Appeal number: LON/2007/1103

CASE MANAGEMENT – whether to admit replacement evidence– yes in so far as relevant - appropriate costs regime – split costs regime ordered for transitional appeal – whether to permit out of time opt out of tax regime on complex appeal – no – whether to extend time for provision of trial bundle - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIRST CLASS COMMUNICATIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Receiving submissions in paper from the appellant dated 2 July 2015 and 17 July 2015 on indicative directions issued following a hearing at the Royal Courts of Justice on 23 June 2015

Mr S El Homsi, director of the appellant, for the Appellant at the hearing

Mr H Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents at the hearing

DECISION

1. This decision relates to interim applications in the course of preparing for hearing a dispute between the parties. There are two separate appeals, now consolidated. One part of the consolidated appeal concerns a decision by HMRC on 8 June 2007 to refuse to repay some £369,136.25 of claimed input tax on grounds that the invoices held by the appellant were inadequate to support the claim (the 'invoice appeal'); and the other part of the appeal concerns a decision by HMRC refusing to repay £332,056.11 in claimed input tax on the grounds that the transactions were connected to fraud and the appellant knew or ought to have known this (the '*Kittel* appeal'). All the transactions in the appeal took place in 2006.

2. There have been many interlocutory hearings in this appeal. A further one took place on 25 June 2015 at which I made some orders. The appellant has since sought to appeal those orders; I refused permission to appeal but the appellant may have renewed the application in the Upper Tribunal.

3. But I also made four orders on the basis that the appellant would be given two weeks to make written objections to them before they became final. The appellant did object so in accordance with the Directions, HMRC was given a further two weeks to make submissions. They elected not to do so, but to rely on what submissions they had made at the hearing. The four matters concerned were:

> (a) Whether the witness statement of Officer Bradshaw would be admitted in evidence;
>
> (b) The appropriate costs regime for the invoice appeal;
>
> (c) The appropriate costs regime for the Kittel appeal;
>
> (d) The date on which HMRC would deliver the trial bundle to the appellant.

Admission of Mr Bradshaw's witness statement

4. The history to the question of the admission of Mr Bradshaw's witness statement is as follows. HMRC served a witness statement dated 3 December 2012 by Officer Kerrigan on the appellant and applied to the Tribunal for its admission. The statement dealt with spreadsheets of deal chains discovered during a criminal investigation which HMRC allege show that the deals contained within the spreadsheets were masterminded by a criminal gang for the purposes of MTIC fraud. The appellant was not mentioned in any of the spreadsheets but four of the chains in the spreadsheets were alleged by HMRC to be chains leading to purchases by the appellant on which the appellant had had its input tax refused and were the subject of the *Kittel* appeal. That witness statement was admitted into the appeal by consent given at a hearing before me on 16 January 2013, subject to HMRC agreeing that it did not rely on a few specified paragraphs because they contained Officer Kerrigan's opinion rather than comprising evidence of fact.

5. When the appellant sought later to challenge the admissibility of that evidence, I ruled in 25 June 2015 hearing that the evidence had been admitted into the appeal by consent and there were no grounds on which to now exclude it.

6. In the meantime, however, Mr Kerrigan had left the employment of HMRC. On 5 March 2015 HMRC had provided the appellant with a copy of a witness statement by a Mr Bradshaw and notified the appellant that they would apply for this to be admitted in substitution for the witness statement of Mr Kerrigan should the appellant's challenge mentioned in the previous paragraph fail.

7. That challenge did fail, as I said. HMRC did then apply to admit Mr Bradshaw's evidence in replacement for that of Mr Kerrigan and the appellant objected.

8. I had to resolve the matter. The parties accept that the fundamental principle is that all relevant evidence should be admitted unless there is a compelling reason not to do so. They disagreed how this should be applied in the circumstances of this case.

Relevance

9. Mr Bradshaw's witness statement deals with the criminal investigation as Mr Kerrigan's. However, Mr Bradshaw identifies 27 chains as connected to purchases made by the appellant, rather than just the 4 dealt with by Mr Kerrigan.

10. The appellant concedes that the evidence (§§1-152 of the witness statement) relating to four of the chains identified by Mr Bradshaw is relevant as it deals with the same 4 chains Mr Kerrigan had identified and are 4 chains in which the appellant allegedly participated and in respect of which it has had its input tax denied, and are therefore 4 chains at issue in this appeal. I find that the evidence at §§1-152 of Mr Bradshaw's statement is therefore relevant to this appeal.

11. The appellant concedes that two additional chains (mentioned briefly at §153 and in detail at §§262-281 of the statement) are "potentially" relevant as they deal with 2 chains in which the appellant allegedly participated and in respect of which it has had its input tax denied and which are also the subject of this appeal. The appellant's objections to the admission of this evidence centre on prejudice and lateness; it does not suggest any reason why this evidence is not relevant. I find that it is. It is clearly as relevant as the evidence on the other four chains already mentioned.

12. The appellant denies that the evidence concerning the remaining 21 chains (dealt with at §§154-261 of the witness statement) is relevant. This evidence concerns chains in which it appears HMRC allege that the appellant participated, but they are not chains in respect of which it has had its input tax claim denied. HMRC made no submissions to me on the relevance of these earlier chains: they made no submissions at the hearing and, as I have said, elected to make none after the hearing. The written submissions given to me prior to the hearing only record that the chains are said to trace to the appellant. I can therefore only guess why HMRC consider them relevant. I presume it is because they see it as 'similar fact' evidence, going to prove

(in their view) that the appellant was involved in orchestrated fraudulent transactions even before the transactions at issue in the appeal.

13. However, there is no allegation in this appeal that any transactions entered into by the appellant prior to those at issue in these appeals were orchestrated for the purpose of fraud. There is no evidence served, or none drawn to my attention, apart from Mr Bradshaw's, to prove that these earlier 21 chains resulted in a fraudulent tax loss to HMRC. The appellant has therefore not served evidence in response to such a case.

14. If HMRC do not intend to allege that these earlier 21 chains involved fraud of which the appellant had knowledge or means of knowledge, then this additional evidence is clearly irrelevant. If HMRC do intend to allege that these earlier 21 chains involved fraud of which the appellant had knowledge or means of knowledge, then they ought to apply to amend their statement of case to make it clear that that allegation comprises a part of their case. And until they do so, and unless and until such an application is allowed, the evidence is irrelevant.

15. And that comment should not be taken as an invitation to make such an application. While I cannot prejudge the outcome of any application, I note that adding some 21 transaction chains to the 56 already in issue would be a substantial increase in subject matter before the tribunal. It might require further rounds of disclosure (eg by HMRC of deal sheets relating to those 21 chains and by the appellant of its due diligence and other records its holds in respect of those 21 chains). It would be likely to delay the hearing still further. And is the delay justified? While the delay in the service of Mr Kerrigan's statement may have been down to the precedence that has to be given to criminal proceedings, on the assumption that such proceedings were taken against the gang allegedly masterminding the various transactions on the spreadsheets, I have no explanation of why information, apparently available to HMRC at the time of Mr Kerrigan's witness statement in late 2012 first featured in these appeals in the witness statement of Mr Bradshaw in March 2015.

16. But dealing with the application before me now, to admit the witness statement, in the absence of an application by HMRC to make a new application that the earlier 21 chains were connected to fraud and the appellant knew or ought to have known of that, the statement in so far as it relates to these 21 chains is irrelevant. HMRC cannot rely on paragraphs §§154-261 of Mr Bradshaw's witness statement.

17. Further, while neither party mentions it, Mr Bradshaw's evidence deals with more than the 27 chains above mentioned. That is his evidence at §§286-327 which deals with (a) the claim by HMRC that the companies mentioned in the spreadsheets always held the same position in the chain; (b) production of covert telephone recordings. The relevance of this evidence to the appeal was not explained to me by HMRC. Other than objecting to §305 as containing opinion, the appellant also makes no comment on this evidence.

18. In so far as it relates to any of the chains actually at issue in this appeal, I am satisfied it is relevant. In so far as it relates to any other chains, I am not satisfied it is relevant, and it is not admitted. I am satisfied that §305 is opinion and is also irrelevant and is not admitted.

19. The irrelevant evidence is not admitted. Having decided which parts of the witness statement comprises relevant evidence, I then need to decide if there is a compelling reason to also exclude some or all of the relevant evidence. I go on to consider the degree of prejudice to the parties in admitting or excluding it and the importance of adhering to directions to progress an appeal to hearing.

Procedural prejudice

20. I need only consider the witness statement in relation to the 6 chains I have found to be relevant as the evidence in respect of the irrelevant 21 chains cannot be admitted.

21. It is difficult to discern any procedural prejudice to the appellant by the admission of Mr Bradshaw's evidence in so far as it replaces Mr Kerrigan's, in other words in so far as it concerns the four chains mentioned in Mr Kerrigan's statement. The appellant has known since early 2013 that this evidence formed a part of HMRC's case against them.

22. The matter of the two additional chains is rather different. This is new evidence. Nevertheless, being of the kind already admitted for the 4 other chains, I do not see any significant procedural prejudice in it being admitted in 2015 when the appellant has had to contend with similar evidence since 2013. There has certainly been no claim that the admission of the evidence in relation to the two 'new' chains will mean that it will now have to pursue rebuttal evidence: it seems to me that if there is rebuttal evidence it will have been sought in relation to the 4 original chains so the procedural prejudice in admitting 2 new chains now is minor.

23. The appellant mentions that it is now in what it considers to be a weaker position as it is no longer represented by "experts" by which I take it to mean it no longer retains counsel and VAT litigation specialist solicitors. That is no reason to exclude relevant evidence: it is for the appellant to decide how it should be represented. Its decision no longer to retain what it describes as expert representation can not be used as a reason to exclude relevant evidence, as this would be an incentive to all litigants to dispense with representation in order to keep any new and unwelcome evidence out.

24. I conclude that the admission of §§262-281 of Mr Bradshaw's statement relating to the two extra chains would not cause any significant procedural prejudice to the appellant. In so far as the evidence at §§286-327 is relevant, in other words, in so far as it relates to chains actually at issue in this appeal, the appellant has not claimed any procedural prejudice and that may be because it duplicates Mr Kerrigan's evidence. Anyway, no procedural prejudice was claimed and so I find none.

Prejudice to HMRC by excluding the evidence?

25. I go on to consider whether excluding the evidence in relation to the 4 original deals would be prejudicial to HMRC's case. It would restrict them to relying on Mr Kerrigan's statement in circumstances where they might not even be able to locate Mr Kerrigan. That is considerable prejudice.

26. I do not consider that there is similar prejudice where the two additional chains are concerned. HMRC were, until 2015, content to rely on all the other evidence they had. There is no suggestion that these 2 extra chains were in any way crucial to its allegations against the appellant. It seems to me when the Tribunal in the main hearing considers the evidence, it will make very little, if any, difference to its decision on the 56 chains whether HMRC produce evidence that 6 rather than just 4 of these chains were contained (they allege) on a spreadsheet produced by an allegedly criminal gang planning alleged frauds.

Observance of Tribunal rules and directions and lateness

27. The appellant's real objection to the witness statement appears to be that it is served very late. The date for service of evidence expired, it says, over three years ago.

28. In so far as this is replacement evidence, that time lapse does not seem particularly significant as HMRC cannot be expected to foresee the resignation of an officer. And in a case where the officer is giving evidence about information contained in documents discovered by other people, a current officer, familiar with the case, is likely to be a more useful witness than a retired officer who may well have forgotten much of the details in the intervening years.

29. I do not consider the time lapse a good reason go keep out the evidence in so far as it is replacement. This is particularly the case when here there is no hearing date fixed.

30. In so far as the 2 new but relevant chains are concerned, the lateness is a relevant factor. As the appellant comments, HMRC do not explain anywhere why Mr Kerrigan did not deal with these 2 chains, particularly as it seems he was aware of additional chains involving (allegedly) the appellant: see §164 of his witness statement. Even if the reason was that in December 2012 Mr Kerrigan did not have time to deal with them, that does not explain why they were not dealt with until Mr Bradshaw dealt with them in 2015. The time for service of new evidence had passed years before, as HMRC knew perfectly well: being aware that they held evidence in respect of more than just four chains they should, if they intended the information to form a part of the evidence in the hearing, have made an attempt to serve it as soon as possible. It seems to me that once the deadline for service of evidence is passed, a party which comes into possession of new evidence should act with reasonable expedition to get it served on the other party: here there has been a time lag of over 2 years and no explanation offered.

31. I note that the Upper Tribunal in *Atlantic Electronics* [2012] UKUT 423 (TCC) said at [16] that:

> "A litigant wishing to put in late evidence has a duty to make the application promptly…."

and that HMRC's failure to do so in that case was a factor, together with prejudice to the other party, which led to the late evidence being excluded. And while Mr Justice Smith in *Nottinghamshire and City of Nottingham Fire Authority & anor v Nottingham CC* [2011] EWHC 1918 (Ch) said:

> "…a decision to exclude evidence should not be made merely because it is late."

that was in the context of evidence the exclusion of which would have been highly prejudicial to the applicant. My conclusion in *First Class* [2013] UKFTT 342 (TC) was:

> "While I consider the Tribunal has an interest in good case management and encouraging parties to proactively pursue their cases and make relevant applications promptly, the tribunal has no interest in simply punishing a party for failing to act in this manner. This does not mean that there is no incentive on a party to act promptly. While the Tribunal should not administer sanctions simply for a failure to act promptly, it must and will apply sanctions (such as refusing an application) where the failure to act promptly leads to procedural prejudice to the other party."

Conclusion

32. The evidence of Mr Bradshaw, in so far as it replaces to Mr Kerrigan's, is admitted. In other words, §§1-152 of the witness statement are admitted and so much of §§286-327 as applies to those four chains. This is because the evidence is relevant and it would prejudice HMRC's case to exclude it while there is no significant procedural prejudice the appellant in admitting it late and it was reasonable for it to be served late, in that the contingency giving rise to the new evidence (the resignation of an officer) was of the type which could not be anticipated.

33. The evidence relating to any but the chains at issue in the appeal is excluded as irrelevant: thus §§154-261 is excluded and so much of §§286-327 as relates to chains not at issue in this appeal. §305 is also excluded.

34. That leaves the evidence at §§262-281 relating to the new evidence on 2 more of the chains at issue in this appeal. It is relevant. I do not consider there is any more than minor procedural prejudice to the appellant in admitting it although on the other hand I also do not consider excluding it to be very prejudicial to HMRC either for much the same reasons: there is little difference in being able to prove (if they can) that 6 out of 56 chains were masterminded by an identified criminal gang rather than just 4 out of 56. I am, however, concerned whether it is right to admit evidence served, it seems to me, at least 2 years later than it could have been served, particularly in circumstances when I have not been given a good reason for the delay.

35. However, applying the authorities as outlined above, mere lateness is insufficient to exclude relevant evidence. If I were satisfied the appellant would suffer real procedural prejudice from its late admission, I would in the circumstances exclude it. As I have not been so satisfied, I consider that it should be admitted.

36. Therefore paragraphs §§262-281 and so much of §§286-327 (but not §305) as relates to those 2 deal chains is admitted.

37. As such a large part of Mr Bradshaw's statement is excluded, HMRC ought to re-serve a new version keeping in only what I have identified above as admitted.

38. They have leave to do so within 28 days of the date of this decision.

Costs of the consolidated appeal

Invoice appeal

39. The invoice appeal was lodged before 1 April 2009. It has therefore never been categorised under the new rules and remains an uncategorised, transitional appeal. The default costs position for such appeals is that the new costs regime applies: this is Rule 10(1) of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009/273. This means each party bears its own costs other than in instances of wasted costs or unreasonable behaviour.

40. As the invoice appeal is a transitional appeal it was open to either party to make an application under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 No 56 ("the TTF Order") Schedule 3 paragraph 7(3) for the 'old' open costs regime to apply to the appeal. HMRC made that application orally in a hearing before me on 19 December 2011. They followed that with a written application on 16 January 2012. The appellant has always opposed this: determination of the application has been on hold for years pending the appellant's application to bar HMRC from the appeal (see *First Class Communications Ltd* [2013] UKFTT 90 (TC)) and then pending HMRC's application to consolidate the two appeals and the appeal against the consolidation order (*First Class* [2013] UKFTT 342 (TC) at §63 and *First Class Communications Ltd* [2014] UKUT 244 (TCC).)

41. At the hearing before me in June 2015 HMRC's position was that in the light of the decision of the Upper Tribunal in *Atlantic Electronics Ltd* [2012] UKUT 45 (TCC) they now only asked for the 'old' costs regime to apply to the pre 1 April 2009 costs. They accept that the costs of the appeal after that date must fall into the new costs regime for unallocated cases (as described in §39 above).

42. The appellant objects to any part of the appeal falling within an open costs regime pointing to the nearly 3 year delay in HMRC making the application following the introduction of the new costs regime on 1 April 2009. I agree this is relevant but, as Warren J pointed out in *Atlantic Electronics*, not too much weight should be put on

this bearing in mind it would also have been open to the appellant at any time to make an application to the Tribunal to clarify the matter.

43. The appellant also points out that most of the work in the appeal must have been done and will be done after 1 April 2009. I reject this as ground to refuse a splits costs order as I consider that significant costs (albeit a long way short of the majority) would have been incurred before 1 April 2009 as at least some interlocutory decisions and hearings had taken place.

44. HMRC say in response that were it not for delays by the appellant the entire case could have been resolved before 1 April 2009. I don't accept that there was any realistic chance of this appeal being heard before 1 April 2009 and even if HMRC could point to delays on the part of the appellant in bringing this case on for hearing, I do not think that HMRC can complain when HMRC made a successful consolidation application in 2012 which they could not have made had the case progressed much faster.

45. The appellant objects to a split order being made. It was not, it points out, a part of the 2012 application and considers that the Tribunal should not make one automatically as the default position is the entire appeal falls into the new regime.

46. I agree with the appellant that a split costs order cannot be the intended default position for transitional cases, as if so, the Regulations would have so provided. But it is an option available to me. Overall my conclusion, taking into account all the factors, including that when this appeal was lodged it was in an open costs regime, looking just at the invoice appeal, is that the most fair and just thing to order is a split costs order so that the costs incurred up to 30 March 2009 fall within an open costs regime and costs after that date fall into the Rule 10 regime.

47. The Kittel appeal: The *Kittel* appeal was lodged after 1 April 2009. It was originally allocated to the standard category but re-allocated to the complex category on 3 June 2010. The Tribunal no longer possesses the file, but I have been provided with a letter dated 7 July 2010 from the appellant's then solicitors from which it is clear that the appellant was aware of the reallocation. It seems odd that if the appellant intended to opt out that this would not have been mentioned in that letter. On the contrary, there is no record of any opt out. Not only was no opt out recorded in the 7 July 2010 letter, an order of this Tribunal dated September 2010 ordered costs in the cause which the appellant would no doubt have objected to if it had opted out a few months earlier. And on 16 January 2013 there was a hearing before me because the appellant was pursuing an order for costs against HMRC. My order as recorded in the transcript read:

> "..this case being an open costs regime, I am going to order that the costs of today's hearing and the preparation of it follows the event in the normal scheme of things."

48. The appellant made its application in 2013 on the basis that the appeal was in the open costs regime. It cannot now claim that the appeal was opted out. Indeed, it does not do so. Its position is that it neither accepts nor denies that it failed to opt out

of the open costs regime. I find on the basis of this evidence that it did not opt out of the open costs regime.

49. It seeks to be allowed to opt out now. In other words, it wants the Tribunal to extend the time for opting out from the 28 days following notification of categorisation as complex (long since expired) until 28 days after the appellant has received the trial bundle from HMRC.

50. Its reason for this is that it considers that it is answering a new case. Since the *Kittel* appeal was lodged, I have consolidated that appeal with the older invoice appeal, and in so doing brought into the *Kittel* appeal the evidence relied on by HMRC in the invoice appeal and permitted HMRC to make a new allegation that the appellant knew that the phones the subject of the invoice appeal did not exist as one of the grounds they allege in the *Kittel* appeal that the appellant knew or ought to have known of the (alleged) fraud. Indeed, the appellant does not consider that it can take an informed decision on whether or not it should opt out until it has read the trial bundle, which is yet to be served.

51. The appellant relies on §6 of Warren J's judgment in *Atlantic Electronics* where he says the appellant is entitled to assess the risk the litigation poses and decide whether or not to opt out. But what the appellant overlooks is that Warren J was quite clear that the rules required the appellant to address this risk at the outset of the proceedings. In the next paragraph Warren J said:

> "[7] The right to opt out under Rule 10 has to be exercised….within 28 days of the allocation of the case as a Complex case. There are, I think, two related reasons for that requirement. The first is to achieve certainty for both parties for that they know, at an early stage, which costs regime is to apply and can run their cases accordingly. The second is to prevent the taxpayer from waiting to see how his case progresses. To take the extreme case, if the taxpayer were entitled to wait until a decision had been given, he would obviously elect from a costs shifting regime if he had won and for a no costs shifting regime if he had lost. This would be effectively a one-way costs shifting which it was never the policy of the Tribunal Procedure Committee to produce. In a less extreme case, say half way through an appeal, the same consideration applies although it has less force; but the policy is that the taxpayer should not be able to wait and see how the wind blows but must make his election early on. The need to make an election within 28 days is well-known and causes no difficulties in practice."

52. In other words, opportunism on costs regime is not allowed. The logic of the appellant's position on opting out is that it ought to be able to re-assess its chances of winning or losing whenever new evidence is admitted and/or new allegations are made against it. Yet that is clearly contrary to the Rules which requires the appellant to opt out within 28 days of notification of categorisation, which in the normal scheme of an appeal will be before any evidence is served and before even the statement of case is filed. So, as the appellant is required by the Rules to make this choice before it knows the evidence and allegations against it, admission of new

evidence and new allegations later do not justify the appellant being given a renewed chance to opt out.

53. And this applies even though in this case the appeal was re-categorised some months after its receipt. Why this happened I do not know for certain and, since the Tribunal's administration saw fit to shred the file, I am unlikely to be able to confirm, but I presume it was because the original allocation was not in line with the tribunal's policy that all appeals raising *Kittel* allegations are categorised as complex. Certainly this appeal fulfils the criteria of a complex appeal. Anyway, it is clear that the reallocation took place before service of the statement of case and evidence. The clear intention of the rules is that appellants are not allowed to adopt a 'wait and see the evidence' approach before deciding whether or not to opt out and the appellant should not be allowed to do so in this case.

54. Considering the *Kittel* appeal alone, I refuse the appellant's application for an extension of time in which to opt out.

55. Different regimes? The appellant also considers that now the appeal is consolidated it should be seen as a single appeal with a single costs regime and that that regime should be the Rule 10 regime that even HMRC accept should apply to the post 30 March 2009 costs on the invoice appeal.

56. Applying for a single costs regime, as the appellant does, could be a double edged sword in that it might equally be seen to justify putting both parts of the appeal into the complex costs regime which I have found applies to the *Kittel* appeal. HMRC, however, do not suggest that that is appropriate and I agree.

57. I agree with the appellant that consolidation in this appeal was a significant matter that went beyond being a matter of case management. As I have recorded, it brought evidence from the invoice appeal into the *Kittel* appeal and was coupled with an amended statement of case bringing in a new allegation to the *Kittel* appeal. But I do not see why that would indicate that the two halves of the now consolidated appeal should have the same costs regime. The appeals each involve similar amounts of money at stake and are both very substantial appeals in themselves: there is no obvious reason why one would take on the costs regime of the other. The appellant should be denied a "wait and see" approach. It should abide by its choice not to opt out of the costs regime on the *Kittel* appeal.

58. The appellant suggests it will be technically difficult after the event to split out the costs applicable to each of the two appeals. I rejected this as a reason for refusing consolidation of the appeals: see § 63 of *First Class* [2013] UKFTT 342 (TC). I also do not agree it is a good reason to 'consolidate' the costs regimes now. There may be difficulties in a making an apportionment but it will not be impossible to do and if the parties cannot agree a fair apportionment a costs judge will be able to determine the matter.

59. Consolidated appeals are usually allocated the appeal reference number of the earliest appeal. That happened in this case so the consolidated appeal is now known

by the reference number which applied to the invoice appeal: LON/2007/1103. Neither party suggested to me that the legal effect of such a consolidation was that the *Kittel* appeal automatically fell into the costs regime of the invoice appeal as the old TC/2010/3995 appeal ceased to exist as separate proceedings. I would not agree that that was the effect of consolidation, but even if I am wrong on that, it is clear that LON/2007/1103 is a transitional appeal and it is open to me to direct an open costs regime on the whole or any part of it. So if that were the legal effect of consolidation, I would direct that that element of the consolidated appeal which derived from TC/2010/3995 should have the open costs regime for the reasons stated at §§47-54 above.

60. So my conclusion is that although consolidated, the costs relating to the two parts of the appeal should be treated separately. All the costs in what was TC/2010/3995 (the *Kittel* appeal) are in an open costs regime. The costs in LON/2007/1103 (the invoice appeal) up to and including 30 March 2009 fall into the old open costs regime. But after that date the costs on that half of the consolidated appeal fall into the Rule 10 default regime.

Item 4: objection to extension of time to serve trial bundle

61. After a hearing, on 6 February 2015 HMRC were directed to serve the trial bundle on the appellant at the end of April. This was a very unusual order so far as timing was concerned as the proceedings are a long way off trial: the appellant is yet to clarify what evidence it disputes. Only when it has done this (the so-called '*Fairford'* directions) will the parties be able and required to provide their listing information and in particular a time estimate for the hearing. And only then can the hearing be set down.

62. The reason for this very unusual direction is that the appellant's erstwhile solicitors are, it appears, exercising a lien (or claiming to exercise a lien) over the appellant's papers in this appeal. I was not told the reason for this. The result the appellant claims is that it has virtually no papers relating to the appeal and therefore is unable to comply with the *Fairford* direction and identify which of HMRC's allegations it actually disputes. As the evidence is served (bar any new applications), I directed early service of the bundle so that the appellant was put in a position to comply with the *Fairford* direction.

63. Having agreed to service on 30 April, HMRC then applied for an extension of time until 31 July 2015 to serve the trial bundle. The appellant both objected to this application and asked, if granted, that HMRC be made subject to an unless order barring them from the proceedings if they failed to meet the deadline.

64. The appellant says that HMRC has delayed production of the trial bundle and has no excuse. The excuse provided by HMRC is that not only was the original date overly optimistic for such a large bundle, the broker officer, who is the primary witness for HMRC, has also resigned from HMRC. A new officer (Mr Yule) has taken over the position and now has to review all the evidence and produce his own witness statement. The appellant does not accept this as a valid excuse as it says a

trial bundle could be produced comprising all the other evidence; moreover HMRC should have anticipated the problem when originally accepted they would produce the bundle by 30 April.

65. I don't agree. It is very important voluminous trial bundles (as this will be) are consistently paginated and witness statements annotated to show the place the exhibits are in the bundles. The broker officer's witness statement is likely to be pivotal to HMRC's case and to bring in the greater number of exhibits (such as deal sheets). It makes good sense to prepare the bundle only when his new evidence is finalised.

66. HMRC have not yet applied for Mr Yule's evidence is admitted: they cannot do so until it is finalised. They are obliged to prepare the bundle on the assumption that such an application will succeed. I do not prejudge that issue but I do agree that the short extension of time for service of the bundle to incorporate this change is reasonable.

67. The Tribunal finds the appellant's position on this to be without merit. Whether or not the appellant is at fault in the matter, the fact of the matter is that solicitors that used to act for it are exercising a lien over its papers. HMRC can be in no way blamed for this. To assist the appellant in progressing its appeal, it was directed that HMRC would deliver the trial bundle much earlier than normal in proceedings. Nor can HMRC be blamed for delay arising out of the resignation of an officer. It is only reasonable to allow HMRC the necessary time to prepare the bundle properly and unreasonable objections such as that made by the appellant in this case serve only to delay matters further. And it is certainly not appropriate at this point when the delay has been justified to make it subject to an unless order.

Decision

68. The appellant's objections to the indicative directions (2), (3) and (4) I gave at the hearing on 25 June are dismissed and those directions remain in force; Direction 1 is varied as explained at §§32-38 above and HMRC should serve a revised, shorter version of Mr Bradshaw's statement within 28 days of the date of release of this decision.

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 2 October 2015