APPEAL AGAINST DIRECTION — First-tier Tribunal refusing to admit certain evidence — whether refusal a reasonable exercise of discretion — no —appeals allowed and decisions re-made — principles to be taken into account by Tribunal

Appeal number: FTC/69&70/2012

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and-

ATLANTIC ELECTRONICS LIMITED

Respondent

Tribunal: **Judge Colin Bishopp**

Sitting in public in London on 28 September 2012

Christopher Foulkes and Karen Robinson, counsel, instructed by Howes Percival, for the Appellants

Abbas Lakha QC and Edmund Vickers, counsel, instructed by Jeffrey Green Russell, for the Respondent

DECISION

Introduction

1. On 28 September 2012 I heard an appeal by H M Revenue and Customs ("HMRC") against certain parts of a direction made by the First-tier Tribunal (Judge Theodore Wallace) ("the judge") following a hearing on 5 and 6 January 2012. The direction was released on 5 March 2012, and full reasons were provided on 29 June 2012. The direction provided for a number of matters, in the context of what is commonly referred to as a missing trader intra-community, or "MTIC" appeal. Those which are the subject of this appeal, namely those at paragraphs 5 and 6 of the direction, dealt with the judge's refusal of HMRC's applications for permission to rely on the evidence of two witnesses, Paul Johnson and Karen Cummins (in respect of Ms Cummins the refusal related to some additional evidence—a first statement made by Ms Cummins had already been admitted).

2. A different judge of the First-tier Tribunal, Judge Berner, gave HMRC permission to appeal against the refusal so far as it related to Ms Cummins, but declined to do so in respect of Mr Johnson's evidence. However, I later granted permission in respect of Mr Johnson, and dealt with the appeal against both of the disputed paragraphs of the direction at a single hearing. I informed the parties at the conclusion of that hearing that I would allow the appeal in respect of both witnesses and, in view of what was at the time perceived to be some urgency, re-make the decisions myself in accordance with s 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I decided to allow HMRC to rely on Ms Cummins' evidence but not on that of Mr Johnson; these are my reasons.

3. HMRC were represented before me by Mr Christopher Foulkes and Ms Karen Robinson, both of counsel, and the respondent (the appellant before the First-tier Tribunal), Atlantic Electronics Limited ("the Company") by Mr Abbas Lakha QC, leading Mr Edmund Vickers. The appeal was vigorously resisted.

4. I begin by making the observation, lest it be forgotten, that an appellate court or tribunal should interfere with case management directions made by a judge of an inferior court or tribunal only in the clearest of cases. It is not enough that the appellate judge disagrees with the direction and would not have made it himself; there must be a plain error, in that the judge failed to take account of a significant and relevant fact, based his decision on an irrelevant matter, misdirected himself in law or in some other way came to a decision which no judge, properly applying the law to the relevant facts, could reasonably have reached. The breadth of what is a reasonable exercise of judicial discretion must also be respected: see *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [33], where Lawrence Collins LJ said

> "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong

that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

5. The evidence of the two witnesses is not inter-dependent, and I can deal with them discretely. I shall begin with Mr Johnson, though it is necessary first to explain the background to the January 2012 hearing.

6. The issue before the First-tier Tribunal is whether HMRC was right to disallow the Company's claim for input tax credit in the VAT periods 03/06, 04/06 and 05/06, in each case on the ground that the transactions in respect of which that input tax had been incurred were connected with fraud, and the Company knew or should have known of that connection. The relevant decisions were set out in three letters, one for each period, the last being dated 28 May 2008. The Company appealed to the VAT and Duties Tribunal against each such decision, and the resulting three appeals were later consolidated. Various procedural steps followed, with which it is not necessary to deal for present purposes, save to record that, even by the standards of MTIC appeals, the number of interlocutory hearings which have taken place and of directions made on the basis of written submissions alone in the course of the appeal is extraordinary. The appeal was transferred to the First-tier Tribunal on 1 April 2009, when the VAT and Duties Tribunal ceased to exist.

7. I should also record that it was initially envisaged that exchange of witness statements would be completed by as long ago as 2008 but, as is so often the case in MTIC appeals, that timescale proved overly optimistic since additional evidence has emerged as time has passed, and there have been repeated applications by HMRC for permission to adduce that additional evidence, of which the application before the judge was only one example. It seems that almost all of the applications have been strongly resisted, and they have met with mixed success.

8. I should add for completeness that over the course of the appeal HMRC applied for, and were granted, several extensions of time for complying with a number of requirements. The Company, too, sought and obtained some indulgence. I do not consider that past conduct offers much assistance in deciding the matter before me, and I have left it out of account.

9. Mr Johnson's statement deals with his analysis of details of the IMEI numbers of the phones in which the Company was dealing or, as his statement suggests, in some cases purportedly dealing. The IMEI material which he analysed was provided by the Company to HMRC's solicitors in January 2011. While it must have been obvious to the Company that HMRC were going to examine the material, it would have known nothing of the result of the examination until HMRC disclosed it. In fact, HMRC said nothing more until about 26 September 2011, when their solicitors issued an application for permission to serve and rely on Mr Johnson's evidence. Even then they did not disclose that evidence, which is set out in a statement Mr Johnson made on 18 October 2011, some 11 months after the provision of the IMEI material.

10. In his reasons for refusing the application in respect of this evidence the judge, after reciting the parties' competing arguments, said (at para 27)

> "As stated at paragraph 18 above I refused to give leave to serve Mr Johnson's statement. At the hearing in March and April 2011 the Tribunal was given no warning as to the IMEI evidence; no satisfactory explanation has been given either for the failure to inform the Tribunal or for the fact that the statement was not served until October 2011. A series of directions were included in the direction released on 12 May 2011 in order to prepare for a final pre-trial review, in particular the parties were required within two months to give notice of any applications to be made at the pre-trial review with a time estimate for the pre-trial review. The Statement of Case directed in March 2011 made no mention of the IMEI numbers or of the allegation that the Appellant did not obtain them at the time of the deals. The Nemesis database is not comprehensive. If Mr Johnson's evidence was admitted the Appellant would be fully entitled to investigate it, if necessary with an expert. It is relevant that Mr Johnson's statement does not relate to any of the disallowed transactions."

11. The judge reminded himself of observations he had made about the exclusion of evidence in reasons given by him in relation to an earlier similar application in the appeal (observations I do not think it necessary to repeat here), and then said at para 28 that, having considered

> "in particular the overriding objective under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, I concluded that permission to introduce this evidence should be refused."

12. The last sentence of paragraph 27 of the reasons is incorrect, as Mr Lakha accepted, although he attempted to persuade me that it was a slip, since other comments in the reasons (he said) showed that the judge realised that the evidence did relate to the disputed transactions. I was not persuaded to that view. The sentence is perfectly clear, and it is equally clear from its context that this perception was a significant factor in the judge's decision-making process. Since the relevance of evidence sought to be admitted is an important matter to be borne in mind when considering whether or not to admit late evidence (see the observation of Lightman J in *Mobile Export 365 Ltd v Revenue and Customs Commissioners* [2007] STC 1794 to which I refer below) I came to the conclusion that there was a fatal flaw in the reasoning which compelled me to set aside this part of the decision.

13. I then proceeded to re-make it.

14. There can be no doubt that Mr Johnson's evidence is in fact relevant; and Mr Lakha did not argue otherwise. I was satisfied that admitting the evidence would cause some prejudice to the Company, in that it would incur costs in having Mr Johnson's statement examined and in dealing with his evidence at the hearing. I was not, however, persuaded that it needed, as Mr Lakha suggested, to secure the evidence of an expert, or to examine Nemesis itself. Mr Johnson's evidence that certain of the IMEI numbers supplied do not match the phones to which they purportedly relate can in my view be simply tested by enquiry of the relevant manufacturer, and the remainder of his evidence by cross examination. The prejudice to HMRC of excluding the evidence (which, if correct, shows that some of the Company's transactions were not as they claim them to have been) is obvious, though nothing Mr Foulkes said led me to the view that it was acute, in

the sense that the absence of this evidence would fatally undermine HMRC's case.

15. As the judge said, HMRC had had several opportunities (in the course of other appearances before the tribunal) to mention that the IMEI numbers were still being examined, but did not do so. Alternatively they could have explained their position to the Company's solicitors in correspondence, but they did not do that either. I was given no, or at least no satisfactory, explanation of those omissions. In addition, even at the hearing of this appeal I had no satisfactory explanation of why it took so long to do the analysis; Mr Johnson says nothing in his statement, he did not attend to offer an explanation, and Mr Foulkes did not offer one on his behalf, beyond a concession that it was in part due to HMRC's having only limited resources. Mr Johnson's statement indicates that he did no more than convert data provided in one format into another format, by a process which I know from personal experience can be undertaken by a computer in a few seconds, and that he then used a computer to compare the converted data with other data held by HMRC (the Nemesis data to which the judge referred), and to produce a report derived from that comparison. I have no personal experience of that process, but there is nothing in Mr Johnson's statement to suggest that it is lengthy. The statement itself runs to ten pages. Some of it is merely formal or uncontroversial narrative, while most of the remainder merely recites the results of the data comparison exercise. There is some, but limited, commentary which Mr Johnson has added. In the absence of proper explanation I must guess, but in my estimation the whole exercise could not have occupied more than a week.

16. The absence of any explanation left me with the clear impression that Mr Johnson gave other tasks higher priority. That may have been a reasonable thing for him to do, but it does not explain or excuse the failure to tell the appellant's solicitors or the tribunal what was going on. This was evidence HMRC wished to put in after the expiry of the time limit imposed by tribunal directions, already extended several times, and when they knew that an application for permission would be necessary. A litigant wishing to put in late evidence has a duty to make the application promptly and, in a case such as this where the evidence is being compiled, to forewarn his opponent: it is not a case in which doing so would undermine the purpose of the evidence. HMRC did not forewarn, and took an unexplained amount of time to produce the evidence.

17. The information available to me about the relative prejudice to the parties of admitting or excluding the evidence was rather limited, but I was satisfied that my admitting Mr Johnson's evidence would cause more than trivial prejudice to the Company. The combination of that prejudice and HMRC's failure to act openly, in my judgment, outweighed the fact that the evidence is relevant and the prejudice to HMRC of excluding it. For that reason I decided that the overriding objective dictated the exclusion of this evidence.

18. Ms Cummins' statement related to the conviction on 19 August 2011 on two counts of conspiracy to cheat the revenue of one Shabir Ahmed, a director of Morganrise Limited. That company was said by HMRC to be a contra-trader in two of the relevant chains of supply. It was not said that the conviction related to the chains in which the Company was involved, but that it was "similar fact"

evidence, demonstrating that Morganrise was a participant in contrived chains, and that it was both material and important. The Company's arguments before the judge, as before me, were that the introduction of this evidence would put the Company at a considerable disadvantage in that would require it or its advisers to embark on a detailed investigation of the prosecution, which had led to a trial lasting two months, and that it would lead to an unacceptable increase in the length of the hearing needed for the resolution of this appeal. It also represented a diversion from the real issue in the appeal. Mr Foulkes' response was that the evidence of the conviction did not warrant such detailed examination since it was relevant only to the activities, in other transactions (albeit undertaken at about the same time as the transaction in issue in the appeal), of Morganrise; and there was no reason to think that that the length of the hearing would be materially increased.

19. After repeating the need to pay heed to rule 2, the judge said:

> "39. … The case is important to both parties, the issues are complex, the costs substantial albeit that the 1986 costs rules do not apply and the resources of the Appellant are not unlimited. If the conviction evidence is admitted the Appellant must have a proper opportunity to deal with it in order to participate fully under Rule 2(3)(b).
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> 40. The evidence of dishonesty by Morganrise's director in 2006 is in my view potentially relevant; how relevant would depend on examination of the facts. This would have involved considerable work and costs for the Appellant. It would almost certainly have added materially to the length of the trial and resulted in delay. The evidence is already very stale. The conviction did not involve the facts in this case, it involved a different type of goods and the Appellant had no dealings with Morganrise.
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> 41. If the evidence had been admitted, the Tribunal would have needed to consider the prosecution opening note with care although much of it did not concern Mr Ahmed.
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> 42. The complexity of the criminal proceedings is shown by the length of the trial and the fact that the case summary to assist the court which had been produced to the Tribunal extended to 1435 paragraphs on 361 pages. In HMRC's skeleton argument for this application, 241 paragraphs of the case summary were highlighted although not to the exclusion of the others. This indicates the extent of investigation which would be necessary for the Appellant.
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> 43. The evidence which has already been served and admitted is extensive and complex. This material would have added substantially to the complexity of the trial.
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> 44. In my judgment adopting the words of Lord Bingham in *O'Brien* [*v Chief Constable of South Wales Police* [2005] 2 AC 534] at [6],
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> > '... admission of the evidence will distort the trial and distract the attention of the decision-maker by focussing attention on issues collateral to the issue to be decided.'
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> Although the Tribunal is a specialist Tribunal, if contains non-legal members for whom complex evidence over a long trial presents a real challenge. This appeal will be challenging without this evidence; the admission of this

> evidence would have added substantially to its complexity. It is relevant that the Appellant had no dealings with Morganrise which only appeared twice in the Appellant's supply chains."

20. In my judgment that analysis of the relevant considerations, with respect to the judge, is quite wrong. It ignores two significant facts: first, that a conviction and the indictment on which it was based are matters of public record; and, second, that the conviction was in August 2011, and the application for permission to put in evidence of it was made in September 2011, about five weeks later—it could not, realistically, have been made much more promptly. The judge also seems to have been influenced by his perception that the evidence was stale. That may be true of the evidence on which the conviction was based, but it was not true of the evidence of the conviction. Had the conviction been earlier, say in 2008, I find it difficult to see how evidence of it, adduced in accordance with the directed timetable, could properly have been excluded—in other words, the only reason why HMRC had to ask for permission, and the only reason why the appellant had any grounds for resisting its inclusion, was that it was put in after the directed deadline had expired. But, here, that is not a ground on which HMRC can be criticised.

21. The judge recognised that the conviction was, at least potentially, relevant. But he then concentrated on the prejudice to the Company its introduction would cause, as he perceived it, to the exclusion of any other consideration. In particular, in addition to overlooking the two facts I have identified above, he did not advert to, let alone consider, the prejudice to HMRC which a refusal to admit the evidence would cause, made only a cursory examination of relevance, and did not undertake a balancing exercise.

22. For those reasons I concluded that his decision could not stand, and that I should set aside his direction and re-make it.

23. If they are to demonstrate that Morganrise was a contra-trader, HMRC must establish that it, or its directors, were knowing participants in fraudulent transactions; it is generally accepted that one cannot be an unwitting contra-trader. The conviction, as Mr Foulkes accepted, does not by itself show that the chains in which Morganrise featured and in which the Company found itself were fraudulent nor, if they were, that Mr Ahmed or, through him, Morganrise was a knowing participant in that fraud. But I agree with the judge that the fact of the conviction and the nature of the offence are at least potentially relevant. One can test that proposition by considering the reverse case: had Mr Ahmed been acquitted, would that fact have offered support to the Company? In my judgment, it would be at least arguable that it did. Plainly HMRC consider the evidence to be an important part of their case. That is not, by itself, a ground for allowing it to be admitted; but the assessment by a party of the importance to its case of the evidence available to it must be a significant indicator of relevance.

24. Once relevance is demonstrated it is in my view necessary to bear in mind the observation of Lightman J to which I have already referred:

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

25. The "compelling reason" which Mr Lakha advanced before me was much the same as the reason he advanced before the judge: that the burden, in cost and time, on the Company of investigating the conviction and the facts on which it was based would put the Company at a great disadvantage. I do not accept that submission. As I have already said, HMRC do not rely on the conviction as evidence of anything more than Mr Ahmed's participation in activities similar to those of which they allege he was guilty here, at about the same time. The judge referred to the length of prosecuting counsel's opening. I agree it is long and will require some analysis, but I am by no means persuaded that the analysis will be as burdensome a task as Mr Lakha would have me believe. Counsel are experienced in identifying the relevant features of long documents quickly and accurately; moreover, although individually long, this will be only one of the thousands of documents customarily seen in MTIC appeals. In short, I am satisfied that Mr Lakha's claims about the burden admission of the evidence will impose on the Company are overstated.

26. I also do not accept the submission that the extract from the speech of Lord Bingham in *O'Brien* which is set out in the judge's reasons is in point. The evidence does not go to a collateral issue, one which will distract the tribunal. It is relevant, if it is relevant at all, to one of the matters HMRC must show in order to succeed. For similar reasons I cannot accept the judge's view that evidence of this kind is too complex to be presented to a non-legal member, with the implication that such a member would not be able to understand it or its relevance. I am bound to say I am somewhat perplexed by the remark; it seems to me to underestimate the intelligence and acumen of the non-legal members of the First-tier Tribunal, most of whom have experience of hearing and analysing the most complicated of evidence.

27. If one is to follow Lightman J in excluding evidence for a compelling reason, it seems to me that by the same token the tribunal should be slow to do so when there are compelling reasons for allowing it. The fact that the conviction and the indictment are matters of public record is in my judgment such a reason. The remaining material HMRC wished to put in, namely counsel's note of his opening to the jury, is not in the same category but I do not apprehend that the tribunal will have the least difficulty in treating it as counsel's note rather than the findings of the jury, and of attaching appropriate weight to it. Moreover, I concluded that it was likely to answer the questions the tribunal would themselves ask if it was not before them.

28. As I have said, the application to adduce this evidence was made promptly after Mr Ahmed's conviction. There is thus no basis to exclude it on grounds of dilatoriness. The fact that the application for it to be admitted was late—that is, made after the time for disclosure of evidence had expired—is no more than the inevitable consequence of the timing of the conviction.

29. Although I have concluded that the burden which will be imposed on the Company by the admission of the evidence is overstated, I am satisfied that there will be some prejudice to it by reason of that burden. But if I am right in my view that the evidence could not have been excluded if the timing of the conviction had made it possible to put in evidence of it before expiry of the directed time limit,

the Company would have no means of escaping that burden. Thus the prejudice arises principally from the timing of the conviction and the consequent introduction of Ms Cummins' evidence. I am satisfied that exclusion of the evidence would cause real prejudice to HMRC although, as in any case of this kind, it is impossible for me at an interlocutory stage to assess the degree of that prejudice. But, by contrast with their position in respect of Mr Johnson's evidence, it is not prejudice HMRC have brought on themselves.

30. I therefore return to the observation of Lightman J. I am satisfied that the evidence is relevant, and that there is no compelling reason for excluding it. It must therefore be admitted.

31. I accordingly re-made the decision as follows:

(a) HMRC are refused permission to rely on the evidence of Mr Paul Johnson;

(b) HMRC may rely on the evidence of Ms Karen Margaret Cummins set out in her witness statement dated 18 October 2011 and the exhibits thereto.

32. I add for completeness that the potential difficulties to which the judge adverted at paras 46 and 47 of his decision, and which Ms Cummins mentions at paras 14 and 15 of her statement, have been resolved and are no longer relevant.

Colin Bishopp
Upper Tribunal Judge

Release date: 26 November 2012