[2018] UKFTT 0252 (TC)

TC06484

Appeal numbers: TC/2015/02184
TC/2016/02974

PROCEDURE – Whether appeal automatically stuck out for failure to comply with "Fairford" directions – Absence of identification of areas in dispute in Respondents' witness statements or positive case advanced by appellant – Whether Respondents' witnesses be directed to attend hearing for cross-examination – Whether comments, opinion and submissions of non-expert witnesses should be struck out and/or redacted

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELBROOK CASH AND CARRY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 27 April 2018

Geraint Jones QC, instructed by Jarmans Solicitors, for the Appellant

Howard Watkinson and Joshua Carey instructed by the General Counsel and Solicitor to HM Revenue and Customs ("HMRC"), for the Respondents

DECISION

1. In my decision in *Elbrook Cash and Carry Limited v HMRC* [2017] UKFTT 650 (TC) dismissing an application by the appellant ("Elbrook) for further and better particulars of HMRC's Statement of Case, I explained the background to this case as follows:

> "5. Elbrook appeals against:
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> (1) HMRC's [decision] to revoke its registration as an owner of duty suspended goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR") (the "WOWGR" appeal); and
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> (2) HMRC's decisions to deny input tax credits of £771,430.20 for its 01/13 to 04/15 VAT accounting periods (under reference TC/2015/02184 – the "First VAT appeal") and £502,309.35 for its 04/12 to 07/13 accounting periods (under reference TC/2016/02974 – the "Second VAT appeal") on the grounds that it knew or should have known that transactions it had entered into were connected to the fraudulent evasion of VAT.
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> 6. Following a contested application hearing on 24 January 2017 I directed that the WOWGR and VAT appeals be heard contemporaneously (for reasons given in my decision in *Elbrook (Cash and Carry) Limited v HMRC* [2017] UKFTT 143 (TC) released on 27 January 2017). Additionally, having first canvassed the availability of parties, witnesses and counsel, I directed that the hearing be listed between 7 and 18 August 2017.
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> 7. As there was an appeal by HMRC to the Upper Tribunal against the decision of the First-tier Tribunal that had allowed Elbrook's hardship application (see *Elbrook (Cash and Carry) Limited v HMRC* [2016] UKFTT 191 (TC)) I made further directions on 1 February 2017, under which the parties were to notify the Tribunal of the Upper Tribunal's decision on that appeal within seven days of its release.
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> 8. On 7 March [2017] HMRC made an application to set aside the directions for a contemporaneous hearing of the WOWGR and VAT appeals and vacate the August hearing dates. I dismissed this application on the papers and the parties were notified by letter from the Tribunal dated 21 March 2017.
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> 9. Following the dismissal by the Upper Tribunal of HMRC's appeal in relation to hardship in the First VAT appeal on 10 May 2017 (see *HMRC v Elbrook (Cash and Carry) Limited* [2017] UKUT 181 (TCC)) the parties were requested to provide either agreed directions or, if they could not agree, their own proposals for the progress of the appeals to a substantive hearing commencing on 7 August 2017. HMRC subsequently agreed that Elbrook would suffer hardship if it was required to pay the VAT in the Second VAT appeal.

> 10. On 21 May 2017 HMRC made an application for directions in which it sought to vacate the August 2017 hearing. Elbrook, not wanting the hearing to be lost opposed the application. At a hearing, on 16 June 2017, I reluctantly directed that the hearing be vacated in the light of the submission of counsel for HMRC that the 10 days for which the appeal was listed would not be sufficient for the hearing given his estimate that 25 days was necessary.
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> 11. Directions for the progress of the appeal were issued on 20 June 2017 under which HMRC were to file and serve a Consolidated Statement of Case for the VAT appeals by 30 June 2017 (which they did on 20 June 2017) and the appellant to file and serve its reply by 14 July 2017 (which it did on 6 July 2017). With its reply to the Consolidated Statement of Case the appellant also made the application for further and better particulars for which, as it was opposed by HMRC, a hearing was listed on 18 August 2017."

2. I also noted, at [2] of that decision:

> "… the distinct lack of cooperation between the parties to date and reminded them of their obligation, under rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to "help the Tribunal to further the overriding objective", I explained that the Tribunal was fully aware and understood that Elbrook, being a commercial organisation wished to get its appeal on for hearing at the first available opportunity and that I hoped, as the directions and therefore further progress in the appeal had been stayed pending the outcome of this application, that following the release of this decision the parties would take the opportunity to co-operate and make a joint application for directions to progress the appeal to a hearing."

3. As I had hoped, a joint application enclosing agreed draft directions was made and those directions were subsequently endorsed and issued by the Tribunal on 29 September 2017.

4. In accordance directions 6 and 7 of those directions, the "Fairford" directions, so called following the decision of the Upper Tribunal (Simon J, as he then was, and Judge Bishopp) in *HMRC v Fairford Group plc (in liquidation) and another* [2015] STC 156 ("*Fairford*"), Elbrook was required to confirm:

> 6. Not later than 10 November 2017 the Appellant shall notify the Respondents and the Tribunal:
>
> > (1) whether it accepts the transaction chains as set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases on which the Respondents 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;
> >
> > (2) whether it accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud; and

(3) 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, and if not why;

7. Not later than 10 November 2017 the Appellant shall notify the Respondents as to:

(1) In respect of the witness statements served what, if any are the matters of fact in dispute;

(2) Which of the Respondents' witness it requires for cross examination; and

(3) The Appellant's time estimates for cross examination of the Respondents' witnesses.

5. Following the grant of several extensions of time for compliance with the directions, on 14 February 2018 the parties agreed the following direction which was endorsed and issued by the Tribunal on 16 February 2018:

> "UNLESS the Appellant complies with directions 6 and 7 of the Tribunal's directions issued on 29 September 2017 by 5:00pm on 1 March 2018 the Appellant's appeal shall be AUTOMATICALLY STRUCK OUT pursuant to Rule 8(1) [of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009)]."

6. In an email, dated 1 March 2018, Elbrook provided the following response to direction 6:

> "1. As regards paragraph 6(1):
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> (a) The Appellant is unable to admit or accept the transaction chains set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases accurately reflect the trading history of the goods bought and sold by the Appellant.
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> (b) The trading history of the goods bought and sold is outside of the Appellant's knowledge.
>
> (c) The Appellant is prepared to accept (cf. admit) that the documents prepared in respect of the transaction chains were prepared by the person(s) said to have prepared them on the draft specified therein.
>
> (d) The Appellant does not admit any of the facts or matters recorded therein are true and correct for the reason given at subparagraph (b) above.
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> 2. As regards paragraph 6(2):
>
> (a) The Appellant does not accept that the transactions were part of an orchestrated fraud.
>
> 3. As regards paragraph 6(3):
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> (a) The Appellant does not accept that there has been a fraudulent VAT defaulter at the start of the chain.

(b) The Appellant does not accept that there has been a fraudulent VAT defaulter at the start of the chain as that matter is outside its knowledge.

(c) The Appellant has no way of knowing whether any alleged default was attributable to a fraudulent design or otherwise."

Its response to direction 7 states:

"1. The Appellant can only admit facts and matters within its own knowledge.

2. Insofar as the witness statements deal therewith, the Appellant disputes/denies that, as a matter of fact, it, whether by itself its servants or agents knew or ought to reasonably ought to have known that the goods supplied to it (referred to in the respondents' witness statements) had been bought/sold in connection with any tax fraud.

3. So far as the served witness statements are concerned:

(a) The Appellant is prepared to accept (cf admit) that the several documents referred to therein were prepared by the person(s) said to have prepared same, on the dates specified therein. The appellant does not admit that any facts or matters recorded therein are true and correct – same being outside the knowledge of the appellant.

(b) None of the unattributed hearsay is admitted as to the truth of the facts asserted.

(c) So far as attributed hearsay is concerned the appellant is prepared to accept that the maker of any such statement made it (in accordance with any written record thereof) but not that the maker was making a true and/or accurate statement of fact.

4. Subject to re-assessment once the respondents' witness statements have been redacted, the following witnesses are required for XX [there is then a list of all of HMRC's witnesses]

5. Subject to revision when the witness statements have been redacted the XX [cross-examination] time estimate is 2 – 3 days."

7. The 1 March 2018 email also contained applications for:

(1) Parts of several HMRC witness statements to be struck out and redacted;

(2) That HMRC inform the appellant's solicitors within 21 days:

(a) In respect of the witness statements served what, if any, are the matters of fact in dispute;

(b) Which of the appellant's witnesses HMRC required for cross-examination, and

(c) HMRC's time estimate for cross-examination of the appellant's witnesses;

(3) Variation of direction 18 so as to provide the Core Bundle 21 days before the hearing (as opposed the three days in the direction);

(4) The appellants costs of the application; and

(5) Permission to file a further witness statement.

8. On 6 March HMRC, who do not oppose the applications at (2), (3) and (5) above, wrote to the Tribunal contending that Elbrook had failed to comply with the "unless direction" of 16 February 2018 and seeking confirmation that its appeal was struck out. If the Tribunal could not provide such confirmation a direction was sought that it was not necessary, in the absence of any positive case advanced or identification matters of fact in dispute in HMRC's witness statements by Elbrook, to call any of the witnesses who deal with the issues of fraudulent VAT default and connection to give evidence and be available for cross-examination. A further application, dated 25 April 2018, by Elbrook sought relief from sanctions if it were found that it had failed to comply with the 16 February 2018 direction.

9. As in the previous hearing, Elbrook was represented by Geraint Jones QC and HMRC by Howard Watkinson and Joshua Carey.

10. I shall first consider HMRC's application for confirmation that, because of its inadequate response to directions 6 and 7 of the 29 September 2017 directions, Elbrook has failed to comply with the direction of 16 February 2018 and its appeal automatically struck out and, if necessary, Elbrook's application for relief from such sanction.

11. Although Mr Watkinson referred to the passages from *Fairford* and from the decision of Judge Berner in *CF Booth Limited v HMRC* [2016] UKFTT 261 (TC) ("*CF Booth*") cited below (at paragraphs 15 and 16) in support of his argument that the approach adopted by Elbrook in its response to direction 6 was wholly inadequate, I agree with Mr Jones that these have no relevance in relation to the question of whether there has been compliance with direction 6. I should also mention that there was some dispute as to whether HMRC had provided Elbrook and its advisers with "deal sheets" setting out the chain of transactions on which HMRC have denied Elbrook the right to recover input tax. But, as it is not necessary for the purposes of this decision to do so, I say nothing further on this issue.

12. Mr Watkinson contends that Elbrook, having agreed the wording of the directions, should have provided a more detailed response to direction 6 than simply stating that it does not admit matters not within its knowledge. However, although not as full as HMRC appears to have expected, I consider that Elbrook has, just about, answered the questions and has therefore complied with direction 6.

13. With regard to direction 6(1), as Mr Jones says, Elbrook does not accept the transaction chains as the trading history of the goods are outside its knowledge. Elbrook, in stating that it did "not accept that the transactions were part of an orchestrated fraud" has clearly answered direction 6(2) and I did not understand Mr Watkinson to contend otherwise. Although the response to direction 6(3) was again not as full or helpful to HMRC as appears to have been expected, Elbrook has clearly stated that it does not accept that there has been a fraudulent VAT default at the start of any chain as it is not within its knowledge.

14. Turning to direction 7, as Elbrook has not identified any matters of fact in dispute in HMRC's witness statements and stated that it requires all HMRC's witness for cross-examination which it estimates will take two to three days it has in my judgment, again just about, complied with direction 7. However, the absence of further detail, especially regarding which factual elements of HMRC witness statements are disputed does have a bearing on which of HMRC's should be directed to attend for cross-examination.

15. In *Fairford* HMRC had provided the deal documents and witness statements to the appellant. It, like Elbrook, had not advanced a positive case but had stated that it wished to put HMRC to proof. As is clear from [40] of the decision in that case leading counsel for the taxpayer:

> "…. maintained that the taxpayer was entitled not to advance any positive case while requiring HMRC to prove the matters set out in the witness statements. We will return later to our views on this approach"

When it did so the Upper Tribunal observed:

> "**Case management**
>
> 44. Although we have concluded that the appeal on the application of r 8(3)(c) [of the Tribunal Procedure Rules] in the present case fails, the case raises an important issue about case management. At an earlier stage in the proceedings those advising the taxpayers indicated that they might require half a day to cross-examine each of the 14 HMRC witnesses as to their evidence that there was a tax loss and that it resulted from a fraudulent evasion. Bearing in mind that the taxpayers were claiming that they had no knowledge of any fraud by the traders it is difficult to see how such an estimate could properly have been given.
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> 45. In the course of his submissions Mr Pickup [leading counsel for the taxpayer] adopted a different approach. He submitted that it might be necessary to cross-examine in order to highlight various matters in the evidence. We do not accept that this is a good reason to cross-examine in the FTT, where the tribunal will have already read the evidence. To require a witness to attend in order to repeat uncontroversial matters in a witness statement is not consonant with the overriding objective. Mr Pickup also revised the time he might need with the 14 witnesses, suggesting that it might be quite short, or he might not require them at all. He suggested that these questions could be left to the judgment of litigators who would, when they had reviewed the evidence at the time of the full hearing, let HMRC know whether a particular witness was required to give oral evidence, following a similar practice in the Crown Court. We do not accept that this is a satisfactory suggestion.
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> 46. In a letter of 20 September 2012, HMRC wrote to Bark & Co asking (1) what issues they considered to be in dispute, (2) what witnesses they wished to cross-examine, and (3) the time estimate for the length of the matter. On 9 October Bark & Co replied (1) all issues remained in dispute, (2) they required all witnesses to attend to give evidence, and (3) the time estimate was 25 days. Again, we do not

consider such an approach to hearings in the FTT to be consonant with the parties' obligations under r 2 of the FTT Rules.

47. A typical example of the form of directions used by the FTT in this type of case 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 para 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 FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted."

16. *Fairford* was considered by Judge Berner who stated in his decision following a case management hearing in *CF Booth*:

> "13. Two aims can be discerned in the approach adopted by the Upper Tribunal. The first is that the appellant, as well as HMRC, should set out its case whether it advances a positive case or is merely putting HMRC to proof. HMRC is entitled to know which of the issues is in dispute, and the basis on which the relevant issues are disputed. The second is that if the appellant makes no positive case with respect to the issues specified in the directions, serves no evidence which challenges the evidence of HMRC's witnesses in those respects and does not identify the areas of dispute in that evidence, then the appellant will not be entitled to cross-examine those witnesses, whose witness statements will be accepted by the tribunal.
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> 14. For such an appellant, that process will not be prejudicial. Acceptance of, or failure to dispute, the underlying facts will not inhibit an appellant from making submissions as to the inferences to be drawn from those facts and the conclusions that may be reached. Tribunals will be astute to the difference between the factual evidence contained in a witness statement and inferences and conclusions that may be contained within it. The latter are not properly part of the evidence of a witness of fact; to the extent they are contained in a witness statement they should be disregarded and it is not necessary for the witness to be cross-examined in those respects.
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> 15. On the other hand, as the Upper Tribunal recognised, cross-examination is not dependent on the appellant having made a positive case or having served evidence in rebuttal. All that is required is identification of the respects in which the evidence is disputed. There may be many legitimate reasons why a party who is not itself in possession of contrary evidence might wish to cross-examine the witnesses of the other party. There might be internal inconsistencies in the witness statement, inconsistencies with other evidence put forward by that other party in the case or in other cases. There might be omissions of fact where something might be expected. Where the facts deposed to are not within the actual knowledge of the witness but are the product of research or investigation, by the witness or possibly by others, there might be questions as to the nature of such investigation or research. It would be wrong to place any obstacles in the way of an appellant wishing to test the evidence of HMRC in that way, and it would deprive the tribunal of the benefit of having heard that evidence being so tested.
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> 16. … The modern approach to case management is, as is well-established, one of "cards face up on the table", but that does not mean that a party should be obliged to disclose in advance its line of questioning in cross-examination. It is enough, as the Upper Tribunal indicated at [49], that the appellant identify the respects in which the relevant witness statements are disputed or, I would say, not accepted. There is no necessity for an appellant to go further than that."

17. Mr Jones criticised *Fairford* for not addressing the position where one party wishes to put the other to proof. However, as is clear from [40] in that decision, it is hard to see how the Upper Tribunal cannot have had such circumstances in mind when giving its case management guidance. Given the similarities with the argument advanced on behalf of Elbrook, I consider that it is appropriate to the apply the guidance given in *Fairford* in this case and, in directions issued at the same time, but separately from, this decision I have directed that witnesses whose evidence solely concerns the issues of whether there was a fraudulent tax loss and whether the appellant's transactions were connected to such fraudulent tax loss are not required to attend for cross-examination and that their witness statements shall stand as their evidence in chief.

18. I now turn to Elbrook's application for sections of several HMRC witness statements to be struck out and redacted

19. A similar application to exclude non-expert opinion evidence was considered by Judge Berner and Judge Walters QC in *Megantic Services Ltd v HMRC* [2013] UKFTT 492 (TC) in which they said:

> "1. We set out in this decision notice our reasons for the decisions we gave at the hearing, with brief reasons only, on applications by the Appellant ("Megantic") that certain evidence served by the Respondents ("HMRC") be excluded.
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> …
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> 16. To the extent that the tribunal in *JDI* or *Chandanmal* based its conclusion on the mere fact that the evidence was opinion evidence of the witness, and decided that because the witness was not an expert the evidence must thereby be excluded, we must respectfully disagree. There is no such rule applicable to this tribunal. The position was summarised by Arnold J in *Megantic* (at [80]):
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> > "... r 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273, allows the tribunal to admit evidence whether or not the evidence would be admissible in a court trial. It follows that the tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the tribunal considers that it is worth. What weight should be given to the evidence is a matter for the tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence being received by the tribunal."
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> 49. … we should add that we do not consider there to be any requirement in this tribunal for permission to be given for the service of expert evidence. That is a question that has divided tribunals in the First-tier. In *Chandanmal*, Judge Mosedale (at [13]) expressed the view that it was arguable that rule 15(1)(c) of the tribunal's Rules:

> "… the tribunal may give directions as to … whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence"

required such permission to be obtained. The tribunal in *JDI* took this a step further, stating (at [75]) that it was apparent that the tribunal's Rules envisaged that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness. On the other hand, the tribunal in *Libra Tech* refused to follow that interpretation, reasoning (at [31]) that rule 15(1)(c) could not be construed as imposing a mandatory requirement to seek such permission.

50. We agree with the tribunal in *Libra Tech*. Although we accept, as Mr Patchett-Joyce [counsel for the taxpayer] submitted, that in the higher courts there is an express duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR 35.1), that does not itself translate into a mandatory requirement for permission to be obtained before that evidence is adduced; but if such evidence is served without permission, and it is found to be have been unnecessary, the costs of that evidence may be irrecoverable. That does not, therefore, provide for support for an interpretation of the tribunal's Rules as imposing a requirement for permission.

51. Rule 15(1)(c) must be construed and applied in the usual way, that is having regard to the overriding objective of dealing with cases fairly and justly (rule 2(3)). The language of rule 15 is not mandatory but permissive. It contains no requirement, such as can be found where relevant in other parts of the Rules, for any application to be made. Its context is that of the exercises of case management powers generally in relation to evidence and submissions, none of which powers are susceptible to construction as a mandatory requirement. The tribunal is given power to intervene and make directions as to evidence, including expert evidence, but there is no requirement (and it is not possible in our view to infer one) that expert evidence can be served only if the tribunal gives permission."

20. In the present case Mr Jones contends that because sections of the statements of HMRC' witnesses contain inadmissible opinion evidence, expert opinion without permission being sought and obtained from the Tribunal for its admission, comment on the credibility of witnesses and hearsay evidence, it should be excluded. He referred to several of HMRC's witness statements, but in particular that of Officer Piers Ginn, whose statement frequently refers to "fraudulent" defaults of companies in the deal chains and makes submissions on the evidence, eg saying "This is incredible" when referring to prices for products purchased by Elbrook from two suppliers which did not "fluctuate but were constant for a period of 19 months" and "it is highly improbable that such consistent profits would be maintained over the 31 months that cover the periods subject to these appeals."

21. Mr Jones contends that had such comment, observation or submissions been confined to occasional or inadvertent "slips" by HMRC's witnesses the approach taken in *Megantic* would be appropriate but, given the "sheer scale" in this case, a

direction should be made for its redaction. He says that if such inadmissible material were to remain before the Tribunal it could give rise to a perception of bias by an informed bystander, especially in relation to the lay or non-legal member of the Tribunal whose role Mr Jones equates with that of a jury.

22. In *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451 at [21], the Court of Appeal (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C) "found force" in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa & Others v. South African Rugby Football Union & Others* 1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test, that in relation to perceived bias:

> "… The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions …"

23. Not only did the Court of Appeal in *Locabail* explain, at [3], that "for convenience" that it in its decision the term "judge" is used "to embrace every judicial decision-maker, whether judge, lay justice or juror", which would clearly include a lay or non-legal member of the Tribunal but that, like all Tribunal Judges, such members are required to take a judicial oath. As such, I do not consider that there would be a risk of a perception of bias by the informed bystander, to whom Mr Jones referred, and find myself in a similar situation to that in the substantive hearing of *CF Booth v HMRC* [2017] UKFTT in which I observed, at [10], that the Tribunal was:

> "… disappointed to find that, in addition to factual matters, the witness statements, particularly those of HMRC officers, contained opinions and conclusions to be drawn from the evidence. As the Tribunal (Judges Berner and Walters QC) observed in *Megantic Services Limited v HMRC* [2013] UKFTT 492, at [15], such evidence:
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> > "… is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded. Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions

> that the tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude."

24. In that case I referred to [15] in *Megantic* and adopted a similar approach in that case. Although I understand that Judge Wallace on several occasions did direct HMRC to redact witness statements to exclude such matters this was before the decision of Judge Berner and Judge Walters QC in *Megantic.* Although I seriously considered directing HMRC to redact the witness statements, I have come to the conclusion that a this is not strictly necessary. As the Tribunal observed at [20] in *Megantic*:

> "… the tribunal itself is quite capable of distinguishing between the evidence on which a conclusion falls to be drawn by the tribunal and an attempt by a witness to draw that conclusion themselves."

I therefore dismiss Elbrook's application for the striking out and redaction of parts of HMRC's witness statements.

25. As I mentioned in paragraph 8, above, Elbrook's applications for HMRC to state the matters of fact in dispute, witnesses required for cross-examination and time estimate for cross-examination; variation of direction 18 so as to provide the Core Bundle 21 days before the hearing (as opposed the three days in the direction); and permission to file a further witness statement were unopposed. I have therefore issued directions separately from but at the same time as this decision.

26. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 30 APRIL 2018