[2019] UKUT 349 (TCC)

Appeal number: UT/2019/0014

PROCEDURE – Rule 9 FTT Procedure Rules– substitution of person as appellant on grounds the wrong person had been named as a party – new appellant objecting – whether FTT erred in law – no – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JOHN McFADZEAN

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE JONATHAN CANNAN

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 22 October 2019

The Appellant appeared in person

Laura Poots, counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue & Customs for the Respondents

DECISION

Introduction

1. This is an appeal by Mr John McFadzean against a case management direction of the First-tier Tribunal ("FTT") issued on 24 September 2018 ("the FTT Decision"), following an oral hearing on 20 September 2018, which substituted Mr McFadzean as an appellant under Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("the FTT Procedure Rules"). The direction was in relation to appeals against an HMRC assessment and decision contained within a set of appeals by a company, of which Mr McFadzean is a director and sole shareholder (MX Enterprises Ltd. ("MX Ltd.")). Those appeals related to pension scheme sanction charges and HMRC's refusals to discharge liability which arose in the context of four sets of pension scheme arrangements.

2. Under the relevant pension taxation legislation, it is the scheme administrator who is primarily liable for the scheme sanction charges. The scheme administrator, as defined in the relevant statute, must be appointed in accordance with the rules of the pension scheme. By the time the relevant appeals were notified to the FTT, the common assumption was that MX Ltd. was the scheme administrator and the correct appellant, however in amended grounds of appeal, which MX Ltd. later filed, MX Ltd. argued in relation to one of the pension scheme arrangements that it had *not* been appointed as a scheme administrator and so was not liable to the scheme sanction charge. After further investigation, HMRC accepted MX Ltd. was not appointed, but maintained, that as regarded one specific assessment (the one for 2007-8 ("the Relevant Assessment")) and the associated HMRC refusal to discharge liability, that Mr McFadzean had been appointed as the scheme administrator. Whether Mr McFadzean had been so appointed remains a matter of dispute, and is, HMRC say a matter that will be resolved in the substantive proceedings which are yet to be heard.

3. HMRC applied, at a case management hearing that was listed before the FTT, to substitute MX Ltd. with Mr McFadzean as the in relation to the Relevant Assessment. The FTT made that direction despite MX Ltd.'s objection. Mr McFadzean submits that, for a number of reasons, the FTT's decision substituting him as the appellant was wrong in law. With the permission of the Upper Tribunal ("UT"), he now appeals to the UT against the FTT Decision.

The Law

4. Rule 9 of the FTT Procedure Rules provides, so far as relevant as follows:

> "**9 Substitution and addition of parties**
>
> (1) The Tribunal may give a direction substituting a party if—
>
> (a) the wrong person has been named as a party; or
>
> (b) the substitution has become necessary because of a change in circumstances since the start of proceedings.

> (2) The Tribunal may give a direction adding a person to the proceedings as a respondent.
>
> (3) A person who is not a party to proceedings may make an application to be added as a party under this rule.
>
> …
>
> (5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate."

5. As far as the pension scheme sanction charge provisions are concerned it is sufficient to note the following sections of Finance Act 2004 ("FA 2004"):

6. Section 270 sets out the meaning of "scheme administrator" and defines it as the person who is "appointed in accordance with the rules of the pension scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator" under the relevant legislation. HMRC highlight that because the appointment must be in accordance with the scheme's own particular rules, they will not necessarily know whether a person registering on their system will have been validly appointed.

7. Section 271(1) provides that the scheme administrator's liability ceases when a person ceases to be a scheme administrator and (2) provides that the person who becomes a scheme administrator assumes any existing liabilities of the scheme administrator. Under subsections (3) and (4), where a person ceases to be the scheme administrator, but there is no scheme administrator, the liability remains with that person until another person becomes the scheme administrator.

8. Scheme administrators may be liable to a "scheme sanction charge" (which is a charge to income tax under s239(1)) but they may, under s268(5), apply to HMRC for discharge of that liability on certain specified grounds. Under s269, where the Revenue decides to refuse a discharge of liability application, the applicant may appeal against the decision and the appeal must be notified within 30 days from notification of the refusal decision. Ms Poots also told us there were strict time limits for applying for discharge[1]; and so far as relevant to the facts of this case these time limits have expired.

The Facts and background

9. As will be seen, the FTT Decision took the form of a direction accompanied by brief reasons. This is commonplace in directions given shortly after a case management hearing. The decision, which was not published, did not need to set out an extensive factual or procedural background as this would have been apparent to those who attended the hearing. We set out below the facts and background necessary to deal with Mr McFadzean's grounds of appeal. These are taken from the materials the parties put before us in this appeal and in particular from Ms Poots' skeleton, which contained a helpful chronology, and the documents she took us to in her

[1] These appear to us to be set out in The Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005

introduction together with Mr McFadzean's input at the hearing on the correspondence he wanted us to be aware of.

10. In summary, and as detailed further below, the particular circumstances which gave rise to the FTT's direction were that while a scheme sanction charge assessment had been made on Mr McFadzean personally as the liable scheme administrator and he had appealed this assessment to HMRC, following the view being taken that MX Ltd. was the liable scheme administrator, it was MX Ltd. which notified an appeal to the FTT. However, as MX Ltd.'s appeal progressed towards hearing MX Ltd. raised a new argument that MX Ltd. had not been validly appointed and therefore was not a liable scheme administrator. After investigating the matter further HMRC accepted MX Ltd. was not the scheme administrator. HMRC maintain, contrary to Mr McFadzean's position, that Mr McFadzean remains the liable scheme administrator.

11. The substantive proceedings before the FTT related to four pension schemes who were involved in a series of transactions, which according to HMRC, amounted to what are commonly known as pension liberation schemes; in other words arrangements which allow scheme members to get funds from their pension savings before the age at which they are permitted to get person benefits (age 55). Mr McFadzean was named as the original scheme administrator for each of the schemes when they were registered with HMRC. The appeal before the UT is only concerned with an FTT Direction which related to one of the schemes, the MX Scheme. That was registered with HMRC, with Mr McFadzean named as the scheme administrator, on 21 June 2007.

12. On 30 January 2012, HMRC issued the Relevant Assessment for scheme sanction charges in the amount of £122,182 (which we understand was later reduced to £26,556.75) for 2007-8 to Mr McFadzean.

13. Mr McFadzean then notified an appeal against the Relevant Assessment to HMRC on 14 February 2012. Over the course of the period 26 to 28 June 2012 Mr McFadzean and MX Ltd. notified HMRC that Mr McFadzean had ceased to be the scheme administrator and that MX Ltd. had become the scheme administrator. It therefore appeared (given the operation of s271(1) and (2) FA 2004 as set out above) that MX Ltd. had assumed liability for the Relevant Assessment. Various correspondence ensued in relation to documents which related to the appointment.

14. On 13 August 2014 HMRC wrote to Mr McFadzean and to MX Ltd. in relation to the Relevant Assessment. HMRC's letter to Mr McFadzean explained that, as MX Ltd. became liable for the scheme liabilities, it was proposed that HMRC settle the appeal with MX Ltd. rather than Mr McFadzean. The letter to MX Ltd. offered a review, which MX Ltd. accepted on 8 September 2014.

15. HMRC wrote to MX Ltd. on 5 May 2015 with the conclusions of its review both in relation to the appeal against the Relevant Assessment and in relation to the decision HMRC had since made on 22 January 2015 refusing MX Ltd.'s application of 8 January 2015 for discharge of liability (under s 268(5) FA 2004).

16. MX Ltd. then notified appeals to the FTT against both the refusal to discharge liability decision and the Relevant Assessment on 2 June 2015. The case before the FTT then progressed until it was almost ready for listing.

17. On 25 August 2017 MX Ltd. submitted amended grounds of appeal on various grounds, which included, for the first time the argument that it had not been appointed as "scheme administrator" in accordance with the scheme rules and that it did not therefore meet the definition of "scheme administrator" under s270 FA 2004.

18. As foreshadowed in HMRC's further amended statement of case of 22 September 2017, which dealt with all four pension schemes, including the MX Scheme, further factual investigations were then made, which included Mr McFadzean preparing an additional witness statement and presenting further documentary evidence. HMRC accepted, following these investigations that MX Ltd. had never been appointed and took the view that Mr McFadzean remained liable for the Relevant Assessment (under s271(4) FA 2004).

19. On 29 June 2018 MX Ltd. applied to the FTT for a disclosure direction requiring HMRC to produce certain correspondence which HMRC regarded as irrelevant as HMRC were no longer arguing that MX Ltd. had been appointed as scheme administrator in relation to the MX Scheme.

20. MX Ltd.'s disclosure application and HMRC's response were put before the FTT (Judge Poole). The FTT's letter written on his instructions of 12 July 2018 and addressed to "John McFadzean, M X Enterprises Ltd.", noted in summary: 1) that despite HMRC saying it was not arguing MX Ltd. was a scheme administrator, HMRC's replacement Statement of Case nevertheless made arguments in relation to MX Ltd as regards at least one of the assessments under appeal 2) that HMRC were also suggesting that part of the appeal ought to be treated as having been made by Mr McFadzean. The letter explained that given the "number of fundamental uncertainties about the subject matter of the appeal and the appropriate parties to it" a case management hearing was to be convened to:

> "1. Address your outstanding application for disclosure;
>
> 2. Consider the correct parties to the appeal, and any issues arising from that consideration; and
>
> 3. Place matters on a sound procedural footing to ensure that all relevant issues are properly identified, pleaded and resolved at the final hearing."

21. Following notification of the hearing date to HMRC and MX Ltd., HMRC sent Mr McFadzean an e-mail on 5 September 2018 seeking amongst other matters to agree a draft list of issues and some draft directions. In so far as one of Mr McFadzean's grounds in this appeal places weight on the terms of that e-mail it is relevant to note that the headers in the list of issues and draft directions listed Mr McFadzean along with MX Ltd. together as "Appellant". HMRC's e-mail also proposed that:

> "…we ask the Tribunal to treat the appeal against the 2007-8 assessment as an appeal by yourself, rather than by scheme. This seems appropriate as the assessment was issued to yourself."

22. MX Ltd. replied on 17 September 2018, stating that the two parties to the hearing were HMRC and MX Ltd., that MX Ltd. did not support HMRC's intention to add another party. It also made it clear that the disclosure application was still in issue.

The FTT Decision

23. At the FTT hearing, MX Ltd. was represented by Mr McFadzean and HMRC by Ms Poots. Following the application hearing the FTT directed:

> "Under Rule 9 (1) of the FTT Rules 2009 Mr J. McFadzean is substituted as the Appellant in consolidated appeal TC/2015/03597 (sic) in relation to the 2007/08 assessment ("the MX Scheme")."

24. The header to the direction detailed the appeal number (TC/2015/03507) and listed both MX Ltd and Mr McFadzean as appellants. In the reasons which followed, after briefly summarising the salient parts of the procedural history outlined above, the FTT went on to explain:

> "6. The Notice of Appeal submitted to the Tribunal on 2 June 2015 and which covered all four schemes was made in the name of MX, which at that time was named on HMRC's system as the scheme administrator.
>
> 7. The issue as to who was the scheme administrator was not raised as contentious until the Appellant submitted Amended Grounds of Appeal on 25 August 2017 which resulted in HMRC reviewing the information provided by the Appellant and amending its Statement of Case. HMRC also continued to investigate the position by contacting the General Trustees and Independent Trustee. Ultimately HMRC submitted a replacement Statement of Case on 29 March 2018 setting out its position.
>
> 8. No criticism can be made of either party in relation to the delay and complex procedural history which arose from the parties' endeavours to clarify the factual position and issues in this appeal. However, as a consequence HMRC now seek to substitute Mr McFadzean as the Appellant in the MX scheme appeal.
>
> 9. I considered Mr McFadzean's objection on the basis that MX may not benefit from the substitution and that the FTT has no power to add a party. At this stage I am not satisfied that there is any prejudice to MX in substituting Mr McFadzean in the MX scheme appeal. Furthermore, the substitution effectively means that Mr McFadzean replaces MX as the Appellant in that appeal and I am satisfied that the Tribunal has power to so direct under the FTT Rules. I have concluded that the application satisfies the requirements of Rule 9 (1) and I therefore grant HMRC's application."

25. The FTT went on to explain its reasons for dismissing MX Ltd.'s application of disclosure but as Mr McFadzean does not challenge the FTT's direction on that aspect

by way of appeal to the UT we need not say anything more about that part of the FTT's decision.

26. In the FTT's subsequent refusal of permission to appeal decision, the FTT clarified that it made the substitution direction because it had been satisfied the wrong party had been named as a party; the relevant sub-part of Rule 9 to its decision was therefore Rule 9(1)(a).

UT's jurisdiction in case management appeals

27. As helpfully noted in Ms Poots' skeleton, the Supreme Court noted in *HM Revenue & Customs v BPP Holdings Ltd* [2017] STC 1655, the circumstances in which it is appropriate for an appellate court to interfere with the directions of the FTT (at [21]):

> "…if it could shown that irrelevant material was taken into account, relevant material was ignored (unless the appellant court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached."

Mr McFadzean's Grounds of appeal

28. Mr McFadzean raised a number of grounds in his application for permission to appeal. In summary these concerned 1) the fairness of the case management hearing 2) the FTT did not have the power to make the substitution direction because the Rule 9 conditions were not satisfied 3) the substitution direction breached his Article 8 ECHR right to respect for his private life by making him an appellant against his will 4) the FTT failed to give adequate reasons for its decision which had caused him to ask for permission to appeal to the FTT on the wrong basis. The UT (Judge Herrington) granted permission to appeal on all the grounds raised it being arguable the FTT Decision disclosed errors of law regarding the basis on which the FTT exercised its discretion to substitute.

29. As became clear from Mr McFadzean's skeleton argument and his submissions before us, his grounds of appeal resolved into five main grounds: 1) the FTT had wrongly added rather than substituted Mr McFadzean as an appellant 2) Rule 9(1)(a) was not satisfied as MX Ltd. was not the wrong party 3) the condition in Rule 9(1)(b) ("that the substitution has become necessary because of a change in circumstances since the start of proceedings") was not satisfied 4) the substitution meant Mr McFadzean lost the right to an independent HMRC review 5) the direction breached his Article 8 ECHR rights. Overarching these grounds, was the criticism, which we deal with first, that Mr McFadzean did not get a fair hearing because he was not invited at the FTT case management hearing to make representations on his own behalf (as opposed to in his capacity as representative of MX Ltd.). Mr McFadzean clarified at the hearing that he did not wish to pursue the ground he had raised in his original application that the FTT erred in failing to provide adequate reasons.

Overarching ground: Mr McFadzean not invited to make representations at hearing

30. Mr McFadzean highlights that, although he was at the hearing on behalf of MX Ltd., which is a limited company with separate legal personality, he was not invited to the hearing in his personal capacity. Nor was he invited to make any representations on his own behalf.

31. The details of the correspondence which had led to the case management hearing being listed are set out above. Although it is correct that the FTT's correspondence was to MX Ltd. and not also addressed to Mr McFadzean personally, given the explanations given by the FTT for listing the hearing, which included establishing the relevant parties to the appeal, having mentioned that HMRC proposed to treat part of the appeal as being made by him personally, and HMRC's e-mail seeking his agreement to being made an appellant, Mr McFadzean cannot reasonably have thought he was precluded from attending the hearing in order to give his personal representations. Even if there were any doubt on the matter, it would have been open to Mr McFadzean, whether personally, or in his capacity as representative of MX Ltd. to specifically ask the FTT either ahead of the hearing or at the hearing whether he could make submissions personally so that the FTT could then deal with his query.

32. In fact, the FTT's decision refusing permission records that Mr McFadzean had made it clear that he would make no representations as an individual but that his objections were made on behalf of MX Ltd. This rather suggests it was a conscious decision on Mr McFadzean's part not to make representations in his personal capacity.

33. In circumstances, where what was at issue was an assessment that had been made on Mr McFadzean, and where a case management hearing had been called to specifically consider the question of who were the correct parties to the appeals before the tribunal, we can see no procedural error in terms of fairness even if the FTT did not specifically invite Mr McFadzean to make representations; it was reasonable for it to assume that if Mr McFadzean had points he wished to make in relation to himself personally then he would do so.

34. This ground does not show any error of law in the FTT Decision directing substitution.

Ground 1: Addition, not substitution

35. Mr McFadzean submits the FTT did not have legal authority to make the direction it did; given the FTT had one consolidated appeal before it, the direction amounted to the FTT *adding* Mr McFadzean as a party rather than *substituting* him as a party. He argues that because the appeals were consolidated there was only one appeal. Rule 9 of the FTT Rules refers to "proceedings"; in this case that means the one consolidated appeal proceeding under reference TC/2015/03507. The FTT, he submits, only has lawful authority to do what it does under the FTT Procedure Rules and that remains the case, irrespective of what is stated in statute elsewhere, for instance the Taxes Management Act 1970 ("TMA").

36. HMRC accept Rule 9(1) does not permit the addition of parties, but highlight that the terminology in the FTT Procedure Rules, which refers to parties to "the proceedings", is different to the provisions containing the statutory rights of appeal which are against specific assessments (s31 TMA 1970) or specific HMRC decisions refusing discharge applications (s269 FA 2004). They submit the fact that the FTT, for administrative convenience, allows appeals to be submitted against multiple assessments and decisions, or consolidates appeals into one set of proceedings, does not alter that position. The effect of the FTT Decision was restricted to substituting Mr McFadzean in relation to the Relevant Assessment. They accept there is a complication that was not noticed by anyone at the time regarding having a consolidated appeal which partially involves different appellants, but which is straightforward to fix: the consolidated appeals may be de-consolidated, given different reference numbers according to which appeals were by MX Ltd. and which by Mr McFadzean, and then direct those appeals to be case managed and heard together. Under Rule 5(2) the FTT can give a direction which amends an earlier direction – so the consolidation direction can be amended in consequence of the FTT Decision. Rule 9(5) specifically envisages that consequential directions may be given upon a substitution direction. HMRC propose to ask the FTT to give such consequential direction under Rule 9(5)) depending on the outcome of the appeal. If Mr McFadzean has an objection to his appeals being case managed and heard together with the appeals of MX Ltd. then this can be dealt with by the FTT.

37. Mr McFadzean's response is that if Rule 9 was intended to apply to particular appeals against assessments then the rule could have made that clear. So, he submits, he must have been *added* as an appellant *along with* MX Ltd. rather than *substituted* for MX Ltd. However, Rule 9(1) only permits substitution not addition (as is clear from the distinction drawn within the rule at 9(2) and (3)) – the FTT therefore erred in its interpretation of Rule 9(1). By way of support, Mr McFadzean drew our attention to the face of the FTT's direction which, in contrast to the previous ones, noted two appellants (Mr McFadzean and MX Ltd.), to the FTT's permission refusal decision referring to "both [MX Ltd. and Mr McFadzean] are parties to the decisions" and to HMRCs skeleton in this appeal before the UT which referred to "appeal" in the singular.

38. Mr McFadzean also says the approach suggested by HMRC in relation to consequential directions is irrelevant to the question of whether the FTT's direction was legally wrong in the first place; that is the question which the UT in this appeal needs to first consider and if we agree with him that the direction was unlawful then he should be put back in the position he was in before the direction was made.

Discussion

39. As identified in the decision of the UT (Judge Herrington) which gave Mr McFadzean permission to appeal to the UT, we do not agree that the appellant has been added as a party to all of the appeals which formed part of the consolidated appeal. The fact the FTT applied the direction to the consolidated appeal without first de-consolidating the appeals does not in our view undermine the clear intention and effect of the direction to *replace* Mr McFadzean as an appellant instead of MX Ltd.

for the Relevant Assessment (the assessment for 2007-8) appeal and in the discharge application appeal which related to that assessment.

40. To the extent it would have been open in its direction to de-consolidate the appeal first and then require that the assessment appeal and discharge application appeal for 2007-8 be given a different reference number, before then making the substitution, such directions would effectively be consequential to the core issue before the FTT; namely to address who were the correct parties to the various different statutory appeals before the FTT.

41. To hold that a substitution direction applied to a consolidated appeal results in the addition of the party, when that is clearly not the intention of the direction, would be to elevate form over substance. It is important to recognise, as is explicitly set out in Rule 2(1) of the FTT Procedure Rules that the overriding objective of the rules is to enable the tribunal to deal with cases fairly and justly. The procedural rules are not ends in themselves but serve to facilitate the fair and just disposal of a multitude of different types of dispute, in so far as statutes or regulations direct that these are to be dealt with by the FTT. In this context the reference in Rule 9 to the term "proceedings", which is left undefined in the FTT Procedure Rules, cannot be taken to indicate that appeal rights which are derived from statutes or regulations elsewhere lose their distinct character. Given the variety of types of appeals that are directed toward the FTT it is hardly surprising that the Rules do not elaborate that the proceedings may encompass appeals against assessments, notices, decisions and determinations; therefore nothing can be drawn, contrary to Mr McFadzean's argument, from the absence of a reference in Rule 9 to being able to make a substitution in relation to a particular appeal against a particular assessment.

42. Ultimately the ground Mr McFadzean raises goes to whether the FTT erred in law in seeking to substitute a party, in relation to an assessment and discharge application, which had been consolidated along with other assessments and discharge applications where no substitution was contemplated across the board. In our view, although it might have been procedurally neater to first effect a de-consolidation of the appeals, the FTT did not err in law. The FTT understandably focussed on the application for substitution in the terms which had been put before it. We consider it was open to the FTT to make a substitution in the Relevant Assessment and discharge application – thereby dealing with the nub of the issue before it and leaving any consequential procedural and administrative matters which flowed from that decision for later.

43. This ground does not therefore show any error of law in the FTT Decision and we therefore go on to consider Mr McFadzean's remaining grounds.

Ground 2: Rule 9(1)(a) not satisfied – MX Ltd was not the wrong party

44. Mr McFadzean submits there is no evidence that the wrong person has been named as a party. As at the date MX Ltd. notified the appeal to the FTT, HMRC were holding MX Ltd. liable for all the scheme sanction charges and not Mr McFadzean – it was correct therefore for MX Ltd to appeal and it would have been absurd for him to appeal.

45. HMRC point out it is now common ground that MX Ltd. was not appointed as the scheme administrator and that it had not become liable for the Relevant Assessment. As MX Ltd. was not the correct person to make the appeal, the wrong person had been named as a party and so Rule 9(1)(a) was satisfied. Ms Poots submitted the relevant time to look at whether the wrong party was named was now, but in any case, in this situation, where MX Ltd. was always the wrong person, this was precisely the situation envisaged by Rule 9(1)(a).

46. We note that while the drafting of Rule 9(1)(a) is consistent with both looking at the issue of "wrongness" at the time proceedings were initiated or at the time of the application, there is no suggestion in the rule that it requires the tribunal to consider the question of whether the party was "wrong" according to the subjective understanding of one of more of the parties, or potential applicants at the time. Furthermore, Mr McFadzean's argument, that Rule 9(1)(a) does not apply where, at the time proceedings were initiated, it was thought by all concerned that the party in issue was the right party, implies a narrow and rather odd ambit for Rule 9(1)(a) to operate in. If correct, it could only lead to a substitution if a wrong party was named in the unusual situation that happened despite the parties knowing the party was the wrong party.

47. On the facts of this case, and in the light of the particular statutory provisions concerning the liabilities of scheme administrators, whether the question of wrongness is assessed at the outset of the proceedings, or at the time of HMRC's substitution application, it is quite clear, as HMRC point out, that MX Ltd., who it is agreed, was not validly appointed, was named as the wrong party, and that the condition in Rule 9(1)(a) was satisfied. The FTT was made aware that the parties agreed MX Ltd. was not validly appointed. Given this we can see no error of law in the FTT finding, as it did, that Rule 9(1)(a) was satisfied.

48. We do not therefore need to deal with the parties' submissions on Ground 3, which concerned the alternative ground for substitution in Rule 9(1)(b) ("that the substitution has become necessary because of a change in circumstances since the start of proceedings"). Mr McFadzean's ground, as clarified at the hearing, was that the condition in Rule 9(1)(b) was not satisfied because the substitution was not "necessary", in summary due to: 1) the terms in which HMRC had written to him before the hearing – their e-mail had suggested it was merely "appropriate" for him to added as a party, and 2) HMRC had other means, which did not involve forcing him to become an appellant, to collect tax, if they thought the tax was due.

49. In any case, as was made clear in its refusal of permission decision the FTT's direction was based on the condition in Rule 9(1)(a).

50. The fact the FTT was entitled to find that Rule 9(1)(a) was satisfied is of course not the end of the matter as a substitution under Rule 9 inevitably entails a decision on *who* it is will replace the wrong party. Furthermore, as the Rule states the FTT "may" make the direction the decision to make such a direction necessarily involves an exercise of discretion. It is in that space that Mr McFadzean's next two grounds become relevant.

Ground 4: Loss of the right to review

51. Mr McFadzean submits the effect of the direction is that he lost his right to an independent review by HMRC, an important right that every other taxpayer has and which he should have too. While HMRC offered a review in their letter of 13 August 2014, this review was offered to MX Ltd. not Mr McFadzean; HMRC had also at the same time written to him to say HMRC no longer regarded him as responsible for the scheme sanction charges. Not having received any decision from HMRC in response to his own appeal to HMRC it would have been impossible for him, he says, to have asked for a review. Although a review was carried out in relation to the decision which was given to MX Ltd., Mr McFadzean suggests that an HMRC independent review carried out in relation to him might work out differently as new arguments, for instance those proposed by HMRC and set out in its replacement Statement of Case regarding his being estopped from arguing that he was not a scheme administrator, might need to be considered.

52. HMRC highlight that the loss of HMRC review rights was not a factor the FTT was asked to take account of, that the claim that review rights have been lost is not in any case correct, and that it is not a factor which affects the FTT's decision. As is clear from s49A TMA, which applies in this case, where notice of appeal has been given to HMRC, there are, following an appeal to HMRC then three options (set out in s49A(2)(a), (b) and (c)) TMA: 1) The appellant may notify HMRC that the appellant requires HMRC to review the matter in question (s49B TMA) 2) HMRC may notify the appellant of an offer to review the matter in question (s49C TMA), or 3) the appellant may notify the appeal to the tribunal (s49D TMA).

53. Here, Mr McFadzean notified his appeal against the Relevant Assessment on 14 February 2012 and at that point had a right to require a review (option 1 above) but did not do so. Under s49C TMA a review can also arise if HMRC offer one (option 2), but there is no obligation on them to do so. In fact, they offered the review to *MX Ltd.* on 13 August 2014 (because at that time there was an assumption, given the actions of Mr McFadzean and MX Ltd., that it was MX Ltd. who had by then assumed liability for the Relevant Assessment). In response to Mr McFadzean's suggestion in the hearing before us that he did not know what action HMRC proposed to take against him personally in relation to the assessment, HMRC were keen to emphasise that they were pursuing him for the Relevant Assessment.

54. In any event HMRC highlight that there are many circumstances in which an appellant will not have had a review of every argument they might ultimately make for example if an appellant amends the grounds of appeal. Also, under Rule 9 a new appellant (who is substituted because the wrong person was named - and who may have wrongly thought to have been the taxpayer and was wrongly making decisions on the appeal) will often not have had an opportunity for review.

Discussion

55. Mr McFadzean is correct, it appears to us, that the FTT's substitution direction means that he no longer has the right to request a statutory independent HMRC review. This follows from the relevant provisions of TMA: The position before the

direction was made was that under s49A(2)(a) and s49B TMA Mr McFadzean could have still asked for a review in relation to the appeal against the Relevant Assessment which he had notified to HMRC but which he had not yet notified to the Tribunal. However s49B(4) prevents an appellant from notifying a review request, and HMRC from carrying out a review, where the appellant has notified the appeal to the FTT. In that case, under s49D, the Tribunal is to decide the matter. HMRC's ability to offer and carry out a review is similarly curtailed once the appeal is notified to the Tribunal (s49C(7)(c) TMA). The TMA provisions do not specifically cover the situation where a person becomes an appellant before the tribunal as a result of a substitution direction rather than through his or her own notification to the tribunal. But, giving substituted appellants a right of review, despite the appellant having a live appeal before the Tribunal would run counter to the common thread running through the limitations to review, whether initiated by the appellant or by HMRC, to the effect that once the Tribunal is seized of the matter this puts a stop to any HMRC review process. In this light, there did not appear to us, rightly, to be any dispute that Mr McFadzean no longer had a right to request an independent HMRC review, following the substitution direction.

56. On the facts of this case Mr McFadzean's ground, in our view, does not however show any error of law on the FTT's part. While we would not go as far as suggesting a loss of review rights would always be an irrelevant consideration - there might be circumstances where it was -this is not a case where it is relevant.

57. First, as HMRC point out, Mr McFadzean did not raise his concern before the FTT (and as we have said above it was open to him to make submissions personally or at least investigate whether he could). Was it nevertheless a factor the FTT should have investigated further in the absence of a specific submission on the point? In our view it was not. The significance of whether a potential appellant wants to take advantage of a review will very much depend on the attitude of that person to the importance of the review stage. If the review stage was thought to be important to the relevant person in respect of whom a substitution direction was contemplated it might reasonably be expected that they would alert the tribunal to their concerns at a hearing concerning the substitution. Furthermore, given that a substitution will inevitably mean that the relevant dispute may proceed to be determined before an independent tribunal, as opposed to an independent HMRC officer, it would not be obvious, unless the relevant person articulated it, what the prejudice would be as far as a fair and just resolution of the dispute was concerned. We therefore can see no error, in circumstances where the point has not been raised by the potential new party, in the FTT proceeding without specifically considering whether there was a loss of a right to an HMRC independent review.

58. Second, while the effect of the FTT's substitution direction is that Mr McFadzean no longer has a right of independent review, the significance of any loss arising from that is diminished by the fact that when he did previously have the opportunity to ask for the review as soon as he had notified his appeal to HMRC, as was clear from the TMA statute, he did not take it. Furthermore, as there was no obligation on HMRC to offer a review, Mr McFadzean can have had no expectation that a review would necessarily be offered. The fact MX Ltd. was offered the review and not Mr

McFadzean, arose because of his own actions in notifying HMRC that MX Ltd. rather than Mr McFadzean was the scheme administrator.

59. In summary there is nothing in Mr McFadzean's complaint that he has lost a right of real significance that would have warranted consideration by the FTT despite no submission on the point having been made. Mr McFadzean previously had the right to ask for a review but did not exercise it, and as a result of the FTT's direction, instead of a review by an independent HMRC officer he has the right to ventilate his dispute, that he was never appointed as the scheme administrator of the MX Scheme, before an independent tribunal.

Ground 5: Human Rights – Article 8 ECHR

60. Mr McFadzean submits the direction breaches his Article 8 ECHR right to a private life because it forces him to act as an appellant in a court case without his consent. He suggests that it is unprecedented for someone to be forced to act as an appellant or claimant (as distinct from a respondent or defendant) against their will.

61. Article 8 (Right to respect for private and family life) provides, so far as is relevant to the parties' submissions, in this case:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of …the economic well-being of the country…"

62. HMRC submit that there is no breach of Mr McFadzean's right to a private life; he is in full control of the proceedings and can continue or withdraw as he chooses. In any case as shown by the second paragraph of the Article, the right is not an absolute one. Even if there were a breach, it is in accordance with the law and falls within the justification as regards the economic well-being of the country, the particular context being the standard judicial and tax administration of this country. Almost every substantive tax appeal begins, Ms Poots submits, with HMRC making an assessment or decision which imposes a tax charge – which "forces" the taxpayer to decide whether to accept the decision or to appeal. Here, an assessment imposing liability was made on Mr McFadzean and it is now for him to decide whether to accept it or continue with his appeal. Ms Poots accepted that the situation of substituting an appellant without their consent may be unusual but submitted Rule 9 envisaged that an appellant in a tax appeal might be substituted and that the substitution might be directed in the face of objection from the appellant.

63. Although HMRC suggest he has full control of whether to accept or continue proceedings, and if he withdraws he would not be subject to any order for costs to withdraw his appeal, Mr McFadzean's reply is that it is wrong that he should be put in that position in the first place. He also suggests there are other ways for HMRC to collect the tax due from someone without forcing the person to become an appellant in proceedings before the tribunal against their will.

Discussion

64. It is not in dispute that the situation where a direction is made to substitute an unwilling appellant is an unusual one; it is usually the person who becomes the new appellant (for instance the executor of an appellant who has deceased) who invites the tribunal to replace the former appellant as a party. Mr McFadzean emphasises the direction which substituted him was unprecedented both as regards appellants in FTT proceedings but also more generally in terms of substituting the initiator of the relevant legal proceedings however that person might be described, for example as a claimant. We were not referred to any previous court or tribunal decisions where a person had been substituted as an appellant or claimant despite the person's objection.

65. In the civil sphere, so far as proceedings in England and Wales are concerned, the lack of precedent is perhaps not surprising, because CPR 19.4, which deals with the procedure for adding and substituting parties, makes it clear that nobody may be added or substituted as claimant without their consent.[2]

66. We invited submissions from Ms Poots on the significance of this provision to the propriety of making someone an appellant against their wishes. She contrasted the context in which the CPR Rule was drafted. There was, she suggested, no parallel between an appellant in tax proceedings before the FTT and a claimant in civil proceedings. She explained that virtually everything which reaches the FTT starts off with an assessment, determination or some kind of decision by HMRC. If a taxpayer wishes to challenge that they must appeal and as a consequence they become an appellant in the proceedings before the FTT; the fact someone must take proceedings to contest a tax liability is a totally standard feature of the system of tax administration.

67. In our view it is not necessary for us to consider the extent to which an appellant in tax proceedings is different to a claimant in civil proceedings because Rule 9 clearly does not require, as CPR 19.4 does, the consent of the new party. It is in principle possible therefore for the tribunal to direct that someone is substituted when that person does not want to be.

68. We were referred (in the different context of our jurisdiction on appeals against case management decisions) to the Supreme Court's decision in *BPP Holdings* which concerned an FTT decision to bar HMRC from taking further part in the proceedings as a sanction for non-compliance with time limits. We note that in its discussion of the relevance of various Court of Appeal decisions which had given guidance on compliance with time limits in the context of the CPR, the Supreme Court noted (at [23]) that:

> "…while it would be unrealistic and undesirable for the tribunals to develop their procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic, the tribunals

[2] CPR 19.4(4) provides "Nobody may be added or substituted as a claimant unless – a) he has given his consent in writing; and b) that consent has been filed with the court."

> have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue."

69. In this case the difference in rules is well illustrated by the different positions taken respectively in the CPR and the FTT Procedure Rules on the need for consent of the person sought to be added as respectively a claimant or appellant.

70. But, the lack of a consent requirement in the FTT Procedure Rules does not of course mean the potential new appellant's views are not relevant. A substitution direction becomes a matter of discretion once one of the alternative conditions in 9(1)(a) and (b) is satisfied. In accordance with Rule 2(3)(a) the FTT must seek to give effect to the overriding objective when exercising its power of direction. Dealing with the application fairly and justly will mean balancing the arguments for and against the proposed substitution. While the consent requirement as set out in the CPR is of limited relevance as far as interpreting the tribunal rules is concerned, because of its absence in the FTT Procedure Rules it does, in our view, signal that a careful evaluation of any objections put forward by the proposed new appellant will be called for.

71. The difficulty with Mr McFadzean's ground in this respect is that, as is clear from his overarching ground regarding not being invited to make personal submissions, he did not in fact make any submissions in his personal capacity. So as far as the FTT was concerned there was no objection from him personally to becoming an appellant (the objection was from MX Ltd. – and that objection was considered and rejected). As we said above, Mr McFadzean was present at the hearing and the FTT might reasonably have assumed that if he, personally, took objection to the proposed substitution he would have at least queried whether he was able to make representations and no doubt in doing so would have been able to put those representations forward to be considered.

72. On the facts, the FTT was not therefore making a substitution direction in the face of an objection from the proposed new appellant. Nor was it proceeding without allowing such appellant to make his representations; Mr McFadzean was present at the case management hearing which had been called to consider the correct parties to the appeal. The background before the FTT indicated that there was an assessment that had been made against Mr McFadzean which remained to be resolved, and that Mr McFadzean was disputing that he was liable because he had not been validly appointed as a scheme administrator. These factors would on the face of it have pointed towards facilitating an appeal by Mr McFadzean. There can be no error of law in the FTT's direction related to Article 8 based on the FTT proceeding in the face of Mr McFadzean's unwillingness because his objection was not made until after the direction was made.

73. That leads onto the question of whether there can, in any case, be a breach of Mr McFadzean's Article 8 rights given it has since become clear that Mr McFadzean *does* object to being made an appellant.

74. At the hearing before us we explored what Mr McFadzean's stance was on the assessment that HMRC had made on him. There was no indication that the assessment

had been withdrawn or otherwise settled and we understood Mr McFadzean's position was that he did not consider himself liable for the assessment as he had not been validly appointed under the scheme rules, and therefore under the relevant statute he was not the scheme administrator. We wanted to understand why he objected to the opportunity the FTT direction afforded him to appeal the assessment before the tribunal. Mr McFadzean explained that, as far as he was concerned, he was not being pursued by HMRC in relation to the assessment that had been made against him; the most recent communication to him personally (in relation to the Relevant Assessment) was back in 2014. He emphasised his wish to be put back into the position he was before the direction was made and that HMRC had other alternatives to pursue (for instance HMRC mentioned they could seek to enforce the assessment in the county court). For their part HMRC mentioned, as we have already set out earlier, that they regarded the assessment as very much in contention and that while collection of the amount might, if it came to it, be pursued in the county court, it was the FTT which was the proper forum for any dispute as to liability.

75. Given the above, we remain somewhat in the dark as to the practical significance of Mr McFadzean's objection to being made an appellant but we accept that he is nevertheless entitled, having been granted permission, to raise the argument that the FTT's direction which makes him an appellant, when he does not want to be one, is an unjustified breach of his Article 8 rights.

76. Although it is open to Mr McFadzean to withdraw from proceedings, we accept that a direction making someone an appellant, and thereby making them a party to FTT proceedings imposes certain responsibilities and risks to which the person would not otherwise be subject. For example, under Rule 2(4) parties must help the FTT to further the overriding objective and co-operate with the FTT generally and may be subjected to various case management requirements (for instance under Rule 5 to provide documents or submissions). The party may in certain circumstances, as set out in Rule 10, become liable for the costs of the other party. Subject to a direction to the contrary under Rule 32, any hearing will be heard in public. While we were not taken to any authorities on the interpretation of Article 8, against the above backdrop of responsibilities and risk, it seems uncontroversial that becoming a party to FTT proceedings, in particular as an appellant, must at some level amount to an interference to the person's private life. But the extent of that interference, and in turn the evaluation of whether such interference is justified must, in our view, take account of the particular facts and circumstances of the case.

77. The interference with Mr McFadzean's private life in this case is minimal. He can, if he wishes, withdraw from proceedings without any hearing with a simple written communication. Given the categorisation of his case (it was and remains allocated as a standard category case) there is no liability for HMRC's costs and HMRC do not propose to make any costs applications before him in the FTT.

78. In our view, this limited interference such as it is, clearly is in accordance with the law (the FTT's powers under Rule 9) and is clearly justified for the purposes of Article 8.2. Mr McFadzean faces a tax liability imposed on him by HMRC and maintains that he is not the correct person to be assessed. Allowing him the

opportunity to litigate that dispute, if he so wishes, by making him an appellant in the appropriate forum is, as Ms Poots articulated, entirely justified in the context of the system of tax administration and justice which in turn serves the "economic well-being of the country".

79. We do not therefore accept that the FTT's direction applied the wrong principles; it appears to us, in all the circumstances, to have been a direction that was well within the bounds of what a reasonable tribunal could have directed and this ground must fail too.

Substitution of Mr McFadzean as appellant in relation to appeal against HMRC's refusal to discharge liability

80. Before concluding it should be noted that while the FTT's direction made Mr McFadzean an appellant for the appeal against the Relevant Assessment, it also made him the appellant in relation to the appeal MX Ltd. had made against MX Ltd.'s discharge application for the 2007-8 liability.

81. While Mr McFadzean's case is that the Rule 9 direction as a whole was wrong in law and that it should be nullified, his arguments before us very much homed in on his unwanted status as an appellant as regards the Relevant Assessment and it is that aspect that we have therefore focussed on above. The significance of Mr McFadzean's substitution on the discharge application appeal should not however be overlooked because if Mr McFadzean were not permitted to become an appellant in the discharge application then he would, according to HMRC, now be out of time to apply for discharge. As regards the current discharge application appeal before the FTT, HMRC do not argue that there was no valid discharge application just because MX Ltd. rather than Mr McFadzean had applied for discharge of liability. In those circumstances it is very much to Mr McFadzean's benefit that he is substituted as the appellant in relation to the appeal of MX Ltd. against HMRC's refusal to discharge liability.

Decision

82. For the reasons we have given, we conclude there was no error of law in the FTT's decision to direct the substitution of Mr McFadzean as an appellant. This is even more apparent bearing in mind our jurisdiction in relation to appeals on case management directions; it has not been shown that irrelevant material was taken into account, relevant material was ignored, that the FTT failed to apply the right principles, or that the decision was one which no reasonable tribunal could have reached. Mr McFadzean's appeal against the FTT's substitution direction is therefore dismissed.

83. The FTT's substitution direction remains in place although, as indicated above, we anticipate that HMRC will now approach the FTT with the proposed further directions regarding de-consolidation of the appeal and the creation of new appeal reference numbers which distinguish between MX Ltd.'s appeals and Mr McFadzean's appeals.

Swami Raghavan
Judge of the Upper Tribunal

Jonathan Cannan
Judge of the Upper Tribunal

Release date: 21 November 2019