[2016] UKFTT 713 (TC)

TC05442

Appeal number: LON/2007/1551

PROCEDURE – application to strike out – rule 8(3)(b), Tribunal Procedure Rules – whether the appellant had failed to co-operate with the tribunal to such an extent that the tribunal cannot deal with the proceedings fairly and justly– application refused but "Fairford direction" made - various applications by the Appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

ATEC ASSOCIATES LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, London on 26 February and 9 March 2015

Renée Kalia for the Appellant

Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This decision relates to an application by the Respondents in this appeal ("HMRC") to strike out the appeal under Rule 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the basis that the appellant, Atec Associates Limited ("Atec"), has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. In addition, this decision also deals with seven applications made by Atec, which I will set out in more detail later in this decision.

2. At a hearing on 9 March 2015, I gave an oral decision to refuse the application to strike out this appeal. Instead, I directed *inter alia*:

> "The Respondents' witnesses listed in Schedule A to the Respondents' application for the hearing dated 30 January 2015 will not be required to attend the hearing either to give evidence-in-chief or for cross-examination and the Tribunal will accept the evidence contained in their witness statements."

3. I now set out my reasons for my decision and directions. I also refused all but one of Atec's applications, giving brief reasons, which I now record.

Background

4. This appeal concerns what is commonly known as alleged MTIC trading. The appeal relates to the denial by HMRC of Atec's claims for repayment of input tax for periods 04/06, 05/06, 06/06 and 07/06. In total, HMRC have denied claims for repayment of input tax in excess of £7 million. The appeal was originally consolidated with an appeal by an associated company, Wireless 5 Ltd, and an appeal by Atec in relation to periods in 2010 but those appeals have now been withdrawn.

5. The hearing of this appeal was originally set down for a period of six weeks commencing 9 March 2015. As will be apparent from the hearing dates in respect of the applications before me, the hearing of the substantive appeal was necessarily be delayed by these applications and the events leading up to them.

6. Although at various times in the past Atec has been legally represented, it is now a self-representing appellant. In the three hearings before me, to which I will refer in more detail below, Atec was represented by Ms Kalia, the sister of Atec's director and main shareholder.

7. This appeal has the distinction of already having been struck out (and then reinstated) twice.

8. The appeal was first struck out by Sir Stephen Oliver QC ([2009] UKFTT 178 (TC)) but was then reinstated by Briggs J (as he then was) sitting as a judge of the Upper Tribunal ([2010] UKUT 176 (TCC)). A full description of the background can

be found in those judgments. Sir Stephen Oliver QC struck out the appeal on 10 November 2008 on the basis that Atec:

(1) had served its list of documents 12 months late;

(2) had failed to serve any witness statements in breach of agreed directions;

(3) had not complied with the directions of the Tribunal over a long period of time and had failed to attend hearings;

(4) had been guilty of inordinate and inexcusable delay.

9. Briggs J reinstated the appeal noting that Atec's appeal had been handled (or, more appropriately, allegedly mis-handled) by a Mr Paul Ross, Atec's accountant and one-time company secretary. Mr Ross appears, so it was said, to have been responsible for the many procedural defaults by Atec and that the directors of Atec were unaware of the extent of Mr Ross' mis-handling of the appeal (although Briggs J criticised the directors for not keeping a closer eye on Mr Ross' conduct of the appeal). Briggs J described Atec's conduct of the appeal as "lamentable". After weighing up the relevant factors, Briggs J, in a decision delivered on 27 May 2010, concluded "on a narrow balance" that fairness and justice and the overriding objective required that the appeal should be reinstated.

10. In reinstating Atec's appeal, Briggs J ordered Atec to pay HMRC's wasted costs on an indemnity basis. However, these costs had still not been paid by 30 September 2011.

11. Accordingly, following an application by HMRC for the payment of its costs, Judge Cornwell-Kelly made an "unless" order for the payment of those costs on 30 September 2011 noting that Atec's "conduct of matters in the past is poor and it is important that there should be no return to the unjustified delay which has already been seen and which makes it increasingly difficult to do justice in the matter."

12. Atec failed to comply with agreed directions approved by Judge Poole on 14 May 2013 – the failure related to the agreement for the service of evidence by 10 August 2013.

13. Judge Sinfield then issued an "unless" order against Atec and Atec then served witness statements on 6 and 19 September 2013, but failed to serve the exhibits to those witness statements within the required time. Atec also failed to comply with other directions and accordingly, for the second time, Atec's appeal was struck out on 20 September 2013.

14. Atec applied for reinstatement of its appeal and the matter came before Judge Mosedale. Judge Mosedale reinstated the appeal on 28 March 2014 stating:

> "HMRC also contend, and I find, that the appellants have a history of non-compliance, have often failed to act reasonably promptly in progressing proceedings and [this] appeal… has already been struck out….While I agree that I should take this into account when considering whether to reinstate, I also take into account that (a) the

> appeal is very complex and the appellant's are unrepresented and it was reasonable to seek legal advice before complying with directions 7 & 8, (b) the new directions were issued following the hearing on eight January which applied in substitution (and without prejudice to the application for reinstatement) and required the appellant by 3 March 2014 to state which witnesses' evidence was in dispute and comply with direction 8. I note that the appellant complied immediately before the deadline. There is reason to think the appellants have learnt to understand the importance of compliance with directions; and (c) the appellants have generally complied with the new directions….
>
> The appellants should be on notice that the Tribunal does require compliance with the directions on the due date and in view of the appellant's history in this matter extensions of time are unlikely to be granted without very good reason. Any failures to comply are likely to be followed by the issue of further Unless orders."

15. I should point out that there was some confusion, which was experienced by both parties, in relation to the timing by which compliance with parts of Judge Sinfield's "unless" order was required, as pointed out by Judge Mosedale in paragraph 4 of her directions. This factor, and that fact that in relation to another deadline Atec had applied for an extension of time rather than merely ignoring the deadline, understandably influenced Judge Mosedale's decision to reinstate the appeal.

16. On 8 January 2014, Judge Mosedale had issued directions requiring Atec to notify both HMRC and the Tribunal of both (i) which witnesses were required for cross-examination and (ii) which of the four issues common to MTIC appeals were not accepted by Atec. In summary, the four issues (which were set out in earlier directions) were:

(1) whether the evidence for each of the alleged defaulting traders revealed a tax loss;

(2) whether the evidence for each tax loss showed that it was attributable to fraud;

(3) whether the evidence established that Atec's transactions were connected to such fraudulent tax losses, and

(4) whether the evidence for each of Atec's transactions showed that they formed part of an orchestrated overall scheme to defraud HMRC.

17. Atec complied with these Directions by a letter dated 3 March 2014 and, as regards the four issues, indicated that all these matters were contested.

18. HMRC wrote to Atec on 28 November 2014 regarding the decision of the Upper Tribunal in *Fairford Group plc & v HMRC* [2014] UKUT 329 (TCC) (23 July 2014). In that case the Upper Tribunal (Simon J and Judge Bishopp) gave the following guidance and [47 – 50]:

> "[47] A typical example of the form of directions used by the FTT in this type of case [an MTIC appeal] is as follows:

'The Appellant shall notify the Respondents and the Tribunal of the issues in dispute in this appeal by no later than [DATE] and in particular shall confirm whether it disputes:

- Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellant's purchases on which HMRC have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;

- Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud;

- Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain;

- Whether, in respect of chains where the alleged connection to an alleged default is via an alleged contra-trader, the Appellant accepts its transactions were connected to fraudulent tax loss.'

[48] In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is No. An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

[49] In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at [47], above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under r 15(1) of the FTT Rules (see also r 5(3)(f)), and that cross-examination of that witness will not be permitted.

[50] In our view this is both a practical and legitimate procedure for dealing with this type of issue."

19. Accordingly, in their letter of 28 November 2014, HMRC referred to the above paragraphs in *Fairford* (enclosing a copy of the decision) and stated:

> "Having regard to these paragraphs, it is apparent that unless the Appellants in this case advance a positive case, which they have not, they are required to indicate why they deny the evidence that the Respondents' witnesses give.
>
> In the event that the Appellant does not do this, we may seek a direction that the Appellants may not be permitted to cross-examine the Officers who give the evidence that relate to the three (3) issues stated at [47] of the *Fairford* decision.
>
> We understand that you have attempted to comply with the directions of Judge Mosedale, however, in the light of the decision of the Upper Tribunal in *Fairford* it is apparent that all Appellants in MTIC cases must do more than merely state that they do not accept the evidence that the Respondents' witnesses give which at present [sic] what the Appellants in this case have done.
>
> Please advise within 21 days as to why the Appellants do not accept the evidence that the Respondents' witnesses give (as set out in your letter)."

20. It will be noted that a delay of approximately four months occurred between the release of the decision in *Fairford* and HMRC's letter of 28 November 2014, which was written just over three months before the expected start of this appeal on 9 March 2015. Atec has relied heavily on this point. Mr Watkinson accepted that there was no satisfactory explanation for this delay.

21. By an e-mail dated 20 December 2014, Ms Kalia replied on behalf of Atec:

> "We have reviewed the Fairford decision and do not believe that this applies to us. We fully expect to cross-examine all the witnesses submitted in support of HMRC…."

22. No reasons were given why Atec thought that the *Fairford* decision did not apply to it.

23. On 22 December 2014, HMRC applied to the Tribunal for directions in the following terms:

> "1. That the Appellant shall notify the Respondents and the Tribunal of the issues in dispute in this appeal no later than 16 January 2014 and in particular shall confirm whether it disputes:
>
> a. Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellants' purchases on which HMRC have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant do [sic] not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect by setting out any matters of fact which are not accepted;

b. Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellants' transactions were part of an orchestrated fraud. If not, what reasons [do] they advance for their position;

c. Whether, in respect of chains alleged to be directly connected with the defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain. If not, what reasons do they advance for their position;

d. Whether, in respect of chains where the alleged connection to an alleged default is via an alleged contra-trader, the Appellants accept its transactions were connected with the fraudulent tax loss. If not, what reasons do they advance for their position;

e. Whether the Appellants accept the facts set out in the witness statements provided by those of the Respondents' witnesses whose evidence [is] primarily concerned with alleged defaulters. If the Appellants wish to challenge any matters set out in any of those witness statements, they are to identify the matters in dispute; and

f. Whether they accept the facts set out in the witness statements provided by those Respondents' witnesses whose evidence is primarily concerned with the alleged contra-traders. If the Appellants wish to challenge any matters set out in those witness statements, they are to identify the matters in dispute."

2. The Appellant shall notify the Respondents and the Tribunal as to whether they accept the facts as set out in the witness statements provided by those of the Respondents' witnesses whose evidence relates primarily to banking and the movement of funds. If the Appellants wish to challenge any matters set out in any of those witness statements, they are to identify the matters in dispute.

3. Where the Appellants' response to the directions 1 and 2 above do not identify any factual dispute, the evidence of each such witness is to be given and accepted by the Tribunal in the form of a witness statement under Rule 15 (1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and cross-examination of those witnesses will not be permitted."

24. A hearing before me was set down to consider HMRC's application on 30 January 2015. In addition to the *Fairford* application, HMRC also applied for permission to introduce new witness statements in respect of three replacement witnesses and an additional two page witness statement from Mr Saunders who was the officer for Atec. The replacement witnesses were to take the place of other officers who, since giving their original witness statements, had left the employment of HMRC.

25. On 6 January 2015, as the date for the *Fairford* hearing was being arranged, the Tribunal sent a notice of hearing directing that the parties provide to the Tribunal and to each other, no later than seven days before the hearing, an outline of the arguments that they intended to put at the hearing of the application. HMRC complied with this request but Atec did not.

26. In their skeleton argument dated 22 January 2015, HMRC submitted that:

> "i. The Tribunal should direct that the Appellants are not permitted to cross-examine the witnesses listed in Schedule A to this document and then evidence will be received in the form of written witness statements; and
>
> ii. The Tribunal should make a *Fairford* direction in relation to the reasons why the Appellants (a) do not accept the transaction chains as set out by the Respondents and (b) do not accept that their transactions were connected with fraud in transaction chains featuring the alleged contra-traders A – Z and Jag-Tec."

27. Schedule A contained a list of 28 HMRC witnesses whose witness statements related to alleged defaulting traders, contra-traders and one witness in respect of the freight-forwarder, 1st Freight.

28. At the hearing on 30 January 2015 (which commenced at mid-day) Atec was represented by Ms Kalia and HMRC was represented by Mr Watkinson. Ms Kalia explained that Atec did not consider that it was bound to comply with the *Fairford* decision because no direction had been made by the Tribunal requiring it to do so. I explained the *Fairford* decision to Ms Kalia and I told her that it was binding upon the First-tier Tribunal and that I would be prepared to make a direction giving effect to that decision in this case.

29. In my judgment, Ms Kalia's view that *Fairford* did not apply to Atec's appeal was simply untenable and indicated an uncooperative attitude on the part of Atec. In effect, Atec was forcing HMRC to apply to the Tribunal to give effect to the *Fairford* decision. This did not strike me as conduct which was intended to further the overriding objective contained in the Rules.

30. I asked Ms Kalia whether there were any reasons why the evidence of the officers in respect of the alleged defaulters and contra-traders was not accepted by Atec. She replied that Atec was concerned by the numerous statements of opinion given by the officers in their witness statements. She believed that unless these statements of opinion were challenged in cross-examination Atec would be treated as having accepted these statements as true.

31. It seemed to me that this was a legitimate concern for a self-representing appellant. I explained that, although the general rule was that evidence which was not challenged in cross-examination could not later be said to be untrue or inaccurate, statements of opinion by a witness (who was not an expert witness) did not constitute evidence which was binding upon the Tribunal. Consequently, a failure to cross-examine a witness of fact in relation to an opinion expressed by that witness did not mean that the Atec would be treated as having accepted that opinion. In order to reassure Atec, I said that I was prepared to embody that principle in any Directions issued pursuant to the hearing. Mr Watkinson helpfully drafted the relevant paragraphs, which were agreed with Ms Kalia, and read as follows:

> "For the avoidance of doubt,

> (1) the Tribunal is not bound by any expression of opinion in a witness statement and will disregard the same if it does not agree with the opinion expressed;
>
> (2) cross-examination on opinion evidence is only required in the case of an expert witness."

32. I further explained to Ms Kalia that even if a witness of fact was not cross-examined by Atec this would not prevent Atec submitting that the evidence of that witness did not make good HMRC's case. Thus, although unchallenged evidence could not be contradicted, Atec would not be constrained from arguing that HMRC had not discharged the burden of proof which lay upon it.

33. I asked Ms Kalia whether she wished to have time to consider her position and she indicated that she would welcome an adjournment. Accordingly, the Tribunal adjourned from 1:20 pm until the parties indicated that they were ready to resume at 2:45 pm. At no time did Ms Kalia indicate that she needed more time to consider the matter.

34. When the hearing resumed, I was informed that Atec did not require any of the HMRC witnesses listed in Schedule A to attend for cross-examination. Moreover, Ms Kalia confirmed that Atec did not require *any* HMRC witness to attend for cross-examination.

35. At this point, Mr Watkinson noted that certain passages in the witness statements produced by Atec's witnesses conflicted with the evidence given by, in particular, Mr Saunders and by Mr Simmons. Mr Saunders was the HMRC officer responsible for Atec and Mr Simmons was an officer who had visited Atec. Mr Watkinson therefore volunteered that Mr Saunders and Mr Simmons would be made available for cross-examination should Atec so require. In making that suggestion, I recognised that Mr Watkinson was fulfilling his professional duty to the Tribunal in relation to a self-representing appellant.

36. I was surprised by the position adopted by Atec to the effect that they did not propose to cross-examine any of HMRC's witnesses. I was less surprised by Atec's decision not to cross-examine the witnesses listed in Schedule A (mainly HMRC officers giving evidence in respect of defaulters and contra-traders). It is very frequently (but not always) the case, in my experience, that appellants in MTIC cases do not challenge the evidence of HMRC officers relating to tax losses and fraudulent evasion – matters of which appellants assert they have no knowledge in any event.

37. Nonetheless, I was satisfied that Ms Kalia fully understood the position that Atec would be treated as having accepted the evidence of those officers which she did not cross-examine. Moreover, I considered that Mr Watkinson's suggestion that Mr Saunders and Mr Simmons should be made available to cross-examination if required was a wise precaution.

38. Ms Kalia noted that she still maintained her objection to the admissibility of the evidence of Mr Corkery, a replacement expert witness for a Mr Fletcher, whom I understood had left the employment of KPMG after the preparation of his witness

statement and needed to be replaced. I decided that any challenge to the admissibility of Mr Corkery's evidence should be heard at the early stages of the substantive hearing, after opening submissions. By that stage, the Tribunal, having read the witness statements and opening submissions, would be better placed to assess the question of admissibility.

39. I also agreed that Mr Saunders' additional witness statement should be admitted and that two witness statements should be admitted in respect of replacement HMRC witnesses – by this stage, Ms Kalia did not object to the admission of this evidence.

40. Directions embodying the above decisions were issues on 3 February 2015.

41. At the end of the hearing, I requested that the parties agree a new timetable because it was clear that, if very few HMRC witnesses were to be cross-examined, the length of the hearing was likely to be significantly reduced from the six weeks (commencing 9 March 2015) originally envisaged. It was agreed that this would be done and forwarded to the Tribunal shortly.

42. On 3 February 2015, Atec gave notice that it was withdrawing its appeal in relation to periods in 2010 as well as the appeal of its associated company, Wireless 5, which had previously been consolidated with the present appeal. Atec explained that it wished to concentrate on its main appeals in relation to VAT periods in 2006.

43. On 9 February 2015, Atec informed HMRC by e-mail that its witnesses would not be available for cross-examination. No explanation was given as to why this position was being adopted.

44. On 10 February 2015, not having received a revised timetable as agreed at the hearing on 30 January, I requested the Tribunal's Listing Office to ask the parties as a matter of urgency to produce a revised timetable because the reduced number of witnesses meant that the substantive hearing was likely to be much shorter than the scheduled six weeks. I was concerned that the courtroom which had been designated for the six-week hearing should not be tied up for a longer period than was necessary.

45. On 11 February 2015, HMRC wrote to Atec, referring to Atec's e-mail of 9 February, informing Atec that if its witnesses were not to be subject to cross-examination, HMRC would invite the Tribunal "to draw an adverse interest [sic] against the Appellant's case." HMRC made it clear that HMRC disputed aspects of the witness statements of Atec's witnesses and required the witnesses to be called for cross-examination.

46. On 12 February 2015, Atec wrote to HMRC asking HMRC to indicate why they disputed aspects of the Appellant's witness statements.

47. On 16 February 2015, HMRC sent to the Tribunal a revised timetable. The revised timetable stated as follows:

> "This indicative timetable is based on the following:

(i) At the directions hearing on 30th January 2015 the Appellant stated that it did not require any of the Respondents' witnesses to attend for cross-examination. Out of caution the Respondents' have allowed some time for Officer Saunders (broker officer) and Officer Simmons (visiting officer) to attend if so required; and

(ii) By an e-mail dated 9th February 2015 the Appellant stated that it would not make its witnesses available for cross-examination.

The hearing is currently listed between 9th March – 21st April 2015.

The Respondents propose serving their opening submissions and the hearing bundles on 9th March 2015, the first day of the listed hearing. That allows the Tribunal three weeks to pre-read into the case prior to the Respondents making their opening submissions. That also allows the Tribunal time to become familiar with the evidence in the case, almost none of which will be subject to cross-examination, prior to the closing submissions being made and affords the Tribunal the opportunity to raise any questions that it has on the evidence. There is then a gap to allow for further reading and the witness evidence if required and a further gap to allow for closing submissions to be prepared in the light of any issues that arise.

9th March 2015 – Service of Respondents' opening submissions and trial bundles

23rd March 2015 – Service of Appellants' opening submissions

30th March 2015 – Respondents' opening submissions

31st March 2015 – Appellant's opening submissions

1st April 2015 – Cross-examination of Officer Saunders (broker officer) if required.

8th April 2015 - Cross-examination of Officer Simmons (visiting officer) if required.

13th April 2015 – Closing submissions.

48. Thus, the hearing was proposed to be set back by three weeks with opening submissions commencing on 30 March 2015, but with HMRC's written opening submissions being served on 9 March 2015 i.e. on what had been, on the original schedule, the opening day of the hearing.

49. HMRC's timetable was sent under cover of a letter from HMRC also dated 16 February 2015 the second paragraph of which read:

"The Respondents note that they have been in discussion with the Appellant regarding the proposed start date of the final hearing. As the Appellant has narrowed the issues in dispute and does not require the number of witnesses that it initially required, the full hearing length is not required."

50. On 16 February, HMRC replied to Atec's letter of 12 February by inviting the Appellant to consider the evidence, specifically that of Mr Saunders. HMRC commented that it was self-evident that there was a serious factual dispute between

the parties. HMRC reiterated that it would invite the tribunal to draw an adverse inference from the appellant's refusal to call its evidence which could then be subject to cross-examination.

51. Atec sent two letters to HMRC on 18 February 2015. In the first letter, Ms Kalia stated in relation to HMRC's revised timetable:

> "2. The Appellant objects to paragraph (2) of the Respondents letter stating that;
>
> ' i. … As the Appellant has narrowed the issues in dispute and does not require the number of witnesses that it initially required…'
>
> It was made clear by the Appellants that it did not accept the witness evidence of the Respondent's witnesses despite not calling for cross-examination and no assumptions contrary to this should be made by the Respondents or the Tribunal.
>
> 3. The Appellants assert that the submission of its grounds of appeal, witness statements and exhibits was to be included in conjunction with cross-examination of the 42 witnesses of HMRC and formed the overall strategy of the Appellant's case.
>
> 4. Due to the Fairford decision, the Appellant now seeks permission to update its grounds of appeal, witness statements and include additional exhibits in replacement of the cross-examination so that the Appellant is allowed to properly plead its case in the interests of fairness and justice."

52. As regards paragraph 2 quoted above, I have to say that, contrary to her assertion, Ms Kalia did not make this clear at the hearing on 30 January 2015. Initially, Ms Kalia stated that Atec was in no position to accept or deny the evidence of the HMRC officers listed in Schedule A. I then went to some lengths to explain to Ms Kalia that if she did not cross-examine HMRC's witnesses Atec would be treated as having accepted that evidence. Indeed, the whole discussion about opinions expressed by HMRC's witnesses (other than expert witnesses) was based on this premise. Atec's decision not to cross-examine HMRC's witnesses was taken after I had explained the consequences of Atec failing to cross-examine HMRC's witnesses. Insofar as this paragraph purports to be an account of what was said at the hearing on 30 January, I do not regard it as accurate.

53. I shall deal with the other paragraphs of this letter later in this decision in relation to the various applications made by Atec. For the moment, I shall simply observe that nothing of this sort was said by Ms Kalia at the hearing on 30 January 2015.

54. The second letter from Atec to HMRC on 18 February 2015 put forward a version of events which Ms Kalia said had happened on 30 January 2015. The letter stated:

> "Having quickly reviewed the witness evidence, the Appellant chose not to cross-examine the Respondents' witnesses in a rushed decision and under time pressure to reach a conclusion knowing that if it did

choose to cross-examine any witnesses, that the Appellant would be required to justify (with reasons) why, and deliver that to the court on the same day."

55. I do not accept this version of events as being accurate. The main purpose (aside from the subsidiary issue of replacement witnesses) of the hearing on 30 January was to consider the application of the *Fairford* decision to the present appeal in the context of a *Fairford* application made by HMRC. It must have been clear to Ms Kalia that she would be asked to explain why Atec objected to the evidence of the witnesses listed in Schedule A to HMRC's application (HMRC's witnesses regarding the defaulting traders and contra-traders). This cannot have taken her by surprise. The only objection she raised in respect of the evidence of the Schedule A witnesses related to the issue of opinion evidence, which was dealt with to Ms Kalia's apparent satisfaction, as I have explained. It was also clear to Ms Kalia that if Atec decided not to cross-examine an HMRC witness it would be treated as having accepted that witness's evidence. I explained this point to her with some care. Moreover, there was no indication from Ms Kalia that her decision not to cross-examine HMRC's witnesses had been taken under "time pressure" and certainly she made no request for further time to consideration.

56. Atec's second letter of 18 February 2015 also asserted that it had a positive case to challenge HMRC's evidence. However, at the hearings on 30 January, 26 February and 9 March Atec did not advance any positive case in relation to the question whether there was a fraudulent tax loss and whether Atec's transactions were connected thereto.

57. In the second letter of 18 February 2015, Atec stated:

> "11. When the Appellants [sic] states that its own witnesses will not be cross-examined having reflected on the new situation of the case, HMRC then put the Appellant on notice of its intention to invite the Judge to draw adverse inferences. This will not be accepted."

58. The letter then went on to summarise the exchange of views in relation to Atec's request that HMRC clarify which paragraphs of its witness statements were in dispute with supporting reasons. The letter continued:

> "13. The Appellant did not object to the cross-examination of its witnesses even though they are not required to be cross-examined, but did believe the case to be fair and balanced; i.e. that both parties were able to cross-examine accordingly, to plead and advance their respective cases.
>
> 14. The Appellant will not accept a situation where it is asked to 'show its hand in advance' and justify why the Respondents witnesses should be cross-examined and the Respondents refused to do the same thing for the Appellants.
>
> 15. The Respondents expectations with this regard are plainly audacious. The Respondents expect the Appellants to make himself available for cross-examination and prove its innocence whilst HMRC have managed to excuse their own witnesses – stating that they were

'not available' in their skeleton argument and subsequently using the Fairford decision to dispel their witnesses as the decision was binding on the Tribunal.

16. The Appellant believed it was in a position to advance a positive case and challenge the evidence of HMRC, and that this has been disposed of by the rulings used in the Fairford decision.

17. The Respondents have suggested two of their witnesses be cross-examined by the Appellant, which is perceived by the Appellant as dictating the course of action in the proceedings to its own convenience and benefit.

18. The Appellants seek recourse as the proceedings have now become unfair and the collective issues outlined are irrational to the Appellants. The Appellant's have the right to a fair trial and the level of unreasonableness has become too overwhelming to the point where the Appellant's do not believe that there is fairness and justice.".

59. Atec’s second letter of 18 February 2015 continued by asking HMRC to disclose the questions which it proposed to ask the Appellant's witnesses in cross-examination and asked HMRC to clarify those issues in which it would ask the Judge to draw adverse inferences. Atec proposed either to seek judicial review on the grounds that the proceedings were unfair or, alternatively, required HMRC to disclose the questions it would asking cross-examination, allow Atec to update an amend its witness statements.

60. It seems to me that these paragraphs indicate that Ms Kalia did not accept, still less understand, the decision of the Upper Tribunal in *Fairford*. There was a plain conflict of evidence between Atec's witnesses and those of HMRC, particularly Mr Saunders and Mr Simmons, with the result that the *Fairford* decision could not apply to Atec’s witnesses. In contrast, there was no indication that there was any factual dispute regarding the evidence of the HMRC officers listed in Schedule A. It was to avoid the need for numerous witnesses to be called unnecessarily in the latter case that the Upper Tribunal gave the guidance that it did in *Fairford*. Ms Kalia’s attempt to apply *Fairford* to HMRC’s witnesses on a “tit for tat” basis was misconceived.

61. As an alternative, Atec suggested (in this second letter) that it should submit an application to cross-examine the HMRC witnesses "as originally intended, amending only the opinions and not the disputed evidence." In addition, Atec indicated that it wished to update its grounds of appeal. Atec also required HMRC to withdraw the notice indicating that they would invite the Judge to draw adverse inferences. Finally, Atec stated that it wanted a directions hearing "for the inadmissible witnesses of HMRC to be held in advance of the trial", failing which Atec invited HMRC to withdraw the witnesses in dispute.

62. Having received these letters from Atec, on 18 February HMRC sought an urgent case management hearing. On 20 February 2015, I directed that a case management hearing be held on 26 February 2015.

63. HMRC also replied at length to Atec's two letters of 18 February, noting that they were unclear as to the contents of much of the letters. HMRC were not aware of

any decision that was susceptible judicial review. Moreover, HMRC could not understand why Atec suggested that it had been rushed into a consideration of why HMRC's witnesses (dealing primarily with defaulting traders and alleged contra-traders) were required for cross-examination because Atec had been asked to consider this question in November 2014. HMRC also pointed out that it had volunteered to make Mr Saunders and Mr Simmons available for cross-examination in fairness to ATEC.

64. HMRC also suggested that Atec 's concern about having to "show its hand" in advance without HMRC having to do likewise, was misguided. HMRC had simply sought to have its witnesses excused from attendance where there was no factual dispute between the parties. There was, however, plainly a factual dispute between the appellant's evidence and that of Mr Simmons and Mr Saunders.

65. On 24 February 2015, Atec served a number of applications. I shall deal with most of these applications later in this decision.

66. One of the applications was for permission to cross-examine a number of HMRC's witnesses. These witnesses included Mr Saunders and Mr Simmons, as well as Mr Dean (who gave evidence in respect of bank accounts with First Curaçao International Bank ("FCIB")). The list of witnesses which Atec wished to cross-examine contained the names of 11 witnesses, five of which were contained in Schedule A (see above), which had been the subject of the 30 January hearing. The application contained brief details of the issues in respect of which Atec wished to cross-examine those witnesses. The application concluded by noting that:

> "This list is not exhaustive and the appellants are in the process of updating further witness requirements."

67. Thus, less than two weeks before the commencement of the hearing, Atec was reversing its position, taken at the 30 January hearing, and was now proposing to cross-examine a number of HMRC witnesses and was, further indicating that it may wish to cross-examine further witnesses as yet unspecified.

68. At the hearing on 26 February, Atec eventually produced its complete list of witnesses (which had grown to a total of 28 HMRC officers) which it wished to cross-examine. I shall come back to this list shortly.

69. In addition, Atec served (22 February 2015) a notice of objection to the evidence of Mr Corkery (HMRC's expert witness in relation to grey market trading), an application (24 February 2015) to amend its grounds of appeal and witness evidence, an application to submit further exhibits (23 February 2015), an application (24 February 2015) to strike out HMRC's evidence relating to the 2010 appeals which had been withdrawn (see paragraph 42 above). Atec also served notices of objection (both dated 23 February 2015) to the evidence of two HMRC witnesses (Mr David Miller and Mr Gavin Wafer) on the grounds of relevance.

70. As regards the application to amend the appellant's grounds of appeal and witness evidence, draft grounds of appeal were not included in the application. In this

application Atec explained that it was seeking permission to amend the grounds to address the issues to be determined in these appeals:

(a) Was there a tax loss?

(b) If so, did this loss result from a fraudulent evasion?

5 (c) If so, were Atec's transactions which were the subject of the appeal connected with that fraudulent evasion?

(d) If so, did Atec know or should it have known that its transactions was so connected.

71. Atec's existing grounds of appeal were that it was "appealing against the reasons 10 given" in HMRC's decision letters of 20 August 2007, 19 November 2007 and 29 February 2008. It seemed to me that, although unspecific, these grounds of appeal were wide enough to cover all the issues referred to in paragraph 70 above.

72. As regards the application to submit further exhibits, the exhibits were not attached to the application. Atec stated that it believed that to advance its case, the 15 exhibits of the transactions for the periods in question should be submitted by Atec. Atec also wished to exhibit correspondence between the appellants and HMRC from 2003 to 2007. There was no indication whether these proposed exhibits had already been exhibited. As HMRC observed, voluminous correspondence between the parties was exhibited to the witness statements of HMRC's witnesses, as well as 20 documentation in respect of each of the deals.

73. In relation to the application to "strike out" HMRC's evidence relating to the appeals relating to periods in 2010 (see paragraph 42 above), these appeals had very recently been withdrawn. Atec objected to the evidence relating to the 2010 appeals on the basis:

25 (a) it was wrong to apply the *Kittel* test in relation to VAT periods in 2006 by reference to evidence which dated from 2010;

(b) the retention of the 2010 evidence merely served to assist HMRC's strategy of overburdening and confusing Atec as a self-represented appellant; and

30 (c) Mr and Ms Kalia were in full-time employment and could only work on the appeal in the evenings and at weekends, HMRC's actions showed that they wish to take advantage of this and had no desire for a fair trial.

74. Furthermore, the reasons given for retaining the 2010 evidence by HMRC were 35 inconsistent with the reasons given when seeking to consolidate the 2010 appeals with the appeals relating to the VAT periods in 2006. On that occasion, HMRC stressed the fact that:

(a) there was a substantial overlap between the 2006 and 2010 appeals;

(b) over 50 witness statements would have to be filed in respect of both 40 sets of appeals if they were not consolidated;

(c) consolidation would avoid the mischief of inconsistent findings of fact;

(d) there would be a time-saving by having the three appeals heard together;

(e) there was an effective commonality of identity of the two appellants.

75. In response, on 26 February 2015, HMRC served an application for this appeal to be struck out under rule 8(3)(b) which provides:

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

76. The case management hearing which had been arranged for 26 February 2015 went ahead but became a hearing of HMRC's strikeout application. Because the application had been made the previous day, Atec was in some difficulty dealing with it at that hearing. Accordingly, it was agreed that HMRC would put forward its submissions on its strikeout application at the hearing and on Atec's various applications 26 February 2015 and that Atec would put forward its submissions on these topics at the hearing on 9 March 2015 (which was originally the opening day of the six-week hearing). It was obvious at this stage that Atec's change of position as regards the cross-examination of witnesses and HMRC's application for a strike-out meant that the original commencement date for the hearing of 9 March would have to be postponed and, indeed, the schedule for the entire hearing was in jeopardy.

77. At the hearing on 9 March 2015, the complete list of witnesses which Atec wished to cross-examine was, as I have said, produced. The list contained brief reasons why Atec wished to cross-examine the witnesses.

78. The list contained the names of 28 HMRC witnesses. Twenty three of the witnesses had been listed on Schedule A (including Mr Simmons and Mr Saunders). The list included six officers in respect of whose evidence Atec had previously indicated, in response to directions of Judge Mosedale, Atec had stated that it accepted that their evidence showed that there had been a fraudulent tax loss.

HMRC's submissions

79. Mr Watkinson submitted that the conjunctive "fairly and justly" words in rule 8(3)(b) conferred on the Tribunal a broad discretionary power that was not intended to be dependent upon the question whether a fair trial was still possible. The reference to "and justly" was intended to allow the Tribunal to consider the wider effects of Atec's failure to cooperate on the administration of justice (*Biguzzi v Rank Leisure PLC* [1999] WLR 1926 at 1933 D in relation to the CPR provisions).

80. Mr Watkinson referred to the history of this appeal and the two previous strike-outs and reinstatements and referred, in particular, to the comments of Briggs J in

relation to the first strikeout application in which he described Atec's conduct as "lamentable."

81. Mr Watkinson submitted that Atec had contrived to put the Tribunal and HMRC in a position whereby:

5 (1) there were (at 26 February) no final witness requirements for an imminent appeal;

(2) no timetable for the pending appeal could be set;

(3) having withdrawn two appeals, Atec envisaged, in the event that its application to exclude the HMRC's evidence was not successful, making 10 vexatious applications to reinstate those appeals and apply to de-consolidate the appeals having never appealed against the decision of this Tribunal to consolidate them;

(4) Atec wished to amend its grounds of appeal in an unspecified manner, serve unspecified exhibits and witness statements (of an unknown volume); and

15 (5) Atec wished to apply for judicial review of the proceedings.

82. The application is served by the appellant were indicative of a thoroughly unreasonable and vexatious approach to the present appeal:

(1) Atec's application to cross-examine a non-exhaustive list of witnesses was an attempt to resile from its position adopted at the hearing on 30 January 2015, 20 on which HMRC relied, and to disrupt the final hearing;

(2) Atec's application to amend its grounds of appeal did not contain any draft grounds, so that HMRC and the Tribunal could not know what the proposed grounds of appeal were and HMRC could not respond to the application;

(3) Atec's application to serve further witness evidence contained neither a 25 copy of that evidence nor any indication of when it was to be served. Neither HMRC nor the Tribunal could deal with the application without sight of the evidence which was sought to be admitted. In any event, Atec was due to serve any further evidence by 19 September 2013 under an "unless" order given by this Tribunal. In addition, Atec wished to keep submitting evidence that it 30 refused to be cross-examined upon; and

(4) Atec 's application to submit exhibits was, first, to submit its transaction documentation for the 2006 transactions. Atec had already submitted this material as exhibits which were now contained within the trial bundle. The application also sought to reduce unspecified correspondence from 2003 – 2007 35 as exhibits. HMRC had already exhibited voluminous correspondence in their exhibits. Further, Atec had not provided any of the material that it sought to have admitted. The application was, therefore, wholly vexatious. In any event, Atec was due to serve any further evidence by 19 September 2013 under an "unless" order given by this Tribunal.

83. HMRC submitted that a point had been reached where the Tribunal could no longer deal with the case fairly and justly both in respect of HMRC and the wider administration of justice.

84. Mr Watkinson submitted that even in the case of a self-representing appellant, the Tribunal could not be seen to endorse litigation conducted in this fashion. Mr Watkinson referred to the comments of Maurice Kay LJ in *Tinkler v Elliott* [2012] EWCA Civ 1289 at [32]:

> "An opponent of the litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

85. Mr Watkinson also referred to the decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory in *David Harold Eastman v The Honourable Justice Anthony James Besanko* [2010] ACTCA 15; 244 FLR 262 and, in particular, to the comments of Graham J at [215]:

> "In this regard it is timely to refer to the observations of Bryson JA in *Malouf v Malouf* (2006) 65 NSWLR 449 at [183] about the need to avoid preferential treatment for self-represented litigants, in fairness to the other parties. His Honour said:
>
> 'Courts should not go so far in accommodating the positions of unrepresented litigants as to make it an advantageous procedural step to dismiss one's lawyers, or to retain none. Nor should courts slip from unreadiness to shut a party out from litigating an issue which is fairly arguable into incapacity to close off procedural opportunities which are not taken. Without procedure, procedural directions and compliance, justice will not be done at all. The time, patience, resources and willingness to behave appropriately of those who do comply should have a place in consideration of what the court should do when a party who has not complied with earlier directions seeks an extension of time, or some procedural indulgence by which earlier directions are disregarded. The compliant also have an entitlement to consideration, and their compliance should not be disregarded, or mocked, by treating their opponent's obligation to comply with the court's directions as less than important, or as superfluous.'"

86. Mr Watkinson submitted that these observations were equally relevant to proceedings before this Tribunal.

87. Mr Watkinson also argued that on the basis of Atec's recent conduct and envisaged further applications, the Tribunal could anticipate that in the future it would not be able to deal with the matter fairly and justly due to the ongoing conduct of the appellant. In this connection, Mr Watkinson referred to allegations made by Atec in correspondence which included allegations of bad faith by HMRC – allegations which Mr Watkinson submitted were wholly unfounded. Mr Watkinson submitted that it was likely these sorts of allegations would continue in the future.

88. Mr Watkinson also submitted that the alternative to a strikeout was an order for wasted costs. In his submission a costs order was an unrealistic and inadequate sanction.

Atec's submissions

5 89. Ms Kalia objected to HMRC's strike out application for the following reasons:

(1) there was no basis for HMRC's argument that the tribunal could not deal with this appeal fairly and justly due to the appellant's conduct;

(2) the appellant also objected to HMRC's claim that Atec had a history of non-compliance.

10 90. Ms Kalia took us through the history of the appeal including the two previous strikeouts and reinstatements.

91. As regards the first strike-out, Briggs J had accepted that Atec's poor record of compliance with Tribunal directions was the fault of Mr Ross rather than of Mr Kalia and Ms Kalia.

15 92. Ms Kalia also referred us to the reinstatement decision of Judge Mosedale of 28 March 2014, where Judge Mosedale agreed with Atec's submissions that one of the reasons for the default in complying with "unless order" of Judge Sinfield of 6 September 2013 was a misunderstanding as regards the terms of directions 7 & 8 of Judge Sinfield's order. Indeed, both parties appear to have misunderstood the terms of
20 these directions.

93. Ms Kalia submitted that Atec had a history of compliance since Judge Mosedale's directions of 8 January 2014. What

94. Ms Kalia drew attention to the fact that HMRC had waited four months before writing at the end of November 2014 seeking Atec's views in relation to the *Fairford*
25 decision.

95. As regards the *Fairford* decision, Ms Kalia submitted that it applied to HMRC as well as to Atec. If none of HMRC's witnesses were to be cross-examined then none of Atec's witnesses should be cross-examined.

96. As regards the agreement by Atec at the hearing on 30 January 2015 not to call
30 any of HMRC's witnesses for cross-examination, Ms Kalia argued that Atec's position was based on a misunderstanding. Atec had regarded HMRC's witnesses as gatherers of data. Atec accepted the method in which the data (which I understood to be the exhibits to the witnesses' evidence) was collected but thought it would be afforded the opportunity to present a case against the data that had been gathered.

Discussion

Strikeout application

97. At the hearing on 30 January 2015, Atec clearly confirmed that it did not require any HMRC witnesses to attend for cross-examination. The consequences of failing to cross-examine a witness were explained by me to Ms Kalia. I have no doubt that she understood the consequences of her decision not to cross-examine HMRC witnesses. I do not accept Ms Kalia's subsequent suggestion that she misunderstood the consequences of her agreement.

98. Furthermore, there was no indication that the decision was taken under pressure of time. Ms Kalia did not request further time for consideration. As I have already indicated, I do not accept her version of events at that hearing as accurate. The hearing was held for the purpose of considering HMRC's *Fairford* application. Ms Kalia must have (and certainly should have) given some thought in advance to the question whether and on what basis she objected to the evidence of the HMRC witnesses dealing with the defaulters and the contra-traders.

99. Atec in its letters of 18 February 2015 did a complete *volte-face*. Having clearly understood that a failure to cross-examine HMRC's witnesses would result in Atec having accepted that evidence, Atec agreed not to cross-examine any of HMRC's witnesses (albeit that HMRC suggested that Mr Saunders and Mr Simmons should be made available for cross-examination). In the letters of 18 February 2015 Atec now sought to reverse its position, knowing that the original start date for the appeal of 9 March 2015 had been put back by three weeks to 30 March 2015. It must have been obvious to Ms Kalia that the logistical difficulties caused by Atec's change of heart put the hearing of the appeal within the allotted time in jeopardy. In the circumstances, it is hard to avoid the conclusion that Ms Kalia was, at best, indifferent to whether the hearing schedule was disrupted or not.

100. Moreover, Atec then produced a flurry of applications, many of which were without merit (see below).

101. The question for decision was whether this somewhat erratic behaviour merited an exercise of this Tribunal's discretion under in rule 8(3)(b) to strike out this appeal.

102. Rule 8(3)(b) has been considered by this Tribunal in two earlier decisions. First, in *First Class Communications Ltd v Revenue and Customs Commissioners* [2013] UKFTT 090 (TC), a case concerning an application for HMRC to be barred from taking part in the proceedings. In that case, Judge Mosedale, whilst not wishing to limit the cases in which rule 8(3)(b) could apply, described, at [52], the following two situations where the rule might be applicable:

> "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 is part of 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."

103. Secondly, in *Nutro UK Ltd v Revenue & Customs* [2014] UKFTT 971 Judge Berner considered a strikeout application in circumstances where the appellant had a history of persistent defaults and where the appellant, in the strikeout proceedings, had misled the Tribunal. Judge Berner, after citing the relevant authorities, stated:

> "17. These judgments have resonance with the decision of Judge Mosedale in *First Class Communications*, to which I have referred. Thus, 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.
>
> …
>
> 52. Mr Watkinson rightly referred to the litany of persistent defaults on the part of Nutro which have characterised these proceedings. It is correct that I should have regard to the whole history, not only in considering the conduct of the proceedings to date, but also the likely conduct in the future. I also have to take account of the fact that the Tribunal has seen fit to deal with those instances by way of case management, including the making of unless orders, in a manner which has, until now, fallen short of a striking out of the appeal."

104. I respectfully agree with the comments of Judge Mosedale and Judge Berner. I should add that I have also taken into account the authorities cited by Judge Berner.

105. In exercising my discretion under rule 8(3)(b), it was necessary that I should take account of all relevant circumstances. In so doing, I should take account of the history of this appeal and, in the light of that history, the likely conduct of the appeal in future. I should also, of course, take account of the overriding objective contained in the Rules that I should deal with cases fairly and justly.

106. I was also conscious of the very severe consequences of a strike-out. An appeal should not be struck out merely for good housekeeping purposes or out of a preoccupation with tidiness. It is a draconian remedy, referred to in one of the authorities as an "atomic weapon in the judicial armoury" (*Hytec Information Systems Ltd v Coventry City Council* [1997] WLR 1666, per Ward LJ at p 1676) and it seems to me one which should only be used where there is no suitable alternative remedy which is more proportionate and appropriate to the conduct of which complaint is made. This was a point noted by Judge Berner in *Nutro* at [13] when he referred to the judgment of Lord Woolf MR in *Biguzzi v Rank Leisure PLC* [1999] WLR 1926 as follows:

> "…Lord Woolf made clear that the step of striking out a case was a draconian one, and that the existence of the power did not mean that in applying the overriding objective (of enabling the court to deal with cases justly) the initial approach will be to strike out the statement of case. Lord Woolf emphasised the existence of other powers to deal with delay or failure to comply. He gave as examples orders for costs, including costs on an indemnity basis."

107. I am bound to say that I found this a very finely balanced decision. It would have been possible to conclude from Atec's conduct that it intended to disrupt a hearing originally scheduled for six weeks (and on the revised timetable lasting for three weeks) and in so doing it failed to cooperate with the Tribunal. On the other hand, Atec is self-represented and some allowances should be made, although not to the extent that unfairness should be visited upon HMRC (see the comments of Maurice Kay LJ in *Tinkler v Elliott* [2012] EWCA Civ 1289 at [32] cited above).

108. Taking all the circumstances into consideration, I decided not to strike out the appeal. Overall, I concluded that striking out the appeal would be disproportionate and that there was a more appropriate method of dealing with the issues before me which allowed the appeal to be dealt with fairly and justly.

109. Instead, I decided to direct that Atec should not be permitted to cross-examine the HMRC witnesses listed in Schedule A (witnesses in relation to defaulters and contra-traders) of HMRC's application of 22 January 2015. In reaching that conclusion, it seemed to me that this was a direction that I would have made if, at the hearing on 26 February 2015, Atec had not decided to refrain from cross-examining any HMRC witnesses, a concession which thereby rendered HMRC's *Fairford* application moot.

110. As I have indicated, I did not consider Ms Kalia's reason for assuming that the *Fairford* decision simply did not apply to Atec to be tenable. Indeed I considered her approach to be obstructive. Furthermore, Atec's failure to give reasons why it objected to the evidence of the HMRC officers in Schedule A until nine days before the original commencement date for the hearing (9 March) also seemed to me to be uncooperative and obstructive. From the end of November 2014 Ms Kalia should have been aware that she was required to give reasons why the evidence of the HMRC officers in respect of defaulters and contra-traders was not accepted. By her delay in giving reasons until a time when it would be impossible to commence the hearing on 9 March in order to allow 28 witnesses to be cross-examined, Ms Kalia effectively was ensuring, if that application to cross-examine was accepted, that the hearing schedule would be disrupted. The hearing would either have had to be vacated or the hearing would have to have been adjourned part-heard. Neither of those outcomes would have been fair and just to HMRC given the extensive preparations that had been made for a full hearing of an appeal of this complexity.

111. I examined the list of HMRC witnesses required for cross-examination put forward by Atec at the hearing on 26 February 2015 and the reasons given why those witnesses' evidence was in dispute.

112. As I have noted, as regards six witnesses, Atec had previously accepted that the evidence of those witnesses established that there was a fraudulent tax loss. I could see no useful purpose in requiring those witnesses to attend.

113. Furthermore, the reasons given for requiring the witnesses to attend seemed to me to be matters for submission rather than a dispute about the evidence given. For example, in some instances the reason given for cross-examination was that there was "no connection" i.e. there was no indication in the evidence of the defaulting officer that Atec's deals were connected to the alleged fraudulent default. This is a matter for submission. Moreover, the issue of connection to fraud was predominantly dealt with in the evidence of Mr Saunders, particularly in the exhibits to his witness statement, and in the FCIB evidence of Mr Dean rather than in the witness statements of the defaulter officers.

114. In a number of other instances, the reasons proffered suggested that the default had been triggered, not by fraud, but by the actions of the various HMRC officers in issuing Regulation 25 notices (which accelerate the date on which a VAT return has to be made) and by de-registering the alleged defaulting trader. Again, it seemed to me that these were matters for submission rather than cross-examination and that there was no factual dispute.

115. Immediately after the hearing on 9 March, HMRC and Atec agreed that 11 HMRC witnesses would be called for cross-examination. In the event, Atec eventually decided only to cross-examine five of these 11 witnesses. Three of the six witnesses that Atec decided not to cross-examine were on the list of witnesses required for cross-examination put forward by Atec at the hearing on 26 February (Ms Wheatcroft and Mr Elms, who dealt with alleged contra-traders, and Mr Downer, who dealt with the criminal investigation in respect of Worldwide Logistics BV). Plainly, in reality, there was no dispute as regards their evidence.

116. Consequently, by refusing HMRC's application to strike out this appeal and by issuing a direction that HMRC's witnesses listed in Schedule A (to their application for the hearing dated 30 January 2015) were not be required to attend the hearing either to give evidence-in-chief or for cross-examination, it has been possible for Atec's appeal to be heard within the time originally allotted for the hearing. In the circumstances, I am satisfied that this was the fair and just way to proceed.

Atec's applications

117. First, as regards Atec's application to amend its grounds of appeal, the proposed amendments were not attached to or contained in the application. Accordingly, it was impossible to form a judgment on the merits of the application. In any event, Atec's existing grounds of appeal were simply that it disagreed with the decision letters denying it a deduction for input tax in the disputed periods. I did not think that any amendment to the grounds of appeal could be wider than Atec's existing grounds of appeal. Moreover, an amendment to pleadings at such a late stage would have required compelling reasons to be given for the change.

118. Accordingly, I refused the application.

119. Secondly, as regards Atec's application to adduce further exhibits, the exhibits which it wished to put forward were not attached to or contained in the application. For that reason and given the lateness of the application, bearing in mind that all evidence should have been served many months before, I refused the application.

120. Thirdly, as regards the application to cross-examine the list of HMRC witnesses in the list put forward by Atec at the 26th February hearing, as will be apparent from the above, I refused the application as regards those HMRC witnesses listed in Schedule A.

121. Fourthly, in relation to the application to exclude evidence in respect of the (withdrawn) 2010 appeals and the evidence of Mr Miller and Mr Corkery, I directed that those applications would be heard at the substantive hearing after the conclusion of opening submissions.

122. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016