TC01883

Appeal number: LON/2008/2398

PROCEDURE – whether case to be stayed pending CJEU decision - whether expert witness to comply with CPR – yes — whether opinion evidence of someone with "expertise" to be admitted – no – exclusion of witness statement containing largely opinion evidence – leave to serve substitute statement

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARJAN CHANDANMAL, ASHOK ARJANDAS NAINANI, and RAJESH CHANDANMAL T/A C NARAIN BROS — **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square London on 22 February 2012

Mr J Dagnall, Counsel, instructed by Hill Dickenson, for the appellants;

Mr J Kinnear, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This appeal is against a decision by HMRC to deny the appellants recovery £4,718,819 input tax claimed in the period 04/06. The grounds of HMRC's refusal are an allegation that the transactions in which this input tax was incurred were connected to MTIC fraud and that the appellants knew or ought to have known this.

2. After a full day's application hearing before me I reserved my decision to give me time to read in detail the witness statement of Mr Stone which the appellant sought to be excluded from proceedings. I promised to issue directions after the hearing and provide written reasons for them. The directions are issued to the parties: this decision records my reasons for them.

The application for a stay

3. The stay is refused firstly on the grounds that even if it were appropriate for proceedings to be stayed pending the release of the *Bonik* decision C-285/11, it is virtually certain that the CJEU will have delivered its judgment in *Bonik* before this appeal comes on for hearing bearing in mind that due to other directions made (explained below) it is most unlikely this appeal will come on for hearing before 2013. Therefore, there is no prejudice to the Appellant in refusing a stay. The parties will have the benefit of the CJEU's opinion in *Bonik* before the hearing of this appeal.

4. Secondly, in any event, I do not consider it appropriate for proceedings to be stayed behind *Bonik* as the matters at issue in this appeal took place six years ago. It is in the interests of justice to bring this matter on to hearing as soon as possible. One witness has already died and the matter should come on before the remaining witnesses lose their recollection of events.

5. Thirdly, the reference in *Bonik* appears to be only peripherally relevant to this appeal because it concerns a chain of transactions in which, unlike this case, it appears the goods did not exist and because there is no allegation of actual knowledge. There is therefore only a small possibility that the CJEU's decision in *Bonik* would significantly change this Tribunal's understanding of the CJEU's decision in *Kittel* as explained by the Court of Appeal in *Mobilx*.

6. It is therefore in the interests of justice that the parties should continue to prepare this case for hearing pending the CJEU's decision in *Bonik*.

The application for Mr Fletcher to give CPR 35 undertaking

7. HMRC have served an expert witness statement by Mr Fletcher, a consultant with KPMG, who gives expert evidence on the grey market in mobile phones. It contains only a statement of truth and not the normal expert witness statement given under Part 35 of the Court Procedure Rules ("CPR"). The appellant seeks a direction that Mr Fletcher provides a further statement saying whether he has complied with Part 35 of CPR.

8. It is part of the role of the court or Tribunal to ascertain the reliability of evidence of fact: where opinion evidence is being expressed in a specialist area it may not be as easy for a court or Tribunal to assess the reliability of that evidence. It is likely to be for that reason that the courts have detailed rules, such as CPR 35 for the High Court, which seek to ensure the reliability of expert evidence.

9. CPR practice direction 35 at 2 requires an expert witness to give an independent view. At 3.2 it requires the expert witness to state his expertise, disclose his sources, make clear if anyone helped him with the report, summarise the range of opinions on the matter and give reasons for his own opinion, and state that he has complied with his duty to the court. At 2.5 he is required to communicate any material change of view to the parties without delay.

10. HMRC point out that the Tribunal does not have rules similar to CPR part 35. The Tribunal can admit what evidence it chooses (Rule 15(2)(a) of Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009) and theoretically could admit expert evidence from an expert who was not independent. But I see no good reason why I would do that in this case. A Tribunal as much as a court is concerned with the reliability of expert evidence. It is right and in the interests of justice that the only opinions of witnesses relied on by the Tribunal are witnesses who are both expert in the specialist area on which they give their opinion and who are impartial between the parties.

11. I reviewed the requirements of CPR Practice direction 35 paragraph 3.2 at the hearing and HMRC agreed that Mr Fletcher would comply or had complied with every one. Indeed, Mr Kinear said Mr Fletcher was instructed to observe the practice direction on experts. However, I note that in one respect at least I was not satisfied that Mr Fletcher had necessarily complied with the practice direction. His summary of sources at paragraph 1.3.1 of his statement does not contain a reference to a confidential report from Nokia which the appellant believes that Mr Fletcher may have relied on when compiling the report and I know from my experience in another case that Mr Fletcher did rely on in compiling the report in that case.

12. This only goes to reinforce my view that expert witnesses, even in the Tribunal, should comply with the requirements of CPR practice direction 35 and state that they have done so. Indeed, it is normal practice within the Tribunal to direct that expert witnesses should do so.

13. That such a direction has not been given in this case is likely to be because leave to serve an expert witness statement was not sought by HMRC. Although no point is taken on this, arguably under Rule 15(1)(c) such leave should have been obtained before serving Mr Fletcher's statement.

14. My conclusion is that there is every advantage to expert witnesses in the Tribunal following CPR Practice Direction 35 and no disadvantage. While some cases in the tax tribunal are informal, in this case, with nearly £5million at issue, both parties are represented by solicitors and counsel and there is no advantage to informality. Even HMRC do not suggest that Mr Fletcher would not in practice obey CPR 35. There is no reason why he should not state (if true) that he has so complied and I so direct.

Application for disclosure

15. Originally the appellants asked for disclosure of "any notes or transcripts of relevant evidence at Tribunal hearings at which any of the Respondents' witnesses (and in particular John Fletcher and/or Roderick Stone have given generic or expert evidence and have in any way resiled from their own evidence and/or conceded or admitted/accepted generic or expert evidence points from the relevant respondents (sic) at such hearings and/or otherwise given generic or expert evidence which differs from the generic or expert evidence sought to be adduced from them in this case."

16. At the hearing, the appellants asked in effect for this application to be stayed on the assumption I ordered Mr Fletcher to serve an additional statement (as I have) stating that he has complied with CPR Practice Direction 35. They expect that, by undertaking to be bound in particular by clause 2.5, Mr Fletcher will realise he must also immediately serve an updating statement saying to what extent he has changed his views. The appellants indicated that they expected Mr Fletcher to retract a number of the views he has made in his statement because they believe he has done so in cross examination in other MTIC cases. The appellants also indicated that if Mr Fletcher does not serve an updating statement, they will wish to revive their application for disclosure in order that they can challenge his evidence at the hearing of this appeal by putting to him the change of views he has expressed (they allege) in cross examination in other cases.

17. In order to avoid unnecessary future applications hearings in this appeal, I will therefore make a few comments on what a Tribunal might be likely to order. Firstly, the appellants request is for HMRC to review all transcripts and indentify any instance where Mr Fletcher has said something inconsistent with his witness statement. This would involve an HMRC officer reading a very great many transcripts and then forming a view on whether Mr Fletcher has in fact said anything inconsistent with his rather lengthy witness statement. It is likely a Tribunal would consider this a fishing expedition and unreasonably onerous.

18. A Tribunal would be more likely to consider ordering the disclosure of named transcripts: this is far less onerous on HMRC as they would not be required to read them first. Mr Dagnall said the transcript of *H T Purser Ltd* TC01694 would be top of his list, but was unable to name at the hearing in front of me any other case the transcript of the hearing of which he would wish to see. I note that in any event, had Mr Fletcher said anything in cross examination in *H T Purser Ltd* or indeed in any other case which the Judge had found to be inconsistent with his witness statement, I would expect this to be recorded in the decision notice. It should not to be taken for granted, therefore, that disclosure would be ordered even of named transcripts unless there is something which suggests it might be relevant to the current proceedings.

The application to exclude Mr Stone's witness statement

19. HMRC also served a witness statement by a Mr Stone, a senior officer of HMRC in their Serious Civil Investigations Directorate and acting as a senior policy advisor on MTIC fraud. The appellant seeks a direction that his statement be excluded.

20. This is not an application to admit a witness statement out of time but an application to exclude one served on time on the grounds it contains opinion and/or irrelevant and/or hearsay evidence. It is therefore for the Appellant whose application it is to satisfy me that it is well-founded: it is not for HMRC to satisfy me that it is not well founded.

Outline of position

21. The appellant objects to Mr Stone's evidence because it includes opinion evidence.

22. Witnesses give evidence of fact from which the Tribunal forms its own opinion of the facts; opinion evidence is where the witness' *opinion* on the facts may be relied on by the Tribunal in reaching its own decision. There is therefore a very crucial distinction between fact and opinion evidence. As the Tribunal's duty is to form its

own opinion on the facts, opinion evidence is only necessary where the matter is a specialist area outside the tribunal's general knowledge.

23. I reject HMRC's contention that there is an intermediate category of witnesses of "expertise" who while not expert witnesses may nevertheless give opinion evidence to the Tribunal. Opinion evidence can only be relevant to the Tribunal where it is a matter beyond the Tribunal's general knowledge. Where the matter is within the Tribunal's own ability to form an opinion, expert evidence is not required and it would wrong in law for the Tribunal to rely on a witness' opinion in such circumstances. There are witnesses of fact and there are expert witnesses: there is no intermediate category.

24. HMRC do not advance the proposition that Mr Stone could be an expert witness. Although it seems likely that Mr Stone is an expert in MTIC fraud from the experience he sets out in his witness statement, he is an officer of HMRC and he could not be considered to be an independent witness. And while the Tribunal might have power to accept expert evidence from someone who is not independent, I cannot see why I would do so particularly in this case where the opinions he expresses (largely on how MTIC fraud works) can as easily form part of HMRC's counsel's submissions. So in so far as Mr Stone gives opinion evidence it is not admissible.

25. Mr Kinnear argues that Mr Stone's explanation of MTIC fraud is useful to a panel which is not familiar with MTIC fraud and mentions the comment of the Judge in *H T Purser Ltd* where he said that he found Mr Stone's explanation of MTIC fraud useful. I do not agree that this is grounds to admit opinion evidence from a witness not put forward as an expert: if an explanation of how theoretically MTIC fraud works is required, counsel can do this in opening and it can be a matter for submissions. I do not accept that a non-expert witness can give opinion evidence.

26. The questions for me are therefore (1) to what extent is Mr Stone's evidence inadmissible and (2) what is the appropriate and proportionate manner of dealing with his witness statement to the extent it is inadmissible. To ascertain this, I have to look at Mr Stone's statement in detail.

Opinion

27. The appellants consider paragraphs 6-64 is opinion evidence as it is Mr Stone's current view of how MTIC fraud works and the typical features of MTIC fraud. I agree that Mr Stone's current view of MTIC fraud is opinion evidence and inadmissible; I do not agree that paragraphs 6-64 contain nothing but opinion evidence.

28. To the extent that Mr Stone is giving factual evidence of the understanding HMRC had of MTIC fraud at the time of the events giving rise to the appeal it is a matter of fact. Examples of this are in paragraphs 8 and 18. There are other matters of fact referred to in paragraphs 45, 46, 53, 57, 58, 59, 60, 61, 62, 63, and 64.

29. I find that paragraphs 65- 138 contain evidence of fact about HMRC's policies and procedures during the period at issue in this appeal: while it might be challenged on the grounds of relevance or hearsay it is not opinion evidence.

30. Paragraphs 139-141 are Mr Stone's opinion on the law relating to the reverse charge: submissions on the law are to be made by counsel and not by the witness. While not strictly opinion evidence, Mr Stone's view of the law is certainly irrelevant.

31. I find that while paragraphs 142-145 contain evidence of fact, paragraphs 146-149 are opinions drawn from the facts and are inadmissible.

32. I also find paragraphs 150 is opinion evidence. It is inadmissible.

33. Paragraphs 151-164 are opinion evidence on the grey market: it is inadmissible.

34. Paragraph 165 was accepted by all parties as factual.

35. Paragraphs 166-169 appears to be a mixture of Mr Stone's and HMRC's current views on MTIC fraud and the grey market: it is inadmissible. While HMRC's views on the grey market in 2005/6 might be something on which Mr Stone could give factual evidence, possibly relevant to the extent it informed HMRC's policies at the time, HMRC's current views can only be a matter for submissions.

Relevance

36. It is for the Appellant to satisfy me that the matter or matters covered in the witness statement are irrelevant to the matters under appeal. The witness statement of Mr A A Nainani refers at paragraphs 80-83 and subsequently to dealings with HMRC officer Mr Jeffels and therefore I am not satisfied that the policies of HMRC and the reasons for them at the time in question are irrelevant to this appeal, even though it is likely they may only have peripheral relevance.

37. Nevertheless, I am satisfied that references to contra-trading are irrelevant to this appeal as both parties were agreed that none of the chains at issue in this appeal were alleged to be contra-trading chains. Paragraph 18 is therefore irrelevant.

38. Mr Dagnall queries whether Mr Stone's role was sufficiently senior to allow him to give evidence of fact on HMRC's policies. This is goes to credibility and is something on which Mr Dagnall can cross examine Mr Stone in due course.

39. Paragraphs 57-60 all appear to relate to events after the matters at issue in this appeal and I find are not relevant except possibly paragraph 60 to explain why HMRC has access to the statements of persons banking with FCIB.

40. I am not satisfied that the question of the extent to which there was a genuine market for mobile phones in 2006 is irrelevant in this appeal: indeed the witness statement of Mr A A Nainani at paragraph [15] gives evidence on the genuine market for mobile phones. To the extent Mr Stone's factual evidence covers this issue it is relevant to this appeal.

41. In summary I consider paragraphs 18, 57-60 to be irrelevant. Many of the other matters of fact covered by Mr Stone, mostly dealing with HMRC's policy at the time, are likely to have only peripheral relevance to the issues in this appeal. The Tribunal judge will be in a much better position to decide if something is relevant to the issues he is called upon to decide that I am. It is therefore right to be cautious in excluding evidence of fact served on time as irrelevant at this stage.

42. I emphasise that the Tribunal might take a very different view if this were an application to admit evidence out of time when it would be for the applicant to satisfy the Tribunal that the evidence was relevant.

Hearsay

43. Some of Mr Stone's evidence is properly regarded as hearsay, for instance where he gives evidence of third party websites. This Tribunal has the discretion to admit evidence not admissible in a court of law: Rule 15(2)(a). In some circumstances hearsay evidence is now admissible in the civil courts: the mere fact it is hearsay evidence will not lead to its exclusion in the Tribunal (although of course the weight that the Tribunal will place on it may be affected).

44. The appellants asked for the evidence to be excluded to the extent it was hearsay: no other particular reason was given. As I have said it is for the appellants to satisfy me that the evidence should be excluded: I am not satisfied that it should be excluded merely because is hearsay and so I would not exclude it (but see paragraph 52 below)

45. At the hearing the appellant is of course free to make representations to the judge on the weight to be attached to it.

Conclusion

46. In summary I am satisfied that the following paragraphs are opinion evidence or submissions or irrelevant and in all cases inadmissible: 6-7; 9-44; 47-52; 54-59; 139-141 146-164; 166-169.

47. In conclusion, the substantial part of Mr Stone's statement is inadmissible. The question is what is the appropriate method of dealing with this matter.

Proportionate manner of dealing with witness statement

48. The appellants' case appeared to be that it was necessarily prejudicial for witness statements containing opinion to be before the Tribunal hearing the substantive appeal. I cannot agree: a Tribunal hearing is not a criminal trial and there is no jury. A Judge will exclude from his mind opinion evidence given by witnesses of fact. The panel member(s) will be instructed to do likewise.

49. However, I agree that statements by witnesses of fact should be limited to facts because (a) it will save the Tribunal's time in having shorter witness statements, (b) it will save the other party time in that they will not have to respond to a matter (the opinion of a witness of fact) which is irrelevant and (c) it is more appropriate for submissions to be made by counsel.

50. Nevertheless, it may not always be proportionate to exclude a witness statement simply because it includes opinion. The exclusion itself requires a hearing to decide whether and to the extent the evidence is opinion. It will depend on the facts of each individual case. In some cases a Direction "that a failure by the other party to cross examine on the opinion of a witness of fact is not to be taken as acceptance of it" would suffice to deal with the matter proportionately.

51. However, dealing with matters proportionately will also include consideration of proper case management. Failing to exclude a witness statement which contains largely inadmissible material will only encourage the submission of such statements in the future. Good case management suggests that the statement should be excluded, although with the right for HMRC to serve a new statement covering the factual matters covered in the original statement.

52. As I have found the inadmissible parts of the Mr Stone's statement to substantially exceed the admissible parts, I have decided it is right to exclude it. Nevertheless as parts of the statement appear to be factual and potentially relevant I have given HMRC leave to file a new statement of fact by Mr Stone. In reaching my decision I have taken into account that because they are other delays, there will be plenty of time for such a new statement to be compiled and it will not prejudice the timetabling of this appeal.

Other witnesses giving opinion evidence

53. HMRC also served a witness statement by a Mr Moorhead, an HMRC officer who has analysed statements of bank accounts held with FCIB, and a statement by Mr Jeffels who was the appellants' visiting officer at the time in question.

54. I do not agree with Mr Dagnall that where Mr Moorhead states "examination of the record shows…" he is stating anything other than fact. He is simply saying he looked at the record and found certain payments. That is not a statement of opinion. Paragraphs in which he makes such a statement are admissible.

55. However, in paragraph 160-161 Mr Moorhead states that he found payments involving the appellants' purchases to be circular in that the person at the start of the money chain was the same as the person at the end. Mr Kinnear says that this is a statement of fact. Mr Dagnall says it is a statement of opinion. I find it is a statement of opinion: this is because it is built on other opinions that Mr Moorhead has formed. In particular, he has looked at the statements and found payments between FCIB account holders. He has formed a view that a payment from A to B relates to a payment by B to C and so on. This in turn has led to his forming a view that the payment chains were circular. That is a matter of opinion and as he is not an expert witness it is inadmissible. The view that the payments are circular can of course form the basis of submissions by counsel at the hearing if counsel is of the same opinion.

56. HMRC accepted that paragraph 162 was a statement of opinion.

57. So I agree with the appellants that paragraphs 160-162 of the witness statement of Mr Peter Moorhead are a statement of opinion and inadmissible. Nevertheless, excluding the entire statement for these 3 short paragraphs is disproportionate and the appellants did not suggest that I should. They suggest that a general direction that a failure by the appellants to cross examine the witness on his opinions is not to be taken as acceptance of them: I agree and make such a direction.

58. Mr Jeffels made a long statement and the appellants' allege that many sections amount to prejudicial opinion evidence. I ruled that I would not hear the arguments on this as HMRC had indicated that they were likely to withdraw the statement. The background is that, very sadly, Mr Jeffels died at the end of 2011. HMRC wish another officer (a Mr Cordwell) to become familiar with the documents held in this case and make a replacement witness statement. HMRC do not expect this to be ready until July 2012 partly because Mr Cordwell will have the responsibility to undertake the disclosure exercise agreed by the parties and ordered by me at the last directions hearing on 27 April 2011, a duty which Mr Jeffels was to undertake but died before he could do so. Until this statement is ready, HMRC are not withdrawing Mr Jeffels' statement.

59. Therefore, this application by the appellant is stayed pending a decision by HMRC on whether they are withdrawing the statement. If by 13 July 2012 HMRC have not notified the appellant that they are withdrawing Mr Jeffels' statement, the

appellant should request the Tribunal to arrange a further hearing to decide this application.

60. I note that the appellant, applying for a stay in any event, raised no objection to HMRC's request for four months before notification of whether or not HMRC are applying for leave to serve a new statement. As both parties consent to the further delay in these proceedings, I have allowed it but bearing in mind the difficulty for the Tribunal in hearing stale evidence, HMRC should not assume an extension to this date will be granted even if unopposed.

Copying costs

61. At the last directions hearing in April 2011 by consent of the parties I ordered disclosure of, amongst other things, FCIB material. HMRC had already served a witness statement which exhibited the FCIB material which they relied on: they considered that the rest of the FCIB material neither assists the appellants' case nor undermines their own. Nevertheless, the appellants wished to check this for themselves and it seems right they should have an opportunity to do so: no doubt for this reason the application for disclosure was conceded by HMRC.

62. What was not agreed at the hearing was who would be responsible for the costs of the disclosure. It was agreed this would be left to the parties to seek to agree themselves failing which they would revert to the Tribunal. They have failed to reach agreement and do now revert to the Tribunal.

63. Mr Kinear told me that at the time he conceded this he had not appreciated the quantity of material involved: it is estimated it will fill some 27 lever arch files. HMRC's position is that they do not wish either a paper or electronic version of the material to leave HMRC's premises as it contains confidential taxpayer information: being information from the Paris server of the FCIB not only are company names recorded but also names of individuals. They want the appellants to inspect the material at HMRC's premises and for the appellants to bear the burden of copying any of the statements they wish to take away. He considers that HMRC made a generous concession allowing inspection and that it would be unreasonable to expect HMRC to pay for making copies of the material to be inspected.

64. HMRC do not consider that they can produce the material electronically. Although the material is held electronically, HMRC's position is it will have to be printed out in any event to see if any of it needs to be redacted. It would be expensive to create an electronic copy of printed out material and indeed for policy reasons regarding taxpayer confidentiality they would not do so, at least not without a court order.

65. At the hearing before me, Mr Dagnall for the appellants conceded that they only required to see the FCIB statements for the two months before and the two months after so the deals at issue in this appeal that they can perform their own analysis of the money movements. This limits the amount of material they wish to see but Mr Kinear was not in a position to estimate by how much. The appellants' position is that they want the material provided in paper or electronic form to them at their offices. They offer a solicitors' undertaking to keep it confidential. As an alternative, they would be prepared to visit an HMRC office to inspect the material as long as that office was in Liverpool where the appellants' solicitors are based. The information is however held in London.

66. It is the appellants' position that HMRC should be responsible for the cost of making the material available for them to inspect. HMRC have introduced evidence from the FCIB, it follows that the appellants should have the right to inspect it and (they say) should not have to bear the burden of the cost of copying the material.

67. I am aware from having looked at FCIB printouts how very time consuming it will be for the appellants to look at such a quantity of material. I can understand their reluctance to send a solicitor to London potentially for days at a time to sit in Customs House and plough through this material and that it will save them travelling costs and travelling time if they could do this at their offices in Liverpool.

68. At root therefore the argument is over whether the appellants should have the entire 6 months of material provided to them in their offices at HMRC's expense which would save them travelling time and costs; or whether they should travel to London to inspect it and save HMRC making a copy of a great deal of what is likely to be mostly irrelevant confidential taxpayer information. I take into account that while it is it is reasonable for the Appellant to wish to look at the undisclosed material, it is also reasonable for HMRC not to wish to bulk copy a very large amount of confidential information most of which is unlikely to be referred to at the hearing. If the appellants must copy the material at their own expense, this will necessarily limit their decision of how much to copy and likely restrict it to relevant material.

69. For these reason I have decided that the inspection must be at HMRC's offices. The appellants will have the right at their own expense to take copies (although I note HMRC has offered to pay if the quantity is not too great).

Costs regime

70. At the hearing before me both parties were agreed that they wished the old costs regime to apply to this appeal. It was agreed that I would make such a direction, no such direction having been made before.

71. The day after the hearing and before the direction was made, the appellants changed their position. Their solicitors indicated that the agreement on costs the day before had been made without specific instructions from their clients and in ignorance of the recent decision of the Upper Tribunal in *Atlantic Electronics Limited* FTC/29/2011, 2012UKUT45TCC. They asked me to withhold making the direction but instead direct a timescale in which the matter could be resolved. I have done so.

72. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 13 March 2012