010, HMRC launched an enquiry into Mr and Mrs Ritchie's partnership tax return for the tax year ended 5 April 2007.

16. The original enquiry focused on the source of capital introduced into the partnership. When HMRC were told that the source of the capital was the proceeds of sale of Mr and Mrs Ritchie's house, HMRC started to raise questions as to whether the gain on the sale of the house was fully protected by principal private residence relief, as claimed by Mr and Mrs Ritchie.

17. At the request of Suzanne McIvor, the Inspector of Taxes dealing with the investigation, Mr Rodgers met with the District Valuer at the house in question on 14 March 2013. The District Valuer had not been made aware in advance of that meeting of Ms McIvor's views on the extent of the dwelling house in question (i.e. whether it included the garage/outbuilding) nor the "permitted area".

18. In around April 2013, Ms McIvor told Mr Rodgers that she accepted that the garage/outbuilding formed part of the dwellinghouse. However, shortly after this and

following discussions with the District Valuer, Ms McIvor changed her view on this point.

19. In May 2013 and as a result of this change of view, Mr Rodgers requested an independent review of the case. The HMRC official assigned to carry out the review retired after three months without having made any progress.

20. At the end of October 2013 (approximately five months after the request for the review), HMRC responded, confirming their view that the garage/outbuilding did not form part of the dwellinghouse.

21. As a result of this, Mr Rodgers requested a face-to-face meeting with Ms McIvor and the District Valuer which took place on 14 January 2014.

22. Mr Rodgers met with Mr and Mrs Ritchie the following day to discuss how to proceed.

23. At some point after this and following further communications with HMRC, Mr Rodgers advised Mr and Mrs Ritchie to appoint Counsel (Mr Gordon) which they did at the end of May 2014.

24. Mr Gordon advised Mr and Mrs Ritchie to request ADR which was done in July 2014.

25. The request for ADR was initially rejected by HMRC on the basis that the matter related to a disagreement by the taxpayer with HMRC's technical view. HMRC were however eventually persuaded to agree to the ADR process in February 2015 and an ADR meeting was held on 14 May 2015.

26. HMRC's technical specialist, Mr Mike Galvin, did not attend the ADR meeting. On the day of the meeting, Mr Galvin discussed matters with the HMRC representatives but refused to hold any direct discussions with Mr and Mrs Ritchie's advisers.

27. No agreement was reached at the ADR meeting. In order to try to progress matters, a number of follow-up actions were agreed including:

(1) Mr Gordon would put together a technical paper setting out the appellants' arguments for further consideration by Mr Galvin.

(2) Mr Gordon would prepare a draft of an agreed statement of facts.

28. Mr Galvin's response to the technical paper in July 2015 simply reiterated HMRC's previously stated position.

29. In relation to the agreed statement of facts, HMRC refused to agree any facts which could not be independently corroborated.

30. By August 2015, it was clear to Mr and Mrs Ritchie that the ADR process would not be successful and they therefore notified their appeals to the Tribunal.

31. The Tribunal did not notify HMRC of the appeal until 15 September 2015. On this date, the Tribunal directed HMRC to provide a statement of case within 60 days – i.e. by 14 November 2015.

32. On 12 November 2015, Mr Hone applied to the Tribunal for a 30 day extension of time for submitting HMRC's statement of case. He sent a copy of the application by post to Mr Rodgers. The Tribunal consented to the extension of time on 19 November 2015 subject to any objections received from Mr Rodgers. Mr Rodgers did not make any objection.

33. HMRC's statement of case was sent to the Tribunal on 10 December 2015. It is not clear when it was received by the Tribunal but it had been received by 16 December 2015. Mr Rodgers received an electronic copy of the statement of case on 14 December 2015.

34. On 22 December 2015, Mr Rodgers emailed Mr Hone raising five points:

(1) He requested a four week extension to all of the deadlines contained in the directions issued by the Tribunal on 16 December 2015 given the impending 31 January tax return deadline;

(2) He asked for agreement to putting the hearing window back as a result of the non-availability of Mr and Mrs Ritchie's Counsel in the first half of 2016. The Tribunal had proposed that the hearing window should be 14 March 2016 – 10 June 2016. Mr Rodgers suggested that this was changed to 1 May 2016 – 31 December 2016;

(3) He asked Mr Hone to agree that the determination of the permitted area should be deferred until after the Tribunal had decided the question as to whether the garage/outbuilding formed part of the dwellinghouse;

(4) He requested confirmation that HMRC accepted the appellants' figures for qualifying expenditure; and

(5) He pointed out that HMRC's statement of case contained information resulting from the ADR discussions and requested HMRC to provide a revised statement of case excluding all without prejudice material, failing which "the appropriate application" would be made to the Tribunal.

The email requested a full response by 15 January 2016.

35. Mr Hone agreed points 1 and 2 on 24 December 2015 and at the same time indicated that he would try to let Mr Rodgers have a full response to the other points by 15 January although he stressed that he could not guarantee this as a result of his workload.

36. Mr Rodgers chased Mr Hone for a response to the outstanding points on 16 January 2016. Having received no response, Mr Rodgers applied to the Tribunal on 2 February 2016 for a direction that HMRC be barred from further participation in the proceedings and that the appeals be summarily allowed or alternatively that HMRC be

ordered to withdraw the statement of case and, within 28 days, issue one that does not reveal without prejudice material.

37. Mr Rodgers wrote again to the Tribunal on 19 February 2016 as he had not received any response and chased again on 25 February 2016.

38. On 26 February 2016, Mr Hone confirmed to Mr Rodgers by email that he was taking advice internally in relation to the statement of case.

39. Mr Hone was not aware when he prepared the statement of case that the comments in question had been made as part of the ADR discussions. They had been included in a document sent to him by Ms McIvor. Ms McIvor would have known that the document in question related to the ADR process.

40. In early January, Mr Hone discussed what to do about the statement of case with his manager and it was agreed that the question should be referred to the Solicitors Office. Initial discussions with the Solicitors Office took place in the first week of February. Further submissions were made to the Solicitors Office in the first week of March.

41. On 3 March 2016, the appellants made the second application which is the subject of this hearing. At the same time as sending a copy of this to Mr Hone, Mr Rodgers made it clear that the appellants were open to resolving both this and the issue relating to the statement of case by agreement with HMRC, thus obviating the need for a hearing.

42. Mr Hone acknowledged this correspondence on 14 March and tried to call Mr Rodgers on 21 March. Mr Hone emailed Mr Rodgers on 23 March to say that he would try to call him again.

43. On 24 March 2016, Mr Hone and Mr Rodgers spoke. There was a discrepancy between Mr Rodgers' witness statement which indicates that he was told by Mr Hone that HMRC would not amend its statement of case and Mr Hone's own evidence that he informed Mr Rodgers that he could not amend the statement of case until he had received advice from the Solicitors Office. Mr Rodgers' oral evidence during cross-examination was that Mr Hone had told him that the offending comments would not be removed until Mr Hone had heard from the Solicitors Office. Mr Hone in his evidence was very clear as to what was said in that conversation. Mr Rodgers was more hesitant in his recollection. On the basis of the evidence before me, I prefer Mr Hone's formulation which is that he said that he could not amend the statement of case until he had received advice from the Solicitors Office.

44. There is no evidence that either party made any effort to resolve matters without recourse to the Tribunal after this date.

45. Following advice received from the Solicitors Office on 10 June 2016, Mr Hone wrote to the Tribunal on 13 June 2016 (with a copy to Mr Rodgers) advising it that HMRC were prepared to withdraw the original statement of case and replace it with a statement of case which removes any reference to comments made at the ADR

meeting. At the same time, Mr Hone filed a skeleton argument dealing with the second application. By the time this was sent to the Tribunal in the late afternoon of 13 June, Mr Hone had already received Mr Gordon's skeleton argument (dealing with both applications) which had been submitted during the morning of 13 June.

Debarring applications – the Tribunal rules and the law

46. Rule 8 of the Tribunal Rules provides for a number of situations in which the Tribunal is either obliged or has the power to strike out an appeal or to bar a respondent from taking further part in the proceedings. The present application is based on rule 8(3)(b) which provides as follows:

> "(3) The Tribunal may strike out the whole or part of the proceedings if –
>
> (a) …
>
> (b) The appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly or justly."

47. In the case of a respondent, this must be read in conjunction with rule 8(7) which reads as follows:

> "(7) This rule applies to a respondent as it applies to an appellant except that –
>
> (a) A reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings."

48. Rule 8(8) is also relevant to this application. This provides:

> "(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

49. There are therefore two requirements which must be satisfied before the Tribunal can bar HMRC from further participation in the proceedings:

(1) HMRC must have failed to co-operate with the Tribunal; and

(2) as a result of that failure to co-operate, the Tribunal cannot deal with the proceedings fairly and justly.

50. It will be apparent from the opening words of rule 8(3) that, even if these threshold conditions are met, the Tribunal has a discretion as to whether to debar HMRC from further participation in the proceedings.

51. The Tribunal has considered the application of rule 8(3)(b) in detail in two cases referred to by Mr Gordon in his submissions, *First Class Communications Ltd v HMRC* [2013] UKFTT 090 and *Nutro UK Ltd v HMRC* [2014] UKFTT 971.

52. Mr Gordon agreed with the explanation of the Tribunal in *First Class Communications* as to the circumstances in which rule 8(3)(b) might be applicable as follows [at 51 and 52]:

> "51 In my view, I agree with Counsel for HMRC that there are at least two situations where rule 8(3)(b) could apply.
>
> 52 Firstly, rule 8(3)(b) could apply where the appellant has already been so prejudiced by HMRC's conduct in a manner which cannot be remedied and that therefore the proceedings cannot be fair and just. In such a case HMRC should normally be barred from the proceedings. Secondly, I consider that rule 8(3)(b) could apply where there has been a course of conduct by HMRC which, while it has not yet meant it is not possible to deal with the appeal fairly and justly, nevertheless it is a pattern of conduct which, if it continues, will mean that the appeal cannot be dealt with fairly and justly. In such a case, I consider it might be appropriate to bar HMRC from proceedings."

53. Although the Tribunal in *First Class Communications* did not suggest that these are the only circumstances in which rule 8(3)(b) might be invoked, Mr Gordon did not suggest that any other circumstances were relevant in this particular case and framed his submissions based on the two situations identified by the Tribunal in *First Class Communications*.

54. In *Nutro UK*, the Tribunal drew attention to the draconian nature of striking out a party's case referring to comments made in two cases in the Court of Appeal.

55. In the first case, *Hytec Information Systems Ltd v Coventry City Council* [1997] WLR 1666, Ward LJ described the strike out power [at 1676] as:

> "An atomic weapon in judicial armoury"

56. In *Marcan Shipping (London) Ltd v Kefalas & Another* [2007] EWCA Civ 463, Moore-Bick LJ described a conditional order for striking out of a case as:

> "One of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified."

57. The Tribunal in *Nutro UK* went on to consider whether rule 8(3)(b) could only apply if a fair trial is no longer possible (or might become impossible). It concluded (again, based on two decisions of the Court of Appeal) [at 17] that:

> "The issue whether there can be a fair hearing is an important one, but not decisive. Regard may be had to the likely future conduct of the proceedings. The Tribunal should, in short, take

> account of all the circumstances, having regard to the overriding objective, including the need to ensure that case management directions, aimed at achieving the objective of dealing with cases fairly and justly, are observed."

58. One of the Court of Appeal cases referred to by the Tribunal in *Nutro UK* was *Biguzzi v Rank Leisure Plc* [1999] WLR 1926 which dealt with an application to strike out the claimant's statement of case on the ground of repeated procedural failures. Lord Woolf MR commented on the importance of adhering to time limits saying [at 1933]:

> "In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

59. This leads on to the question as to the relevance of the decision of the Court of Appeal in *BPP Holdings Ltd v HMRC* [2016] 1WLR 1915. The Tribunal in *Nutro UK* did not have the benefit of that decision but concluded [at 18] that:

> "I do not consider that, in the context of an application to strike out, much direct assistance can be derived from the line of cases dealing with relief from sanctions."

60. *BPP Holdings* itself related to an application to bar HMRC from further participation in the proceedings for failure to comply with an order which stated that such failure could lead to HMRC being barred from further participation. The decision was therefore dealing with rule 8(3)(a) rather than rule 8(3)(b). Although the previous authorities discussed in *BPP Holdings* relate to relief from sanctions, it is therefore apparent that the same principles apply to a strike out application or an application to bar a respondent from taking further part in proceedings, albeit that non-compliance is only one of the factors which the Tribunal must take into account in deciding whether to exercise its power to strike out/bar. The Tribunal's conclusion in *BPP Holdings* (with which the Court of Appeal approved) is set out [at 1925 D and E] in the Court of Appeal decision:

> "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 r 3.9 and accord them significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly."

61. Factors (a) and (b) in CPR r 3.9 are the need:

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

62. The Court of Appeal in *BPP Holdings* made it clear that, in applying the overriding objective of the Tribunal (to deal with cases fairly and justly), the approach to these factors should be a strict one. Ryder LJ put this in the strongest possible terms [at 37 and 38]:

> "37 There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the Tax Tribunals of the FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the Tax Tribunal Rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the Tribunals and while I might commend the Civil Procedure Rule Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the Tribunal rules likewise incorporate proportionality, cost and time limits. It should not need to be said that a Tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38 … the interests of justice are not just in terms of the effect on the parties of a particular case but also the impact of the non-compliance on the wider system including the time expended by the Tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

63. Taking all of this into account, the process I should follow can be summarised in this way:

(1) I must decide whether HMRC has failed to co-operate with the Tribunal.

(2) I must consider whether the result of the failure to co-operate is that the Tribunal cannot deal with the proceedings fairly and justly. This may be because the appellant has been prejudiced by HMRC's conduct in a way which cannot be remedied and which means that the proceedings cannot be dealt with fairly and justly or alternatively it may be that, whilst HMRC's failure to co-operate has not yet meant that it is not possible to deal with the appeal fairly and justly, it is part of a pattern of conduct which I think is likely to continue and which, if it does continue, will mean that the appeal cannot be dealt with fairly and justly or it may be for some other reason.

(3) If (and only if) I am of the view that both of these conditions are satisfied, I must consider whether HMRC should be barred from participating further in the proceedings.

(4) In coming to my conclusions on each of these matters I must take account of all of the relevant circumstances, having regard to the overriding objective of the Tribunal to deal with cases fairly and justly. This includes giving appropriate weight to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders of the Tribunal.

Should HMRC be barred from further participation in the proceedings

64. Mr Gordon's primary submission on behalf of the appellants was that HMRC's use of without prejudice material in its statement of case coupled with a six month delay in agreeing to remedy this has already prejudiced the appellants to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. In support of this, Mr Gordon drew attention to the following points.

(1) It took Mr Hone six weeks to refer the matter to the Solicitors Office and it then took the Solicitors Office a further four months to give its opinion.

(2) Mr Hone accepted that the use of without prejudice material in the statement of case is a serious matter and yet appears to have given it a low degree of priority, disregarding the impact of the delay on the appellants.

(3) Mr Rodgers gave HMRC plenty of opportunity to sort out the problem including the original e-mail of 22 December 2015, a reminder after a month and then a further week before the application was made to the Tribunal.

(4) Ms McIvor (who provided the offending material to Mr Hone) was present at the ADR hearing and therefore should have known better. At best, her conduct was seriously incompetent.

(5) Mr and Mrs Ritchie are an elderly couple and not in the best of health. The proceedings are a physical and mental drain to them and time is precious.

(6) If the case goes forward, Mr and Mrs Ritchie will need to give evidence as their evidence as to how the property was used, in particular between 1987-1995 will be vital to the outcome of the case. The substantive hearing may not now take place until 2017 and it cannot be certain that they will be well enough to give evidence.

(7) Delay in itself is a serious matter and, for the reasons mentioned above, causes significant prejudice to Mr and Mrs Ritchie.

(8) Mr and Mrs Ritchie are now in a situation where, ten months after notifying their appeal to the Tribunal, they still have no valid statement of case.

65. Although Mr Gordon did not press the point at the hearing, he also referred in his skeleton argument to the possibility that any Tribunal which hears the substantive appeal may, consciously or otherwise, be influenced by the offending comments and that, as a result, the Tribunal cannot deal with the proceedings fairly and justly.

66. Mr Gordon compared the facts of this case to the situation in *First Class Communications*. In that case, the Tribunal had ordered HMRC to disclose certain information to the appellant immediately upon a contempt order being lifted. The appellants had previously made an application to the Tribunal for an unless order requiring HMRC to make disclosure by a certain date but had not proceeded with this application. The contempt order was lifted on 12 June 2012. Contrary to the Tribunal's directions, HMRC did not disclose the relevant information to the appellant although in July 2012 it did issue a press release relating to matters connected with the contempt order. Following the press coverage generated by HMRC's press release, the appellant applied on 20 August 2012 for HMRC to be barred from the proceedings on the grounds of failure to comply with the Tribunal's order.

67. In *First Class Communications*, the Tribunal did not bar HMRC from further participation in the proceedings. It did however say [at 67] that:

> "On balance, I do not consider that the delay of four months, albeit caused by HMRC without any excuse being offered, is by itself sufficient to justify barring HMRC, which as I have said, would probably amount to allowing the appeal. I do not in any way wish to suggest that HMRC's conduct is condoned. HMRC's conduct is very serious indeed and on slightly different facts or longer delay might lead to a barring order."

68. Mr Gordon made the point that, in this case, the delay was longer than in *First Class Communications* (five or six months depending on how the delay is measured). He also submitted that there was, in this case, greater prejudice to Mr and Mrs Ritchie than to the appellant in *First Class Communications*. The appellant did not allege any specific prejudice as a result of the four month delay in that case.

69. Mr Hone's submissions on this aspect were relatively brief. He pointed out that barring HMRC from further participation in the proceedings was a draconian remedy. In his view, whilst there had been delay on the part of HMRC, there had been no unreasonable behaviour. In particular, the statement of case was drafted in good faith.

70. Mr Hone submitted that the steps that he took to deal with the issue were reasonable given his other commitments. In particular, it was reasonable to take legal advice although he accepted that it should not have taken so long for the advice to be given.

71. As far as the statement of case itself is concerned, Mr Hone's view was that Mr and Mrs Ritchie will get what they want if the Tribunal agrees with HMRC's proposal that it should withdraw the existing statement of case and issue a revised statement of case removing the offending material. Assuming this is done, there is nothing so prejudicial to Mr and Mrs Ritchie that they will not get a fair and just hearing.

72. Before explaining my decision in relation to the issues surrounding the use of material arising out of the ADR proceedings and the subsequent delay in dealing with

the issue, I should briefly touch on the reason why such material should not have been included.

73. Given that HMRC had, prior to the hearing, agreed to replace their statement of case, this point was not argued although it was addressed in Mr Gordon's skeleton argument as, when that was prepared, he had not been informed that HMRC were prepared to change the statement of case.

74. In litigation generally, it is accepted that ADR proceedings constitute, at the very least, some form of without prejudice discussions (see *Reed Executive Plc v Reed Business Information Ltd* [2004] 4 All ER 942).

75. It is equally clear that without prejudice material (subject to certain exceptions) cannot be allowed in evidence in any proceedings relating to the dispute in question (see in particular *Unilever Plc v the Proctor & Gamble Co* [2000] 1 WLR 2436).

76. The general rule therefore is that material arising from any ADR process cannot be used in relation to subsequent proceedings before the Tribunal.

77. It is important to mention a further point referred to by Robert Walker LJ in *Unilever* [at 2446B] that:

> "One party's advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions."

78. I now turn to consider whether, as a result of including without prejudice material in the statement of case and the delay in dealing with this, HMRC should be barred from further participation in the proceedings.

79. As mentioned above, the first question is whether HMRC has failed to co-operate with the Tribunal.

80. HMRC is not in breach of any orders or directions made by the Tribunal. Whilst it did not provide the statement of case within the original timescale contained in the directions issued on 15 September 2015, it applied for (and was granted) an extension of time and filed the statement of case within that time limit.

81. Mr Gordon submitted that HMRC's use of without prejudice material in the statement of case and its failure to engage with the appellant once this was pointed out itself amounted to a failure to co-operate with the Tribunal given the requirement in rule 2(4) of the Tribunal Rules for each of the parties to help the Tribunal to further the overriding objective and to co-operate with the Tribunal generally. Mr Hone did not specifically argue against this proposition.

82. In principle, I agree that providing a defective or inadequate statement of case can amount to a failure to co-operate with the Tribunal as it does nothing to help, and

indeed is likely to hinder, the Tribunal in furthering the overriding objective of dealing with a case fairly and justly.

83. Similarly, a significant delay by one party in dealing with matters raised by the other, in particular where the matter is one which, as in this case, is serious, is also capable of constituting a failure to co-operate with the Tribunal given the requirement for each of the parties to help the Tribunal to further the overriding objective and the fact that dealing with a case fairly and justly specifically includes (in rule 2(2)(e)) avoiding delay, so far as compatible with proper consideration of the issues.

84. The next question I must deal with is whether HMRC's failure to co-operate with the Tribunal is so serious that the Tribunal cannot deal with the proceedings fairly and justly

85. Although, as I have mentioned, there is some suggestion in Mr Gordon's skeleton that the mere fact that without prejudice material was included in the statement of case could affect the Tribunal's assessment of the case at the substantive hearing, Mr Gordon did not seek to argue that there cannot be a fair hearing. There are of course many situations in which a judge will become aware of evidence which is not admissible for one reason or another and I would expect that a Tribunal in this case would be perfectly capable of making a fair decision even if it became aware of the offending comments.

86. However, as I have made clear, the question as to whether or not there can be a fair hearing is not the question I have to answer. The question is whether the Tribunal can deal with the proceedings justly and fairly and requires me to take into account all of the relevant circumstances.

87. There clearly is a certain amount of prejudice in this case to Mr and Mrs Ritchie as a result of HMRC's mistake in including the relevant material in the statement of case and the fact that it has taken HMRC so long to agree to replace the statement of case with one which does not include any references to the without prejudice material. This includes a delay of approximately six months which could possibly affect their ability to give evidence at the delayed hearing as well as the additional costs involved as a result of the delay and of having to make this application.

88. I do however bear in mind that no detailed evidence was provided to the Tribunal about Mr and Mrs Ritchie's state of health and, in particular, Mrs Ritchie's struggle with cancer. Mr Rodgers did not elaborate on this in his evidence. A delay of six months in giving evidence of events which started almost 30 years ago (in 1987) is not in my view seriously prejudicial in the absence of clear evidence that Mr and Mrs Ritchie are significantly less likely to be able to give that evidence in six months' time.

89. It should not be forgotten that Mr Rodgers himself requested in his e-mail of 22 December 2015 that the hearing window he put back from 14 March 2016 – 6 June 2016 to 1 May 2016 – 31 December 2016 which indicates that he was not all that concerned about waiting up to a further six months for a hearing date.

90. Although I have taken the possible impact of the delay on Mr and Mrs Ritchie's ability to give evidence into account, I have not therefore placed significant weight on this aspect.

91. I also take into account the fact that (as I have found), HMRC did not deliberately use without prejudice material in its statement of case. Had it done so, it would be much more likely that the Tribunal might feel that it could not deal with the proceedings fairly and justly. The Tribunal, for example in *Nutro* observed [at 53] that:

> "Absent any finding that Mr Sethi had been deliberately withholding material evidence, it does not seem to me that the production of these materials, albeit late, should, either alone or in combination with other procedural defaults, lead to a striking out of the appeal on this basis."

92. I am conscious that if I were to bar HMRC from taking further part in the proceedings, that is likely in substance to amount to allowing the appeal given that, as confirmed in *Michael Burgess & Brimheath Developments Limited v HMRC* [2015] UKUT 578, HMRC has the burden of proving that all of the conditions for the issue of the discovery assessments which are being appealed against have been satisfied.

93. On the other hand, HMRC were clearly at fault in allowing information obtained as part of the ADR procedure to find its way to Mr Hone. If it does not already have them, HMRC need to put in place procedures to ensure that follow up correspondence from an ADR meeting and which still forms part of the ADR process is kept separate and is not included in the case file which is then passed to the litigation team. Ms McIvor in this case should have checked that no ADR information was included in the file passed to Mr Hone.

94. HMRC was also at fault in taking as long as it did to agree to remedy the situation. In the light of the Court of Appeal's comments in *BPP Holdings*, this would have been much more serious had it constituted a breach of an order or directions made by the Tribunal. Whilst I have accepted that the delay in dealing with the legitimate concerns raised by Mr Rodgers on behalf of the appellants does amount to a failure to co-operate with the Tribunal (and therefore a breach of the Tribunal Rules), I do give this factor less weight than would be the case if the delay was a delay in complying with an order of the Tribunal.

95. In each of *First Class Communications*, *Nutro UK* and *BPP Holdings*, the party which was struck out/barred from further participation was in breach of an order of the Tribunal and, in one form or another, had noticed that there may be a strike out/barring if it failed to comply.

96. When Mr Rodgers wrote to Mr Hone on 22 December 2015, the request was that HMRC should revise its statement of case to exclude the without prejudice material. Otherwise, Mr Rodgers said he would be obliged to make "the appropriate application" to the Tribunal. As it turned out, the application to the Tribunal on 2 February was not just to ask the Tribunal to direct HMRC to replace its statement of

case but was to bar HMRC from further participation and, as a result, to summarily allow the appeals or alternatively to order HMRC to replace its statement of case.

97. Whilst HMRC's failure to agree to replace its statement of case for a further four months after this application had been made is surprising, in my view it carries less weight given that the application to bar HMRC from taking further part in the proceedings was made without any reliance on that additional delay. Had Mr Rodgers informed HMRC that he intended to make an application for HMRC to be barred from taking any further part in the proceedings if it failed to revise its statement of case within a certain time, this might have been an additional factor which would weigh in favour of granting the application although I think it is unlikely in these circumstances that it would have tipped the balance.

98. Taking into account all of these factors, my conclusion therefore is that the inadvertent use of the without prejudice material in HMRC's statement of case and the subsequent delay in agreeing to remedy the situation does not amount to a failure to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly and that HMRC should not therefore be barred from further participation in the proceedings on this basis.

99. Mr Gordon did however put forward a secondary submission which is that this was all part of a pattern of conduct on the part of HMRC which, if it continues, will mean that the Tribunal will not be able to deal with the proceedings fairly and justly.

100. It was in this context that Mr Gordon referred to the conduct of HMRC's enquiry prior to the proceedings being commenced. He referred in particular to the following:

(1) HMRC had no reason to suspect that main residence relief was not due. The questions they asked were simply a fishing expedition.

(2) HMRC's own manual (CG64236) is clear that it is necessary to identify exactly what is comprised in the "dwelling house" before trying to determine the "permitted area". Yet, at the meeting which took place with the District Valuer in March 2013, it was clear that the District Valuer had not been given any instructions as to the extent of the dwelling house.

(3) In April 2013, Ms McIvor agreed that the garage/outbuilding did form part of the dwelling house but then withdrew this agreement.

(4) The subsequent request for a review of the case was sent to someone who was about to retire and who did not deal with the review causing a five month delay.

(5) HMRC originally blocked the request for ADR on the basis that the case involved a departure from HMRC's technical view, even though the outcome depended to a large extent on the facts as well as the law.

(6) Mr Galvin (who is effectively controlling the case for HMRC) declined to attend the ADR meeting and showed a lack of engagement.

(7) Mr Galvin did not deal properly with the appellants' technical arguments after the ADR meeting.

(8) Ms McIvor did not engage in any meaningful way in agreeing a statement of facts.

(9) As a result of this, the ADR process was a waste of time and money.

(10) HMRC delayed producing its statement of case. It only applied for an extension of time two days before the time limit for delivering the statement of case and it is clear that if the Tribunal had refused the application, HMRC would not have been able to file the statement of case on time. The application was therefore effectively granted simply as a result of it being made so late.

(11) HMRC made no effort to ask Mr Rodgers to agree to an extension of time for filing a statement of case before making the application to the Tribunal.

(12) HMRC did not respond to Mr Rodgers' request in his email of 22 December 2015 to defer the determination of the permitted area until it delivered its skeleton argument for this hearing.

(13) HMRC's approach to the second application (to defer the determination of the permitted area) is unfair and designed to put pressure on the appellants by making them incur further costs as there is no point getting expert evidence on the extent of the permitted area until the extent of the dwelling house has been determined.

101. All of this shows, in Mr Gordon's submission, that the inclusion of the without prejudice material in HMRC's statement of case is not a one-off error but that HMRC have acted consistently at every opportunity to prejudice the appellants and continue to do so now.

102. Unlike in *First Class Communications*, there is no suggestion of any change of personnel at HMRC which might lead the Tribunal to conclude that this pattern of conduct will not continue.

103. Mr Hone on the other hand submitted that this is not a case where there has been a series of inexcusable failures. In particular, there has been no failure to comply with any Tribunal directions or time limits (as was the case, for example, in *First Class Communications*).

104. Mr Hone did not consider the ADR process to have been a waste of time. Although, it was ultimately unsuccessful, it might have been helpful.

105. As far as Mr Galvin's involvement was concerned, Mr Hone explained that Mr Galvin was a technical specialist and there was no need for him to be at the ADR meeting as HMRC's technical position had been clearly stated.

106. There is a question in my mind as to the extent to which I can take account of HMRC's conduct prior to the commencement of the proceedings. Clearly, until proceedings have been commenced, there cannot be a failure to co-operate with the Tribunal. Having said that, I do accept that HMRC's conduct prior to an appeal being

notified to the Tribunal could be indicative of HMRC's future conduct in relation to those proceedings.

107. However, in this case, I am not persuaded that, as matters currently stand, HMRC's conduct gives rise to any material risk that the Tribunal will not be able to deal with the proceedings justly and fairly.

108. Prior to the commencement of these proceedings, there appear to be delays on both sides in relation to HMRC's enquiries.

109. HMRC's enquiries themselves are perfectly legitimate and it is clear that the application of principal private residence relief is not straightforward in this case.

110. Despite HMRC's guidance in its manual, it seems to me to be perfectly appropriate for Ms McIvor to expect the District Valuer to have opinions both on the extent of the dwelling house itself as well as the extent of the permitted area.

111. I have little sympathy with the arguments relating to the ADR process given that the appellants were the ones who wanted to engage in ADR despite the fact that they knew that HMRC had a different view of the law to their own. Whilst the ADR process might have been helpful in narrowing down the issues or agreeing some of the facts, it is not surprising that HMRC continue to put forward a consistent view (and I am not expressing any view as to whether HMRC's position is right or wrong) as to their understanding of the law.

112. Mr Hone should have realised sooner than he did that he would be unable to produce the statement of case within the original time limit specified by the Tribunal. He should have informed Mr Rodgers of his intention to apply for an extension of time and asked him whether he had any objections. The likelihood is that Mr Rodgers would not have objected as indeed he made no objection when Mr Hone made the application direct to the Tribunal and the Tribunal offered Mr Rodgers the opportunity to object. However, the extension was relatively short and the revised timetable was complied with.

113. As far as the defective statement of case is concerned, Mr Hone himself dealt with this reasonably promptly. Given the Christmas break, the fact that he had to verify whether the comments did in fact emerge from the ADR discussions and the fact that this is not a point which Mr Hone would have had to deal with before and therefore required him to consult with colleagues and his manager, it is not at all that surprising that no reference was made to the Solicitors Office until the beginning of February.

114. Having said this, the delay of four months in the Solicitors Office providing a response is inexcusable. Mr Hone should have made sure that he received a response long before this, particularly in the light of the fact that an application had been made to the Tribunal and that HMRC had been invited by Mr Rodgers to resolve the position without the need for a hearing.

115. In my view, however, this is not part of a "pattern of conduct" on the part of HMRC generally or Mr Hone specifically. There is no evidence of any attempt to prejudice the Applicants at every turn as suggested by Mr Gordon.

116. In any event, looking forward to the likely future conduct of these appeals, there is no reason to suspect that there will be significant further delays on the part of HMRC. I am issuing updated directions agreed by all parties (see further below) which will no doubt be adhered to.

117. Clearly, if HMRC were to cause significant further delay by breaching the Tribunal's directions in relation to the progress of the appeals or by requesting extensions of time at a late stage and without good reason, this might give grounds for the appellants to make a further application to bar HMRC from further participation.

118. I have therefore decided that HMRC should not be barred from future participation in the proceedings. Although there has been a lack of co-operation with the Tribunal (in hindering the Tribunal and furthering the overriding objective), this has not been (and in my view is unlikely to be) to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

119. This means that I therefore need to go on to consider Mr Rodgers' second application.

Should the determination of the "permitted area" be deferred

120. As mentioned at the start of this decision, there are two main areas of disagreement between Mr and Mrs Ritchie and HMRC. The first is whether the garage/outbuilding should form part of the "dwelling house" for the purposes of main residence relief. The second question is the size of the "permitted area" which also qualifies for relief.

121. The permitted area depends on the "size and character" of the dwelling house (s 222(3) Taxation of Chargeable Gains Act 1992).

122. Both parties accept that the extent of the permitted area is a matter on which it is appropriate to have expert evidence.

123. Mr Gordon however submits that the question as to the extent of the dwelling house itself is simply a question of applying the law to the facts and is not a matter on which expert evidence is required.

124. Mr Hone on the other hand anticipates that the District Valuer will give expert evidence not only on the issue of permitted area but also what constitutes the dwelling house.

125. Mr Gordon argued that Mr and Mrs Ritchie would have to incur the costs of instructing an expert and for the expert to give evidence at the hearing if the question of the permitted area is not deferred. If this aspect is deferred, it may not be necessary to have any expert evidence at all. This is on the basis that, if the Tribunal decides

that the garage/outbuilding does form part of the dwelling house, HMRC may well accept that the whole of the property qualifies for relief. On the other hand, if the Tribunal decides that the garage/outbuilding does not form part of the dwelling house, it may be that Mr and Mrs Ritchie would decide to accept HMRC's calculations as to the permitted area (although it was specifically stated that this is not something which would be conceded in advance).

126. Again, I have to decide this application taking into account all of the circumstances in the light of the overriding objective. This includes not only the costs of the parties but also the impact on the Tribunal and its resources.

127. In my view, it would be highly undesirable to take the risk that there may need to be a further hearing in relation to the permitted area. This would give rise to significant additional costs both for the parties and for the Tribunal. When this is weighed against the possible incremental cost of having to instruct an expert to provide evidence as to the permitted area, this does not seem to me to be a risk worth taking. It will be much more efficient for this aspect to be dealt with at the same hearing as the remaining issues and I have therefore refused the application.

Costs

128. Part of Mr Rodgers' application of 2 February was that:

> "The appellants be invited to make an application for costs under rule 10(1)(a) and/or 10(1)(b)."

129. Rule 10(1)(a) relates to wasted costs and rule 10(1)(b) applies where a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

130. Mr Gordon did not suggest that, in the present circumstances, there was any material difference between rules 10(1)(a) and 10(1)(b). I have therefore treated this as an application under rule 10(1)(b) on the basis that HMRC has acted unreasonably in its conduct of the proceedings.

131. At the hearing, I invited both parties to make further submissions as to whether I should make an award of costs in favour of the appellants and both have done so. This decision takes into account those submissions.

132. The Upper Tribunal provided some guidance on how the question as to whether a party has acted unreasonably should be approached in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 0012 [at 49]:

> "49 It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to Tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the Tribunal to consider

> what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the Tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT rules."

133. It should also be remembered that, even where a party has acted unreasonably, the Tribunal has a discretion whether or not to make a costs order or indeed, whether only a proportion of the costs should be awarded.

134. In the context of what costs (if any) should be awarded, Mr Rodgers in his written submissions on behalf of Mr and Mrs Ritchie, argued that they should be awarded their costs relating to the hearing itself (i.e. the costs incurred after HMRC indicated on 13 June 2016 that they would be willing to replace the statement of case) irrespective of the question as to whether these costs were directly attributable to HMRC's unreasonable conduct. In support of this, he referred to a special educational needs case in the Upper Tribunal, *HJ v London Borough of Brent* (SEN) [2011] UKUT 191(AAC) and in particular drew attention to the Tribunal's comment [at 13] that:

> "The decision in the Court of Appeal in *Kovacs v Queen Mary & Westfield College* [2002] ICR 919 is also relevant. The court decided that … an award should cover as a minimum the costs attributable to the unreasonable behaviour."

135. That case was dealing with an award of costs under rule 10(1)(b) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education & Social Care Chamber) Rules 2008 which is identical terms to the equivalent rule in the Tax Chamber.

136. However, on reviewing the decision in *Kovacs*, it does appear that Mr Rodgers may be reading too much into this. *Kovacs* was principally a decision as to whether a person's ability to pay is a relevant factor in deciding what award of costs to make (it is not a relevant factor). Chadwick LJ made some additional comments [at 930 G and H] about a particular costs rule which was relevant in that case under which the Tribunal had power to order costs to be paid up to a specified amount without being taxed:

> "The point does not fall for decision on this appeal and I express no considered view on it, but I should not be taken to accept that in a case where the Tribunal has decided under sub-rule (1) to make an order for costs, it can use the power under sub-rule (3)(a) to award an amount which is less than a proper compensation for the costs incurred by the receiving party by reason of the culpable conduct which had led to the decision under sub-rule (1)."

137. This comment is clearly obiter and in any event, it does not appear that Chadwick LJ was intending to imply that a tribunal might award a party more than the costs attributable to what he described as the culpable conduct (in this case

unreasonable behaviour). Instead, he was simply saying that the limit contained in the relevant rules on the amount of costs which could be awarded without those costs being taxed should not be used as a reason for awarding less than the amount of the costs incurred by reason of the culpable conduct.

138. I also note that in *HJ*, the judge referred to another Court of Appeal case, *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398. In that case, Mummery LJ said [at 41]:

> "It is … impermissible for a Tribunal to order costs without confining them to the costs attributable to the unreasonable conduct."

139. As a matter of principle, this seems to me to be right. The Tribunal does not have a general discretion to award costs. It can only do so in certain limited circumstances. In this case, the circumstance in question is that one of the parties has acted unreasonably in bringing, defending or conducting the proceedings. There must therefore, in my view, be some link between the unreasonable behaviour and the costs incurred.

140. HMRC's written submissions amount principally to a summary of the reasons why I have refused the two applications made by the appellants and in particular why I came to the conclusion that, although HMRC had failed to co-operate with the Tribunal, this lack of co-operation was not to such an extent that the Tribunal cannot deal with the proceedings fairly or justly. This is of course a very different question than an enquiry as to whether HMRC has acted unreasonably in conducting the proceedings. Mr Rodgers makes this point very clearly in his own submissions.

141. I therefore turn to consider whether HMRC's conduct in these proceedings has been unreasonable.

142. In this case, the conduct complained of is that:

(1) HMRC used without prejudice material in its statement of case;

(2) it did not take seriously the fact that it had included without prejudice material in its statement of case;

(3) it did not appear to give any priority to resolving the issue; and

(4) it only agreed a week before the hearing (some six months after the issue was first raised) that it would revise its statement of case.

143. As far as the second application (relating to the possible deferral of the consideration of the "permitted area") is concerned, this issue was also raised on 22 December 2015. HMRC did not respond at all to this point despite several reminders and despite the application itself on 3 March 2016. The point was only addressed when HMRC filed its skeleton argument for this hearing on 13 June 2016.

144. The question is what a reasonable person in Mr Hone's position would have done. Looking first at the issues relating to the statement of case, a reasonable person

would, at the very least, have indicated to Mr Rodgers before the application was made to the Tribunal on 2 February 2016 when he might expect a response to the point which had been raised. Faced with an application to the Tribunal, a reasonable person would also have ensured that he received advice from his solicitor promptly in order to decide whether to resist the application. It is clear that, in this case, the advice was that the statement of case should be replaced, as requested by the appellants. Had Mr Hone taken these actions, both the application and the hearing would very likely have been unnecessary.

145. Similarly, a reasonable person would not have simply ignored the request to defer the determination of the permitted area throughout the whole of January and February 2016 and continue to ignore it, even after the application which was made on 3 March 2016 and which was received with a covering email encouraging HMRC to resolve the matter without the need for a hearing.

146. On this point, HMRC may well have refused to agree to the request (as it now does) and a hearing may still have been necessary if the appellants did not accept HMRC's position.

147. I do take into account the fact that HMRC did agree to revise its statement of case in advance of the hearing. Mr Hone in his submissions made the point that, as a result of this, the hearing dealing with this aspect of the applications could have been avoided. However, the appellants decided to press ahead with their application to bar HMRC from further participation in the proceedings in any event. Not surprisingly, this comprised the vast majority of the hearing. Whilst I have already said that the hearing may well have been unnecessary (or at least the part of it that relates to barring HMRC from further participation) had HMRC dealt with the issue relating to the statement of case sooner, it is equally true that the appellants could have decided not to proceed with this part of their application once HMRC had agreed to revise its statement of case.

148. Mr Rodgers argues that it was still necessary for the appellants to go ahead with the application to bar HMRC from further participation as Mr Hone had not indicated any timescale for providing the revised statement of case. However, an application could instead have been made for the Tribunal to make a direction that the statement of case should be provided within a specific timescale. This would have significantly reduced the time needed to prepare for the hearing and the length of the hearing itself.

149. In the circumstances, I award the appellants all of their costs relating to these applications from and including the preparation of the application dated 2 February 2016 up to and including the preparation of their skeleton argument lodged on 13 June 2016. I also award the appellants 50% of their costs relating to these applications incurred after this up to and including the hearing itself on 20 June 2016 (but not any costs incurred after that date).

150. The costs are awarded on the standard basis. I was not provided with a schedule of costs. In default of agreement between the parties of the amount of costs awarded, I direct that the costs be determined by a Costs Judge.

Directions

151. As a result of the decisions made in respect of the two applications made by the appellant, I have made further directions which are attached as an appendix to this decision.

152. It will be noted that the direction for HMRC to provide a revised statement of case excluding any of the offending material is on the basis that HMRC may be barred from further participation in the proceedings if it fails to comply with that direction.

153. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 20 JULY 2016

APPENDIX

Appeal number: TC/2015/05047
TC/2015/05049

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM BILLY RITCHIE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**
HAZEL RITCHIE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

DIRECTIONS

The Tribunal DIRECTS that:

1. Statement of case: Not later than 5:00pm on 4 July 2016 the Respondents shall provide a revised statement of case to the Appellants and the Tribunal. The revised statement of case shall not contain any reference to comments made on a without prejudice basis as part of the ADR process between the Appellants and the Respondents.

Failure by the Respondents to comply with this Direction may lead to the Respondents being barred from taking further part in these proceedings.

2. List of documents: Not later than 18 July 2016 each party shall send or deliver to the other party and the Tribunal a list (or amended list) of documents in its possession or control on which that party intends to rely in connection with the appeal and provide to the other party copies of any documents on that list which have not already been provided to the other party.

3. Expert witnesses: Each party be permitted (but not required) to instruct an expert witness to give evidence as to the extent of the "permitted area" for the purposes of s 222 Taxation of Chargeable Gains Act 1992 in relation to the property in question in these proceedings.

4. Witness statements: Not later than 26 August 2016 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be ("witness statements") and shall notify the Tribunal that they have done so.

5. Listing information: Not later than 9 September 2016 each of the parties shall send or deliver to the Tribunal and each other a statement detailing:

a. the expected number of persons attending the hearing for each party, to assist the Tribunal in identifying an appropriate venue;
b. the names of all the witnesses who will give evidence on behalf of the party in question;
c. the anticipated duration of the hearing; and
d. dates to avoid for a hearing for the period from 1 December 2016 and ending 30 June 2017.

154.

155. Shortly after 9 September 2016 the Tribunal will fix the date of the hearing **even if you did not provide your dates to avoid.** A request for postponement on the grounds that the date of the hearing is inconvenient is unlikely to succeed if you did not provide your dates to avoid.

6. Bundles for hearing: Not later than 30 September 2016 the Respondents shall provide to the Appellants a paginated and bound bundle ("the bundle") of documents to include:

a. All documents on the Lists of Documents referred to above;
b. any returns relating to the matters under appeal;
c. any notices, assessments or amendments under appeal;
d. any notices or letters of appeal under consideration;
e. copies of the correspondence relating to the matter under appeal; and
f. the witness statements provided as directed above.

The Respondents shall ensure that the copy of the witnesses' statements in the documents bundle shall, where there is a reference to an exhibit in the text, have added in its margin a cross reference to the exhibit by its place in the documents bundle.

7. Outline of case:

a. Not later than 21 days before the hearing, the Appellants shall send or deliver to the Respondents an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which they intend to refer at the hearing.

b. Not later than 14 days before the hearing, the Respondents shall send or deliver to the Appellants an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law to which they intend to refer at the hearing.

c. At the same time as providing their skeleton arguments, each party will file with the Tribunal an electronic copy of their skeleton arguments together with electronic copies of the witness statements on which they rely.

8. Authorities bundle: Not later than 14 days before the hearing the Respondents shall send or deliver to the Appellants and to the Tribunal one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments).

9. Delivery of bundles to Tribunal: The Respondents shall deposit with the Tribunal two copies of the bound bundle referred to in Direction 6 above not later than 5:00pm on the 14th day before the date of hearing.

10. Witness attendance at hearing: At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

11. Right to request new directions: Any party may apply at any time for these Directions to be amended, suspended or set aside or for further directions.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 22 JUNE 2016

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