[2017] UKUT 23 (TCC)

Appeal number: UT/2014/0073-075

PROCEDURE–MTIC appeals- refusal of application to adjourn substantive hearing of appeals in circumstances where appellants' representative and main witness unfit to participate in the proceedings - whether decision not to adjourn within the ambit of the proper exercise of judicial discretion in the circumstances- yes - appeals dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WESTMINSTER TRADING LIMITED **Appellants**
SGL INTERNATIONAL LIMITED
WESTMINSTER IMPORT & EXPORT LIMITED

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Greg Sinfield

Sitting in public at The Royal Courts of Justice, Strand, London WC2 A2LL on 14 December 2016

Philip Hackett QC, for the Appellants

Helen Malcolm QC and Tina Ranales-Cotos, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellants appeal against a decision of the First-tier Tribunal ("FTT") (Judge Short and Mrs Hunter) released on 15 October 2014 ("the Decision") which recorded the FTT's refusal of four applications by the Appellants for the adjournment of the substantive hearing of the Appellants' appeals made in 2008 against various decisions of the Respondents ("HMRC") denying input tax reclaims for VAT periods in May and June 2006.

2. The first two applications which were the subject of the Decision were made shortly before the substantive hearing of the appeals was due to commence on the grounds that the Appellants' lawyers had withdrawn from representing them and there was insufficient time to instruct replacement lawyers. These applications were refused on the grounds that the Appellants' director, Mr Kohli, could represent them. A third application was made shortly after the substantive hearing of the appeals commenced on the grounds that Mr Kohli had fallen ill and was unable to continue to represent the Appellants. Following that application, the substantive hearing was adjourned for seven days to allow the Appellants to make arrangements either to be represented by Mr Kohli, if his health permitted, or to find alternative representation, the FTT having found on the basis of the medical evidence before them that there was a real risk that Mr Kohli might never be in a position to represent the Appellants.

3. The fourth application for an adjournment ("the Fourth Adjournment Application") was made shortly before the substantive hearing was due to resume on the grounds that the FTT were wrong to conclude that Mr Kohli's illness, brought on by the stress of attending the hearing, meant that he might never be fit to attend the hearing and that it was not possible for anyone other than Mr Kohli to represent the Appellants since only he was involved in the day-to-day running of the Appellants' businesses. The Appellants also relied on the fact that Mr Kohli would be the Appellants' main witness in the proceedings.

4. Although the Appellants sought to appeal against the last three decisions to refuse an adjournment, they now only pursue their appeal against the refusal of the Fourth Adjournment Application, pursuant to the permission in that regard which was given by Judge Short on 19 November 2014.

5. Following its decision on the Fourth Adjournment Application, the substantive hearing proceeded and the evidence of HMRC was heard in the absence of any representation for the Appellants and without their main witness, Mr Kohli. The parties, however, were offered and accepted an opportunity to make final written and oral submissions some time after the original hearing and Mr Kohli was present and provided written submissions for that final day of the hearing.

6. The FTT released their substantive decision on the appeals ("the Substantive Decision") on 10 September 2015. The FTT found that the Appellants, acting through

Mr Kohli, knew that each of the 52 transactions in respect of which HMRC had denied claims for deductions of input tax were connected with the fraudulent evasion of VAT and accordingly dismissed the appeals. There has been no appeal against the Substantive Decision.

7. In essence, on this appeal the Appellants contend that, as a result of the refusal of the Fourth Adjournment Application, they have been denied a fair trial. In particular, they contend that the FTT erred by:

(1) finding that the Appellants could be adequately represented by a former director, Mr Maini, or instruct fresh lawyers;

(2) proceeding to hear the entirety of the evidential part of the substantive hearing in the absence of any representation for the Appellants;

(3) continuing with the hearing of the matter when the safeguards for a fair hearing that the FTT itself had defined in an earlier direction were no longer possible;

(4) failing to have any regard to the allegations of fraud that underpinned the Respondents' case when deciding to refuse the Fourth Adjournment Application and failing to have any regard to the principle that a party must have a proper opportunity to give evidence and be cross examined in answer to an allegation of fraud in civil matters; and

(5) failing, in considering the implications of Mr Kohli's involuntary absence, to have any regard to the fact that the allegations of fraud would be made against him personally and, through him, against the Appellants.

8. The Appellants contend that the Decision cannot be treated as a case management decision when the consequence was that the Appellants would be unrepresented in the substantive hearing where fraud was to be alleged against the Appellants and Mr Kohli personally.

9. HMRC contend that the decision by the FTT involved the exercise of a judicial discretion in the context of its case management powers as a consequence of which this Tribunal should interfere only on the clearest of grounds and the hurdle the Appellants must surmount is a high one. HMRC contend that there are no grounds to interfere with the Decision and the Appellants' contention that the more serious the consequence the less likely the decision should be treated as merely case management is both unprincipled and unsustainable.

The Decision and its factual background

10. Understandably, being a relatively short decision on interlocutory matters, the Decision does not recite in detail the factual background to the various adjournment applications. We were taken to a considerable amount of background material relating to interlocutory matters concerning the appeals and transcripts of the relevant hearings, the factual content of which was not in dispute. In our view, it is helpful to

refer to a significant amount of that material in order to put the Decision in context, as set out as follows.

11. The substantive appeals were made against three decisions of HMRC addressed to the three Appellants (who were associated with each other) between March and June 2008 denying claims for input tax in respect of VAT periods occurring in May and June 2006. The total amount of input VAT in dispute was £12.7 million pounds. Appeals against HMRC's denial of the input tax claimed were made by the first Appellant on 31 March 2008 and the second and third Appellants on 14 July 2008.

12. The reason for refusing each of the claims was the same; that the underlying transactions were connected via a "contra-trading" scheme with fraud and the Appellants, acting through their director, Mr Kohli, knew or should have known of the fact. In other words, HMRC believed that the transactions concerned formed part of an overall scheme to defraud the Revenue, commonly known as a "Missing Trader Intra-Community Fraud" ("MTIC"). The Appellants were alleged to have played the role of a UK broker in the transaction chain and HMRC contended that the Appellants were, or should each have been, aware of the fact that these transactions were connected with fraudulent trades. The Appellants denied knowledge of the details of the fraudulent transactions to which HMRC say their deals were connected and contended that HMRC had not properly proved the actual participation by any of the Appellants in the fraud.

13. It is fair to say that progress in bringing the appeals to a hearing was very slow and it is clear from a procedural chronology prepared by HMRC on 15 September 2014, shortly before the substantive hearing of the appeals commenced, that the Appellants must bear a considerable amount of responsibility for the delays in bringing the appeals to a substantive hearing.

14. For example, directions were made on 21 July 2008 for the Appellants to confirm which issues were contested by 20 March 2009. That direction was not complied with and was repeated no less than twelve times between January 2009 and November 2012 before the Appellants' solicitors confirmed, on 29 November 2012, that all issues in the appeals were contested.

15. The first round of witness evidence directed to be served by HMRC was provided in March 2009. The Appellants provided their first round of witness evidence, including witness statements from Mr Kohli and his co-director in two of the Appellants, Mr Maini, on 10 November 2009. In those statements, responses were given to the evidence filed by HMRC. In his witness statements, Mr Maini confirmed that he had direct knowledge of a large number of the statements made by Mr Kohli in his witness statements and that he agreed with them. After various extensions of time, the Appellants' evidence had been directed to be served by 16 October 2009, so it was provided nearly a month late.

16. HMRC served its second round of evidence in February 2010. This included evidence relating to the record of transactions provided from servers used by First Curacao International Bank NV (FCIB) to record money flows. Directions were made

on 16 February 2010 for the Appellants to serve witness statements in response by the 19 April 2010, a deadline which was extended on a number of occasions during 2010, 2011 and 2012, including on occasions where the deadline had already passed.

17. On 26 July 2012, following a hearing before Judge Hellier, agreed directions were made pursuant to which the Appellants were to confirm by 14 September 2012 that a witness had been appointed who would respond to HMRC's served FCIB evidence. By this time, HMRC had served further FCIB evidence which provided information from FCIB's Paris server, showing a narrative description attached to each transfer of funds.

18. The Appellants' solicitors confirmed on 8 October 2012 that a witness to deal with the FCIB evidence had been appointed. An extension of time to serve the relevant evidence was requested. A deadline of 17 May 2013 was set for the filing of this evidence but, in fact, none was ever served.

19. A further hearing was held on 23 October 2013 before Judge McKenna with a view to making directions to bring the appeals to a substantive hearing. The Appellants did not attend and were not represented at that hearing. Judge McKenna nevertheless made directions for the appeals to be listed for a substantive hearing commencing on 15 September 2014 with a time estimate of five weeks and also directed that if the Appellants failed to comply with any of the directions made in respect of that hearing then the appeals may be struck out without further reference to the parties. In her reasons, Judge McKenna expressed the view that the Appellants had failed to meet their obligations under the overriding objective to cooperate and liaise with HMRC concerning procedural matters and that had led her to conclude that the correct course of action was to list the substantive hearing, subject to the Appellants having a week to object, with detailed grounds and supporting evidence.

20. As recorded by the FTT at [5] of the Decision, on 26 August 2014 the Appellants made their first application for the substantive hearing to be adjourned. The grounds for the application were that the Appellants' solicitors had ceased to act for them on 8 August 2014 and the Appellants had not been able to instruct replacement advisers in time for the commencement of the hearing. That application was rejected on 29 August 2014 by Judge Berner because the Appellants had not provided sufficient reasons why their solicitors had ceased to act or why it was not possible for Mr Kohli, as a director of each of the Appellant companies, to represent them at the hearing.

21. The first day of the substantive hearing, 15 September 2014, was designated a reading day so that the substantive hearing was due to commence on 16 September 2014. At the outset of the hearing, the Appellants made their second application for the substantive hearing to be adjourned. The FTT recorded at [6] of the Decision the basis on which that application was made (which was argued on behalf of the Appellants by Mr David Hewitt of Counsel). In particular, Counsel submitted that the nature and complexity of the Appellants' case and the very large amount of material (114 trial bundles) was too difficult for the unrepresented Appellants to deal with. The Solicitors' decision to come off the record was a unilateral decision by them and the

Appellants should not be prejudiced as a result of the decision of their advisers which they could do nothing to avoid. The Appellants also objected to two new witness statements filed shortly before the commencement of the hearing and also submitted that the hearing should be adjourned to await the Court of Appeal's decision in *Fonecomp.*

22. The FTT recorded HMRC's objections to the application at [7] of the Decision and their reasons for refusing the application at [8] of the Decision as follows:

> "7. HMRC objected to the adjournment request, pointing out that both they and the Tribunal had an obligation to the courts to ensure that the case was heard fairly and that there was no reason why Mr Kohli could not represent the Appellants with suitable adjustments being made to take account of the fact that he was not legally qualified. Mr Kohli had been involved with the appeals since 2008 and must have had numerous conversations with his advisers while they were still instructed. As at 8 August 2014 when the Appellants' advisers came off the record it was fair to assume that preparations for the hearing were complete. It was possible within the five-week timetable for which the case had been listed to give the Appellants time to familiarise themselves with the new evidence which had been provided. As far as the Fonecomp decision was concerned, the Tribunal could request later submissions on any relevant points if necessary.
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> 8. The Tribunal concluded bearing in mind their overriding objective to deal with cases justly and fairly that none of the objections raised by the Appellants were sufficient to persuade the Tribunal to adjourn a five week hearing for a case which had already been significantly delayed. The Tribunal concluded that it would use its wide and flexible powers which were intended to enable it to deal with cases such as this to ensure that each of the Appellants' concerns could be dealt with satisfactorily and that it was in the interests of justice that the case should not be further delayed.
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> (1) The First Tier Tribunal Rules were essentially designed to ensure that it was possible to deal with unrepresented parties including in a complex case such as this. In these circumstances the Tribunal would undertake to use those powers to ensure that the unrepresented Appellants were not prejudiced, including giving the Appellants additional time to deal with complex and detailed evidence, providing technical support on questions of law and ensuring that the evidence was produced to the Tribunal in a manner which was straightforward for the Appellants to deal with.
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> (2) Mr Kohli was a director of each of the Appellant companies, he was therefore well placed to understand and comment on their businesses and how the disputed transactions were undertaken. He had been involved in these appeals from inception and therefore should be aware of all the relevant facts in issue. The Tribunal concluded that for those reasons, and with support from the Tribunal, there was no reason why he should not be able to effectively present the Appellants' case.
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> (3) In coming to this decision the Tribunal did not consider the culpability or otherwise of the Appellants in their solicitors' decision to

> cease to act. The Tribunal accepted as a fact that the solicitors were no longer willing to act and made its decision considering only whether the case could be heard fairly and justly without the Appellants having legal representation.
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> (4) It was accepted that HMRC had served two witness statements only a number of weeks before the hearing was due to commence, but the Tribunal was prepared to give the Appellants additional time to consider this evidence prior to the start of the hearing and to ensure that those witnesses were not called until the Appellants had had sufficient time to familiarise themselves with that material.
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> (5) The Court of Appeal's decision in Fonecomp, while it might well be relevant to the Appellants' case, was likely to be known before the Tribunal provided its final decision in this case. If required, the Tribunal would be prepared to invite the parties to make further submissions on the implications of the Fonecomp decision after the end of the hearing."

23. Accordingly, the substantive hearing commenced the next day, on 17 September 2014, with Mr Kohli present to represent the Appellants. However, the hearing was adjourned for a five-day period until 24 September 2014 to allow Mr Kohli ample time to prepare to make submissions and respond to HMRC's arguments and if possible, find alternative legal representation. Mr Kohli did, however, as directed by Judge Short, provide what was described as a "skeleton statement of case". This was a two-page document which essentially summarised the Appellants' position on the case which was that they had no knowledge of any enlarged chain, but were only aware of their dealings with their own customers and suppliers and had no actual knowledge nor could have known that their transactions may have been connected to fraud. It was also stated that the Appellants should not be judged with hindsight, they could only be expected to know what was apparent at the time. The document therefore stated that HMRC were "put to strict proof" that the Appellants knew or should have known that their transactions were part of an overall scheme to defraud and furthermore that there was actually a fraud. Although it appeared that the Appellants were continuing to contest that there was a fraudulent scheme, in practice no evidence was filed or submissions made to rebut that point.

24. Judge Short made further directions on 23 September 2014. The purpose of these directions was described at [11] of the Decision as follows:

> "The Tribunal also issued directions as to the way in which the hearing should proceed to make it as easy as possible for Mr Kohli to represent the Appellants' case, including (i) allowing Mr Kohli to rely on his written opening submissions (ii) re ordering the proceedings so that Mr Kohli could respond immediately to HMRC's opening submissions (iii) giving Mr Kohli 24 hours notice of which witnesses would be called by the Respondents and of the matters which each witness would address (iv) allowing Mr Kohli to respond to and cross examine specified elements of each witnesses' evidence rather than hearing lengthy witness evidence and cross examining at the end and (v) limiting the material to be covered to one sample deal per Appellant."

25. As recorded by the FTT at [12] of the Decision, the substantive hearing commenced on 24 September 2014 with HMRC's opening submissions, including

detailed comments on various aspects of a single transaction. Mr Kohli then responded to the submissions setting out his main arguments and also providing factual evidence in relation to the single transaction commented on by Ms Malcolm QC, who appeared for HMRC, in her opening submissions. Because Mr Kohli strayed into giving evidence as well as making submissions in his opening, the following morning Mr Kohli affirmed before continuing with his submissions. Judge Short confirmed that anything that Mr Kohli had said in his opening would stand as evidence. Mr Kohli concluded his opening submissions before the short adjournment on 25 September 2014.

26. During the short adjournment on 25 September, Mr Kohli fell ill and was taken to hospital. The hearing was adjourned pending further information about Mr Kohli's state of health. The FTT convened for a short session on 26 September with nobody present for the Appellants, having been informed that, under medical advice, Mr Kohli would not be attending the tribunal that day. Judge Short made reference to the fact that it was now going to be difficult to achieve the timetable for the hearing and Ms Malcolm alluded to the possibility that the FTT may have to decide whether to go ahead in Mr Kohli's absence. At the end of the day on 26 September 2014, as recorded at [15] of the Decision, the FTT were provided with a medical certificate from a general practitioner stating that Mr Kohli had been assessed with "*severe anxiety, chest pain under investigation, awaiting cardiology assessment, patient advised to rest and is not fit to attend court in current condition.*" The medical certificate was stated to have a duration of fourteen days.

27. The FTT reconvened on the morning of 29 September 2014, again in the absence of any representation for the Appellants, and heard representations from HMRC in the light of the latest medical evidence.

28. Discussion took place as to whether alternative representation could be available for the Appellants. Ms Malcolm referred to the fact that, as far as two of the Appellants were concerned, there was a second director, Mr Maini, who was aware of the proceedings and was a witness. However, although Mr Maini's witness statement indicated that he was a director of these companies, he had (unbeknown to Ms Malcolm at that point) in fact resigned before the commencement of the proceedings, although we were told that he remained a substantial shareholder in the Appellants. Ms Malcolm floated the possibility of the FTT reconvening at the end of the fourteen-day period covered by the medical certificate, stating that that would give Mr Kohli time to instruct lawyers if he wished, alternatively for Mr Maini "to step up to the block." Ms Malcolm made reference to the fact that Mr Kohli had told her that Mr Maini had expected to be present for at least part of the proceedings.

29. Judge Short at this point clearly had concerns about proceeding in the absence of any representation from the Appellants. The transcript of the proceedings records that she stated:

> "If we possibly can avoid a further adjournment then that is what we want to do. But we do of course also have real concerns about continuing with all of the evidence without any representation from the Appellants, whether or not that be

> Mr Kohli. So that would be uppermost in our minds tomorrow when we decide whether we can continue."

30. Ms Malcolm stated that her preferred position would be that the case should be heard and judgment given, rather than the proceedings being struck out. As long as the Appellants had an adequate opportunity to make representations then the proceedings should go ahead. In those circumstances, it would only be necessary for a limited number of witnesses to be heard so that the proceedings might be over within four or five days.

31. Judge Short then indicated that the FTT's thinking was that to the extent that there is any request from the Appellants to either find alternative representation or use "the other director" to represent them, the FTT would give them a fourteen-day adjournment in order to achieve that. She then said:

> "As far as any decisions as to how we might proceed, if it is decided that actually the Appellants are not going to put up any alternative representation, then my preliminary view, and this is obviously something that we will consider fully tomorrow if it arises, is that it is going to be difficult for us to feel that we have had a just and fair hearing without any further representation from the Appellants."

32. The FTT reconvened the next day, 30 September. Shortly after the proceedings commenced, the FTT received the third adjournment Application on the basis that only Mr Kohli was able to represent the Appellants and that he was not able to do so because of his health issues. The FTT was provided with a cardiologist's report which stated that:

> "it seems most likely that [Mr Kohli's] syncopal episode was of neurocardiogenic origin.... This episode seems to have been provoked by stress. In my opinion it would not be advisable [for Mr Kohli] to be placed in the same situation again..... I conclude that it could be harmful for Mr Kohli [sic] health to be placed in the same stressful environment of the Court; and therefore am of the opinion he is currently not in a fit state to attend Court for at least 14 days".

33. Ms Malcolm submitted that, in the light of this medical evidence an adjournment was not going to help the Appellants because if Mr Kohli was placed in a stressful position again by attending the proceedings then there would simply be a recurrence. She submitted that there was no reason advanced by the Appellants why Mr Maini could not represent the Appellants. Ms Malcolm also referred to the fact that Mr Kohli had already given a day's evidence, and provided statements which are part of the evidence which would stand as evidence in the case, albeit that its weight will be less because it is not been tested by cross examination.

34. The FTT refused the application. Its reasoning was set out at [19] to [22] of the Decision as follows:

> "19. HMRC's counsel directed the Tribunal to the decision of the Court of Appeal in *Forresters Ketley v Brent & Another* [2012] EWCA Civ 324 which

stated that "*In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing*" and requested that the Appellants' request for a further adjournment be refused. HMRC also suggested that the Appellants could seek alternative representation, including in respect of WTL and WIE Mr Kohli's co-director, Mr Maini, who was in any event due to provide witness evidence to the Tribunal.

20. The Tribunal concluded from the medical evidence that Mr Kohli was suffering from stress-related ill health and that the earliest date on which Mr Kohli could be expected to attend the Tribunal was 14 October 2014. The Tribunal was of the view that there was a real risk, on the basis of that evidence that Mr Kohli might never be in a position to represent the Appellants since his stress-related illness had been triggered by appearing before the Tribunal.

21. Bearing in mind the overriding objective that cases should be heard fairly and justly, the Tribunal nevertheless concluded that it was in the interests of justice to continue with the hearing if at all possible given the amount of time and resource which all of the parties and the Tribunal had committed to having the case heard in the five weeks for which it was listed.

22. The Tribunal was aware of its obligations to ensure that all parties participated fully in proceedings as far as practicable and so directed on Wednesday 1 October that the hearing be adjourned for a further seven days, until Friday 10 October to allow the Appellants to make arrangements to either be represented by Mr Kohli, if his health permitted, or to find alternative representation. The directions included details of how the hearing should proceed should Mr Kohli not be available to attend to ensure that the Appellants were able to participate in the hearing as far as practicable, including the provision of transcripts to the Appellants, taking account of any requests from the Appellants for the order in which witnesses should be heard and providing an extended time for written closing submissions and directed that the parties should make specific requests for any other reasonable special arrangements which they required in order to ensure that the hearing could proceed on Friday 10 October 2014, before 2pm on Thursday 9 October."

35. On 3 October 2014, HMRC made a number of submissions to the FTT as to arrangements that would allow the hearing to proceed even if Mr Kohli was not able to attend some or all of the remainder of the hearing days. As detailed at [40] below, the submissions were reflected in the directions made by the FTT at [34] of the Decision.

36. On 9 October 2014, the FTT received the Fourth Adjournment Application from Counsel representing the Appellants. The basis of the application was that the Tribunal had been incorrect to conclude on the medical evidence provided that Mr Kohli's illness meant that he might never be fit to attend the FTT. The medical evidence only stated that Mr Kohli was not currently able to attend the FTT and that further tests were required to be carried out. The Appellants contended that the

directions issued by the FTT were unfair and contrary to the overriding objective that all cases should be heard fairly and justly, since only Mr Kohli was able to represent the Appellants and the arrangements suggested by the Tribunal and HMRC would not be adequate to ensure that the Appellants could participate fully in the proceedings. HMRC opposed the application.

37. The application was heard on 10 October 2014, the Appellants again being represented by Mr Hewitt of Counsel. The thrust of Counsel's submissions, as recorded at [27] of the Decision, was that it was not possible for anyone other than Mr Kohli to represent the Appellants since only he (and not Mr Maini) was involved in the day-to-day running of the businesses. Neither could the FTT conduct a fair hearing without considering direct evidence from Mr Kohli as to the mens rea for entering into the disputed transactions. Counsel sought an indefinite adjournment, or at least until 14 October for further medical reports on Mr Kohli.

38. The Decision records at [28] Ms Malcolm referring to the history of postponement requests from the Appellant, both prior to and during the course of the hearing, and the "foot dragging" of the Appellants throughout the preparation for the hearing. Ms Malcolm then referred to the fact that Mr Maini had resigned on 19 September 2014 from the two Appellants of which he was a director but nevertheless there was no reason why he could not represent them. The medical evidence showed that Mr Kohli's health issues were stress-related and that he would not be fit to attend court with no specified end date to that condition.

39. The FTT concluded at [30] to [32] as follows:

> "30. Having considered the arguments of both parties the Tribunal decided that it was not in the interests of justice to grant a further adjournment in this case. The Tribunal recognised the significance of a decision to continue with the hearing without being certain that the Appellants' representative and main witness would be available to attend and that this was to the disadvantage not just of the Appellants but also the Respondents who would lose the ability to cross examine Mr Kohli. In coming to its decision the Tribunal has taken account of these factors;
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> > (1) The medical evidence available to it at the time, particularly the evidence from Dr Been, Mr Kohli's cardiologist which suggested that Mr Kohli had suffered from stress-related illness triggered by attending the Tribunal which could re-occur, but that Mr Kohli might be fit to attend the Tribunal after 14 October. The Tribunal has concluded from this that there was a risk that Mr Kohli would not be available to attend the Tribunal either on or after 14 October or on any other occasion to represent the Appellants and that an adjournment would therefore serve no purpose.
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> > (2) Having heard from Mr Hewitt on this and previous occasions concerning the possibility of other legal representation or other representatives of the Appellant companies being found to represent the Appellants, the Tribunal concluded that there was no certainty than any other representation would be found for the Appellants in the short to medium term if at all. Even if new legal representatives were appointed that would entail considerable further delay.

(3) The Tribunal had already heard relatively lengthy opening submissions from Mr Kohli on behalf of the Appellants who had also provided written witness evidence.

(4) The Appellants had been provided with the opportunity to request any further measures to ensure that they could participate in the hearing as far as practicable, but they had chosen not to make any such requests.

(5) The Tribunal had stressed at the start of the hearing and in relation to the second adjournment request that all parties, including the Appellants had a duty to the Tribunal to ensure that there was a fair and just hearing and to co-operate with the Tribunal. Taking account of the number of adjournment applications, the failure by the Appellants to comply with earlier directions prior to the commencement of the hearing, their lack of response to evidence served by the Respondents and their failure to specify what evidence submitted by the Respondents was contested, it was hard to avoid the conclusion that the Appellants were not committed to working with the Tribunal to ensure that that the hearing could proceed. This was demonstrated by the fact that a fourth adjournment application was being heard at the end of the fourth week of a hearing which had been listed for five weeks and had heard, at that stage, only one and a half days of submissions, the rest of its time having been taken up with adjournment applications and other case management issues.

(6) Mr Hewitt's reference to Article 6 of the Human Rights Act was not relevant to these proceedings which were against companies which were accused not of fraud or any criminal activities, but of being knowingly involved in a chain of transactions which included fraudulent deals.

31. The Tribunal has been left in the unenviable position of deciding whether it is fairer to adjourn a hearing which has already been subject to extensive delay and which has taken significant resources to get to this point, with no certainty as to when it might be continued, and deciding to continue in the absence of any representation for the Appellants and without their main witness. The Tribunal has concluded that adjourning a case in which there is a risk that the Appellants may never be in a position to represent themselves or obtain representation before the Tribunal is tantamount to accepting that the case will never be heard and that this cannot be in the interests of justice.

32. Contrary to Mr Hewitt's arguments, the obligation of the Tribunal is not simply to provide that the parties participate in the proceedings, but rather that this is done as "far as is practicable". In these circumstances, where the Tribunal is faced with Appellants who have no legal representation and whose main representative is unavailable potentially for the foreseeable future, the Tribunal has no alternative but to consider what is "practicable" in order for hearing to proceed at all, even if that is less than ideal."

40. The FTT directed that the hearing should proceed on 10 October 2014 and made further directions which it stated were intended to ensure that the Appellants could participate in the hearing as far as practicable in the circumstances. Those directions were set out at [34] of the Decision as follows:

"The Tribunal DIRECTS that;

(1) Transcripts of each day's hearing for which the Appellants are not able to provide a representative to attend the Tribunal on their behalf be provided free of charge to the Appellants as soon as they are available.

(2) The order of witness evidence will be as requested by HMRC in their submissions of 3 October 2014 and in any event Mr Kohli will not be required to attend the Tribunal to provide witness evidence before 15 October 2014 at the earliest.

(3) If Mr Kohli is not fit to attend the Tribunal on 15 October 2014 the Appellants provide medical evidence from Mr Kohli's consultant, Mr Been to explain why he is not available to attend, before 5pm on 14 October 2014.

(4) The Appellants provide to the Tribunal before 2pm on 16 October 2014 details of the Respondents' evidence which is contested in respect of (i) the identity of the deal chains; (ii) the fact of the tax loss (iii) that the tax loss was fraudulent (iv) that the transactions subject to this appeal were connected with that fraudulent tax loss. If the Appellants do not accept HMRC's evidence in respect of each of these issues the Appellants must state which specific details are disputed and why. If this is not provided the Tribunal will proceed on the basis that witnesses whose evidence relates to those issues will not be called for cross-examination and their written witness evidence will be accepted by the Tribunal.

(5) Closing submissions be made by the parties in writing, that HMRC serve their closing submissions first and no later than three weeks after the end of the hearing, and that the Appellants' closing submissions be served no more than five weeks after receipt of the Respondents' submissions. Both parties may apply for a further hearing to make oral closing submissions, of no more than one day.

(6) That the Appellants should inform the Tribunal before 2pm on Thursday 16 October 2014 whether Mr Maini and Mr Ibrahim will be available to give oral evidence on behalf of the Appellants to the Tribunal on Friday 17 October 2014 and of any other witnesses who they intend to call.

(7) If the decision of the Court of Appeal in *Fonecomp* has not been released before the 8 week period in (5), the parties have leave to make further written submissions in respect of that decision within two weeks of the date of the release of that decision."

Events following the Decision

41. As directed by the FTT, the substantive hearing of the appeals resumed on 10 October 2014 and heard three days of evidence from HMRC's witnesses, in particular evidence as to the money flows through FCIB. No evidence having been called by the Appellants, the hearing concluded on 17 October but the FTT offered the parties the opportunity to make final written and oral submissions. That offer was accepted and a further hearing took place on 24 February 2015 at which Mr Kohli was present. Mr Kohli also provided written submissions.

42. HMRC observed in its closing submissions that "there is virtually no evidence of any substance from the Appellants" and that the FTT would have to look at the evidence as it stands, without the benefit of cogent written evidence or oral evidence in chief or cross examination of any witness on behalf of the Appellants.

43. The FTT released the Substantive Decision dismissing the appeals on 10 September 2015. The essence of the decision can be summarised as follows:

(1) As the Appellants' main argument was that they had no knowledge of either the contra-traders or the fraudulent tax chains produced by HMRC, as a matter of logic it was difficult for the Appellants to contest any elements of this evidence from HMRC and the Appellants did not put forward a positive case to dispute any of these matters;

(2) Accordingly, the FTT accepted that each of the transactions in which the Appellants were involved could be linked to transactions which were connected with fraud;

(3) The FCIB evidence demonstrated control of payment flows between a small number of connected parties and also demonstrated that the deals in which the Appellants were involved were carried out in very narrow time windows, with large numbers of payments being made in very quick succession, despite the fact that the documents relating to the Appellants' deals made no suggestion that payment had to be made on any particular day, let alone at a particular time, leading the FTT to conclude that the Appellants' deals were linked with the other payments (and transactions) in the fraudulent chain of transactions as part of an orchestrated scheme to defraud HMRC;

(4) Mr Kohli did not at any stage properly meet the central challenge of explaining a commercial rationale for the transactions or how he was able to satisfy himself that they were not connected with fraud;

(5) Despite the Appellants deriving comfort from various clearances from HMRC, that the suppliers had not been investigated by HMRC and that HMRC had no concerns with the Appellants' due diligence, the FTT concluded that there were a number of features of the transactions which no reasonable person would have accepted without question and without undertaking significantly more due diligence than the Appellants did, unless they knew that these deals were connected to fraud;

(6) Mr Kohli's willingness to turn a blind eye to these features could only, in the view of the FTT, be because he knew that each of these transactions was connected with fraud and he dealt with the Appellants' counterparties despite these features because he knew that there was no real commercial risk in the trades at all because they were part of a fraudulent chain of transactions; and

(7) Mr Kohli did not deal straightforwardly with HMRC and did not provide documents requested by HMRC in a timely fashion, which he would have no reason not to do if, as he sought to have the FTT believe, he was not concerned that any of his deals were other than normal commercial deals.

44. The FTT therefore concluded that the Appellants, acting through Mr Kohli, knew that each of the disputed transactions was connected with the fraudulent evasion of VAT.

Grounds of Appeal and issues to be determined

45. The grounds of appeal in respect of the Fourth Adjournment Application in respect of which Judge Short gave permission to appeal and which are still being pursued can be summarised as follows:

> (1) It was wrong in law to refuse the application, having found that the main witness in in respect of the appeals, Mr Kohli, was at that point unfit to attend either to represent the Appellants or to give evidence;
>
> (2) It was not possible to deal with the matter justly or fairly in Mr Kohli's absence;
>
> (3) It was wrong in law for the FTT to come to its own medical opinion that attending the FTT could trigger Mr Kohli's condition and that there was a risk that he would not be available to attend the FTT either on 14 October 2014 or on any other occasion, in circumstances where further tests were required to confirm the cardiologist's diagnosis; and
>
> (4) It was perverse and therefore an error of law for the FTT to proceed to hear the appeals with the Appellants unrepresented and their key witness unable to attend.

46. As summarised at [7] and [8] above, in support of these grounds Mr Hackett contends that the FTT erred in law by treating the Decision as a "mere case management decision" because the allegations of fraud were made against the Appellants and Mr Kohli personally and therefore the usual high hurdle that must be surmounted in seeking to persuade an appellate tribunal to interfere with case management decision did not apply.

47. In the circumstances, it appears to us that we first need to determine whether Mr Hackett is right on that point, in which case such a finding may be sufficient in itself for us to set aside the Decision. If, however, we conclude that the Decision is, as HMRC contend, a case management decision to be dealt with in accordance with the usual principles applying to the exercise of the appellate jurisdiction in relation to such decisions then we will need to consider whether it is appropriate in all the circumstances for us to interfere with the Decision.

Relevant law

48. In deciding not to grant the Fourth Adjournment Application the FTT was obliged to have regard to overriding objective set out in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") which provides as follows:

> "2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it–

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

Rule 5 of the Rules sets out the FTT's case management powers. So far as relevant, it provides:

"5. (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction–

…

(h) adjourn or postpone a hearing;

…"

49. It is well-established that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. The position was summarised by Norris J in this Tribunal in *Goldman Sachs International and another v Revenue and Customs Commissioners* [2009] UKUT 90 (TCC), at [23] and [24]:

> "23. … I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in *Walbrook Trustee v Fattal & Others* [2008] EWCA Civ 427, not as establishing any novel proposition but as containing in paragraph 33 the following convenient statement from the judgment of Lord Justice Lawrence Collins:
>
> > "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
>
> 24. I am clear that the principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system."

50. If we conclude, contrary to Mr Hackett's submissions, that the Decision is to be reviewed in the light of the relevant principles applicable to case management decisions we must bear this passage in mind when considering the grounds of appeal. In short, if these principles are to be applied, we will need to be satisfied that the FTT were plainly wrong if we are to set aside their decision. It is not sufficient that we may have exercised the discretion ourselves differently. Ms Malcolm drew our attention to the judgment of the Court of Appeal in *The Commissioner of Police of the Metropolis v Abdulle & others* [2015] EWCA Civ 1260 where, in declining interfere with a first instance decision on a strike out application, Lewison LJ said at [28]:

> "In a case in which, as the judge himself said, the balance was a "fine" one, an appeal court should respect the balance struck by the first instance judge. As I have said I would have found that the balance tipped the other way; that is precisely because in cases where the balance is a fine one reasonable people can disagree. It is impossible to characterise the judge's decision as perverse."

51. Mr Hackett submits that the Decision is not a mere case management decision on the question of whether to grant an adjournment application because, in reality, the FTT were deciding to proceed in a fraud case in the absence of representation and the absence of the principal evidence for the Appellants. Those matters, he contends, go to the fundamental nature of a fair hearing where allegations of fraud are being made and, as such, cannot be regarded as mere case management.

52. Mr Hackett submits that the right to a fair trial is absolute. The fact that the overriding objective requires that the parties participate in so far as practicable does not equate to conducting a substantive part of the hearing, where serious fraud is alleged, in the absence of the party accused of fraud being represented because its representative is unable to attend for medical reasons.

53. Mr Hackett submits that assistance in the correct approach to allegations of fraud such as those made in this case may be gained from *Ingenious Games LLP v HMRC* [2015] UKUT 0105 (TCC). That case concerned the question of whether the

FTT were right to have dismissed an application for an adjournment of a trial on the basis that HMRC proposed to make allegations of dishonesty against three witnesses without those allegations having been pleaded or put to the three individuals concerned in cross examination. The appellants asked for an adjournment to enable them to produce evidence to rebut the allegations.

54. The Upper Tribunal (Henderson J) confirmed, at [65], the well-established principle that it is not open to a tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. In the same paragraph however, the Upper Tribunal held that this obligation does not entail a prior requirement to plead the fraud and misconduct which is put to the witness. The question for the Upper Tribunal was therefore whether it was now too late for HMRC to put the relevant allegations to the three individuals and, if it is not too late, whether it will be open to the FTT to make findings of fraud or dishonesty against the witnesses concerned. The Upper Tribunal's conclusion was that the FTT's decision to permit the allegations to be put was not to be interfered with, neither was its decision that there should be no adjournment.

55. In our view, *Ingenious* gives no support to the wider proposition advanced by Mr Hackett in this case that it was not permissible for the FTT to proceed to conduct a hearing where allegations of fraud are being made in the absence of the party or witness against whom the allegations were being made. There can be no doubt that the allegations of fraud against both the Appellants and Mr Kohli personally (particularly as regards his knowledge that the transactions were being orchestrated) were adequately pleaded by HMRC and at no point during the lengthy interlocutory proceedings when, for the most part, the Appellants were legally represented was it suggested otherwise. That is entirely different from the position in *Ingenious* where the question was whether witnesses were in effect being "ambushed" with allegations of dishonesty that had not been fairly put.

56. The Appellants therefore had adequate opportunity to deal with the allegations of fraud in their evidence in response to HMRC's evidence, particularly in relation to the movement of money through the FCIB accounts. However, as we have seen, despite being directed to do so the Appellants did not reply to the FCIB evidence.

57. In our view, it is therefore important to divorce the question as to whether allegations of fraud or dishonesty have been fairly pleaded, or will be fairly put to a witness, which was the question in *Ingenious*, from the question as to whether it is appropriate to continue with a hearing in circumstances where the witness to whom those allegations are to be put is not going to be present during the proceedings.

58. In our view, the latter question is a matter to be weighed in the balance by the FTT in considering whether it is appropriate to adjourn the hearing. In other words, the FTT needs to have it in mind that if it refuses an adjournment the effect will be that the witness against whom the fraud allegations are made will not be in a position

to answer them in cross examination and that will clearly be an important factor to which sufficient weight must be given in the balancing exercise.

59. Mr Hackett has therefore not been able to satisfy us that the Decision was anything other than a case management decision to which the overriding objective should be applied and all relevant factors should be taken into account. The matters referred to at [58] clearly fall into that category and, as we have indicated, must be given sufficient weight. In this case, the relevant case management power was the power to adjourn the hearing but the fact that one of the factors to be considered and weighed in the balance was that, if the hearing was to continue, there might be no opportunity for the fraud allegations to be tested in cross examination does not in our view mean that the decision is no longer a case management decision. However, as Ms Malcolm put it in argument, that factor should inform and influence how the case management power was exercised.

60. We shall therefore consider whether it is appropriate to interfere with the Decision solely by reference to the principles that we have set out at [49] above.

Discussion

61. From our review of the factual background prevailing at the time of the making of the Decision, it appears to us that in the particular circumstances of this case there were six relevant factors that the FTT needed to take into account when making their decision on the Fourth Adjournment Application as follows:

(1) The fact that the proceedings involve allegations of fraud made against both the Appellants and the main witness, Mr Kohli, whose knowledge of the fraud, HMRC contends, is to be attributed to the Appellants;

(2) The delays that had occurred in bringing the appeals to their substantive hearing;

(3) The position regarding the evidence to be considered in relation to the appeals and in particular:

(a) what evidence was available to the FTT in respect of the witness statements previously served in relation to the Appeals and what further evidence, if the previous directions had been complied with, may have been served;

(b) what evidence had been given in the short time in which Mr Kohli was representing the Appellants;

(c) whether other witnesses, particularly Mr Maini, could give evidence on the matters that might have been covered by Mr Kohli's evidence;

(d) the fact that if Mr Kohli was not present he would be unable to give further evidence in chief orally;

(e) the fact that if Mr Kohli was not present he would not be in a position to cross-examine HMRC's witnesses neither would HMRC be able to cross examine Mr Kohli; and

(f) what further evidence might reasonably be expected to be given according to the arguments set out by Mr Kohli in the "skeleton statement of case" served on 17 September 2014;

(4) the medical evidence and the finding of the FTT in its decision on the third adjournment application that there was a real risk, on the basis of that evidence that Mr Kohli might never be in a position to represent the Appellants;

(5) the question as to whether alternative representation, particularly through Mr Maini, would be available to the Appellants in the absence of Mr Kohli; and

(6) the safeguards that the FTT had laid down in its directions of 15 October 2014 for the future conduct of the substantive hearing.

62. We shall review how the FTT dealt with each of these factors in turn.

The fraud allegations

63. Mr Hackett submits that the FTT failed have any regard to the allegations of fraud that underpinned HMRC's case when deciding to refuse the Fourth Adjournment Application.

64. There is no explicit reference by the FTT in its Decision to the fact that the proceedings involve allegations of fraud both against the Appellants and Mr Kohli personally. However, it is clear from its summary of the arguments made by Mr Hewitt at [27] of the Decision, that the FTT clearly had in mind Mr Hewitt's submission that the Tribunal could not conduct a fair hearing without considering the evidence of Mr Kohli's mens rea on entering into the disputed transactions. As we read [30] of the Decision, and in particular the factors that the FTT said had led them to conclude that it would not be in the interests of justice to adjourn the hearing, they clearly concluded that those factors outweighed the factors to the contrary, in particular the fact that the proceedings involved allegations of fraud. On that basis, we are satisfied that the FTT did consider this factor when carrying out the balancing exercise in applying the overriding objective. Furthermore, Judge Short must have had the nature of the allegations in mind when she made the observation at the hearing on 29 September 2014, recorded at [31] above, before the final medical evidence was received.

The delays in the proceedings

65. It is clear that the FTT placed considerable weight on the failure by the Appellants to comply with earlier directions prior to the commencement of the hearing, their lack of response to evidence served by HMRC and their failure to specify what evidence submitted by HMRC was contested. The FTT had before them at this point the detailed procedural chronology prepared by HMRC and, in particular, would have been aware of Judge McKenna's view expressed after the hearing on 23 October 2013 that the Appellants had failed to meet their obligations under the overriding objective to cooperate and liaise with HMRC concerning procedural matters. In the light of this, the FTT concluded at [30 (5)] of the Decision that it was

hard to avoid the conclusion that the Appellants were not committed to working with the FTT to ensure that the hearing could proceed. In our view, the FTT were, on the evidence before them, entitled to come to that finding and were therefore entitled to give significant weight to the earlier procedural history of the matter. Mr Hackett did not seek to argue otherwise before us.

Evidence

66. Mr Hackett submits that HMRC were right in their observations in their closing submissions, recorded at [42] above, that there was virtually no evidence of any substance from the Appellants and that the FTT would have to look at the evidence as it stands, without the benefit of cogent written evidence, oral evidence in chief or cross examination of any witness on behalf of the Appellants. He submits that it was wrong for the FTT to have placed any weight, as they did at [30 (3)] of the Decision, on what it described as "relatively lengthy opening submissions" from Mr Kohli and the written witness evidence. Mr Kohli had been deprived of the opportunity of giving any positive oral evidence in chief and rebutting the allegations of fraud. Such evidence that may have been given during the course of his opening was not significant and other significant evidence was not given on the part of the Appellants in the ordinary sense because of the absence of Mr Kohli. The right given to make closing submissions that was exercised by Mr Kohli was no substitute because those submissions could only deal with evidence that had been heard in his absence.

67. As Ms Malcolm put it, the situation in which the hearing proceeded without hearing any further substantive evidence from the Appellants and without any cross examination of any of HMRC's witnesses, or indeed Mr Kohli himself, having taken place was far from ideal.

68. However, in our view, the picture that Mr Hackett paints of the situation is greatly oversimplified. In a properly conducted MTIC appeal, most of the evidence in chief will arise from written statements that are taken as read and which will provide answers to the main allegations made in the Statement of Case and in the evidence filed on behalf of HMRC. This would leave comparatively little to be supplemented by way of oral evidence in chief.

69. In this case, the Appellants had ample opportunity to prepare detailed witness statements covering all the issues raised by HMRC, including the question as to whether HMRC were correct in their allegations that there was an orchestrated fraud and to provide positive reasons why Mr Kohli believed that the transactions that the Appellants entered into had a commercial rationale. It would also have been expected that detailed written evidence would have been provided with a view to rebutting the FCIB evidence that the FTT found compelling. The Appellants were given ample opportunities to provide that written evidence and never did, despite being legally represented for most of the time that those opportunities existed.

70. Nevertheless, the FTT in the directions of 23 September 2014 allowed Mr Kohli to rely on his written opening submissions so that it was clear that the FTT were prepared to be flexible in admitting new oral evidence in chief. However, there was

no indication from the "skeleton statement of case" that Mr Kohli served on 17 September 2014 that Mr Kohli was in any event going to provide any significant evidence on any of the matters referred to at [69] above in order to rebut HMRC's evidence on those issues. It is, therefore, not clear in practice what evidence the FTT was deprived of due to Mr Kohli's non-participation.

71. Furthermore, it was envisaged at the time of the Decision that Mr Maini would give evidence. He had filed a witness statement in which he had said that he had personal knowledge of the matters dealt with by Mr Kohli in his written evidence so it might well have been of assistance to the Appellants had he given oral evidence and been cross-examined. Mr Kohli had indicated to Ms Malcolm that Mr Maini would at some point be attending the hearing. No explanation has been given as to why, in the event, he did not attend the proceedings.

72. In those circumstances, and in the absence of cross-examination, as is apparent from the Substantive Decision, the FTT came to its conclusion as regards Mr Kohli's state of mind by drawing inferences from the written evidence that was before it. It is also worth mentioning that cross examination is a two edged sword; HMRC were equally disadvantaged by the lack of opportunity to cross examine Mr Kohli on the question of his knowledge as regards the alleged fraud, a point which the FTT makes reference to at [30] of the Decision.

73. We therefore do not agree with HMRC's observation that there was no evidence of significance on the part of the Appellants, although there was an absence of evidence to challenge the key points in HMRC's case, but that was not because of the lack of opportunity to provide it.

74. In our view therefore, the FTT were entitled to take account and give appropriate weight to the full picture as regards what evidence had been filed, what opportunities had been missed to file further evidence, and what further evidence might reasonably be expected to be given following the serving of Mr Kohli's "skeleton statement of case".

Medical Evidence

75. Mr Hackett submits that the FTT were wrong to conclude from the medical evidence before them at the time of the making of the Decision that attending the FTT could trigger Mr Kohli's condition and that there was a risk that he would not be available to attend in the foreseeable future. In his submission, it was premature to take a decision not to adjourn the proceedings where it was clear that further tests were to be made, pending the receipt of that further evidence.

76. The difficulty with this submission is that there was an opportunity for Mr Kohli to provide further up-to-date medical evidence by 14 October 2014, that is prior to the earliest date on which he was expected to give evidence. He was directed to do so in the directions recorded at [34] of the Decision but never did so. In those circumstances, in our view the FTT was entitled to give significant weight to the evidence that was before it at the time of the third adjournment application which, as

the FTT found, provided considerable uncertainty as to whether Mr Kohli would be fit to attend the proceedings at any time bearing in mind the nature of his illness.

Alternative representation

77. Mr Hackett submits that the FTT were wrong to take account of HMRC's submissions that Mr Maini could "step up to the block" and take up representation on the Appellant's behalf in the absence of Mr Kohli.

78. Whilst the FTT records at [27] of the Decision the possibility of Mr Maini representing the Appellants, it does not appear that in fact the FTT placed any significant weight on that possibility. The FTT concluded at [30 (2)] of the Decision that there was no certainty that any other representation would be found for the Appellants in the short to medium term, if at all. It therefore appears to us that the FTT made the Decision on the assumption that the hearing would proceed without any representation on behalf of the Appellants. It is, clear however, that the FTT did take into account that Mr Kohli had already made an opening, filed a "skeleton statement of case" and was to be given the opportunity of making closing submissions.

Safeguards

79. Mr Hackett submits that the directions recorded at [34] of the Decision, which the FTT said were intended to ensure that the Appellants can participate in the hearing as far as practicable in the given circumstances, provide no assistance whatsoever to the Appellants for participating in a fair hearing properly in the absence of Mr Kohli or any other representative. In particular, the ability to make closing submissions is completely inadequate if the Appellants had not been able to participate in the hearing of evidence.

80. We accept that the directions concerned do not, in substance, provide a basis on which the Appellants could participate in the hearing but it is inevitable that they would not be able to do so in practice if Mr Kohli was not fit to attend and no other representation was available. That was readily apparent to the FTT and accordingly the directions were clearly made on the basis that it was anticipated that there would be no representation on the part of the Appellants during the scheduled hearing days but the opportunity was given for the Appellants to participate in other ways, by providing evidence through other witnesses and closing submissions. On that basis, it would have been more accurate for the FTT to have said that the directions provide a basis on which the Appellants can provide further input into the decision-making process rather than participating in the hearing as such. The directions also indicate to the Appellants how the hearing was to proceed in their absence.

Conclusion

81. As the FTT said at [31] of the Decision, they found themselves in an "unenviable position". There were three possible courses of action open to the FTT in the circumstances. First, the FTT could have struck out the appeals on the ground that, effectively, the Appellants had abandoned them. Consideration was never given to

that option and, quite rightly in our view, the FTT determined that the hearing should at least be concluded. That at least gave the FTT the opportunity to test HMRC's evidence, bearing in mind that the burden of proof was on HMRC. The other option was not to have adjourned the hearing. Mr Hackett's overall position was that, bearing in mind the seriousness of the allegations and the inadequacy of the medical evidence, the correct approach to take was to have adjourned the hearing indefinitely or at least until the point at which it became apparent that the Appellants could no longer pursue the appeals and they would have to be regarded as abandoned. His submission was, however, that that point had not yet been reached.

82. In our view, the FTT quite correctly set out the unwelcome dilemma that they faced at [31] of the Decision. They had to decide whether it was fairer to adjourn a hearing which had already been subject to extensive delay and which had taken significant resources to get to the substantive hearing, with no certainty as to when it might be continued, or to continue in the absence of any representation for the Appellants and without their main witness.

83. As is apparent from the observations that the FTT made on 29 September 2014, as recorded at [31] above, the FTT were initially inclined to conclude in favour of an adjournment. In our view, it was the nature of the medical evidence and the uncertainty as to when, if at all, Mr Kohli would be able to participate that ultimately tipped the balance in the other direction.

84. In our view, the FTT were entitled to conclude, as they did, that the procedural delays, which had caused the appeals to become very stale, and in respect of which a large part of the blame must be laid at the door of the Appellants, was a very strong factor tending against an adjournment. The questions relating to evidence, do not in our view, provide very strong factors in the opposite direction, bearing in mind the previous opportunities given to the Appellants to provide evidence and the fact that, in the end, the FTT did undertake an exercise of testing the evidence as best they could and drawing inferences from that evidence. That exercise took place in circumstances where it was not apparent that any further significant evidence to counter HMRC's evidence would in fact be forthcoming even if Mr Kohli had continued to participate in the proceedings. In those circumstances, the relative strengths of those factors, coupled with the medical evidence, which Mr Kohli had the opportunity to update and did not take, lead us to conclude that the FTT were entitled to decide that the factors tending against an adjournment were sufficiently strong, even in circumstances where allegations of fraud were being made against the Appellants and Mr Kohli personally.

85. In our view, the FTT faced a situation in this case where the decision was finely balanced. In those circumstances, as the passage from *Abdulle* quoted at [50] above indicates, we should not interfere with the FTT's exercise of its discretion. We do not find that the relative weight that the FTT gave to the various factors was plainly wrong and in those circumstances we must conclude that the Decision was within the generous ambit of the discretion entrusted to the FTT.

Disposition

86. For the reasons set out above, the appeal is dismissed.

TIMOTHY HERRINGTON GREG SINFIELD

UPPER TRIBUNAL JUDGES
RELEASE DATE: 25 January 2017