TC06852

Appeal number: TC/2017/02767

FIRST-TIER TRIBUNAL
TAX CHAMBER

SET ASIDE DECISION
IN THE APPEAL OF

COLIN RODGERS **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
SUSAN STOTT FCA CTA

Decided on the papers on 30 November 2018

DIRECTIONS

1. The Tribunal has decided to set aside its decision dated 31 July 2018 in which it dismissed the Appellant's appeal and confirmed the issue of a Conduct Notice by HMRC pursuant to paragraph 5(4) of Schedule 38 to the Finance Act 2012.

2. In its decision dismissing the appeal the Tribunal found that the Appellant acted dishonestly while acting as a tax agent with a view to bringing about a loss of tax revenue in the course of assisting his client with his tax affairs. That finding is set aside pursuant to Rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') for a fresh determination to be made.

3. The Tribunal directs that the appeal be re-heard before a differently constituted panel (Judge and member) with directions to be issued to enable the Appellant a

reasonable opportunity to attend the fresh hearing in person and / or participate by telephone or video-conferencing as available and applicable.

REASONS

4. The Tribunal has had its attention drawn to an article appearing in Taxation Magazine published on 8 November 2018 criticising the Tribunal's decision dated 31 July 2018 (the Decision'). The criticism is to the effect that there was a lack of procedural fairness in the hearing of the Appellant's appeal which took place at Leeds Magistrates' Court on 24 April 2018. The article suggested that justice was not seen to be done.

5. The Tribunal has reviewed the substance of the criticism and reflected upon whether it has merit.

6. The Tribunal had previously refused permission to appeal the Decision in a decision issued on 6 October 2018 for the reasons set out in that decision. Likewise, the Tribunal is aware that the Upper Tribunal has refused permission to appeal on the papers, although the Appellant may yet choose to renew his application orally. Nonetheless, the Tribunal has decided that it is in the interests of justice to exercise its power to set aside the Decision.

Jurisdiction to set aside

7. The jurisdiction to set aside is to be found in Rule 38 of FTT Rules which provides:

> "38.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings.
>
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.
>
> (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

8. The Tribunal is satisfied it can exercise the power under Rule 38(1) of the FTT Rules of its own motion and without an application having been made to set aside. There is nothing within Rule 38(1) or (2) which limits the Tribunal to exercising the

power only pursuant to an application made by a party under Rule 38(3). In any event, under Rule 42 of the FTT Rules, the Tribunal may treat an application for permission to appeal as an application to set aside a decision.

9. Further, the Tribunal can exercise its case management powers under Rule 5(3) of the Rules to treat the Appellant's post hearing correspondence as an application by him to set aside its decision and to the extent necessary, the Tribunal grants an extension of time for such an application.

10. In refusing permission to appeal on 6 October 2018, the Tribunal has previously considered the Appellant's letter requesting permission to appeal dated 19 September 2018, his letter dated 14 June 2018 requesting a full decision from the Tribunal and his letter dated 3 May 2018 with post-hearing representations.

11. The Appellant's letter dated 19 September 2018 includes no grounds of appeal but his letter dated 14 June 2018, in response to the Tribunal's summary decision of 22 May 2018, stated as follows.

> "I refer you to my letter of 22 May 2018.
>
> As you stated in the letter above I would like to apply for a full decision notice from the proceedings of 24 April 2018 held in Leeds which the reasons already stated I could not attend.
>
> On reading the summary decision there are a number of facts I am unhappy about but would like a full decision before deciding on my next course of action.
>
> I would however like it made known to the judge and the layperson that I was told by HMRC that the hearing would last for 2 days stop at no time was I informed about telephone conferencing facilities until the letter of 24th April which arrived about Noon but because of problems I was unable to open and read until about 2.30. The only mention to me that was ever made and telephone conferencing was when I was asked about the possibility of mediation but the HMRC officers refused to take part in mediation so nothing came of it."

12. The Tribunal has also considered the Appellant's post-hearing representations of 3 May 2018, the hearing having taken place on 24 April 2018. In that letter the Appellant made various factual representations as to why he had not acted dishonestly which were rejected by the Tribunal for reasons given both in its summary decision of 22 May 2018 and the Decision on 31 July 2018.

13. The Appellant concluded his letter of 3 May 2018 by stating:

> "I am sorry that I could not attend the hearing but if I had not informed you of my inability to attend I would have struggled to get there as my wife's care company had problems that morning and only one carer could attend so I had to step in as the second carer so it would have been impossible for them to provide care for the rest of the day.
>
> I thank you for the opportunity to express my points again but as a non legal person I have to say that for something that it is not a prosecution it does seem to follow court rules protocol and etiquette very closely.
>
> After everything I am not very hopeful of succeeding in my appeal but if HMRC try to use the same tactics on another person I hope they can find my details so they can see that somebody else has been treated the same way and maybe somebody at HMRC might realise they maybe how they do things is not right."

Exercising the jurisdiction to set aside

14. The Tribunal has considered in accordance with Rule 38 of the FTT Rules whether to set aside the Decision.

15. The Tribunal is satisfied that, for the purposes of Rule 38(1)(a), it is in the interests of justice to set aside the Decision for the reasons set out below and that, for the purposes of satisfying Rule 38(1)(b), one or more of the conditions in Rule 38(2) is satisfied. The conditions are satisfied as follows:

(1) a letter from HM Courts & Tribunal Service ('HMCTS') dated 23 April 2018 was not received by the Appellant until 12.05pm on the first day of the hearing, 24 April 2018, when proceedings were due to have begun at 10am (Rule 38(2) (a)); and

(2) the Appellant was neither present nor represented at the hearing on 24 April (Rule 38(2)(d)).

Interests of justice in setting aside the decision – Rule 38(1)(a)

16. The Tribunal has decided to set aside the Decision because it is satisfied it is in the interests of justice to do so. The Tribunal is of the view the Appellant did not have and was not given a reasonable opportunity to participate in the hearing by telephone on 24 April 2018.

17. In summary, this is because HMCTS's letter which was dated 23 April 2018, stated the Appellant could participate by telephone by dialling into a teleconference number in advance of the hearing at 10am. The letter was only received by the Appellant at 12.05pm on 24 April, when the hearing had been due to begin at 10am. The letter told the Appellant that he should dial into the teleconferencing number 10 minutes before the hearing was due to begin (i.e. at 9.50am).

18. Therefore, the Appellant may reasonably have considered he was too late to participate in the hearing by telephone and been under the misapprehension that he could not dial in thereafter or there would be no point in dialling the number in the afternoon and he could not reasonably know when and whether the hearing was taking place after 10am so as to participate by phone.

Background to the hearing

19. The Tribunal prefaces this background by indicating it accepts the Appellant's explanations for not attending the hearing set out in his letters dated 17 April and 3 May 2018. It has put out of its mind HMRC's allegation (and finding, as now set aside) of dishonesty by the Appellant, as it excluded any criminal conviction of the Appellant from consideration in its original finding.

20. The Appellant was sent a letter by HMCTS dated 13 March 2018 informing him of the date of the hearing lasting 1.5 days on 24-25 April 2018 at Leeds Magistrates' Court. This was received by the Appellant in good time before the hearing.

21. That letter provided the start time for the hearing being at 10am and the address of the Court. The letter stated the Appellant should arrive half an hour before the hearing and stated "If you do not attend, the Tribunal may decide the matter in your absence".

22. The letter also referred to enclosed guidance for Tribunal Users on the postponement of a hearing in standard terms. The enclosed guidance included the following:

> "All postponement applications will be considered by a Judge. The Judge will not normally agree to a postponement unless the reasons in the application are compelling, even if the other party consents.
>
> ……..
>
> The parties to an appeal must assume that a hearing remains in the list unless the Tribunal tells them it has been removed, and, they should be prepared to proceed with the hearing. The Tribunal has the power to hear an appeal in the absence of a party, or both parties."

23. On 17 April 2018, the Appellant wrote to the Tribunal in the following terms:

> "I refer to your letter of 13 March 2018.
>
> It is with regret that I have to inform you that I will not be able to attend the hearing scheduled for 24th and 25 April 2018 in Leeds.
>
> I have spent the last month trying to organise care my wife but have now had to give up on the idea. My wife's care company would have to supply a carer to stay with her whilst I was away and another to come in when she needed hoisting from her bed to her chair and for the return journey. However we have calculated that this the whole time I would be away would be approximately 13 hours per day stop this would involve the total cost of £494 as the current hourly rate care is £19 per hour.
>
> As we now live on the grand total of £246 per week you are asking me to commit 2 weeks of our income which I cannot afford to do. I have informed Mr Ferguson who was also having trouble getting the time of as he is potentially working away on those dates and would have lost 2 days attending.
>
> I am sure that the HMRC representatives will be on full pay and expense so will suffer no financial loss or hardship in attending as I pointed out in an earlier letter.
>
> I was told dearly 2 years ago HMRC was changing its attitude to the disabled and their carers but it seems that was also a lie as no consideration has been given to my circumstances even though you are fully aware of the facts. My feeling about this case and the actions of all the officers involved in this are well documented and I would hope they will be made available to the chairman of the hearing but I have so little confidence in the honesty and integrity of HMRC and I will be sending this letter recorded delivery so if it is not presented to the hearing I will be wanting an explanation.
>
> I am staggered at the lengths HMRC will go to protect their officers who now consider lying and using threatening behaviour to be an acceptable part of their job."

24. It is apparent from this letter that the Appellant was informing the Tribunal that he did not intend to attend the hearing listed for 24 April 2018. He did not apply for a postponement of the hearing, nor indicate that he may be available on a future date nor ask to participate in the hearing by telephone.

25. On receipt of the letter, HMCTS asked HMRC to comment on any postponement of the hearing. David Miles, HMRC's solicitor, emailed HMCTS on 19 April 2018 in the following terms:

> "Thank you for your email with the attached scanned letter from you dated today, and the scanned letter dated 17 April 2018 from the Appellant in this matter, which I have received this afternoon. I have attached both to this reply for ease of reference.
>
> Your letter suggests that the Appellant has applied to postpone the hearing next week. However, having carefully read the Appellant's letter I don't think he has made any application. His letter simply seems to explain that he cannot attend a two day hearing because it would cost him too much in care fees for his wife to be looked after in his absence. There is no suggestion that he would be able to attend at any other time.
>
> Given that the Appellant seems to suggest he would not be able to attend a hearing at all, HMRC considers there would be no benefit in postponing the hearing. HMRC therefore confirms that unless the Tribunal notifies it otherwise it will attend the hearing on Tuesday 24 April at 10am.
>
> Please contact me if you would like any further information or have any queries about this response."

26. This email was then forwarded to a salaried Judge of the Tribunal (not the Tribunal Judge hearing the appeal) who asked that all correspondence together with this email be forwarded to the hearing-Judge as soon as possible. The Salaried Judge indicated that HMRC were right to indicate that the letter was not an application for a postponement. The Salaried Judge directed that the hearing Judge could consider whether there were any adjustments that could be made in light of the issues in the case that might enable the Appellant to participate in some way, for example by telephone or answering specific written questions following the oral hearing.

27. The hearing Judge (this Tribunal Judge) was forwarded all the correspondence on Friday 20 April 2018 shortly after 11am. This Tribunal Judge replied shortly after midday, within an hour of receipt, in the following terms:

> "Would you mind checking with the Court that next week that we can have a suitable court room and telephone available so that the appellant has the opportunity to participate by telephone (I assume there is no video link available and the appellant would not have the facilities at his home in any event). Then would you mind writing to the Appellant in the following terms.
>
> "Thank you for your letter dated xxx. Please find enclosed the letter the Tribunal sent to HMRC dated xx and HMRC's response by email dated 19 April 2018.
>
> You will see that HMRC appear to be right in their understanding that you have not actually applied for the hearing to be postponed to another date for you to attend.
>
> If you still wish the hearing to proceed on 24 April 2018, your letter will be put before the Tribunal to consider alongside all the other evidence but the Tribunal is likely to proceed in your absence. If you do wish to participate by telephone during the course of the hearing then the Tribunal has arranged the following telephone number for you to dial into proceedings:
>
> [Please insert telephone number and PIN and all other details]
>
> If you do not attend or participate by telephone and the hearing proceeds in your absence you should note that it may mean that the Tribunal may not have all the information you wish would to present before it. The Tribunal therefore may not receive all the evidence it needs in order for you to establish your case. You should also be aware that HMRC may argue that less weight should be placed on the contents of your written evidence or correspondence because they have not

had the opportunity to test your reliability and credibility (whether what you are saying is accurate) in cross examination (through questioning you). If HMRC do make that argument, it will be for the Tribunal to determine whether that is a fair argument. You are therefore strongly urged to attend in person or participate by telephone.

If you wish to apply for the proceedings to be postponed so that you can attend on a future date, please do so immediately giving your reasons and the dates in the future which you would be able to attend. Any application will be considered by the Tribunal after hearing from HMRC whether they object. There is no guarantee that any application for postponement will be successful and the Tribunal will consider all the arguments and the interests of justice. Therefore, if the application for postponement is not made until the day before the hearing or morning of the hearing, the Tribunal may not have time to give you a decision in advance.

Therefore, you again are invited to attend or participate by telephone in the hearing listed next Tuesday 24 April."

28. The Tribunal Judge was informed that because the Appellant had provided no email address, the letter would have to be posted and HMCTS would not be able to send the letter out until Monday 23 April 2018.

29. The letter drafted by HMCTS, in almost identical terms to that drafted above, was sent by special delivery by Royal Mail on Monday 23 April 2018 to the Appellant. The only difference in wording is that the final letter inserted the following paragraphs:

> "If you do wish to participate by telephone during the hearing, then the Tribunal has arranged the following telephone number for you to dial into proceedings (please dial in 10 minutes before the start time of 10:00am):
>
> UK landline: XXXX UK mobile: **XXXX** Your PIN: XXXX"

30. Therefore, this letter told the Appellant he had to dial in to the teleconferencing number at a specific time, 10 minutes before 10am i.e. 9.50am.

31. The letter was sent by recorded next day delivery service on Monday 23 April 2018 together with a separate letter, also drafted by this Tribunal Judge. The separate letter informed the Appellant of his opportunity to object to the Tribunal Judge hearing the matter and applying for recusal given the Judge's professional contact with HMRC's solicitor. The issue of recusal is covered in the Tribunal's full decision of 31 July 2018.

The day of the hearing

32. In terms of the decision to proceed in the Appellant's absence, the Tribunal provided full reasons for this within its decision released on 31 July 2018 at paragraphs 2 to 15.

33. Nonetheless, the Tribunal omitted to record within the decision some further details regarding the hearing of the appeal on 24 April 2018. It should have done so and it erred in this regard.

34. First, the Tribunal was only informed around 10am that HMCTS's letters ((a) regarding postponement and participating by phone and phone number and (b) the opportunity to apply for the Judge's recusal) sent by special delivery to the Appellant had not been delivered to the Appellant by 9am as HMCTS intended but were due for delivery by 1pm.

35. Second, the Tribunal Judge rang into the teleconferencing facility in the number provided and remained on the line between 10 and 10.20am (at a time by which the Tribunal had originally hoped the Appellant would have received the letter), at 12.15pm and between 1.50 and 2.15pm. On the final occasion the phone call was kept on in the court room during open court with HMRC present. This is recorded in his hearing notes but not in the full decision.

36. The Tribunal Judge decided to wait until after 2pm before proceeding in the Appellant's absence on the basis that the Tribunal was informed shortly after midday that the letters to the Appellant had been delivered and receipt acknowledged by signature at 12.05pm. The Appellant's address in Ossett was only 20 minutes' drive away from the Court such that in the unlikely event he had wished to attend by person he could have arrived by 2pm by private or public transport.

37. Third, before or around the start time of the hearing at 10am both members of the Tribunal believe that the clerk, a clerk at Leeds Magistrates' Court, was asked by the Tribunal to ring both home and mobile telephone numbers of the Appellant which the Appellant had provided in correspondence. No contact was made by the clerk with the Appellant.

38. The Judge failed to record these attempts by the clerk to contact the Appellant by telephone in his notes of the hearing and in the full decision. Likewise, the Tribunal file does not contain any notes of the attempted contact. Nonetheless the Tribunal believes that attempts were made to contact the Appellant by phone on the morning of the hearing, and also after noon, without success. This is because both members of the Tribunal recall the clerk coming in and out of their retiring room on more than one occasion and discussing the making of phone-calls.

39. These telephone calls were an attempt to give the Appellant a further opportunity to be made aware of the opportunity to participate by phone or attend the hearing and warn him that otherwise it might proceed in absence. Nonetheless, the attempts to contact him were not successful and the Appellant would not necessarily or reasonably been expecting such phone calls to be made so as to make himself available to receive them.

Evaluating the interests of justice in setting aside the decision

40. Evaluating the interests of justice, requires deciding whether the Appellant had a reasonable opportunity to attend and participate in the appeal hearing either in person or by telephone. There is no doubt he had the opportunity to attend and participate in the appeal hearing in person.

41. There are a number of factors which militate in favour of the fairness of the proceedings as conducted:

(1) The Appellant was given reasonable notice of the hearing in advance by letter dated 13 March 2018 which warned him that should he not attend, the hearing of his appeal may take place in his absence.

(2) The Appellant was aware of the seriousness of the allegations and matters in issue.

(3) The Appellant was aware of the hearing date and chose not to attend for reasons he set out in his letter of 17 April 2018, caring for his wife. He only communicated this shortly before the hearing was due to take place. The Tribunal treats the explanation with some scepticism in light of earlier correspondence from the Appellant such as a letter dated 3 January 2018 in which he refers to being the carer of a seriously ill woman but does not suggest he would be unable to attend the hearing stating 'I will be representing myself at the hearing as I cannot afford any legal representation'. In none of the previous correspondence with HMCTS regarding listing the hearing does the Appellant suggest he would not be able to attend.

(4) Nonetheless, even though the Tribunal accepts the explanation for his not attending put forward in the letter of 17 April 2018 (his caring for his wife and the cost of replacement carers), the Appellant should reasonably have been aware that the appeal may proceed should he choose not to attend and he decided not to attend, weighing up those matters in the balance.

(5) The Appellant was given the opportunity to file written evidence and submissions in support of his appeal in advance of the hearing. That which he did file, his earlier witness statement and correspondence with both HMRC and the Tribunal between 2016 and 2018 was fully considered.

(6) The Appellant did not ask for a postponement of the hearing or an opportunity to participate by telephone, he did not request to be present in person or give any oral evidence at the hearing.

(7) Nonetheless, the Tribunal of its own initiative attempted to grant the Appellant the opportunity to participate in the hearing by telephone – it attempted to devise a mechanism which would mitigate non-attendance.

(8) On the morning of the hearing, the Tribunal asked the clerk to ring both phone numbers provided by the Appellant in correspondence and there was no answer from the Appellant (the Tribunal erred in not recording this in its notes and in its decision).

(9) The Tribunal Judge rang into the designated dial in conference number both in the morning of the hearing on 24 April (before it was made aware that the letter of 23 April had not yet been delivered) and shortly after noon when the letter had been delivered.

(10) Once the Tribunal was made aware the letter had not been delivered, it delayed the start of the hearing by 4 hours until 2pm. The Tribunal also believes the clerk made a further attempt to contact the Appellant on his telephone numbers after noon (but has not recorded this in the hearing notes).

(11) The Tribunal Judge rang in again to the teleconferencing number for a third time between 1.50pm and 2.15pm on the afternoon of the hearing after the letter had been delivered. The Appellant did not dial into the number during this time. The Appellant has explained that he did not read the letter until 2.30pm, despite it being delivered personally at noon, and the Tribunal is bound to accept this explanation.

(12) The Appellant has not suggested he made any attempt to contact by telephone or email the Tribunal Service or the Court on the day of the hearing. There is no record of any such attempt - he suggests he only looked at the letter afterwards.

(13) The Appellant has not suggested he made any attempt to dial into the teleconferencing number on the day of the hearing following receipt of the letter (he accepts receiving the recorded delivery letter at noon but not looking at it until 2.30pm). There is no record of any attempt by the Appellant to dial into the facility but the facility itself only states if there are any other participants on the line – it may not record previous attempts to dial into it.

(14) During the hearing, the Tribunal put the case as set out in the Appellant's letters and statement to HMRC's witnesses as questions for them to respond to in oral evidence.

(15) The Appellant was given the opportunity to file written submissions after the hearing which he did in writing on 3 May 2018 in which he repeated his reasons for choosing not to attend the hearing. These submissions were considered by the Tribunal before reaching its decision. The Tribunal also took into account the Appellant's subsequent representations dated 3 May 2018 continuing to deny the allegation of dishonesty before releasing its summary decision on 22 May 2018.

42. Therefore, the Tribunal remains of the view that the Appellant had full notice and opportunity to attend the hearing in person and did not do so by choice. He did not seek a postponement of the hearing in his letter of 19 April 2018. The hearing that was conducted was fair, the question is whether the proceedings as a whole were fair.

43. The Tribunal having considered the nature of the reasons for the Appellant being unable to attend, namely his caring responsibilities and lack of finances, properly and fairly attempted to arrange alternative methods by which the Appellant might participate in the hearing. Opportunity was offered by telephone – by dialling into a teleconference facility. Albeit that the offer was only received on the day of the hearing, the Appellant accepts in correspondence that he received the offer and has not suggested that he made any such attempt to participate on the day or would do so on a future occasion.

44. One might have expected a person who wished to participate in the hearing but was not available to attend in person, at least to have rung the Magistrates' Court or HMCTS or attempted to ring into the teleconferencing facility or to be available on the day of the hearing by telephone (in case the Tribunal wished to contact him). The Appellant did not take any of these steps.

Reasonable opportunity to participate by telephone

45. Notwithstanding all that is said above, evaluating the interests of justice must turn on whether the Appellant was given a reasonable opportunity to participate by telephone once the Tribunal had decided to offer such a facility.

46. If the Tribunal has decided to offer an opportunity for a party to participate by phone it must be an opportunity of which the party can reasonably avail itself. The fact that the Tribunal might have chosen not to make this facility available, and was under no obligation to do so, is irrelevant. The fact that the Appellant did not attempt to participate by phone after receiving the letter is not to the point.

47. Once the Tribunal has decided to offer an opportunity to participate by phone it must ensure that this is a reasonable opportunity, even if it is one that the Appellant chooses not to take up. It goes without saying that Article 6(1) of the European

Convention on Human Rights, natural justice under the common law and the FTT Rules require that there is a fair hearing and this requires a fair procedure when examining the proceedings in their entirety.

48. Despite all that is set out above and despite its best endeavours to provide such a procedure, the Tribunal is now of the view that it failed to provide the Appellant a reasonable opportunity to participate in the hearing of 24 April 2018 by telephone.

49. The letter of 23 April 2018, as sent to the Appellant rather than as drafted by the Judge, only indicated that the Appellant could participate by telephone by dialling in 10 minutes before the start time of 10:00am. That time had already passed by the time the Appellant received the letter shortly after noon. Therefore, the Appellant could not reasonably have been expected to ring into the number at a later time on the day on the off chance he might be able to participate at a later stage.

50. The Appellant may reasonably have considered he was too late to participate in the hearing by telephone and been under the misapprehension that he could not dial in thereafter or there would be no point in dialling the number in the afternoon and he could not reasonably know when and whether the hearing was taking place after 10am so as to participate by phone. He could not know the hearing was delayed and begun at 2pm.

51. The Tribunal should have reminded itself that the decision to proceed in absence should be exercised with the utmost care and caution, particularly given the serious nature of the allegation under appeal, one of dishonesty. The Tribunal might have had regard to the test for proceeding in absence in criminal cases as set out by Lord Bingham in *R v Jones* [2002] UKHL 5. The Tribunal should have applied its mind more fully to the substantial prejudice that may have been occasioned to the Appellant by not giving some oral evidence over the telephone even if he was not to attend and give oral evidence in person. This is all the more so in a case where there is a serious allegation of dishonesty to be tried and the matter is central to determining the appeal which relies on evaluating the credibility of the Appellant's evidence.

52. The Tribunal's failure to provide the Appellant with a reasonable opportunity to participate by telephone is compounded by two mentions of the Appellant not giving oral evidence in the full decision. At paragraph 71 of its decision the Tribunal notes that the Appellant gave no oral evidence or explanation why his conduct was not dishonest and at paragraph 75 of its decision the Tribunal notes that the Appellant did not give oral evidence so that his explanation could not be tested in cross examination.

53. While it is not suggested in the decision that any adverse inference is being made against the Appellant from his failure to give oral evidence, it does imply that less weight was given to his written accounts where he did not give oral evidence.

54. Where, as here, an Appellant has not had a reasonable opportunity to participate by telephone and has not attended the Tribunal to give evidence in person and the Tribunal has accepted the explanation for non-attendance, the absence of oral evidence from the Appellant should not have formed any part of the Tribunal's reasoning for finding dishonesty to be proved.

55. Therefore, the Tribunal has weighed up all the matters set out above and decided it is in the interests of justice for its decision to be set aside so that its findings no longer

stand. The appeal should be re-heard before a fresh Tribunal consisting of a panel (Judge and member).

56. A further Tribunal can make a fresh determination as to whether the Appellant has engaged in dishonest conduct at a hearing at which the Appellant has had a reasonable opportunity to attend in person or by telephone or by video-conferencing as appropriate and available. The Tribunal hopes that the Appellant will avail himself of this opportunity.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 07 December 2018