Neutral Citation: [2023] UKFTT 292 (TC)

Case Number: TC08763

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2021/11335
TC/2021/10548
TC/2021/10550
TC/2021/10552
TC/2021/10553

PROCEDURE – whether Rule 18 Direction for appeals to be related cases is appropriate – no whether Rule 5 Direction to case manage and hear two of the appeals together is appropriate – yes

Heard on: 23 January 2023
Judgment date: 10 March 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

(1) PUTNEY POWER LIMITED
(2) PISTON HEATING SERVICES LIMITED
(3) THERMAL GENERATION LIMITED
(4) COGENERATION SOLUTIONS LIMITED
(5) MORPHEAT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Ewart, KC and Sam Brodsky, of counsel instructed by Reynolds Porter Chamberlain LLP

For the Respondents: Christopher Stone and Thomas Wedwell, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This was a case management hearing to consider two applications before the Tribunal, namely:-

(a) The respondents' (HMRC's) application in terms of Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") to take the appeals of Putney Power Limited ("Putney") and Piston Heating Services Ltd ("Piston") forward as separate appeals to be case managed and heard together at a single hearing and for the appeals of Cogeneration Solutions Limited ("Cogeneration"), Thermal Generation Limited ("Thermal") and Morpheat Limited ("Morpheat") to be stayed behind those two appeals and for appropriate further Directions to be issued ("the Rule 5 Application"); and

(b) The appellants' application dated 19 July 2022 in terms of Rule 18 of the Rules that Putney be specified as a lead case and that appropriate further Directions be issued ("the Rule 18 Application"). The appellants' default position was that if Putney were not to be the lead case then Cogeneration (HMRC's original proposal) be the lead case.

2. Leaving to one side the issue of which appeal(s) should proceed, the practical difference between the two Applications is that HMRC are effectively seeking an informal Rule 18 Direction with the consequence that any decisions in Putney and Piston would not be binding on the other appellants.

3. I had a Hearing bundle extending to 292 pages, an Authorities bundle extending to 315 pages and Skeleton Arguments for both the appellants and HMRC. I heard no evidence.

4. Mr Ewart, KC had attached to the Skeleton Argument for the appellants what were described as the "precise terms" of the Rule 18 Directions sought. I have now numbered them for ease of reference and those read as follows:-

1. The case of Putney Power Limited (the Lead Case) is hereby specified as a lead case pursuant to Rule 18(2)(a) in respect of the appellants' appeals. The cases of the other appellants (the Related Cases) are hereby stayed pursuant to Rule 18(2)(b).

2. The common and related issues to be determined are as follows:

(a) What activity is required, in the particular context of commencing a trade of providing electricity, in order for the trade to have commenced. In particular, is it necessary for construction of the intended power station to have been completed or is it sufficient for other activity to have taken place, provided that such activity has progressed beyond a mere review of the possibilities and mere negotiation?

(b) When did Putney Power Ltd commence its trade?

(c) What was the legal effect of the various agreements and other steps taken by Putney Power in order to commence trading, and which steps and/or agreements were the most significant (if any) in the commencement of its trade?

5. In the course of oral argument, Mr Ewart accepted that they amounted to draft Directions and if the Tribunal was minded to grant the Rule 18 Application, then it should be remitted to the parties to adjust the terms of the common issues as had been the case in *Jones Bros Ruthin (Civil Engineering) Co Ltd and Others v HMRC* [2018] UKFTT 500 (TC) ("Jones") at paragraph 53. Judge Dean had directed that within 28 days of release of that decision, the parties must provide the Tribunal with an agreed form of words for the common or related issues.

6. Mr Stone disagreed stating that that would not be possible. He argued that, as opposed to the legal issue, HMRC could not identify common issues in regard to the facts that if determined in Putney could or should be applied to the other appeals. He went on to argue that the issues as defined by the appellants were exceptionally wide and imprecise. Directions 2(a) and (c) amounted to advice being sought as opposed to seeking decisions on clearly defined precise issues.

7. In his response to Mr Stone's arguments on those proposed Directions, Mr Ewart conceded that the Directions might simply be confined only to 2(b). He said that Direction 2(a) had been included to address HMRC's proposition that the appellants had to be in a position to generate and distribute power and 2(c) was primarily seeking guidance and was not entirely necessary.

Background

Procedural Background

8. On 27 February 2020, the appellants all appealed the Decisions in their cases and provided further detail to HMRC in support of those appeals by letters dated 7 May 2020.

9. On 6 May 2021, HMRC, in View Of The Matter ("VOTM") letters, upheld the Decisions.

10. On 4 June 2021, the appellants requested that the VOTM letters be reviewed and on 17 September 2021, HMRC issued review conclusion letters upholding both the VOTM letters and the Decisions.

11. By detailed Grounds of Appeal dated 14 October 2021, the appellants appealed the Decisions to the Tribunal.

12. On 20 April 2022 the appellants' solicitors proposed case management directions which would have progressed all five appeals.

13. On 27 April 2022, HMRC wrote to the appellants' agent, RPC, stating:

> "Respectfully, it is our preferred approach in this set of appeals for one case to be taken as a lead case, with the others stayed behind, rather than having all 5 heard together. This is primarily because the issue and facts are substantially similar enough that determination of the issue in 1 case would be sufficient to determine all of the appeals. It would therefore introduce unnecessary complexity to hear all the appeals at the same time, with unnecessary time and cost associated for both parties."

14. RPC responded on 9 May 2022 stating that in principle they were prepared to proceed with a lead case provided that it was Putney. That was on the basis that it covered the widest factual pattern and should cover all of the issues arising across the five appeals.

15. As HMRC confirmed in an email dated 24 May 2022, they had originally intended to proceed with "…Cogeneration as the lead case in this set of appeals, as it appears to sit directly in the middle of the 5 appeals in terms of its strength. Its facts are also more straightforward than some of the others". That having been said, they agreed that Putney could be the lead case but only if Piston was the second lead case on the basis that Piston was required for more "factual variety". However in the draft directions which were attached, they sought a stay of the other appeals under Rule 5 rather than Rule 18 of the Rules.

16. Ultimately, on 10 June 2022, HMRC confirmed that in their view, whilst they accepted that there was a common issue of law and a common industry across the appeals, having a decision in Putney alone would not resolve the other appeals, not least because the appellants relied on different stages of preparedness.

17. On 20 June 2022, HMRC's Rule 5 Application was filed and an extension of time was thereafter granted by the Tribunal for serving Statements of Case. As the appellants point out, that Application acknowledged that:- "There is a common issue of law across the appeals and a factual similarity" and the appellants have quoted that. However, it should be taken in context as it commenced stating "While" and finished stating "the Appellants rely on different facts as having constituted commencement of a trade."

18. Mr Stone explained that it was only when drafting the Statements of Case for Putney and Piston, which were lodged on 1 July 2022, that, having investigated the granularity of the five appeals, it had become apparent that HMRC could not identify a common issue in Putney which would apply to the other appellants. In their view, on comparative analysis, the facts were different.

Factual Background

19. I set out here a summary of the background facts derived from the five Grounds of Appeal and the two Statements of Case which I have cross-referenced to the parties' Skeleton Arguments.

20. The Skeleton Argument for the appellants outlines the alleged similarities in very general terms. Whilst I do not doubt the accuracy of those representations, not all of the detail of those similarities (eg the arguments that there were common directors and that each company had a detailed draft Investment Committee paper) is identifiable from the pleadings and HMRC have not made admissions.

21. The Skeleton Argument for HMRC had a detailed summary of the "Stages of preparedness relied upon by the Appellants" that was cross-referenced to the Bundle.

22. The objective is to set out a general explanation of the facts and issues arising in these appeals in order to consider whether, as submitted by the appellants, they raise common or related issues of fact. Obviously, since no evidence has been heard and there is not even a Statement of Case in three of the appeals, no findings in fact are made in relation to substantive matters.

23. The appellant companies each issued shares to investors on 4 April 2016. The shares were issued pursuant to the Enterprise Investment Scheme ("EIS").

24. By decisions dated 28 January 2020 (27 January in the case of Thermal) ("the Decisions"), HMRC determined pursuant to section 234(3)(b) Income Tax Act 2007 ("ITA 2007") and paragraph 16, Schedule 5B, Taxation of Chargeable Gains Act 1992 ("TCGA") that those shares were no longer eligible shares for the purposes of section 179(2)(b)(ii) ITA 2007.

25. The ultimate issue arising in the appeals is whether the said shares were issued for the purpose of a "qualifying business activity" in terms of section 174(1) ITA 2007, as defined in sections 179(1) and (2)(b) ITA 2007. It is a matter of agreement between the parties that that issue turns on whether each appellant had begun to carry on its trade within two years after the date on which the shares were issued, ie by 4 April 2018 ("the EIS Deadline") as required by section 179(2)(b)(ii) ITA 2007. That is the common issue of law and that is not in dispute.

26. The parties are agreed that there are certain areas of common ground including:-

(a) Each of the appellants was incorporated with a view to constructing a power plant and selling the electricity to be generated by it.

(b) In their Grounds of Appeal each appellant states that their trade is "the provision of electricity".

(c) None of the appellants was producing electricity as at the EIS Deadline.

(d) They all currently operate such power plants which generate electricity from gas and the electricity is then sold to customers. It is not in dispute that each appellant is, now, carrying on a qualifying trade.

27. Since the appellants wish Putney to be the lead case, it is appropriate to identify the grounds upon which it relies and to contrast those with the other appellants.

28. In summary, in its Grounds of Appeal, Putney argued that:-

(1) The first choice of site not having proceeded, it had selected a site for construction of the plant.

(2) It had carried out preparatory work including negotiating contracts, undertaking due diligence, entering into Heads of Terms both for the construction of the site and the sale and purchase of energy, and instructing advisers.

(3) On 25 May 2017 "financial closure" had taken place through the execution of eight named agreements (amongst others) including a Power Purchase Agreement with Gazprom.

(4) On 23 August 2017 it had entered into a 21-year lease between it and the landlord of the site.

(5) It received £116,500 liquidated damages as compensation for delay and consequential loss of trading profits. That was on the basis that the handover of the site had been due on 31 December 2017 but was delayed until 31 August 2018 which was the date when the site became fully operational.

29. Cogeneration also received liquidated damages but that is not relevant because the handover for their site, where construction work only commenced after the EIS Deadline, was delayed from June 2018 to March 2019. No other appellant received liquidated damages.

30. Cogeneration has argued that it had selected a site by July 2017, completed the preparatory work referred to in paragraph 28(2) above and financial closure had also been achieved on 24 November 2017 with the execution of the same eight types of agreements, amongst others. It had entered a lease for the site on 24 November 2017.

31. Morpheat has argued that it had selected a site by May 2017 and carried out preparatory work including due diligence and negotiation of agreements. There were agreements because the acquisition of the site involved the purchase of a company, Shovel Ready 7 Limited ("SR7"), which had carried out preparatory work including entering into an Option Agreement granting it the right to purchase the freehold of the site.

32. On 11 August 2017, financial closure had taken place through the execution of documents including a Share Purchase Agreement under which Morpheat agreed to buy the entire shareholding in SR7, and a Power Purchase Agreement between SR7 and Gazprom. Like Cogeneration, either Morpheat or SR7 entered into the same eight types of agreement as Putney.

33. SR7 had exercised its rights to purchase the freehold of the site under the Option Agreement.

34. Thermal has argued that it had engaged in preparatory work for trading including negotiating contracts, undertaking due diligence and instructing advisers. The Investment Committee gave approval to proceed with the project in March 2018.

35. On 17 April 2018, after the EIS Deadline, Thermal purchased a separate entity, Shovel Ready 6 Limited (SR6), and a number of contractual agreements were entered into on that date either by Thermal or SR6. Those included a Power Purchase Agreement and a 21 year lease of the site. Construction commenced in late April 2018.

36. Piston has argued that it had entered into an agreement for business administration services and had signed Heads of Terms in relation to a potential power plant site and had engaged in discussions about that site. However, that did not progress and its Grounds of Appeal state that a "leading contender", which in fact was ultimately the site utilised, was identified after the EIS Deadline.

Overview of the arguments

37. HMRC argue that the fact that each appeal has a different factual matrix is crucial as the issues of qualifying trade and trade cannot be decided in the abstract. They say that the appellants all rely on different stages of their preparedness in order to discharge the burden of showing that they had each commenced trading by the EIS Deadline. HMRC recognise that all of the appellants' activities prior to the EIS Deadline were legitimate business activities but argue that that amounted to nothing more than getting ready to trade.

38. The appellants argue that each of the companies set about commencing to trade in a similar way and their activities were broadly the same. It is argued that the differences in the detail were not such that the outcome was likely to be different.

The Tribunal Rules

39. Rule 2—

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally.

40. Rule 5—

> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
(c) permit or require a party to amend a document;
(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
(e) deal with an issue in the proceedings as a preliminary issue;
(f) hold a hearing to consider any matter, including a case management hearing;
(g) decide the form of any hearing;
(h) adjourn or postpone a hearing;
(i) require a party to produce a bundle for a hearing;
(j) stay (or, in Scotland, sist) proceedings;
(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.

41. Rule 18—

(1) This rule applies if—

(a) two or more cases have been started before the Tribunal;
(b) in each such case the Tribunal has not made a decision disposing of the proceedings; and
(c) the cases give rise to common or related issues of fact or law.

(2) The Tribunal may give a direction—

(a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and
(b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) ("the related cases").

(3) When the Tribunal makes a decision in respect of the common or related issues—

(a) the Tribunal must send a copy of that decision to each party in each of the relates cases; and
(b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 28 days after the date that the Tribunal sent a copy of the decision to a party
under paragraph (3)(a), that party may apply in writing to a direction that the decision does not apply to, and is not binding on the parties to, that case.

(5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.

(6) If the lead case or cases are withdrawn or disposed of before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to—

(a) whether another case or other cases are to be heard as a lead case or lead cases; and
(b) whether any direction affecting the related cases should be set aside or amended.

The EIS legislation, insofar as relevant

42. Section 157(1) ITA 2007 provides:

"(1) An individual ('the investor') is eligible for EIS relief in respect of an amount subscribed by investor on the investor's own behalf for an issue of shares in a company ('the issuing company') if—

…

(c) the general requirements (including requirements as to the purpose of the issue of shares and the use of the money raised) are met in respect of the relevant shares (see Chapter 3) …".

43. Section 172 in Chapter 3 relevantly provides that:

"The general requirements are met in respect of the relevant shares if the requirements of this Chapter are met as to—

…

(b) the purpose of the issue (see section 174) …".

44. Section 174 provides (emphasis added):

"174 The purpose of the issue requirement

(1) The relevant shares (other than any of them which are bonus shares) must be issued in order to raise money <u>for the purpose of a qualifying business activity</u> so as to promote business growth and development.

(2) For this purpose "business growth and development" means the growth and development of—

(a) If the issuing company is a single company, the business of that company …".

45. The term "qualifying business activity" is defined in section 179, which provides:

"(1) In this Part 'qualifying business activity', in relation to the issuing company, means—

(a) activity A, or

(b) activity B,

if it is carried on by the company or a qualifying 90% subsidiary of the company.

(2) Activity A is—

(a) the carrying on of a qualifying trade which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or

(b) the activity of preparing to carry on (or preparing to carry on and then carrying on) a qualifying trade—

(i) which, on that date, is intended to be carried on … by the company or such a subsidiary, and

(ii) which is begun to be carried on by the company or such a subsidiary within two years after that date".

46. The term "qualifying trade" in section 179(2)(b) is defined in section 189 as follows:

"(1) For the purposes of this Part, a trade is a qualifying trade if—

(a) it is conducted on a commercial basis and with a view to the realisation of profits, and

(b) it does not at any time in period B consist wholly or as to a substantial part in the carrying on of excluded activities.

(2) References in this section and sections 192 to 198 to a trade are to be read without regard to the definition of "trade" in section 989."

47. Section 989 provides that "'trade' includes any venture in the nature of trade".

TCGA

48. Section 150A(2) provides relief for capital gains tax purposes when it is available for income tax purposes.

Discussion

49. As is obvious, the primary question before me was whether these appeals give rise to common or related issues and, if so, if it is appropriate to exercise the Tribunal's discretion to specify a lead case in terms of Rule 18.

50. In the event that it is not appropriate then the question is whether one or two appeals should go forward with the other four or three appeals stayed. Neither party wishes all five to proceed at this stage.

51. I am required to interpret the Rules to give effect to the overriding objective of dealing with cases fairly and justly and that is to all parties.

52. It is argued for the appellants that because Mr Stone accepts that three of the appeals should be stayed, HMRC are accepting that there are related issues, so a Rule 18 direction is *prima facie* appropriate.

53. I can understand why, initially, HMRC was seduced by the perceived simplicity of a lead case. Mr Stone readily accepted that, in principle, Rule 18 was a useful tool especially where there was only a common legal issue, as was the case in *General Healthcare Group Limited* [2014] UKFTT 353 (TC) ("Healthcare"). The reason that HMRC changed their stance was, and is, the difficulty in finding common or related factual issues in all five appeals in a situation where, in Piston, not even a site had been identified in the relevant period.

54. Mr Ewart argues that the factual distinctions between the appeals are nuanced and that there are sufficient "common facts" to make a Rule 18 Direction. He used the word "nuanced" because at paragraph 36 of *Jones* Judge Dean found that nuanced differences of fact were not a reason not to make a Rule 18 Direction.

55. Mr Ewart was emphatic that a decision as to when Putney commenced trading would determine the result in all five appeals because Putney was the most "advanced" of the five appellants. Mr Stone agreed that it was the most advanced and accurately pointed out that if Putney lost, then all of the appellants would lose.

56. I agree with both parties that the appellants rely on different stages of preparedness to discharge the burden of showing that they had commenced trading by the EIS Deadline.

57. At one end of the spectrum there is Putney which, by that time, had achieved financial closure and commenced construction of the plant. Furthermore it sought, and was paid, a six figure sum including liquidated damages for loss of trading profits.

58. That raises an interesting issue in that, in its Statement of Case, HMRC relies on what it describes as the fact that the two "essential steps" that Putney had not completed were constructing the plant and completing tests to ensure that the plant was able to generate and provide electricity. Had the site been delivered on time then possibly (but that is a factual issue) those steps might have been completed and there would have been no damages as they might have been trading. Given that it appears that they commenced trading on the day that the site was eventually handed over that seems likely. That raises the very obvious point, made by Mr Stone, that a Tribunal adjudicating on Putney might look no further than that. That would shed no light on any of the other appeals.

59. Furthermore, as was pointed out in HMRC's Skeleton Argument, the receipt of liquidated damages for loss of trading profits, might raise an additional point of law as to whether that amounts itself to trading.

60. If either were to be the basis of a decision in Putney, and it was the lead case, then the other four appellants would have suffered a significant delay and to no avail.

61. On the other hand I agree with Mr Stone that a decision in Putney would be very relevant to the other appellants if Putney lost. There would be significant savings for all concerned.

62. If Putney won on the issue of liquidated damages with no detailed examination of other issues, it is possible that any such decision might be of assistance to one or more of the other appellants. I can put it no higher than that.

63. The assertion at paragraph 3.3 in the appellants' Rule 18 Application states that:

> "The Appellants each followed a materially similar pattern in preparing to and eventually commencing, trade. There is a slight variation in the timeline for each….An examination of the SOC's filed by HMRC for Putney Power Limited and Piston Heating Services Ltd also demonstrates that most of the factual matters present in Piston Heating Services Ltd's appeal are also present in the appeal for Putney Power Ltd."

and is superficially appealing.

64. There is a footnote which states that only two material paragraphs in the Statement of Case for Piston have been omitted from that for Putney. Those paragraphs identify how little had been done before the EIS Deadline. As I have indicated at paragraph 36 above, it was only after the EIS Deadline that Piston even identified a site as being a "leading contender" (and from the Grounds of Appeal I can see that that was only because another site fell through). It was on 3 October 2018 that contractual documentation was completed.

65. Given the strict statutory deadline, I do not consider that to be a "slight variation in the timeline."

66. By the EIS Deadline, neither Piston nor Thermal had achieved what the other appellants described as "financial closure". In the context of financial closure, Putney and Cogeneration seem to have probably entered into eight very similar, if not identical contracts but Morpheat is complicated by the existence of SR7.

67. Of course, I do understand the argument for the appellants that if the Tribunal in Putney decided that only by achieving "financial closure" it had commenced to trade then Piston and Thermal would lose their appeals. However, on the balance of probability even if there were no lead case, any such decision would no doubt be very persuasive.

68. I was not referred to the case but I agree with Judge Citron in *Kingston Maurward College v HMRC* [2017] UKFTT 502 (TC) ("Kingston") where he stated:-

> "25. The tribunal's power to specify lead cases under rule 18 is a case management tool for rationalising the tribunal's consideration of common or related issues of fact or law across more than one appeal. The tribunal (Judge Mosedale) observed in *288 Group Limited & Others v HMRC* [2013] UKFTT 659 (TC) at [39]:
>
> > 'The purpose of rule 18 is, it seems to me, to avoid unnecessary litigation, and that must include shortening the length of hearings. It must also include decreasing the risk of multiple tribunals deciding the same issues, and particularly to avoid the risk of FTT tribunals in different hearings coming to different conclusions on the same issue.'
>
> 26. Rule 18 operates by making the tribunal's decision in the lead case in respect of the common or related issues binding on the related cases. A clear definition of the common or related issues is important to the efficient operation of rule 18; without this, the case management efficiency of the rule 18 mechanism is reduced or reversed as related cases apply to the tribunal for a direction under rule 18(4) that they be unbound from the lead case. On the other hand, the presence of additional issues to the common or related ones, in the lead case or a related case or both, should not be a barrier to the operation of rule 18, as the decision in the lead case is binding only in relation to the common or related issues." (emphasis added)

69. I observe that whilst Rule 18(4) can apply to unbind, there is no right to be unbound.

70. I also agree with Judge Berner in *Healthcare* where he stated at paragraph 30 that:

> "The lead case procedure under Rule 18 is no more than a procedural means whereby the First-tier Tribunal determines the relevant issues in the appeals both in the lead case and in the related cases.".

Judge Berner had made the points, with which I certainly agree, at paragraph 18 that care should be taken before an appeal is designated as a related case under a Rule 18 direction and that such a direction is not one that is made lightly.

71. He expanded upon that in the following paragraph stating that "Clarity is paramount…", which it is, and that is why I have added emphasis to the quotation from *Kingston.*

72. I am afraid that I do not think that the proposed Directions 2(a) and (c) could be described as models of clarity. They are both vague and extremely wide.

73. Direction 2(b) is very precise, albeit in argument Mr Ewart conceded that it could be varied such that rather than specifying a date the question could be whether it had commenced to trade before the EIS Deadline.

74. I agree with Mr Stone that the proposed Direction 2(a) reads like an examination question and is almost theoretical.

75. An obvious problem is that Direction 2(c) refers to "steps", which term is not defined and is extremely vague. It is difficult to identify what could possibly be described as "the most significant" step, let alone one that is common to all five appellants.

76. In a similar vein, I do not accept the argument that because there were Heads of Terms entered into in Putney, and the other appeals, the Tribunal in Putney would have to decide whether that was sufficient to constitute commencement of trading and that would be applicable to the other four appeals.

77. There are two issues. Firstly, the Heads of Terms in Piston did not relate to the site that was eventually selected. Secondly, the Tribunal might not even consider the Heads of Terms in Putney.

78. Initially, like HMRC, I was beguiled by the apparent attractions of a Rule 18 Direction since, at one level, there are undoubtedly common facts since the appellants all seem to be connected and wished to establish the same type of business model using broadly the same advisers to various extents. I listened to both parties, read all of the documentation, and then attempted to identify precisely what I might draft as a direction (since agreement between the parties is not possible). Therein lay the problem.

79. Both parties accept, as they must, that it is only the decision on the common or related issues which is binding on the related cases. I have already pointed out how crucial it is that if there is to be a Rule 18 direction that it must be clear and precise since it would be binding in respect of the issues identified therein. Both parties accept that in regard to all other issues any such determination does not conclude the appeals.

80. I noted, but was not impressed with, the argument that was advanced to the effect that because the companies were "related", apparently they have common directors but I have no evidence on that beyond an assertion in the appellants' Skeleton Argument, the appellants would all work together if the lead case failed so if an appeal was appropriate for one it would be made in the interests of all. That may be the case but it is not a factor upon which I would place any reliance. However, I accept there could be recourse to Rule 18(5).

81. Mr Ewart argues that if Piston were to be litigated in addition to Putney there would be significant duplication with examination of lengthy contractual documentation. I accept that

there is a different chronology but I do not accept that there would be significant duplication in relation to contracts.

82. For the reasons given, I agree with Mr Stone that a decision as to when Putney commenced to trade would not necessarily be decisive in the other appeals unless it was a decision that it did not commence to trade before the EIS deadline.

83. As I have explained, it probably would not assist in the other appeals if it was a decision based on the liquidated damages.

84. Therefore, I must also consider the appellant's default position which is that Cogeneration should be the lead case. If that appeal were to be determined on the basis of "financial closure" then I can see that it might be decisive for Putney on that issue but the factual matrix in Morpheat is very different and there was no financial closure in Thermal or Piston. However, if Cogeneration lost, Putney would still have an argument on the liquidated damages so it probably would not be determinative of Putney.

85. As I have pointed out I agree with Judge Berner that a decision to issue a Rule 18 direction should not be taken lightly. I have given the Rule 18 Application considerable thought and I accept that there are similarities in the approach taken by each of the appellants. However, I am afraid that I cannot agree with Mr Ewart that the differences in the factual matrices are simply nuanced. I am unable to identify with sufficient clarity factual issues in Putney or Cogeneration that would be determinative of all of the appeals.

86. Since in Putney there is the issue of liquidated damages and in Piston there was not even a site, I can see why both should proceed. I also understand why both parties accept that a decision in Putney might assist the parties in the other three appeals and, of course, both parties in each of those appeals currently seek a stay.

Decision

87. For the reasons given I refuse the Rule 18 Application and grant the Rule 5 Application.

88. The parties have agreed the procedural directions which will be issued today.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 10th MARCH 2023