[2015] UKUT 0012 (TCC)

Appeal number: FTC/21/2014

COSTS – withdrawal of case by HMRC before FTT – claim for costs by appellant on basis that HMRC had acted unreasonably in defending or conducting the proceedings – rule 10(1)(b), Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – whether FTT applied the correct legal test – whether the reasons for HMRC were not properly disclosed and FTT was led into error

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARKET & OPINION RESEARCH INTERNATIONAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JUDITH POWELL

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 15 December 2014

Tarlochan Lall, instructed by UHY Hacker Young LLP, Chartered Accountants, for the Appellant

Jonathan Bremner, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of Market & Opinion Research International Limited ("MORI") against the decision of the First-tier Tribunal ("FTT") (Judge Raghavan) refusing to award costs to MORI in respect of an appeal to the FTT by MORI against a decision of HMRC to refuse a *Fleming* claim for VAT input tax ("the substantive appeal").

2. The circumstances of MORI's application for costs of the substantive appeal were that the appeal had been settled during the second day of the substantive hearing of the appeal in June 2012 ("the June 2012 hearing"), when HMRC had withdrawn their case, and MORI had abandoned a small element of its claim. As the appeal was categorised as standard, MORI had made its application for costs under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"), on the basis, it was submitted, that HMRC had acted unreasonably in defending or conducting the proceedings of the substantive appeal, in that HMRC had acted unreasonably in not settling the substantive appeal before the June 2012 hearing.

3. The FTT considered the application at an oral hearing on 15 April 2013 and refused it for the reasons given in its decision released on 13 September 2013. The FTT decided that HMRC had not acted unreasonably. Having examined the history of the proceedings, it found that it was not unreasonable for HMRC not to have settled the case any sooner than they had. It is from that decision that MORI now appeals.

Background

4. MORI is a well-known market opinion research organisation. The substantive appeal concerned a claim by MORI, made on 27 March 2009, for recovery of input tax for the period 1 January 1986 to 30 April 1997 ("the claim period") in respect of the fuel element of mileage allowances reimbursed to researchers engaged by MORI. HMRC had accepted in respect of a separate claim by MORI for a later period that MORI had not already claimed input tax in that later period. The sole issue on the substantive appeal was whether MORI could discharge the burden of proof in relation to the claim period that it was more likely than not that MORI had not already claimed input tax in the claim period.

5. MORI did not have any direct evidence in respect of the claim period. It relied on witness evidence of two directors in certain respects, and copies of Handbook guides, initially for 2005 and 2007, and subsequently for 1995. There was a dispute about the meaning to be attached to excerpts of visit reports complied by HMRC officers following visits to MORI, in particular on 18 October 1990.

6. The hearing of the substantive appeal was listed for three days. The first day was taken up with certain questions of jurisdiction. The FTT permitted HMRC to amend their statement of case to raise the jurisdiction issue, but decided the issue

against HMRC. The jurisdiction issue was also the subject of a separate costs application by MORI, which is included in this appeal.

7. On the second day of the hearing, and after hearing submissions by Mr Lall (who appeared for MORI both before the FTT and on this appeal), HMRC agreed to meet MORI's claim subject to some small adjustments.

8. The reasons for HMRC abandoning substantially the whole of their defence to MORI's claim form part of the issues in this appeal. We were shown a note of the hearing taken by an HMRC officer present at the hearing. This shows that lunch on the second day of the hearing was taken at 1pm. On resumption at 2pm, the note records that Mr Shea, the HMRC officer representing HMRC before the FTT, requested permission to address the tribunal in relation to HMRC having gained a "better and full understanding" of MORI's case and "the distinctions between mileage claims". He informed the FTT that there had been a discussion with MORI over the lunch adjournment and it had been agreed that MORI would withdraw its claim for 1986 to 1988 and HMRC would accept the remainder of the claim.

9. The FTT then adjourned for the parties to agree a form of words for a consent order. On reconvening, as the note records,

> "Mr Shea presented a copy of the following draft of words to the Tribunal:
>
> 'The Commissioners have listened to the presentation this morning and reached a better understanding of the Appellant's case. Only today has it been pointed out that the appellant could not have claimed (input tax) in 1986 to 1988. So it has not been claimed for the first period.
>
> It has been explained (sic) the difference between mileage allowances and business mileage to support a claim and the Commissioners are now willing to accept the claim.
>
> Having discussed the claim with Mr Egerton [the relevant HMRC officer], normally authority would be required to authorise acceptance of the quantum – but in view of the fact that we are before the Tribunal, we are agreeing on behalf of the Commissioners that we are willing to accept the computations.'"

10. It seems clear that, contrary to what the note suggests, these words of Mr Shea were merely spoken orally to the judge, and that the judge was not handed a written statement to this effect. What was handed to the judge was what had been agreed as the form of the consent order.

11. Before us, the form of words used by Mr Shea was referred to as "the Statement". We prefer to adopt the description "Hearing Statement", which we think serves to distinguish it more clearly from what was referred to as "the Impugned Statement"; we shall come to describe the Impugned Statement a little later.

12. Before the FTT, HMRC explained what it was that led them to change their decision on the second day of the June 2012 hearing. The FTT described it as follows (at [33]):

> "They [the review officer and the decision maker] say the explanation of the 1995 Handbook and the way it operated (while by itself not conclusive) plus the detailed review of visit reports changed HMRC's mind about the meaning of the visit reports which was an issue which was finely balanced. It was only following submissions made at the Tribunal by the appellant, some in response to requested clarifications from the Tribunal[,] that the appellant's case became clear. In particular they refer to an explanation prompted by the Tribunal's question as to why the handbook evidence was relevant to the issue of whether the appellant had made VAT claims during the relevant period."

The law

13. The power of the FTT to award costs is derived from s 29 of the Tribunals, Courts and Enforcement Act 2007 which materially provides:

> "**29 Costs or expenses**
>
> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

14. The discretion afforded to the FTT in this respect is subject to the FTT Rules. Rule 10 relevantly provides:

> "**10** – (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings"

Approach of the Upper Tribunal

15. The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.

16. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment. An appeal against such a judgment, on a question of law, needs to be approached with appropriate caution. As Jacob LJ observed in *Proctor & Gamble UK*

v Revenue and Customs Commissioners [2009] STC 1990, at [7], it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error, for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test) it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffmann said in *Biogen v Medeva* [1997] RPC 1, at p 45:

> "Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

17. Lord Hoffmann returned to the same theme in *Designer Guild v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, a case concerning whether one company had infringed another's copyright by copying a fabric design. The judge at first instance had found that there had been such copying. The Court of Appeal conducted its own analysis and came to a different view. The House of Lords reversed the decision of the Court of Appeal, holding that they had adopted the wrong approach. Lord Hoffmann said, at p 2423:

> "… because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle …"

MORI's grounds of appeal in brief

18. There was no argument before us that the FTT had failed to adopt, in general terms, the correct approach to the enquiry it had to make. That approach was explained by this Tribunal, albeit in a decision released after the FTT's decision in this case, in *Tarafdar (t/a Shah Indian Cuisine) v Revenue and Customs Commissioners* [2014] UKUT 0362 (TCC), at [34]:

> "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

19. The question in this appeal, and where MORI says the FTT fell into error, is in the way it approached the third of those questions.

20. MORI does not seek to persuade us that we should simply disagree with the conclusions reached by the FTT, and substitute our own decision. That would not be

the correct approach to the appellate function of this Tribunal. MORI submits that the FTT's decision is flawed as a matter of law in the following two respects:

(1) The FTT erred in law because it applied a test of "obviousness" rather than "reasonableness" in determining whether HMRC had acted unreasonably in not settling the case at various points in the proceedings at which certain information and explanations had been made available to them.

(2) The FTT had been led into error by the failure of HMRC to disclose, at the time of the costs hearing, that the real reason why HMRC had persisted with their case was their alleged misunderstanding (as set out in the Hearing Statement) over the difference between business mileage and mileage allowances.

21. As regards (2), MORI's case in relation to the Hearing Statement was not one for which permission to appeal had been given. Although MORI argued that its submissions in this regard should be regarded as part and parcel of its appeal for which permission had been granted, we consider that it amounts to a new ground of appeal for which permission would be required. MORI submitted that the Hearing Statement had only been disclosed after permission to appeal had been granted, and sought permission by letter addressed to this Tribunal on 12 December 2014. We indicated at the hearing that we would not make any preliminary ruling in this respect, but would hear full argument on MORI's case, and make a determination on that basis.

The FTT's decision

22. The FTT reviewed a number of decisions of the First-tier Tribunal and one of its predecessors, the Special Commissioners, as to the approach to be adopted in determining whether a party's conduct had been unreasonable. There was nothing controversial in these, and we set out the FTT's summary at [8]:

> "(1) It was to be noted that the test in the Tribunal Rules that a party or representative had "acted unreasonably" required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted "wholly unreasonably". This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395(TC) at [9].
>
> (2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings
>
> > "…whether they are part of any continuous or prolonged pattern or occur from time to time".
>
> (3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power

which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.

(4) Actions for the purpose of "acting unreasonably" also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)

(5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC)) at [45]).

(6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting. (*Southwest Communications Group Ltd* at [39]).

(7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* [2012] UKFTT 215(TC)).

(8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) 30 Judge Hellier stated at [27]:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting."

23. We agree with these propositions. We would add only what this Tribunal (Judge Bishopp) said in *Catanã v Revenue and Customs Commissioners* [2012] STC 2138, at [14] concerning the phrase "bringing, defending or conducting the proceedings" in rule 10(1)(b):

> "It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

24. In *Catanã*, Judge Bishopp dealt with a complaint by Mr Catanã that documents he had produced had been disregarded. Judge Bishopp commented, at [19], that the case was not one "in which it could justifiably be said that all the relevant material was in HMRC's hands yet they unreasonably disregarded it when making the

amendment, and continued to disregard it during the course of the tribunal proceedings."

25. In *Tarafdar*, in circumstances similar to those in this case, where HMRC had withdrawn following an adjournment of the hearing, this Tribunal observed, at [33], that "the proper enquiry … was whether HMRC had unreasonably prolonged matters once they were in the tribunal, or whether they should have withdrawn the assessment at an earlier stage".

26. Having instructed itself in the relevant law, and before embarking on an analysis of the procedural history of the case, the FTT summarised, at [45], the approach it proposed to adopt. Judge Raghavan said:

> "Taking account of the concerns outlined above as to the need to be aware of the effect of hindsight, I will consider whether at the various stages of the proceedings (which the appellant has highlighted as being points in time the case could have settled) it was unreasonable on the part of HMRC to continue to defend the proceedings considering what was reasonably available to them at the time. In doing this I will also take into account what if any new information or arguments which advanced the appellant's case became available to HMRC. This is on the basis that given HMRC's view at settlement must be take to be that its case was weak, if it then turns out they had the same information available to them at the outset then this would tend to support a finding that HMRC ought to have appreciated the weakness of their case sooner and settled earlier."

27. The FTT's reference to hindsight in this passage can be understood by referring to what Judge Raghavan said at [42]:

> "Where the issue is whether the case could have been settled sooner one approach would be to assume that whatever information was available to HMRC at the time of the settlement was enough to mean they had a weak case and then to scroll back along the timeline of the case to consider what if any new material or arguments HMRC could reasonably have been expected to be aware of at a given point in time in order to see whether the case could have been settled sooner. But, in my view to only consider the matter on this basis would be to fail to acknowledge the way in which hindsight may colour an assessment of whether a party acted unreasonably. A party may have acted reasonably in defending proceedings at a given point in time even though with the benefit of hindsight it might be said the appeal could have been settled then. Also as pointed out by the Tribunal in *Eastenders Cash and Carry* there is a need to guard against creating a "backdoor" costs shifting regime."

28. We respectfully agree. What the judge said at [42] effectively foreshadowed the three-stage approach of this Tribunal in *Tarafdar*. The judge was right to reject the notion that all that would be required in such a case would be to identify whether, on the available information, the case could have been settled sooner than it was. That would be to stop at the second stage of the approach adopted by this Tribunal in

Tarafdar. Once the second stage has been reached, it is the third stage, that of testing whether the failure to withdraw or settle was unreasonable in the circumstances, which is crucial to the enquiry.

29. Having set out its proposed approach, the FTT went on to consider three occasions on which MORI had argued that HMRC had information in their possession which made it unreasonable for them not to have settled at that stage. The three occasions were:

> (a) a request by MORI on 27 January 2011 for a further review by HMRC of its claim (including also the service of HMRC's statement of case on 3 May 2011);
>
> (b) a letter dated 8 May 2012 from HMRC to MORI stating that they had considered the evidence supplied, including a copy of the Handbook for researchers in force in 1995, but that their decision to disallow the claim still stood; and
>
> (c) the receipt by HMRC of MORI's skeleton argument served on 6 June 2012.

Request for further review: 27 January 2011

30. The FTT concluded, at [46], that the evidence available at the time of MORI's request for a further review was "a long way off from amounting to evidence that would have led to the conclusion that HMRC were unreasonable in not having drawn the conclusion that the relevant input tax had not been claimed and that they had therefore acted unreasonably in continuing to defend the proceedings at this point."

31. The evidence considered by the FTT in this connection included, in particular, a statement, in the letter from UHY Hacker Young dated 27 January 2011, as to the ex-directors' recollections of a VAT visit on 18 October 1990. It was the note prepared by HMRC of that visit which contained what we referred to earlier as "the Impugned Statement", namely:

> "Discussed scale charges. Satisfied only business mileage claimed – amounts negligible."

This was significant in the context of the costs application because (as the FTT stated at [21]) HMRC had explained, in their response to MORI's costs application, that having heard MORI's arguments related to the visit reports and heard other explanations during the June 2012 hearing, HMRC had accepted that the comments in the visit reports did not show that input tax had been claimed on mileage during the claim period. On the other hand, as the FTT also recorded at [22], that was not the same as accepting that the 1990 visit report showed that input tax on mileage had not been claimed.

32. The Impugned Statement was the subject of detailed analysis before the FTT. The FTT found, first, at [51], that the difference, as a matter of law, between scale charges and business mileage was something HMRC knew or ought to have known

without the matter having been spelled out to them. The FTT took a different view, however, as to what ought to have been understood, or inferred, by the references to "business mileage" and "negligible". Judge Raghavan, at [52] – [53], made the following determination:

> "52. However, the business mileage point was not made in the same terms, and the point about the significance about the reference to 'negligible' was not made at all. That raises the issue of whether the business mileage points and points about 'negligible' were things which HMRC ought to have been able to take on board without having the matter spelled out to them.
>
> 53. In my view these points were not obvious. It was not unreasonable for HMRC to have taken the view it did that the visit report did not tend to suggest the relevant input tax had not been claimed."

33. The FTT went on to find that HMRC had considered the points raised by MORI on its request for a second review, both at the time of that request and when preparing their statement of case and that it was still the case at the time of the statement of case on 3 May 2011 that HMRC had not acted unreasonably in continuing to defend the proceedings.

The 1995 Handbook evidence: HMRC letter of 8 May 2012

34. The background to HMRC's letter of 8 May 2012 is set out by the FTT at [17]. Between 23 December 2011 and 2 March 2012 the parties had been corresponding over a draft statement of facts. This had developed into an exchange of factual and legal submissions. On 8 May 2012, HMRC had written to MORI to say that they had considered the evidence supplied but that they continued to deny the claim.

35. The draft statement of facts dated 23 December 2011, prepared by MORI, had included reference to what were described as the 2005 and 2007 Handbooks, which were Finance and Admin Guides provided by MORI to its researchers. The Handbooks contained sections on mileage allowances and indicated that mileage allowances were payable on submission of a claim form. Those versions of the Handbook were outside the claim period. HMRC had responded on 17 January 2012 that there was no evidence that similar guides applied in that period.

36. An amended draft of the statement of facts prepared by MORI on 10 February 2012 referred to a Handbook issued in June 1995, within the claim period. MORI asserted at that time that this showed that mileage allowances had been paid to interviewers who claimed them during the claim period. A copy of the 1995 Handbook was sent to HMRC on 23 February 2012. HMRC's response on 2 March 2012 was to accept that mileage costs had been incurred by MORI at the relevant time, but to deny that the information in the Handbook showed that MORI had not recovered input tax on interviewer mileage claims rendered.

37. The FTT found, at [60], that the view taken by HMRC was not an unreasonable one for them to have taken. It was not unreasonable for HMRC to have continued to defend the proceedings. At [61] the FTT found that the information apparent to

HMRC at 8 May 2012 was not the same as that at the June 2012 hearing. The relevance of the 1995 Handbook to the issue of whether input tax had been recovered in the claim period had not been addressed in MORI's exchanges on the draft statement of facts.

Receipt of skeleton argument

38. The 1995 Handbook played a central role in the argument over the significance of the skeleton argument served on behalf of MORI in relation to the June 2012 hearing. The essential point being made by MORI was that, although its appeal should succeed without the evidence of the 1995 Handbook, that evidence, showing as it did that the pattern of payments during the claim period was the same in material respects as the pattern in the period for which a claim had been accepted by HMRC, strengthened MORI's case.

39. The FTT, having reviewed what MORI had said in its skeleton argument, and the clarification that had been given at the June 2012 hearing in response to questions from the tribunal, found, at [68], that it was not unreasonable for HMRC not to have settled on the basis of the skeleton argument.

40. At [66] the judge said:

> "A link was being made between it being accepted that if claims for input tax were valid in respect of the capped period (i.e. no input tax claims had already been made in the capped period) even though certain handbooks were in operation, then it was more likely than not, if similar handbooks were in operation in the disputed period, that claims for input tax were similarly not being made in the disputed period. With the benefit of hindsight the link between the capped period and the claim period might have been understood from the appellant's skeleton but it was not an obvious point in my view. (Given I was the tribunal judge on the panel at the substantive hearing who asked for clarification on the significance of the 1995 Handbook claim forms I am conscious it might be said that it is not surprising that I would come to the view that the point was not an obvious one. But even putting that to one side I would still say it was not an obvious point). To say that HMRC ought to have settled on the back of this argument I think the point would need to have been made more explicitly. By the time of the hearing it was in any event a matter of dispute between the parties whether payments of allowances (in relation to which the input tax said to not have been claimed arose) had in fact been made by the company to the researchers."

41. The judge went on to express the view, at [67], that it had not been unreasonable for HMRC to have raised the point that the Handbook evidence was not evidence as to whether input tax had been claimed during the claim period. It was, as the judge put it, within the range of reasonable course of action for HMRC to have taken to leave it to MORI to bring forward evidence and make arguments as to why it should be found that allowances were paid but that input tax in relation to the allowances had not been claimed.

The FTT's summary

42. Judge Raghavan summarised his conclusions at [69] – [72]:

> "69. It follows from the various point above that I do not agree with the appellant that HMRC had reasonably at their disposal all the materials and arguments before them which were apparent at the time of the hearing at earlier stages of the proceedings. Accordingly I do not accept the appellant's argument that the only difference between what was before HMRC at various stages before the hearing and what was available to them at the hearing was the fact that the arguments were put forward by counsel rather than the appellant's accountant.
>
> 70. I also disagree having reviewed the correspondence between the parties that it has been shown that HMRC failed to engage with the issue. They did consider the information provided, and responded with their views. Although the appellant may not have agreed with those views I cannot find that HMRC acted unreasonably in their conduct of the case.
>
> 71. The issue in the substantive appeal came down to a determination of fact. As alluded to by HMRC particularly where there is lack of direct evidence the assessment of the strength of such a case is not straightforward and requires the evidence to be carefully assessed and balanced. In my view there was no question of this being the sort of case where HMRC were seeking to defend the indefensible because the evidence clearly pointed against them.
>
> 72. Another way of approaching the issue is to start from the position that the case was weak from HMRC's point of view as at the second day of the hearing and then ask what new matter gave rise to that conclusion? While it might well have appeared to the appellant that there was no startling denouement and that no significant new matters had been raised by the time of the hearing, there were in my view shifts and developments in the points being raised such as the interpretation of the visit report and the significance of the handbook evidence to the extent that when viewed together it is possible to see that HMRC were not unreasonable in altering their assessment of the likelihood of success. Looking at any of the given points up to the point HMRC settled I cannot say it was unreasonable of them to continue defending the proceedings."

Discussion

43. MORI's case before the FTT was, in essence, that the information and explanations available to competent, trained HMRC officers at various stages in the proceedings prior to the June 2012 hearing had been sufficient to enable such officers, acing reasonably, to have been able to conclude that the claim ought not to have been defended further. Those officers, argued Mr Lall, should have been able to reach that conclusion, and HMRC had acted unreasonably in continuing to defend the proceedings in the face of that evidence.

44. The FTT disagreed with MORI, for the reasons we have set out. The question for this Tribunal is not whether we would have come to the same conclusion as the

FTT, but whether there is an error of law, or errors of law, in the FTT's determination which merits that determination being set aside.

The test of reasonableness

45. We have cited earlier, with approval, the approach of other tribunals, and the courts, to the test of reasonableness. The FTT properly instructed itself as to that approach, and we consider that Judge Raghavan's summary, at [45], of the approach he intended to adopt in this respect cannot be faulted. As Mr Lall recognised, his task was to persuade us that, despite the judge's self-direction, he had actually failed to apply the proper test.

46. The focus of Mr Lall's criticism was on the references which the judge made, at [53] and [66] of the FTT decision, to the points concerning, in the first case, the Impugned Statement, and secondly the 1995 Handbook, not having been obvious. Mr Lall also submitted that the judge was in error in not referring to the abilities and experience of the HMRC officers concerned.

47. We agree that it would have been wrong for the FTT to have applied a test of obviousness rather than of reasonableness. The judge would have been in error if he had adopted the approach that the only circumstance in which it would have been unreasonable for HMRC not to have withdrawn its defence of the claim at a particular juncture was if at that time sufficient information had been given to them so that the point was obvious.

48. It is clear that a test of obviousness is not the same as a test of reasonableness. If something is not obvious or readily apparent, a person may nevertheless act unreasonably in not applying reasonable diligence, whether by applying their mind to the issue, or by making reasonable enquiries. On the other hand, if, viewed objectively, something would be obvious to the properly comparable reasonable observer, or the inferences to be drawn would be obvious to such an observer, a failure of a particular person not to appreciate that thing, or those inferences, is likely to be unreasonable.

49. It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules.

50. We derive some support in that respect from what Lewison J (as he then was) said in *Davy's of London (Wine Merchants) Ltd v The City of London Corporation and another* [2004] EWHC 2224 (Ch). That case concerned, in part, what notice

period for a break clause inserted into a new tenancy of business premises would be reasonable. At [34], Lewison J said:

> "What is reasonable in the circumstances of a particular case is a value judgment on which reasonable people may differ. Since judges are people, their views may differ, but some degree of diversity is an acceptable price to pay for the flexibility enshrined in the statute …"

The threshold test in rule 10(1)(b) is one of unreasonable conduct, which mandates a value judgment on which views may differ. The flexibility, and diversity, inherent in such a test must therefore be respected.

51. Having regard to the FTT's decision as a whole, we consider Mr Lall's criticism of the judge in this respect to have been misplaced. The judge did find, at [53], that the points that had been made concerning the Impugned Statement were not obvious. But it is clear that he was doing so in the context of considering whether the "business mileage" and "negligible" points were things that HMRC ought to have been able to take on board without having the matter spelled out to them. That is a classic approach, in the circumstances of this case, to the application of a test of reasonableness; the question being addressed was whether, on the information available to them HMRC should reasonably have been able to appreciate the significance of the particular evidence presented to them. The judge found that the view which HMRC took was not an unreasonable one. In the context of the FTT's decision as a whole, it is clear that the judge was considering the question of obviousness as a part of his application of the reasonableness test, and not instead of it or as a proxy for it.

52. We make the same finding in relation to what the judge said at [66]. Again, the judge was concerned with the question whether the information available to HMRC was such that, acting reasonably, HMRC ought to have settled. The material information available at this point was the submission made in MORI's skeleton argument concerning the 1995 Handbook. The judge accepted that, in hindsight, what had been said in the skeleton argument could have been understood as making what had turned out to be a crucial link between the claim period and the period for which a similar claim had been accepted. But in evaluating whether HMRC had at the material time failed unreasonably to appreciate such a link, it was in our view an entirely legitimate approach for the judge to have considered whether the point was an obvious one, one that with reasonable diligence the HMRC officers ought reasonably to have understood, or was one that required further explanation from MORI.

53. The judge found that, in order for it to be concluded that HMRC ought to have settled on the back of the argument related to the 1995 Handbook, which can be understood as referring to a conclusion that HMRC would have acted unreasonably in not so settling, the point would have needed to have been made more explicitly. The judge clearly took the view that reasonable diligence on the part of HMRC in respect of what had been provided would not have led them to the conclusion that they should cease defending the claim, nor that, absent further explanation from MORI, HMRC ought reasonably to have discerned for themselves what that further explanation

might have been. That was a conclusion the judge was entitled to reach, and it is one that cannot be impugned as an error of law.

54. There is, accordingly, nothing in Mr Lall's point on the use of obviousness as a test. Nor is there anything in criticism of the FTT as not having taken into account the abilities and experience of the HMRC officers concerned. The FTT was fully aware of the history of the case, and of the status of the HMRC officers involved. In applying the test of reasonableness the FTT did not fall into the error of hypothesising a typical officer whose competence was below that of the officers involved in the case; the FTT referred in this respect only to HMRC as a body. There is nothing in the FTT's decision to suggest that it applied reasonableness by reference to a reasonable observer of lesser experience and ability than was appropriate in the circumstances, nor that it applied anything other than an objective test.

55. There is one point we should make in this respect. In his skeleton argument, Mr Bremner submitted that if it were suggested that HMRC should be subjected to some higher standard that other litigants, then HMRC would submit that such a suggestion was wrong. There was, it was argued, no justification for subjecting different litigants to different standards.

56. To the extent this argument is concerned with the application of a test of reasonableness, and not some different or higher standard, we agree. However, the test of reasonableness must be applied to the particular circumstances of a case, which will include the abilities and experience of the party in question. The reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question. There is a single standard, but its application, and the result of applying the necessary value judgment, will depend on the circumstances.

57. In our judgment, viewed overall, the approach of the FTT was impeccable. It properly instructed itself in the relevant law. It set out the proper approach to be adopted. It applied that approach. Its references to matters not being obvious were nothing more than constituent parts of the FTT's exercise of a value judgment, applying the correct legal principles, and having regard to all relevant circumstances, and no irrelevant ones. We can discern no error of law in its approach. There is no basis for this Tribunal to interfere with the decision of the FTT in this respect.

The Hearing Statement

58. As we have described, MORI's argument on the basis of the Hearing Statement was not one for which permission to appeal was sought by MORI or given by this Tribunal. We consider it on the basis that we must first determine whether to grant permission to appeal on this basis.

59. The essence of MORI's case in relation to the Hearing Statement is that, in connection with the costs hearing, there was material non-disclosure by HMRC of its true reason for abandoning its case, namely that HMRC had misunderstood, until the

June 2012 hearing, the difference between business mileage and mileage allowances, and that consequently the FTT had been led into error.

60. From the material available to us, we have found that the Hearing Statement was an oral statement made to the tribunal on the substantive hearing in open court. MORI and its representatives were present at the time, and the Hearing Statement was made to Judge Raghavan. We do not consider that there can be any question of non-disclosure.

61. What happened, however, was that the fact of Mr Shea having made the Hearing Statement, and consequently the significance, if any, of HMRC's epiphany on the question of the difference between business mileage and mileage allowances was not addressed by the FTT when determining MORI's costs applications. Does this amount to an error of law?

62. In our view it cannot do so. The FTT made its determination on the matters put before it. Even though Judge Raghavan had himself been the recipient of the Hearing Statement at the June 2012 hearing, he was entitled to determine the costs application without regard to any matters not put before him by the parties. As the Hearing Statement was made in open court in the presence of MORI, and there had been no non-disclosure of it, it was open to MORI to raise it in relation to the costs applications. The fact that it did not do so cannot amount to an error of law on the part of the FTT.

63. Furthermore, we agree with Mr Bremner that the Hearing Statement cannot be taken to be an exhaustive statement of the reasons why HMRC settled the appeal. The FTT dealt with a similar argument to the effect that it was restricted to the reasons set out in HMRC's written response to MORI's costs applications, and could not take into account further reasons put forward in oral submissions at the hearing. In our respectful judgment the FTT adopted the correct course, described by it at [37], of considering all the submissions, having proper regard to the caution to be adopted in relation to explanations proffered after the event. It is for the FTT to determine, on the basis of all the submissions made to it by the parties, what were, as the FTT put it "the real reasons why the case was settled".

64. In the event, the FTT did not give any weight to the further submissions for HMRC that had been made at the hearing; those submissions had been directed at the reasonableness of HMRC settling when they did, and not to the question whether it had been unreasonable for HMRC not to have settled sooner (FTT, at [38]). The FTT was also right to decide that HMRC could not rein back from its decision to settle and seek to raise arguments on the merits of the case. Once a case has been abandoned, it must, for the purpose of determining a costs application, be presumed that the other party's case would have succeeded.

65. Applying those principles, it cannot now be argued that the FTT should have focussed solely on the difference between business mileage and mileage allowances as the reason for HMRC's withdrawal. The FTT clearly accepted that the reasons

given by HMRC in its written response to the costs applications were proper reasons, and it gave full consideration to the parties' respective arguments on that basis.

66. Nor can we see any basis for an argument that, if the FTT had considered the question of the difference between business mileage and mileage allowances, it would have come to any different conclusion. Mr Lall argued that, had the FTT had before it the difference between business mileage and mileage allowances as a reason for HMRC's withdrawal, it would have discounted that factor in the same way that, at [24], it had discounted any possible reliance by HMRC on the fact that input tax was "embedded" in costs incurred by third party researchers, because this could not have come as a surprise to HMRC, and so cannot have been new information that would have persuaded them to settle when they did. He made a similar submission in relation to the FTT's finding, at [51], that HMRC "knew or ought to have known" why scale charges and mileage allowances were different. In the same way, it was argued, HMRC should have known the difference between business mileage and mileage allowances. But even if that is right, it could not have been the determining factor in relation to the question whether it was unreasonable for HMRC not to have settled sooner. It would have remained necessary for the FTT to consider, as it did, whether, in all the circumstances of the case, it was unreasonable for HMRC at any earlier time to have continued to defend the proceedings.

67. For these reasons, we do not consider that MORI has disclosed an arguable case in relation to the Hearing Statement, and we refuse permission to appeal in that respect.

Decision

68. We dismiss this appeal.

UPPER TRIBUNAL JUDGE ROGER BERNER

DEPUTY UPPER TRIBUNAL JUDGE JUDITH POWELL

RELEASE DATE: 15 January 2015