TC04953

Appeal no: TC/2010/07246

Value Added Tax - Preliminary issues concerning application to strike out the Appellant's Appeal or Application to file new Statement of Case and witness statements - Strike out Application refused - Application to file new Statement of Case and witness statements, and Appellant's application to adjourn proceedings all allowed

FIRST-TIER TRIBUNAL

TAX CHAMBER

JSM CONSTRUCTION LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

GILL HUNTER

Sitting in public at the Royal Courts of Justice in London on 18 to 25 January 2016

Francis Fitzpatrick QC on behalf of the Appellant

Howard Watkinson, counsel, on behalf of the Respondents

DECISION ON PRELIMINARY APPLICATIONS

Introduction

1. This was an Appeal that did not go to plan. The hearing had been arranged in order to consider a substantive issue between the parties that we will describe below. It commenced, however, with Applications by the Respondents first to strike out the Appellant's Appeal and, were we to decline to do that, then with further Applications to permit the Respondents to change their Statement of Case and to file two further witness statements. The Appellant contended that in the event that we decided not to strike out the Appeal but then allowed the Respondents to change their Statement of Case, the Appeal should be adjourned in order to enable the Appellant to consider its response to the new Statement of Case and to decide whether to call additional witnesses. The Appellant also claimed, or had at least at one point claimed, that the Respondents should be debarred from having further conduct of the Appeal though this application appeared not to be pursued.

2. In the event, the entire hearing was taken up, after a general description of the facts and the substantive issue, with a very full and hotly disputed consideration of the Respondents' claim that the Appellant's Appeal should be struck out. The ground for this was the claim that the Appellant had relied on a false witness statement, the claim being based principally on a hand-written note discovered by the Respondents in which the relevant witness had recorded that the witness statement contained a story made up in a conversation with the Appellant’s principal director. We had made it clear at an early stage that, in the event that we decided not to strike out the Appeal, we would certainly be inclined to allow the Respondents' other Applications (it being futile to rule that the Respondents should be restricted to advancing a case whose principal contention they no longer believed even to be tenable), though it also followed that if we admitted the new Statement of Case we certainly considered it almost inevitable that we would grant an adjournment for the hearing of the substantive issue, as requested by the Appellant.

3. While the strike out issue, and the various Applications, were the only matters on which we were called upon to give decisions, we were given a detailed summary of all the facts by the Appellant’s counsel, and we need to record those facts, both because of the full description that we were given and also because it would be impossible to explain our decision in relation to the strike out issue and the Applications in relation to the proposed new Statement of Case and the additional witness statements without now summarising the background to the substantive issue and all the facts relevant to the issues on which we now give our decisions.

Background and an outline description of the substantive issue

4. The substantive issue in the Appeal revolved around whether a company called Goldflex Solutions Limited ("Goldflex") had rendered supplies to the Appellant, so that the Appellant might sustain its claimed entitlement to relief for input tax in respect of those alleged supplies. The supplies in question resulted from the fact that the Appellant construction company had a highly fluctuating level of activity and thus an ever-changing requirement for labour. As a result it periodically contracted with companies that engaged construction workers for those companies to supply labour to the Appellant, and the claim in the present case was that that was the correct analysis of the relationship between Goldflex and the

Appellant. The trading arrangement between Goldflex and the Appellant spanned from September 2009 to June 2010, with Goldflex having been placed in liquidation on 22 June. While Goldflex and the Appellant contended that Goldflex engaged the gangs of workers and that the Appellant paid Goldflex for the supply of the workers, as periodically required by the Appellant, the Respondents disputed the Appellant's claim to deduct input tax, this claim eventually being advanced and justified on the basis that Goldflex was not rendering supplies of services to the Appellant at all. Implicitly the Respondents presumably contended (though this was not expressly asserted, since it was material only to the substantive issue which was not considered to this level of detail) that the Appellant was engaging the relevant workers directly and that Goldflex was acting just as a paying agent to receive payments from the Appellant and then to distribute those payments amongst the various workers.

5. When Goldflex was placed in liquidation on 22 June 2010 it had very substantial debts owing to HMRC. These debts resulted from the fact that while on the analysis adopted by both the Appellant and Goldflex, Goldflex should have been accounting for VAT in respect of its supplies to the Appellant, and should more relevantly have been deducting PAYE tax, or CIS tax and NIC deductions from payments made to its workers (according to whether they were Goldflex's employees or self-employed construction workers), it appeared that Goldflex had only accounted for some of the VAT owing to HMRC, and it had altogether failed to deduct any of the other taxes from payments made to the workers. So far as CIS deductions were concerned, Goldflex did have the appropriate entitlement to receive payments without CIS deduction from the Appellant, but it had no authorisation to make any of its own payments to the workers without CIS deductions.

6. Although the Appellant had been liable under its contract with Goldflex to pay for the supplies of labour on a VAT-inclusive basis, Mr. Katz, the insolvency specialist who was to be appointed as the liquidator of Goldflex on 22 June, noted shortly before his formal appointment that the Appellant had deducted an amount, eventually agreed to be £98,191.28, from the invoice amounts payable to Goldflex. It appeared to have been the Appellant's practice to retain amounts roughly equal to Goldflex's VAT liability for about two months, in order to provide the Appellant with a retention fund in case the Appellant had any claim against Goldflex for faulty workmanship on the part of workers supplied by Goldflex. The £98,000 was the amount so withheld in respect of the most recent periods. On 18 June 2010 (four days prior to the liquidation of Goldflex) Mr. Katz required the director of Goldflex and the company secretary, namely Mr. Steven King ("Mr. King") and Mr. Beckinsale, to pursue Goldflex's claim to receive the balance of the consideration for services (i.e. the withheld £98,000) by attending the Appellant's office and meeting with Mr. Wiltshire, the Appellant's managing director. In a short 10-minute meeting it seems that this claim was resisted by Mr. Wiltshire on the ground that the Appellant had a considerably larger counter-claim in respect of poor workmanship on the part of the workers supplied by Goldflex.

7. At a relatively early stage, and well before the issue of the credit note that we refer to below, it appeared that Mr. Katz was considering an alternative strategy to that of demanding payment of the outstanding £98,000, namely the alternative strategy of eliminating Goldflex's liability for VAT, and indeed of recovering from HMRC the VAT that had actually been paid, by contending that there had been no evidence that Goldflex had actually rendered any supplies to the Appellant at all. Initially, however, this was not Mr. Katz's dominant contention.

8. While Goldflex and the Appellant were principally engaged in the dispute for the payment of the outstanding £98,000, it had certainly emerged from a date as early as May 2010 that HMRC were undertaking extended verification into the issue of whether to concede the Appellant's claim for input tax in relation to the supplies from Goldflex, and indeed at times from other labour suppliers as well. It may be that these enquiries were prompted by the fact that HMRC may have gathered that Goldflex had not paid all the VAT owing in respect of the supplies, but the ostensible reasons given for the further enquiries in relation to the Appellant's input claims, and in due course for the suspension of payments to the Appellant referable to the claimed input tax, were all geared (rather unconvincingly) to various contentions to the effect that the VAT invoices contained insufficient detail, and that the Appellant had failed to provide the requested additional information.

9. In January 2011, Goldflex and its liquidator and the Appellant were preparing for a mediation hearing of their dispute with the focus being on the issue of whether the Appellant should pay Goldflex the withheld £98,000 or whether the Appellant could sustain its counter-claim in respect of alleged faulty workmanship.

10. Although allegedly Mr. Wiltshire had only met Mr. King for the 10-minute meeting in June 2010 referred to above, it appears that Mr. Wiltshire gathered that although Mr. King was being pressed by Mr. Katz to produce a witness statement in support of Goldflex's case in the pending mediation, Mr. King might also be prepared to give and sign a witness statement effectively supporting the Appellant's case in that mediation as well. In order to discuss this, and either to secure Mr. King's undertaking to sign a witness statement, or to discuss what its content might be, there was a meeting on 27 January 2011 between Mr. Wiltshire and Mr. King. Following this meeting, Mr. Wiltshire sent an email to Mr. Pugh, the Appellant's solicitor, explaining that Mr. King was ready to supply a witness statement in support of the Appellant's case, with Mr. Wiltshire then asking Mr. Pugh, who was very familiar with the whole dispute, to prepare a draft of a witness statement and to send it to Mr. King. Three points to mention in relation to Mr. Wiltshire's email were that it referred to Mr. Wiltshire having discussed with Mr. King the possibility that Mr. King and the Appellant might work together in the future; it also confirmed that Mr. King "wanted to ensure that he did not do anything to ruin our prospects of successful outcome(s) [with the liquidator] and HMRC, and finally in terms of the content of the requested draft witness statement, Mr. Wiltshire said that Mr. King would be happy to sign a witness statement *"outlining our agreement and reiterating his understanding of Goldflex's responsibility to indemnify [the Appellant] against loss in respect to third party damage or loss of plant through theft by his operatives."*

11. Although there had been no communication between Mr. Pugh and Mr. King, Mr. Pugh prepared a draft witness statement, and sent it for approval first to Mr. Wiltshire and Mr. Scanlon, another director of the Appellant, and following their confirmation that the draft was fine, it was emailed to Mr. King on 28 January. Mr. Pugh asked Mr. King to read it carefully; to make any changes he considered appropriate and then to sign it and return it to Mr. Pugh. The draft witness statement was very largely based on Mr. Pugh's understanding of the contract between the Appellant and Goldflex. It contained one or two observations, almost volunteered by Mr. Pugh, in relation to Mr. Pugh's understanding of other service arrangements for the supply of construction workers, but it did not appear to add any information that might have been discussed between Mr. Wiltshire and Mr. King, or

information otherwise given to Mr. Pugh by Mr. Wiltshire. Indeed, in Mr. Wiltshire's email asking Mr. Pugh to provide a first draft of the relevant witness statement, there was no suggestion that the statement should address any particular points, other than the reference to Goldflex's liability for faulty workmanship etc that we mentioned at the end of paragraph 10 above. There was also no evidence of there having been any phone conversation in relation to the content of the witness statement between Mr. Wiltshire and Mr. King and, as we have already said, our understanding is that Mr. Pugh never had a discussion with Mr. King.

12. Mr. King was unhappy with three of the points in relation to the statement, and he also happened to write on his printed copy of the email with which Mr. Pugh had sent the draft, two very crucial comments in relation to which most of the remainder of this decision will be concerned. Leaving aside the crucial points at this stage, we know that Mr. King then delayed doing anything about amending or signing the witness statement and, for several days, Mr. Wiltshire suggested that "Mr. King went cold on us". At Mr. Wiltshire's request and after the relevant few days' delay, Mr. King went again to the Appellant's office, discussed the changes with Mr. Wiltshire and then signed a slightly modified form of the witness statement that had been produced by one of the Appellant's secretaries. Two of the changes made related to the comments that Mr. King had put on his printed copy of Mr. Pugh's email that we have mentioned. It seems that even at this stage, Mr. King never spoke to Mr. Pugh, and indeed we were not informed whether the signed statement was immediately returned to Mr. Pugh or not.

13. In our hearing on the preliminary issues we were given no further information about the outcome of the mediation, though it rather appeared that it did not result in the Appellant actually paying Goldflex any of the £98,000 that the Appellant had retained, ostensibly to meet claims for faulty workmanship. It then seems that this led to Mr. Katz changing his approach, by then claiming that the realistic analysis of the situation was that Goldflex had not been supplying any services to the Appellant at all, thereby eliminating Goldflex's liability to VAT. On 6 May 2011 Mr. Katz formalised his revised approach and issued a credit note to the Appellant for the entire VAT-inclusive payments made to, or otherwise still owing to, Goldflex. Following the issue of the credit note, we understand that HMRC duly refunded the amounts that Goldflex had paid in respect of VAT. We were not told whether the refunded VAT met liquidation costs or whether any of it passed back to HMRC in discharge of any of the various other tax debts.

14. The change of attack on the part of Mr. Katz, the issue of the credit note and the feature that HMRC actually repaid the VAT that Goldflex had initially paid to HMRC resulted in HMRC changing their justification for denying the Appellant's claim for input tax relief. From this point, and for a very considerable period thereafter, the principal ground for denying the Appellant's entitlement to relief for input tax became the proposition that the issue of the credit note conclusively undermined the Appellant's entitlement to any deduction for input tax. As a secondary ground it was asserted that Goldflex had indeed not rendered any services to the Appellant.

15. The Appellant sought a review of the initial HMRC decision to deny credit for input tax and in supporting its claim for a review, in June 2011 the Appellant submitted numerous documents in four lever arch files to HMRC, including a copy of Mr. King's witness statement. The review upheld the decision, notwithstanding the Appellant's contentions that

the function of credit notes was to reduce the consideration for a supply and not to dispute the very existence of a supply, and that supplies had in any event been made. Furthermore the Appellant pointed out that any assertion by Mr. Katz was only the opinion of one person and while his role as liquidator might demand some respect, his opinion was again most certainly not conclusive of anything.

16. Being dissatisfied with the outcome of the review, the Appellant appealed to the Tribunal. In its resultant Statement of Case, HMRC still based the denial of the relief for input tax principally on the issue of the credit note, and only thereafter on the more general assertion that there had been no supplies. HMRC's reliance on the conclusive significance of the credit note led to approximately a one year delay in the proceedings because HMRC contended that the Appellant would need to establish in the High Court that the credit note had been improperly issued in order to have any chance of sustaining the Appellant's entitlement to input tax. These proceedings never in fact took place but they were considered seriously by the parties, notwithstanding the fact that it was far from clear (to us at least) what the cause of action might have been in the High Court. In the event this whole issue became academic when, very much later, HMRC conceded that their whole reliance on the significance of the credit note had been fallacious.

17. In May 2011, HMRC officers had obtained, in various search operations, copies of Mr. King's witness statement and copies of Mr. Pugh's email on which we mentioned that Mr. King had made various annotations. These documents were found under the bed in Mr. King's flat or house, and also apparently in Mr. Beckinsale's car. In January 2012 (i.e. seven months later), HMRC notified the Appellant that these documents had been found, and sent the Appellant a copy of the email with the highly relevant annotations on it. It did not appear, however, that the discovery of the particular email resulted in any change of contention on the part of HMRC, and the parties continued to prepare for the Appeal on the basis that the case that the Appellant had to answer was that in the original Statement of Case. In other words, the denial was still justified by the issue of the credit note, and secondly on a general contention that there had been no supplies.

18. In March 2015, the Appellant expressly asked the Respondents whether indeed they still wished to pursue their case, largely on the basis that the issue by Goldflex, through its liquidator, of the credit note conclusively undermined the Appellant's entitlement to input tax. It seems that the Respondents confirmed that that remained their intention. They also indicated that they did not propose to call any witnesses, or of course to present any witness statements.

19. One of the Appellant's complaints of the conduct of HMRC was that there had been numerous changes in the personnel who had been responsible for managing HMRC's case and even changes in counsel appointed to deal with Applications for Directions from the Tribunal.

20. In September 2015 there was a further hearing before Judge Sinfield, principally dedicated to the issue, relevant to costs, of whether or not the Appeal should be designated as a complex appeal. While it is possible that a different conclusion might have been reached had the contentions that later emerged been understood at the time, the decision was that the Appeal should not be so designated. The more significant finding of Judge Sinfield, in the

context of the points to which we are about to turn, was that he recorded that *"HMRC makes no allegation of fraud against [the Appellant] and does not suggest that [the Appellant] was party to any fraud perpetrated by Goldflex or any person"*.

21. On 1 December 2015, in other words approximately 6 weeks prior to the date set down for the hearing before us, HMRC wrote to the Appellant indicating that it had now appointed a new counsel; that the new counsel agreed with the Appellant that the issue of the credit note was certainly not conclusively fatal to the Appellant's entitlement to deduct input tax, and that HMRC would shortly be making various Applications to the Tribunal, requesting both a strike out of the Appellant's Appeal and, failing that, the entitlement to produce a markedly different Statement of Case, with two accompanying witness statements. The Applications were only made on 17 December 2015.

22. The ground on which the strike out Application was made was that directors of the Appellant had filed Mr. King's witness statement for the purpose of the once requested review consideration by HMRC, and that the witness statement had remained thereafter in the list of documents filed for the purposes of the hearing. Mr. King's annotations on Mr. Pugh's email with which Mr. Pugh had sent the draft witness statement to Mr. King indicated that Mr. Wiltshire and Mr. Scanlon had been party to a discussion, in which Mr. King appeared to have suggested that "*we must change the date; otherwise they will know we made the story up"*, and therefore Mr. Wiltshire and Mr. Scanlon were in some way involved in providing and seeking to rely on a false witness statement. The basic approach outlined in the revised Statement of Case was that the contract between the Appellant and Goldflex was a sham, and that it did not reflect the real intended relationship between the parties. The reality was that there had been no supplies rendered by Goldflex to the Appellant, and that therefore the Appellant's claim for input tax should be denied simply on that ground. The issue of the credit note, and the views of Mr. Katz that led to the issue of the credit note, could well be of evidential significance in relation to the contention that there had been no supplies. But that was the extent of the relevance of the credit note.

The strike out Application

23. We now turn to the strike out issue, which was the main focus of the hearing before us and is from now on the main subject of this Decision. We will deal with this in the following order, thus addressing:

- the terms of the test in the Tribunal Rules that enable us to strike out an Appeal, and some preliminary observations on the factors for and against actually striking out the Appeal;
- the detail of the contested witness statement, and the method of its production, and the crucial annotations on Mr. King's printed copy of the email from Mr. Pugh that initially forwarded the draft witness statement to Mr. King for consideration;
- the subsequent manner in which the witness statement was annexed to the Appellant's request for a review of HMRC's refusal to concede the Appellant a deduction for input tax, and the respect in which the witness statement has remained in the filed papers for this Appeal;
- the conduct of the Appellant's main witnesses in relation to its evidence concerning the preparation and reliance on the relevant witness statement, and the conduct of

those witnesses in the hearing before us, and in addition findings in relation to the issue of whether Mr. King had been located and whether he might be available voluntarily to give evidence to us, notwithstanding that neither party had called him as a witness in the present proceedings;

- and finally our Decision.

The circumstances in which we may strike out an Appeal

24. Rule 8(3)(b) of the Tribunal rules provides that:

> *"The Tribunal may strike out the whole or a part of the proceedings if –*
>
> *(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly."*

25. The first point to make in relation to this power to strike out is that it is simply permissive. We are given the liberty to strike out the appeal when the two conditions are satisfied, but are not bound to do so. We will defer, until the Decision section below, addressing the points as to whether the Appellant's submission of the witness statement, and the feature that it was claimed to be a false witness statement, as well as the conduct of the Appellant's witnesses in now giving evidence before us, would preclude us from being able to hear the substantive appeal in a fair and just manner. At present we will simply note the parties' key contentions in relation to the way in which we should address the various tests.

26. For the Appellant it was claimed that a strike out was an extreme remedy, and that it should only be adopted if we were absolutely clear that the conditions in Rule 8(3)(b) had been satisfied. The point was also made that when Mr. King's witness statement was submitted along with numerous other documents at the stage of requesting HMRC to review their decision not to concede the claim for input tax, the Appellant was almost certainly unaware of the notes that Mr. King had put on his copy of the relevant email. This of course places far more importance on the underlying issue of the degree to which Mr. Wiltshire had actually influenced, and improperly influenced, the content of the witness statement and influenced the changes that were made to it. This we regard as a point of fundamental importance in relation to the strike out Application. As regards continuing reliance on the witness statement, we accept that when the Appellant was informed (in early 2012) of the crucial manuscript notes made by Mr. King on the copy of Mr. Pugh's email, the Appellant did not withdraw the witness statement and it was indeed left in the List of Documents for the purposes of the Appeal to this Tribunal. The Appellant said, however, that it was simply left in the List because it was a document that the Appellant had in its possession, and therefore that it had to be disclosed, and that it was clear that the Appellant was not now seeking to rely in any way on the witness statement, or to call Mr. King as a witness.

27. The Respondents claimed that the production of a false witness statement was a serious and extreme feature of non-compliance with the Tribunal, albeit that in terms of the more natural meaning of *"failure to co-operate"* it was rather the Respondents' conduct that had been dilatory whilst the Appellant's case had been advanced efficiently. We do, however, accept the Respondents' point that reliance on a false witness statement does represent very challengeable conduct in court proceedings.

28. The Respondents also suggested that the feature that the Appellant's witnesses had lied, or at the very best had been highly evasive in respects that we will address shortly, would cast a shadow over the whole proceedings in that we would constantly be having to assess whether their evidence was true and reliable. We ought accordingly to strike the Appeal out *"in a surgical manner"*.

Mr. King's witness statement and the annotations written by Mr. King on the printed copy of the email with which Mr. Pugh sent the draft statement to Mr. King and our observations on some of the facts and the parties' related contentions

Facts material to the preparation of the witness statement

29. The first criticisms by the Respondents in relation to the production of Mr. King's witness statement were based on the three points that we mentioned towards the end of paragraph 10 above. The first criticism pointed out that when Mr. Wiltshire had mentioned in his email to Mr. Pugh that there had been some discussion as to whether Mr. King might be able to work with, and assist, the Appellant in future, this revealed that Mr. King was effectively being bribed to provide a witness statement. Mr. Wiltshire said that these remarks had resulted from the Appellant being keen to find some replacement way to secure the provision of occasional labour supplies, but we accept that the Respondents' claim was in fact realistic. The next point was that when Mr. King had been said to be keen to do nothing to undermine the successful outcome for the Appellant of both its dispute with the Goldflex liquidator and its dispute with HMRC, this represented reliance by the Appellant on improper conduct by Mr. King. Finally the reference in Mr. Wiltshire's email to Mr. Pugh that the witness statement that Mr. Pugh was being asked to draft was intended to concentrate on "*the terms of the agreement between Goldflex and the Appellant*" and that it was meant to stress the obligation under that agreement on the part of Goldflex to bear the cost of rectifying bad work, and to indemnify the Appellant in relation to the cost of damaged or stolen tools, all suggested that Mr. Wiltshire and Mr. King had had an improper discussion about the intended content of the witness statement. Furthermore Mr. Pugh was being asked by Mr. Wiltshire to prepare the draft statement along these lines without there having then been, or indeed without there later being, any contact or discussion between Mr. King and Mr. Pugh.

30. There is no need for us to quote the whole of, or indeed any of, Mr. King's witness statement. Mr. Pugh claimed in his evidence that he based the draft very much on the terms of the written contract that had been entered into between Goldflex and the Appellant around the time when the relationship commenced, and we accept that that is accurate. The Respondents' counsel pointed out that when the witness statement observed that the arrangement between Goldflex and the Appellant differed somewhat from the more common terms of service contracts between other parties for the supply of occasional contract labour, this observation was not derived from the terms of the contract between Goldflex and the Appellant. That is a fair observation but, rather more significantly, this reference to the terms of the present contract differing from perhaps more usual terms in such contracts entered into by other parties was an observation inserted gratuitously by Mr. Pugh, and was certainly not an observation that either Mr. Wiltshire or Mr. King could have suggested or discussed at their meeting on 27 January. We also note that considerable emphasis was placed in the witness statement on Goldflex's various obligations to indemnify the Appellant in relation to lost and stolen tools, and to remedy bad work by Goldflex operatives at Goldflex's cost.

These observations did however precisely match the terms of the contract. There may have been a temptation to emphasise these points in that the prime focus of the Appellant at the time will have been to defend the Goldflex liquidator's claim for the withheld £98,000 and to support the Appellant's asserted counter-claim against Goldflex for poor work, theft of tools etc. But we do confirm that everything stated in this regard simply reflected the contract terms.

31. We should add that no attention was given in the hearing to the issue of whether there was any validity to the various asserted counter-claims. The sort of insertions into the witness statement that would have been far more material, and far more to the discredit of Mr. King and Mr. Wiltshire, had they been inserted and had they been untrue, would have been acceptance by Mr. King that various identified claims in respect of poor work, thefts of plant etc had been justified. This would have been designed to add real credibility to the asserted counter-claims, and had information along those lines been false then the witness statement would have included highly material lies. But the witness statement contained no such material. In this regard it simply reflected the contract terms.

Mr. King's three changes to the draft witness statement

32. We turn now to the three material changes that Mr. King made to the draft witness statement, and to the annotations on Mr. Pugh's email made by Mr. King.

33. The first change was in a paragraph that described how Mr. Scanlon, the Appellant's director of operations, would describe to Goldflex's "ganger men" (who supervised gangs of workers) the tasks that they were expected to undertake. Turning to the payment arrangements, the witness statement then said that Mr. Scanlon would agree with the ganger men whether the tasks were to be undertaken on a day rate or effectively on a piecework basis, and it then said that usually the work would be undertaken *"on day rates which John Scanlon had already agreed with me."* Before dealing with the requested change to that wording, we might just observe that the recited facts in relation to the arrangements as to how men were paid was hardly supportive of the substantive issue in relation to Goldflex's alleged supply of labour, so that this particular statement was certainly not fabricated content designed to enhance the Appellant's case with HMRC.

34. Reverting to the requested change, Mr King wished to change the wording just quoted so that the witness statement would say *"on day rates which John Scanlon had agreed previously"*. The hand-written annotation on Mr. Pugh's e-mail (which Mr. King accepted that he had written and which he confirmed did indeed relate to the change just referred to) had said:

> *"I said I didn't no [sic] John Scanlon"*

The explanation for this comment, and for the change that Mr. King made to the witness statement was suggested by the Respondents to be designed to tie in with a statement that Mr. King had made in discussions with Mr. Katz, attended by HMRC officers, around the time when Goldflex was placed in liquidation to the effect that he had not met Mr. Scanlon or indeed any of the directors of the Appellant. We do not know with certainty whether Mr. King had indeed met any of the Appellant's directors, prior at least to the admitted 10 minute meeting that Mr. King had had with Mr. Wiltshire that we mentioned in paragraph 6 above,

but we certainly accept that the phrasing of the comment just quoted did suggest that Mr. King would have met Mr. Scanlon, but was simply trying to support the earlier statement that he had not met any of the directors.

35. The second change that Mr. King made to the witness statement was not the subject of any note on Mr. Pugh's email, but was clearly something that Mr. King wished to change. One paragraph in the draft statement had said that Goldflex's operatives were obliged to provide their own light hand-held tools and plant, and then went on to say:

> *"Major items of plant were provided by JSM, to be used by Goldflex. The sub-contract provided that if such major plant was provided by JSM, it could be used by Goldflex operatives but that JSM would invoice for that use".*

This statement was broadly in line with the terms of the original contract, save that the contract had said that the Appellant was entitled to invoice Goldflex for its use, and not that it necessarily would do. Mr. King anyway changed the reference quoted above to say that if major items of plant were provided by JSM, they would be provided "free of charge".

36. While the Respondents made virtually no reference to this second change required by Mr. King to the draft witness statement, and we accept that its significance may have more relevance to the substantive dispute than to the present issue of the strike out Application, we will make some observations on this change in the decision sections below.

37. The third material change, which was technically not a change at all, but was certainly the most significant matter in relation to the strike out Application, was the fact that whilst Mr. Pugh had naturally supplied the draft on the basis that there was a blank where it was intended ultimately to be dated, the witness statement ended up being dated 27 January 2011, notwithstanding that it was not actually finalised and signed until a number of days later, at the meeting that Mr. King had on re-attending the Appellant's office with Mr. Wiltshire, with whom the changes were discussed. We referred to this later meeting in paragraph 12 above. The highly significant annotation on Mr. Pugh's email that referred to this matter of the date to be inserted as the effective date of the witness statement was:

> *"Date needs to be changed otherwise they no [sic] we made story up".*

38. There was very considerable discussion about this crucial annotation during the hearing. Mr. King eventually came voluntarily to the Tribunal in order to give evidence whereupon he was asked what he had meant by this somewhat blatant comment. Mr .King confirmed that the two annotations on Mr. Pugh's email (i.e. those quoted in paragraphs 34 and 37 above) were both in his writing and that the reference quoted in paragraph 34 above did indeed relate to the change made in relation to whether Mr. King had previously agreed daily rates with Mr. Scanlon, suggesting thus that Mr. King and Mr. Scanlon must have met. While Mr. King accepted that the annotation quoted in paragraph 34 above did indeed relate to the *"with me"* change, Mr. King denied that the annotation about changing the date to prevent *"them"* knowing that *"we made the story up"* actually had anything to do with the witness statement. He must have simply been "doodling" and discussing something with Mr. Beckinsale in their office, and the relevant annotation must have related to that.

39. We have no hesitation in saying that that evidence was just ridiculous. The two annotations were numbered "1" and "2" and the proposition that one related to the witness statement and that the other did not is simply nonsense. That still leaves the question of who the *"we"* referred to; who the *"they"* were, and which date in the witness statement had to be changed. Since the only material date in the witness statement was the date indicating its signature date, it seems obvious that it was the insertion of the wrong signature date that Mr. King had in mind when referring to "changing a date". Furthermore when the signature date was inserted as 27 January, the date of Mr. King's meeting with Mr. Wiltshire, this lends further force to the supposition that 27 January, as the date of signature, was the significant date that had to be "changed", and the feature of the meeting having been with Mr. Wiltshire on that date makes it reasonably clear that the people referred to as *"we"* in the context of making up the story must have been Mr. King and Mr. Wiltshire. There is less significance to who the *"they"* were, i.e. the people who would deduce that the story had been made up, but the most obvious candidates seem to be Mr. Katz and the mediator for whom the witness statement was being prepared.

40. In giving our decision, we will re-visit this whole issue of *"making up a story"* and the significance of this, but for present purposes, we merely record the fact that the annotation about making up a story must have referred in some way to the discussion with Mr. Wiltshire.

The delay in Mr. King signing the witness statement and the further meeting with Mr. Wiltshire

41. Moving on from the annotations and the changes made to the witness statement, we revert now to the point mentioned in paragraph 12 above, related to the fact that Mr. King must obviously have become somewhat nervous about signing the witness statement at all, and that having received the draft on 28 January, he thereafter "went cold on" Mr. Wiltshire and the Appellant. It was only therefore several days later that he was persuaded to go for a further meeting to the Appellant's office, where he obviously discussed his proposed changes with Mr. Wiltshire. Mr. Wiltshire initially said, in his first witness statement following the Respondents' Application to strike out the Appellant's Appeal, that he could not remember this but when he was shown a copy of the original draft statement with his (Mr. Wiltshire's) writing on it, recording the proposed changes, he conceded that this had triggered his memory and that he did indeed remember the meeting. One of the Appellant's secretaries apparently made the required changes to the witness statement, and ran off a new copy, and it was then signed.

General criticisms of Mr. Wiltshire and Mr. Pugh

42. The Respondents' counsel naturally claimed that it was improper for Mr. King to have been having contact with Mr. Wiltshire, and presumably discussing and agreeing the content of the witness statement, and later even the changes, with Mr. Wiltshire, and it was also improper for Mr. Pugh to have prepared a draft without ever having spoken to Mr. King. Mr. Pugh asserted that his draft had been almost entirely based on repeating the terms of the contract between the two companies and that he had prepared a draft for Mr. King because there was great urgency to obtain the witness statement before the mediation. He had at least indicated that Mr. King should read the draft carefully and revert to him (Mr. Pugh) if he was unhappy with any of the text in the draft. The Respondents' counsel also criticised Mr. Pugh

for not having spotted that the statement had been wrongly dated whenever it was provided to him, or worse still if he had spotted the wrong dating, for not enquiring into why the statement had been dated as it had been dated. Of course at this time, and until January 2012, neither the Appellant nor Mr. Pugh had any knowledge of the comments that Mr. King had written on Mr. Pugh's original email, but nevertheless Mr. Pugh should have enquired into why the statement had been wrongly dated. Mr. Pugh did of course know that there had been a meeting between Mr. King and Mr. Wiltshire on 27 January, so that while on the most charitable analysis some might have supposed that Mr. King might have dated the witness statement on the date when matters were initially discussed, there was more obviously another explanation for the statement being dated 27 January.

The subsequent utilisation of the witness statement

43. We summarised the way in which Mr. King's witness statement had been forwarded in June 2011 to HMRC along with four lever arch files of papers at the point of the request for a review of HMRC's decision to refuse relief for the Appellant's input tax claim. While we accept that the witness statement was not later withdrawn when the Appellant was informed in early January 2012 of the annotations made by Mr. King on Mr. Pugh's email of 28 January 2011, the Appellant certainly contended that, following that revelation, the Appellant had not intended to rely in any way on the statement in advancing its appeal before the Tribunal and that the Appellant was not proposing to call Mr. King as a witness. The Appellant said that the witness statement was a document that it had in its possession and that it therefore had to be disclosed and that it was amongst the papers for the hearing essentially for that reason. Particularly in the light of our conclusion given in paragraphs 65 and 66 below to the effect that the terms of the witness statement are more appropriately described as repetitious and irrelevant, rather than false, we attach little importance to the fact that the witness statement was left in the List of Documents for the purposes of the appeal.

The conduct, and reliability of evidence, of the Appellant's witnesses in relation to all matters concerning the production of the witness statement, and the location of Mr. King and his readiness to come to the Tribunal to give his evidence

44. There were two aspects to the Respondents' claim that the Appeal should be struck out. One related principally to the claim that Mr. King's witness statement had been false. This in itself could be justified on the contention that its actual content was simply untrue, or that it had been produced in an unacceptable manner. The second broad thrust of the Respondents' contentions was that Mr. Wiltshire and Mr. Scanlon had given highly evasive and sometimes untrue evidence, such that it would be impossible in any substantive hearing to accept their evidence without constantly giving attention to whether we believed it.

45. Until we deal with our decision itself, and the reasons for it, we cannot address the degree to which the witness statement was actually and materially false, and the significance of Mr. Wiltshire having been somewhat involved in its preparation. At this point, therefore, we will simply confine our observations to the general claim that the two witnesses for the Appellant had been evasive and dishonest in their testimony both in relation to matters concerning the preparation of the witness statement and the issue of whether Mr.King could be located and whether he would be prepared to come to the Tribunal in order to give evidence.

Evidence in relation to the preparation of Mr. King's witness statement

46. There is no doubt that some of the evidence given by Mr. Wiltshire and Mr. Scanlon (more Mr. Wiltshire in that he had had a greater involvement with the preparation of Mr. King's witness statement) was unconvincing and evasive and that it is reasonable to say that some of the answers given by both witnesses were untrue. The Respondents' counsel would doubtless say that any lie is a lie and that any lie indicates that a witness is prepared to lie. There are however degrees of untruth. At the more extreme end of the scale, if Mr. Wiltshire had entered the witness stand bent on concocting a whole and highly material story that was simply fabricated, that would have been exceptionally damaging. But in the present case any lies only related to matters that embarrassed the two witnesses, particularly Mr. Wiltshire, relating to the degree to which Mr.Wiltshire might have cajoled Mr. King into giving a witness statement, the degree (it actually seems the very marginal degree) to which he might have influenced the content of the witness statement and the issue of whether he in a sense vetted the changes that Mr. King wished to make. The present point that we make is simply that when embarrassed about the matters on which he was being questioned, and being subjected to fairly challenging cross-examination, Mr. Wiltshire may have been both evasive and might also have lied in respects that we are eventually going to conclude were fairly inconsequential. His lies or evasive answers arose as he was squirming under powerful cross-examination on matters that he obviously found embarrassing, but he was certainly not entering the witness box setting out to advance some new wholly untrue story.

Evidence in relation to whether Mr. King could be located and whether he would be prepared to come voluntarily, at the informal request of the Tribunal, to give evidence

47. At the commencement of the hearing, the Appellant had not sought to rely on Mr. King's witness statement or to call him as a witness. During the hearing there was discussion along the lines that in a complex manner the Tribunal could require Mr. King to give evidence but this became immaterial when the suggestion was made that if the Appellant could locate the whereabouts of Mr. King and he was prepared voluntarily to give evidence at the Tribunal's informal request, his evidence might be of assistance. At the commencement of the hearing, however, it was indeed possible that neither Mr. Wiltshire nor Mr. Scanlon knew the whereabouts of Mr. King and Mr. Scanlon remarked that he did not even know whether he was alive.

48. The Respondents' counsel challenged Mr. Wiltshire and Mr. Scanlon for having refused to acknowledge, as soon as they learnt of the relevant information, first that Mr. King had indeed been located, and secondly that he was prepared to give evidence. We accept that when Mr. Wiltshire and Mr. Scanlon learnt these two important facts, they initially denied that they knew the outcome of enquiries by other of the Appellant's employees. There was a suggestion, however, that their reticence resulted from the fact that they had disclosed the facts to their lawyers and that until they had been told what to do or say they were reluctant to admit to the availability of Mr. King. It nevertheless remains the case that the Appellant did locate Mr. King and ascertain that he was prepared to come to court to give evidence voluntarily. Insofar as the Respondents might have supposed that the diffidence resulted from the feature of seeking first to ascertain how supportive Mr. King's testimony might be (not that this was actually suggested by the Respondents' counsel), we conclude that if that was what was being done, the Appellant did a fairly poor job in ensuring that Mr.

King's evidence would be supportive. There is no evidence that the Appellant did any such thing, though when Mr. King's most crucial answer and claim was that his annotation on Mr. Pugh's email about *"making the story up"* was all to do with some doodling in relation to discussions with Mr. Beckinsale about something quite remote from the witness statement, we can hardly conclude that his evidence was supportive of the Appellant's case.

49. Our observation at this point is that when highly embarrassed, the Appellant's two witnesses did give evasive answers, some of their answers might well have been untrue and probably were. We will deal below, however, with whether any of those evasive answers or even lies related to material untruths or to any fabrication of a story.

Our decision

The extreme nature of a strike-out decision

50. The decision to strike out an Appeal is an extreme step that we consider we should only take if we are satisfied that the conduct by the Appellant's witnesses has involved lies, that that conduct may pervade much of their testimony that might be given in the substantive hearing and that we are clear that it would be impossible or unlikely for us to hear the substantive matters in dispute in a fair and just manner. We consider that the decision as to whether to strike out the Appeal also calls on us to weigh up the challenged conduct of the Appellant's witnesses against the seriousness of the alleged falseness of the witness statement at the heart of this dispute.

The apparent lack of interest on the part of HMRC in relation to the discovery in mid-2011 of the two copies of Mr. Pugh's email of 28 January 2011 and Mr. King's annotations on it.

51. We turn now to the quite different topic that when in mid-2011 HMRC criminal investigation officers obtained copies of the damaging email (containing the hand-written annotations by Mr. King), they did not reveal this to the Appellant until early January 2012 and they advanced no remote contention in relation to the issue that is the present subject of the strike-out Application until 2 December 2015. Furthermore in March 2015 they confirmed that they did not wish to amend their Statement of Case in any way, and they obviously indicated in the hearing before Judge Sinfield (related principally to the standard or complex categorisation of the Appeal) in September 2015*"that [HMRC] makes no allegation of fraud against [the Appellant] and does not suggest that [the Appellant] was party to any fraud perpetrated by Goldflex or any other person."*

52. In the light of this, it seems somewhat remarkable that HMRC has veered after a period of four and a half years from basing no particular contention on the claim that Mr. King's witness statement was a fraudulent statement, or indeed any contention remotely geared to Mr. King's annotations on the 28 January 2011 email, to an Application to strike out the Appeal, to the request to file a new Statement of Case alleging that the original contract between the Appellant and Goldflex was a sham (a contention relatively close to one of fraud) and to the presentation of a completely new basic argument. Moreover that complete change of tack occurred very shortly prior to the hearing.

The period during which preparations have been made for the hearing, in the context of the present "strike-out" application

53. In the previous section we were implicitly addressing the seriousness of the claimed fraudulent witness statement by indicating that HMRC had altogether ignored this issue for four and a half years. In this section, we note that one of the reasons for a "strike-out" decision is that it saves the waste of judicial time and costs for all parties if a case that is bound to be hopeless or pervaded by fraudulent evidence is struck out in a "surgical manner". That is the Respondents' counsel's request and Application.

54. In this regard, we also find it remarkable that when the parties have been preparing for this Appeal for approximately five years, spending very considerable time and incurring very considerable costs on the Appeal, the Respondents contend for a reason of which they have been fully aware for the vast majority of that time that the Appeal should be struck out. We also record that in terms of the more general issue of the parties being co-operative with the Tribunal, the Appellant's case has generally been advanced efficiently and, without going into now irrelevant detail, the Respondents have been more at fault in this regard. It is also noteworthy that time was spent, and costs incurred, at the suggestion of the Respondents on the claim that the Appellant could only sustain its claim and succeed in its Appeal if it persuaded the High Court to decide that Mr. Katz's credit note had been improperly issued. Beyond the fact that the whole credit note contention on the part of HMRC was wholly incorrect ("bunkum" according to the Respondents' present counsel), we for our part are at a loss to understand what form of action or claim the Respondents expected the Appellant to make before the High Court.

55. While the following conclusion may not be strictly relevant to the proper consideration of the "strike-out" issue, we still consider it pragmatically significant that after five years, and after four and a half years in which HMRC has paid no regard to the affair that is now said to be so decisive against the Appellant, the Respondents wish to change their case at the last minute, and to "strike-out" the Appeal without thus giving the Appellant the chance to sustain its substantive case. In terms of the waste of time and cost it is also worth noting that the preliminary enquiry on the "strike-out" issue took six days of court time, the precise time that had been estimated to be required for the substantive hearing.

56. In short, our observation is that in making the "strike out" application, while we do not say that the Respondents' present claim is unfounded, in the light of the Respondents' past conduct, they make this present Application very much on the back foot.

The purpose for which Mr. King's witness statement was requested or procured

57. There is little relevance to the following point because we accept that if the Appellant's witnesses have been dishonest, it might not be appropriate to allow the Appeal to proceed, and it would be immaterial whether the dishonest conduct directly related to the appeal against the denial of input tax or to the mediation with Mr. Katz, pending at the time the witness statement was produced. It is however the case that the witness statement in question was designed to be used in the mediation with Mr. Katz as the liquidator of Goldflex, and when at that stage the liquidator's principal claim (as we understood matters) was to receive the outstanding payment of £98,000 from the Appellant, the material point, for which the witness statement was doubtless requested, was to seek to sustain the point about Goldflex being liable under the principal contract to bear the cost of rectifying faulty work on the part of Goldflex's workers and to replace damaged or stolen plant. This is indeed the

point that Mr. Wiltshire made to Mr. Pugh when asking Mr. Pugh to prepare the draft witness statement, in the terms that we quoted at the end of paragraph 10 above.

58. While this feature would not render untrue testimony irrelevant, it is certainly the case that in the preparation of the witness statement, no thought appears to have been given to the present dispute with HMRC.

Whether any discussion between Mr. Wiltshire and Mr. King on 27 January 2011 influenced the content of the draft witness statement produced by Mr. Pugh, and the witness statement as signed

59. Aside from the terms of the request to Mr. Pugh made in his email to Mr. Pugh that we quoted at the end of paragraph 10 above, there was no evidence that anything discussed between Mr. Wiltshire and Mr. King on 27 January 2011 found its way into Mr. King's witness statement. All that Mr. Wiltshire asked Mr. King to address in preparing a draft witness statement were the terms of the basic contract between the two parties and the respect in which that contract imposed various potential liabilities on Goldflex. We have already suggested that the sort of evidence that might have been fabricated and that would have been of significance would have been claims on the part of the Appellant in relation to various examples of faulty workmanship, and more relevantly, acceptance by Mr. King that those identified and costed claims were indeed all justified. That would indeed have been highly material to the chance of the Appellant sustaining its counter-claim, and had the evidence all been false we would have had no hesitation in treating such false evidence most seriously.

60. Not only was there no evidence of any discussion between Mr. King and Mr. Wiltshire having proceeded along those lines, or of such points being passed on to Mr. Pugh, but it is absolutely clear that nothing in the draft witness statement went beyond simply re-stating the import of the original contract. Mr. Pugh suggested to us that that is what he sought to do in preparing the draft and essentially that is precisely what he did do.

The three changes to the draft witness statement

61. We turn now to the significance of the three changes made by Mr. King to the draft witness statement.

The change geared to whether Mr. King had met Mr. Scanlon

62. There is no doubt that the change that Mr. King made to the draft witness statement, relating to whether Mr. Scanlon and Mr. King had met, was designed to remove the implication that Mr. King must have met Mr. Scanlon, and this change was made, it seems, because Mr. King would have remembered that a few months earlier he had indicated in discussions, recorded by both one of Mr. Katz's assistants and an HMRC officer, that he had never met Mr. Scanlon. There is no respect, however, in which this particular change rendered the actual witness statement, as signed, more supportive of the Appellant's case, either indeed as regards Goldflex and its liquidator or HMRC. We did not actually learn with certainty whether Mr. King had indeed met any of the directors of the Appellant prior to the 10 minute meeting that Mr. King had with Mr. Wiltshire. It did seem that most, if not all, the discussions about payments had been between Mr. King and Mr. Steve Gibson of the Appellant and not one of the directors, so that is possible that the change made may have

simply been accurate. More significantly, however, at most the change would appear to have been designed to conform the witness statement to the earlier claim by Mr. King, and we certainly fail to see that it was particularly supportive of the Appellant's case, or material in the context of the strike out Application.

The change in relation to the terms on which heavy plant might be provided to Goldflex operatives by the Appellant

63. No attention was paid to the change that Mr. King made to the draft witness statement, changing the original text to the effect that the Appellant would charge Goldflex for the use of heavy plant, to the statement that heavy plant was to be provided free of charge. The wording in the original draft did in fact conflict in a minor way with the terms of the contract because the contract said that the Appellant **could,** rather than **would**, charge for this provision of heavy plant. That minor point aside, Mr. King changed the wording here to say that the major plant was to be provided to Goldflex by the Appellant free of charge. Whether or not this change may have any implication on the substantive issues in due course, we consider that it has no particular bearing on the strike out issue. We imagine that the Respondents take the same view because no attention was given to this change during the hearing.

The crucial annotation on Mr. Pugh's email in which Mr. King referred to changing a date in order to conceal that "we had made the story up".

64. This is the single most important point in relation to the "strike-out" Application because the annotation that referred to a story having been made up does, in our judgment, obviously relate to some story ostensibly being made up by Mr. King and Mr. Wiltshire. We have already rejected the proposition that Mr. King was just doodling in relation to some quite different matter, and the slightly less far-fetched notion that the "we" in question might have been Mr. King and Mr. Beckinsale.

65. The crucial point, however, is that while Mr. King appears to have feared that if the witness statement had been dated, say 4 February 2011, others would have concluded that some story had been made up between Mr. King and Mr. Wiltshire at the meeting on 27 January, we are at a loss to understand what fabricated story Mr. King was troubled about. Instead of our concluding that the witness statement was a materially false statement, we actually consider that it was an irrelevant witness statement because it produced virtually no new evidence and simply re-stated the basic content of the contract between the two companies HMRC are now of course claiming that the original contract was itself a sham, and HMRC's claim may be that if they sustain the proposition that the original contract was a sham, Mr. King's reference to a story having been made up may simply relate to the whole arrangement, and may be damaging to the Appellant's substantive case. This rationalisation would, however, not suggest that anything that may have been discussed on 27 January between Mr. King and Mr. Wiltshire found its way into the draft witness statement prepared by Mr. Pugh or that any story was actually made up in the relevant meeting.

66. We accept that Mr. Wiltshire may have persuaded Mr. King to give a witness statement; there was clearly a discussion between Mr. Wiltshire and Mr. King on 27 January 2011 and a few days later there was a further meeting at which Mr. Wiltshire was informed of the proposed changes and he may or may not have agreed to them. What is crucially

relevant, however, is that nothing that may have been discussed between Mr. Wiltshire and Mr. King found its way into the witness statement, and furthermore, aside from reflecting the terms of the contract that HMRC now say was a sham, there was not a single new false fact or assertion in the witness statement. We accept that the witness statement was drafted by Mr. Pugh to reflect the terms of the original contract, and nothing seems to have been inserted to reflect anything discussed on 27 January or to refer to any new facts or claims. The witness statement was therefore closer to being irrelevant than false.

Reliance on Mr. King's witness statement

67. Beyond the conclusion that we have reached to the effect that Mr. King's witness statement was irrelevant rather than false, we do attach some significance to the Appellant's claim that while the witness statement was left in the pack of documents disclosed by the Appellant for the purposes of this Appeal, it does very much seem that the Appellant was not proposing to rely on the witness statement in the present Appeal. In view of its irrelevance that was hardly surprising.

Our overall conclusion

68. We accept that the Respondents' counsel was able to make a powerful case in relation to the circumstances in which Mr. King's witness statement was procured and produced. We also accept that some of the evidence given by Mr. Wiltshire, and to a lesser extent Mr. Scanlon, during the hearing has been evasive and some of it almost certainly untrue. Any untrue statements were however statements in response to rigorous cross-examination in relation to circumstances that the witnesses will have found embarrassing, but nothing remotely approaches the endeavour to fabricate an entirely false story.

69. In the light of that, we dismiss the Application to strike out the Appeal. We are heavily influenced by the conclusion that we have reached that if anything Mr. King's witness statement was repetitious and irrelevant, rather than materially false in any way. We see no information or claim in that statement that resulted from any discussion that there may have been between Mr. Wiltshire and Mr. King, and indeed virtually nothing that was not already contained in the original contract. When preparations have been made for this Appeal for five years, when very considerable costs have been incurred, and when HMRC made no point whatsoever in relation to the production of the witness statement or the apparently damaging annotations made by Mr. King on Mr. Pugh's email for four and a half years after those annotations were discovered by HMRC, we decide that it would be wholly inappropriate to strike-out the Appeal at this very late stage.

The other Applications

70. As we indicated at an early point in the hearing, we do decide to allow the Respondents to file their heavily revised Statement of Case, and to produce the witness statements that they wish to rely on. We consider it futile to require the Respondents to advance a case that they no longer wish to advance, and the prime contention in which the Respondents' counsel has described as "bunkum". We also grant the Appellant a period in which to prepare for the now somewhat different contentions that the Appellant has to face, and we note that the Appellant may choose to defer doing that in the period in which the Respondents may seek to appeal against our decision on the strike out Application. We accordingly direct that within

two months of the date on which the Respondents notify the Appellant and the Tribunal that they do not intend to appeal against this Decision, or within two months of the date after which an appeal could only be brought with leave of the Tribunal, the Appellant and the Respondents should produce draft Directions, if required, in relation to further preparation for the adjourned hearing, a time estimate for the hearing and an indication of dates to avoid. The resumed hearing shall of course be conducted by the originally constituted Tribunal.

Right of Appeal

71. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 8 MARCH 2016