TC01914

Appeal number LON/2008/8113

Procedure – costs - application for costs out of time – whether discretion to entertain an application should be exercised – Rule 5 (3) (a) Tribunal Rules 2009 – whether direction should be made to apply Rule 29 of the VAT Tribunal Rules 1986 – Atlantic Electronics considered – alternatively whether order for costs should be made under Rule 10 Tribunal Rules 2009 – whether Respondents acting unreasonably

FIRST-TIER TRIBUNAL
TAX CHAMBER

EASTENDERS CASH AND CARRY PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at 45 Bedford Square, London WC1 on 27 September 2011, with written submissions on 22 and 28 February and 9 March 2012

Geraint Jones QC, instructed by Anami Law, for the Appellant

Richard Smith, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application by the Appellant for costs in relation to a decision of this Tribunal dated 29 December 2010, which allowed the Appellant's appeal and directed the Respondents to review the Appellant's application for a licence under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR").

2. The Appellant had lodged a Notice of Appeal with the VAT Tribunal on 25 September 2008.

3. In summary, there are three issues for determination. The first issue is whether the application is made out of time, and, if so, I must decide whether I should exercise my discretion to permit the late application to be made. If the application made out of time is allowed to proceed, the second question is whether I should exercise my discretion to apply the old cost rules contained in Rule 29 of the VAT Tribunal Rules 1986 ("the 1986 Rules") in relation to the costs of the appeal. The third question, if Rule 29 is not applied, is whether the Tribunal should exercise its discretion under Rule 10 (1) (b) The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules") to award costs to the Appellant.

Background

4. The substantive appeal concerned whether HMRC had acted reasonably in the *Wednesbury* sense when deciding to refuse the Appellant's application for registration under WOWGR. We decided that because the relevant HMRC officer had failed to take account of all relevant circumstances (and, indeed, had failed to apply HMRC's published guidance requiring him to do so) his decision could not reasonably have been arrived at, within the meaning of section 16 (4) Finance Act 1994. We, therefore, directed HMRC, pursuant to section 16 (4) (b) Finance Act 1994, to review its decision in accordance with our directions.

5. The crux of our decision was contained in paragraph 118 where we said:

> "Applying these tests to the evidence before us it is plain that Mr Dyer's [the HMRC officer] decision took account only of the convictions of Mr Windsor and Mr Singh [directors of the Appellant]. There is no evidence that any other factors were taken into consideration. We do not know why this was so. It may be that Mr Dyer was simply following the guidance in paragraph 5.8 of Public Notice 201 or it may be that he thought that those convictions were so important that no other factors needed to be taken into account. It does not matter why he considered one factor and not others; it only matters whether he failed to take into account matters which he should have done. In our view, he should have taken into account other relevant factors."

6. We gave directions to HMRC (at paragraph 139) to carry out a further review of the original decision and set out certain factors which should be taken into account.

7. After the hearing of the original appeal on 11 November 2010, there were further proceedings between the parties. Mr Geraint Jones QC, for the Appellant, summarised the chronology of the subsequent proceedings as set out below. His chronology was not challenged by Mr Richard Smith, for HMRC. The summary was as follows:

Date	**Event**
11 November 2010	Hearing of the appeal [by this Tribunal in respect of the WOWGR application]
6 December 2010	Judge Hawkins QC (Central Criminal Court) grants Crown Prosecution Service ("CPS") and HMRC ex parte Restraint and Receivership Orders against, inter alios, the Appellant.
14 December 2010	Judge Hawkins QC extends the Receiver's powers, thus preventing the Appellant's directors from performing any management functions in respect of the Appellant's affairs.
23 December 2010	At an inter partes hearing, Judge Hawkins QC refused to discharge the Orders made on 6 December 2010.
29 December 2010	This Tribunal's decision in the appeal is released.
4 January 2011	Reasons are handed down for the decision given on the 23 December 2010
26 January 2011	Court of Appeal (Criminal Division) quashes the Orders made by Judge Hawkins QC insofar as they appointed a Receiver in respect of the Appellant and/or restraint dealings in the Appellant's assets.
8 February 2011	Court of Appeal (Criminal Division) quashes the Orders made by Judge Hawkins QC insofar as they affected the other Appellant's. The Court of Appeal found that there was no evidence adduced by the CPS and/or HMRC that could give rise to a finding that there was reasonable cause to suspect that the various Appellants were engaged in duty evasion.
22 February 2011	Mackay J (sitting at the Central Criminal Court) gave judgement upon a renewed application by CPS and HMRC for Restraint Orders. The applications were dismissed.
1 March 2011	E-mail from HMRC arguing that the Appellant is out of time to make a costs application.

8. In his written submissions, Mr Jones informed us that on 20 January 2012, in *Eastenders Cash & Carry PLC v HMRC* [2012] EWCA Civ 15 the Court of Appeal held that the power of detention under section 139 Customs and Excise Management Act 1979 could only be exercised where goods were in fact liable to forfeiture and not where there was a reasonable cause to believe that they may be liable to forfeiture.

Further submissions

9. The Appellant's application was heard on 27 September 2011. At the hearing reference was made by counsel to the fact that the decision of this Tribunal in *Atlantic Electronics Limited v HMRC* [2011] UKFTT 276 (TC) – a decision of Judge Wallace which dealt with the question of costs in appeals which ranked as "current proceedings" – was under appeal to the Upper Tribunal. It was, however, submitted that the grounds of appeal lodged by HMRC meant that the appeal was of limited relevance to the present application. After the hearing, I became aware that the Upper Tribunal would hear the *Atlantic Electronics* appeal on 10 November 2011 and I concluded that I should postpone my decision in respect of this application until the judgment of the Upper Tribunal was available.

10. On 6 February 2012, the Chamber President, Warren J, delivered judgment in the *Atlantic Electronics* appeal [2012] UKUT 45 TCC. I then requested written submissions from the parties on the *Atlantic Electronics* decision and these were received in February and March 2012. I have, therefore, taken into account Warren J's helpful decision in *Atlantic Electronics* and the parties' submissions thereon in reaching this decision.

Statutory background

11. It was common ground that if the appeal had been both lodged and determined before 1 April 2009 Rule 29 of the 1986 Rules would have applied to the appeal. On 1 April 2009 the 2009 Rules came into force and replaced the 1986 Rules. Appeals that were pending prior to 1 April 2009 were defined as "current proceedings" and were then to be governed by the 2009 Rules by virtue of paragraph 1 (2) and 6 of Schedule 3 to The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the Transfer Order").

12. These provisions were, however, subject to paragraph 7 (3) of Schedule 3 to the Transfer Order ("paragraph 7 (3)") which provided:

> "The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may –
>
> (a) apply any provision in procedural rules which applied to the proceedings before the commencement date [1 April 2009]; or
>
> (b) disapply any provision of the [2009] Rules."

13. The Tribunal must, therefore, apply the 2009 Rules to proceedings before it, subject to a discretion contained in paragraph 7 (3) to apply the 1986 Rules and disapply the 2009 Rules to ensure that cases are dealt with fairly and justly.

14. Rule 10 (4) of the 2009 Rules provides, so far as is relevant, that an application for costs under Rule 10 (1) of the 2009 Rules may not be made later than 28 days after the date on which the Tribunal sends the final decision notice disposing of the proceedings. The decision of the Tribunal in the appeal was, as noted above, 29 December 2010 and was sent to the parties on that date. Therefore, it was common ground that the time for making a costs application elapsed on 26 January 2011.

15. It should be noted that paragraph 7 (7) of Schedule 3 to the Transfer Order provides that:

> "An order for costs may only be made [in the current proceedings] if, and to the extent that, an order could have been made before the commencement date [1 April 2009] (on the assumption, in the case of costs actually incurred after that date, that they had been incurred before that date)."

16. Rule 29 (1) of the 1986 Rules provided:

> "A tribunal may direct that a party or applicant shall pay to the other party to the appeal or application –
>
> (a) within such period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or
>
> (b) the costs of such other party of and incidental to and consequent upon the appeal or application to be assessed…by way of detailed assessment."

17. Rule 10 (1) of the 2009 Rules provides:

> "(1) The Tribunal may only make an order in respect of costs… --
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; and
>
> (c) if—
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph."

18. In my view, Rule 10 must also be read in the light of the overriding objective (Rule 2 (1)) of the Rules which is "to enable the Tribunal to deal with cases fairly and justly." In particular, Rule 2 (4) provides that:

"Parties must

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

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

Application out of time

19. The first issue was whether the 28 day time limit for making an application for costs, contained in Rule 10 (4) of the 2009 Rules, was relevant to an application under Rule 29.

20. I was informed by counsel that the 1986 Rules contained no time limit for making an application for costs under Rule 29. Presumably, a very late application would have been a factor in the exercise of VAT and Duties Tribunal's discretion under Rule 29 to award costs.

21. Mr Jones submitted that the 28 day time limit contained in Rule 10 (4) of the 2009 Rules did not apply to an application for costs made under Rule 29 of the 1986 Rules. Mr Smith submitted that absent a direction to the contrary, the default position was that Rule 10 (4) applied unless it can be shown that it was necessary for the time limit to be disapplied so that proceedings could be dealt with fairly and justly. Mr Smith argued that it was not unreasonable to have a time limit in relation to an application for costs and therefore it could not be shown that it was necessary for the 28 day time limit to be disapplied.

22. In my view, Mr Smith's submission faces one insuperable hurdle in relation to Rule 29. The 28 day time limit in Rule 10 (4) only applies to an "application for an order under paragraph (1)." The Appellant's primary application is for a direction pursuant paragraph 7 of Schedule 3 to the Transfer Order that Rule 29 of the 1986 Rules should apply and for an award of costs under that Rule. It therefore seems to me that Rule 10 (4) cannot apply to this application insofar as it relates to Rule 29.

23. The 28 day time limit in Rule 10 (4) does, however, apply to the Appellant's alternative submission that costs should be awarded under Rule 10 (1) of the 2009 Rules. I must, therefore, consider whether the failure by the Appellant to make an application within the 28 day period is fatal to its alternative application under Rule 10 (1).

24. Rule 5 (3) (a) of the 2009 Rules permits the Tribunal to give a direction to "extend or shorten the time for complying with any rule…." I therefore have a discretion whether to permit an application for costs under Rule 10 (1) to be made out of time.

25. In support of his Rule 10 application, Mr Jones, referring to the chronology set out above, submitted that:

(1) When the Tribunal's decision was released on 29 December 2010, the Appellant was subject to Receivership and its directors had no control over its

affairs. The Receiver, having been appointed at the behest of the CPS and HMRC, had no interest in making an application to the Tribunal.

(2) The Appellant's directors did not regain control of the Appellant's affairs until the Order of the Court of Appeal on 26 January 2011. The directors were then faced with, what Mr Jones described as, a huge managerial problem to salvage the business and goodwill of the Appellant after the Receiver had run it down; purchased no new stock; but had spent approximately £700,000 of the Appellant's money (in large measure in paying his own fees).

26. Mr Jones also referred to the fact that there was e-mail correspondence between 9 February 2011 to 1 March 2011 between the Appellant's solicitor and HMRC on the issue of costs.

27. Mr Jones submitted that there was clear prejudice to the Appellant if it was denied the opportunity to make an application in respect of an appeal in which it had been successful. On the other hand, there was no real prejudice to HMRC. A few weeks delay made little difference. This was not a case where evidence had to be heard and where the delay might cause prejudice because witnesses were unavailable or memories had faded. In addition, it was permissible for the Tribunal to consider the merits of the application when considering the degree of prejudice which the Appellant might suffer if its late application was denied. In this case, the Appellant had a strong case for the award of costs. Applying a test of the balance of prejudice, it was clear that an application under Rule 10 (1) out of time should be permitted.

28. Mr Smith submitted that it was clear from the correspondence that by 9 February 2011 the Appellant's solicitors had instructions to apply for costs. There was, therefore, no excuse for the failure to submit an application for costs in the period between 9 February and 7 March 2011. As regards the balance of prejudice, Mr Smith submitted that prompt efforts should be made to comply with the Rules. HMRC did suffer prejudice. Like any litigant, HMRC was entitled to expect finality once time limits had expired without an application having been made. There was a public interest in certainty and finality which would be prejudiced if the Appellant were permitted to pursue the application without proper grounds to excuse its lateness. Mr Smith submitted that the merits of the case were irrelevant.

29. I am persuaded that the application should be permitted to be made out of time in the exercise of my discretion under Rule 5 (3) (a). I consider that the correct approach in deciding whether to exercise my discretion as to carry out a balancing exercise, weighing up the potential prejudice to the Appellant and to HMRC and taking account of any factors which may explain or excuse the late application.

30. Moreover, when balancing the respective prejudice to the parties, I consider that it is permissible to take account, at least in outline, of the likely merits of the application. Where an applicant has a reasonably arguable case the prejudice which it suffers if it is not able to make its application because that application was made out of time is greater than that suffered by an applicant making a plainly unmeritorious application. In assessing the merits of an application it is not necessary, in my view,

that I should think that the application will certainly succeed. All that is necessary is that I should consider that the applicant has a good arguable case.

31. I believe that the balance of prejudice suggests that I should exercise my discretion in favour of the Appellant. I consider that the Appellant has a reasonably arguable case. I do not think that the Appellant's case is so unmeritorious that it suffers no prejudice by being precluded from putting it forward. On the other hand, HMRC seems to have suffered little prejudice occasioned by a delay approximately one month. I do not deny the desirability of achieving finality in litigation but I consider that the weight of this factor grows over time. As Mr Jones pointed out, this is not a case where documents may no longer be available or the memories of witnesses may have faded.

32. I also consider that the Appellant's delay was, in part, attributable to reasonable causes. First, I accept Mr Jones's submission that until the Order of the Court of Appeal on 26 January 2011, there was no realistic likelihood of the Appellant being able to make an application. Thereafter, I consider it probable that the Appellant was preoccupied in rectifying the problems caused to its business by the appointment of a Receiver.

33. For these reasons, I direct that permission be given for the alternative application under Rule 10 (1).

34. As I have said, I do not think that the 28 day time limit in Rule 10 (4) of the 2009 Rules can apply to an application under Rule 29 of the 1986 Rules. In the absence of a specific time limit for an application under Rule 29, it is a matter for the discretion of the Tribunal whether the application is made so late that it would be unfair and unjust to permit it. For the reasons given above in relation to the application under Rule 10 (1), I think that it would be fair and just for the application to be made.

Rule 29 application

35. It was common ground that:

(1) the Appellant's Notice of Appeal was lodged on 25 September 2008 at a time when the 1986 Rules were in force and some six months before the 2009 Rules came into effect.

(2) The appeal constituted "current proceedings" for the purposes of the Transfer Order and that the Tribunal had a discretion whether to direct that Rule 29 of the 1986 Rules should apply.

36. The issue is whether the Tribunal should exercise its discretion to direct that Rule 29 should apply pursuant to paragraph 7 (3) Schedule 3 of the Transfer Order.

Atlantic Electronics – judgment of Warren J

37. I have set out above the provisions of paragraph 7 (3). They are beguiling in their simplicity. Nonetheless, they give rise to difficult issues of principle when deciding

what fair and just treatment demands in the context of current proceedings. Warren J's careful decision in *Atlantic Electronics* extends to 75 paragraphs and illustrates very clearly the difficulties faced (at one point described by Warren J as "almost intractable") in the fair and just exercise of the discretion created by paragraph 7 (3).

38. The facts in that case were different from those in the present application and were as follows.

39. The appellant ("Atlantic") was appealing from a decision of HMRC to disallow input tax in accordance with the decision of the European Court of Justice *in Kittel v Belgium* (Case C–439/04) [2008] STC 1537 and of the Court of Appeal in *Mobilx v HMRC* [2010] STC 1436. Atlantic had lodged three appeals (which were consolidated) in May and June 2007 and May 2008. The proceedings were therefore "current proceedings" for the purposes of the Transfer Order.

40. Atlantic's solicitors were erroneously informed by Tribunal staff that the case had been categorised as standard. The solicitors did not rely on this information and applied for a direction that Rule 10 of the 2009 Rules should not be disapplied. HMRC opposed the application and applied, instead, for the 1986 Rules to be applied in respect of costs.

41. Judge Wallace, sitting in the First-tier Tribunal, dismissed HMRC's application in respect of Rule 29 , and, by implication, allowed Atlantic's application in respect of Rule 10. Judge Wallace was influenced by the length of time which had passed since 1 April 2009 and considered that it had given rise to a legitimate expectation on the part of Atlantic that the 2009 Rules would apply.

42. An appeal to the Upper Tribunal, the Chamber President, Warren J, dismissed HMRC's appeal and held that Judge Wallace's decision was (paragraph 70):

> "within the range of reasonable decisions open to him for him to have reached the conclusion that the lapse of time in the present case was such that HMRC should not obtain the prospective costs order which they sought in relation to the entire proceedings including the costs in the VAT Tribunal."

43. There are a few initial points to note concerning the *Atlantic Electronics* case.

44. First, as is clear from the above, the case concerned an application for a prospective costs order rather than (as is the case with the application before me) a retrospective one i.e. an application made after the result of the substantive proceedings has been communicated to the parties.

45. Secondly, Warren J observed that in *Atlantic Electronics* and in an earlier case on a similar point, *Hawkeye Communications v HMRC* [2010] UKFTT 636 (TC) (Judge Berner), the parties had both argued for an "all or nothing" approach i.e. that either Rule 10 or Rule 29 applied. Warren J noted that it was, however, open to the Tribunal to make a "split" direction if it considered this wouldproduce a fair and just result (paragraph 35 and 36). The Tribunal could make such a direction even if neither party

argued for this approach and the Tribunal should not necessarily be "compelled to accede to the parties' wishes."

46. The following principles relevant to the exercise of my discretion under paragraph 7 (3) in relation to the present application can be derived from Warren J's judgment in *Atlantic Electronics* :

(1) The use of the expression "legitimate expectation", to describe the reasonable assumptions of the parties as to the costs position in a case which straddled 1 April 2009 was misleading. Those assumptions did not amount to a "legitimate expectation" in the sense "in which it is understood in public law cases nor in the sense of the EU principle of legitimate expectations." (Paragraph 25)

(2) A party to a tax appeal has a reasonable expectation that the relevant procedural rules will be applied, but also a right to have them applied in fact. In the case of current proceedings, the relevant rules are to be found in the 2009 Rules read with paragraph 7. Neither a taxpayer nor HMRC are entitled to have the 2009 Rules applied as if paragraph 7 did not exist. But unless a direction is made under paragraph 7, whether a prospective direction or a direction at the time when a costs order comes to be made, then the Rule 10 will apply. In that sense, it is perfectly true that a taxpayer has a reasonable expectation that Rule 10 will apply, indeed he has a right to that effect. (Paragraph 54)

(3) When it comes to exercising the discretion under paragraph 7 (3), whether in making a prospective direction or an actual order for costs, the Tribunal must act judicially and apply the correct principles. The discretion cannot be exercised in an arbitrary manner. The reasonable expectation arises because of the way that the taxpayer is entitled to expect that discretion to be exercised; it is not the case that the discretion must be exercised in favour of the application of Rule 10 because there is a reasonable expectation that it would be. The expectations of the parties should be taken into account by the Tribunal only as a reflection of the factors which lead to those expectations and the Tribunal must be careful not to give separate weight to those expectations (absent other circumstances e.g. an express representation by HMRC as to the costs position). (Paragraphs 55 and 56)

(4) Two policies could be identified in the 2009 Rules. First, the taxpayer in a Complex case is to be given a choice as to the applicable costs regime (Rule 10 (1) (c)). The choice must be made at an early stage whether to opt out of the costs regime for Complex cases. If the taxpayer does not opt out, the case falls, by default, within the costs shifting regime. The second policy is to provide certainty about the applicable costs regime at an early stage. If the taxpayer was able to exercise his right of election at a late stage, or even once a result of the appeal was known, he would be able to elect the regime he knew to be more favourable, resulting in effectively a one-way costs shifting, which was never intended. (Paragraph 33)

(5) current proceedings cannot be allocated to the Complex category, at least according to *Surestone Limited v HMRC* [2009] UKFTT 352 (TC). It is the nature of a case as complex, rather than its categorisation as a Complex case, which is

relevant to the exercise of the paragraph 7 (3) discretion either to displace or fix in place the default regime for current proceedings under Rule 10 (i.e. no costs shifting). (Paragraph 38)

(6) once a reasonable time after 1 April 2009 has passed, there is no longer a policy imperative to give the taxpayer a choice; on the contrary, the second policy is to achieve certainty and suggests that the taxpayer should no longer have a choice. If he is to have no choice, the default regime under Rule 10 (which is a no costs regime because there has been no allocation of the appeal as the Complex case) should apply. The taxpayer could not, seeing the wind flowing strongly in his favour, after the passage of time, successfully seek a prospective costs order applying Rule 29 or seek an order for costs when he actually wins appeal. (Paragraphs 41 and 42)

(7) in the case of current proceedings where a substantial amount of work and considerable expense has been incurred both before and after 1 April 2009 (Warren J's "third example", to which I shall refer to as a "straddle appeal") there are good arguments for making a prospective direction. Both the 1986 and 2009 Rules satisfy the second policy objective, that of providing certainty. The 1986 Rules provide certainty that a costs shifting regime will apply. The 2009 Rules provide certainty in that the costs regime will be identified at an early stage (depending on whether the taxpayer elects to opt out). (Paragraph 44)

(8) the tension between applying the 2009 Rules to a "new" case and the fairness and justice of maintaining the old regime in what is essentially an "old" case cannot be resolved by appeals to policy in a straddle appeal. That tension can be avoided by applying different costs regime is to different periods i.e. Rule 29 to the period pre-1 April 2009 and Rule 10 to the post-1 April 2009 period (a “split direction”). That could be a starting point from which to arrive at a direction best designed to achieve fairness and justice in the context of the proceedings as a whole. (Paragraph 46).

(9) If a single regime is to be imposed, a major factor in the exercise of discretion will be the relative amount of time and money spent on the proceedings before and after 1 April 2009. The actual length of time proceedings continued before and after that date carries less weight compared with the actual work done in the two periods, although ordinarily there would be a correlation between the two. (Paragraph 47)

(10) given the default position under Rule 10, it is incumbent on the party who wishes to operate in a costs shifting regime to make an application to disapply Rule 10 and to apply rule 29. (Paragraph 49).

(11) Delay beyond a reasonable time after 1 April 2009 is relevant to the exercise of discretion. After a reasonable time has expired, parties who wait and see how their case develops before making an application should not ordinarily expect their application to succeed. (Paragraphs 66 and 68) Delay is something which falls to be taken into account and, where delay is present, the legitimate expectation is that the paragraph 7 (3) discretion will not be exercised to disapply the default position of Rule 10 (no cost shifting). (Paragraph 66).

Arguments for the Appellant

47. At the hearing, Mr Jones submitted that the Tribunal's power was necessary to address situations where a party, having commenced an appeal in the VAT and Duties Tribunal, had a legitimate expectation that the rules in relation to costs contained in the 1986 Rules would apply to that litigation. He referred to two decisions of the Tribunal, both decisions of Judge Berner, in *The Bowcombe Shoot v HMRC* [2011] UKFTT 64 and *Hawkeye Communications Limited v HMRC* [2010] UKFTT 636. Mr Jones noted that the issue of legitimate expectation was not argued in either of the above-mentioned decisions.

48. In order to achieve the overriding objective of the 2009 Rules – i.e. that cases should be dealt with "fairly and justly" – it was, according to Mr Jones, necessary to give effect to the legitimate expectation of an appellant that existed when the appeal was launched. That expectation was that if the appellant was successful it would recover its costs. Mr Jones submitted that that was, in part, the rationale for the Transfer Order providing that the Tribunal have the power to direct that the existing procedural rules (including Rule 29 of the 1986 Rules) should apply to the appeal. Mr Jones said that the provisions of paragraph 7 of Schedule 3 to the Transfer Order were transitional provisions which were the legislative mechanism to ensure that accrued legitimate expectations were not thwarted by legislation having retrospective effect.

49. This was reinforced, according to Mr Jones, by the fact the removal of an accrued or contingent property right by retrospective legislation would be contrary to Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR").

50. If the appeal had been commenced on or after 1 April 2009, Mr Jones submitted that it would have most probably been allocated to the Complex category. In that event, costs would usually have followed the event (Rule 10 (1) (c) (i)), subject to the right of the Appellant to opt out of the costs regime. Subject to the opt out, this would place the parties in effectively the same position as Rule 29. There was no power to categorise this case now as a Complex case (see *Hawkeye Communications Limited, supra*) because the categorisation provisions of the 2009 Rules did not apply to "current proceedings". The Appellant's only avenue was to make an application for a direction that Rule 29 should apply. This was an important factor which should persuade the Tribunal to exercise its discretion in favour of the Appellant.

51. Mr Jones referred to paragraph 118 of our Decision where we stated that it was "plain" that the relevant decision took account of only one factor i.e. the criminal convictions of two individuals. It should also have been "plain" to HMRC. There was, therefore, an "overwhelming likelihood" that the appeal would be successful for the reasons set out in paragraph 118 of our Decision and this, therefore, offset any prejudice arising from the fact that the Appellant had only made this application after knowing of its success in the appeal.

52. In his written submissions in relation to *Atlantic Electronics*, Mr Jones submitted that the relevant principles should not be confused with different principles that may apply when a prospective application was being made. He submitted that the Tribunal

had a wide discretion under paragraph 7 (3) which had to be exercised fairly and justly. (*Atlantic Electronics* paragraphs 19 and 27)

53. Mr Jones submitted that the present case is closest to Warren J's third example, but noted that in that case he was dealing with a prospective application. He referred to paragraph 55 of Warren J's judgment where the learned judge said:

> "When it comes to exercising the discretion under paragraph 7, whether in making a prospective direction or in making an actual order for costs, the tribunal must, of course, act judicially applying the correct principles whatever they may be. In the case of an application for a prospective order, the passage of time since 1 April 2009 will be a relevant factor, as I will explain, in how that discretion should be exercised. The taxpayer has not only a reasonable expectation, but also a right to insist, that the discretion will be exercised in accordance with those principles…"

54. He noted that in paragraph 55 Warren J was dealing with a prospective application and argued that he was not dealing with the situation (per Warren J's third example) of an appeal commenced in the VAT Tribunal well before 1 April 2009, but straddling that date. He argued that Warren J expressed the view that a taxpayer had a reasonable expectation of recovering his costs if successful. Such a reasonable expectation would be even stronger where the appeal began in September 2008 before the VAT Tribunal.

55. He recognised that HMRC would rely on Warren J's comments in paragraph 68 (summarised in paragraph 46 (11) above) that parties who awaited events and then made an application should not ordinarily expect an award of costs. However, he submitted that the substantive appeal had failed to make significant progress right up to the time when the Appellant's business was subject to a Receivership Order which the Court of Appeal later found should never have been made. Although he recognised that Warren J's comments about delay being a factor that can weigh against the party making an application for costs, Mr Jones countered that by contending:

(1) HMRC's defence of the appeal was wholly unreasonable. HMRC had attempted to defend the indefensible.

(2) This was not a case where they were 50-50 risks in litigation. This was an appeal that was almost bound to succeed. This was not an opportunistic application.

(3) The Appellant's delay was because it had not appreciated, until advised by counsel, that it should get its costs consequent upon a successful appeal.

(4) Warren J's comment at paragraph 68 was plainly directed at discouraging opportunistic applications.

(5) The strength of the Appellant's case in relation to the substantive appeal was a relevant factor which should be taken into account by the Tribunal in exercising its discretion in favour of the Appellant.

(6) The decision in *Atlantic Electronics* did not affect the Appellant's arguments in relation to Rule 10 concerning HMRC's unreasonable conduct of the appeal.

Arguments for HMRC

56. At the hearing, Mr Smith submitted the fact that the appeal was commenced prior to the 2009 Rules coming into force was not enough to require the Tribunal to direct that fairness and justice demanded that the 1986 Rules should apply. This was apparent from the terms of paragraph 7 (3) of the Transfer Order and this view was confirmed by the Tribunal in *Everest Limited v HMRC* [2010] UKFTT 621 (TC) at paragraph 106:

> "It is evident from the way in which para 7 (3) is framed that the mere fact that an appeal qualifies as "current proceedings" is not itself sufficient for the 1986 Rules, or any particular provision of those rules, to be applied."

57. Mr Smith said that this was enough to dismiss the Appellant's primary case for the application of Rule 29. If, however, the Tribunal decided not to dismiss the application on that basis, Mr Smith referred to Judge Berner's decision in *Hawkeye Communications Limited v HMRC* [2010] UKFTT 636 (TC) for guidance as to how the Tribunal should exercise the discretion conferred upon it by paragraph 7 (3). Judge Berner said at paragraph 18:

> "…what is required in considering the proper approach to be adopted in the case of “current proceedings” is a balancing exercise, weighing the question of fairness and justice in all the circumstances of the individual case, and the prejudice that would be suffered by either party were the tribunal, on the one hand, to exercise its discretion to apply the 1986 Rules or, on the other, not to do so. I do not agree with Mr Lakha [counsel for the Appellant] that the threshold for the exercise of the discretion under para 7(3) is higher than that. As a general matter of course rule 10 of the 2009 Rules does not of itself prevent the tribunal dealing with cases fairly and justly. But what para 7(3) recognises in the special circumstances of current proceedings is that fairness and justice might require application of the former rules in certain respects."

58. Mr Smith dismissed the argument of the Appellant that it was necessary to apply Rule 29 in order for the proceedings to be dealt with fairly and justly in order to give effect to the Appellant's legitimate expectation, supported by Article 1, Protocol 1 ECHR. The Appellant had no legitimate expectation that the 1986 Rules would apply on or after 1 April 2009. The Appellant had no accrued right to costs until the Tribunal directed that Rule 29 should apply and, therefore, no point under Article 1 arose. Mr Smith said that the Appellant's reliance on the merits of the claim did not assist with the question whether it was fair and just to apply the 1986 Rules.

59. Mr Smith did not agree with Mr Jones's submission that the appeal would most probably have been allocated to the Complex category if it had been commenced after 1 April 2009. Rule 23 (4) of the 2009 Rules states:

> "The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case -
>
> (a) will require lengthy or complex evidence or a lengthy hearing;
>
> (b) involves a complex or important principle or issue; or
>
> (c) involves a large financial sum."

60. Mr Smith noted that the appeal did not involve lengthy or complex evidence and it did not involve a complex important principle or issue. As to whether the appeal involved a large financial sum, there was no evidence put forward to substantiate this. The point had not been tested and, therefore, Mr Smith submitted that it was dangerous for the Tribunal to take a view on this point.

61. Mr Smith suggested that the following relevant factors should be taken into account:

> (a) The Notice of Appeal was dated 25 September 2008 so the proceedings began only six months prior to the 2009 Rules coming into force.
>
> (b) Even when the 1986 Rules were in force, the Appellant could only have recovered costs from the date when the original decision was deemed to have been upheld on review (7 September 2008) because costs incurred prior to that date would not have been incidental to the appeal: *Customs and Exercise Commissioners v Dave* [2002] STC 900.
>
> (c) The Appellant's expectation of recovering the costs following a successful appeal brought under the 1986 Rules ended, in the absence of any application to the contrary, when those Rules were replaced by the 2009 Rules on 1 April 2009. The Appellant could have had no such expectation from that date because, absent a direction from the Tribunal pursuant to paragraph 7 (3), given the provisions of Rule 10 of the 2009 Rules.
>
> (d) The bulk of the work done by the Appellant's solicitors was done after the 2009 Rules had come into force.
>
> (e) The Tribunal ruled in *Atlantic Electronics* [2011] UKFTT 314 (TC) (at paragraph 50) that the greater the amount of costs incurred after 1 April 2009, the stronger the position of the party resisting a direction for the 1986 Rules to apply.
>
> (f) The Appellant had advanced no grounds on which it can be said to be necessary in the interests of fairness and justice to apply Rule 29 of the 1986 Rules and disapply Rule 10 of the 2009 Rules. The balancing exercise must, therefore, come down against making any such direction.

62. In his written submissions in relation to *Atlantic Electronics*, Mr Smith agreed that this case fell within the third example (a straddle appeal) given by Warren J, but argued that it was closer to his first example (i.e. where an appeal was lodged shortly before 1 April 2009). In this case, the appeal had been lodged only six months before 1 April 2009 and had been concluded 21 months later. In addition, as noted above, the Respondents did not accept that the case would have been allocated to the Complex category had it been commenced under the 2009 Rules.

63. Mr Smith referred to Warren J's reasoning in paragraph 41 (summarised in paragraph 46 (6) above) where the President indicated that a party could not delay until it had won an appeal before making an application for costs.

64. Mr Smith submitted that the longer the time an application was made after 1 April 2009, the less likely it was that at paragraph 7 (3) direction would be made.

65. The ratio of work undertaken pre-and post-one April 2009 was to be taken into account is the fact that away in the balance when considering fairness and justice under paragraph 7 (3).

66. If neither party made an application to the Tribunal for a prospective direction, the Tribunal was unlikely to depart from the default regime (i.e. Rule 10 – no costs shifting).

67. Mr Smith noted that the President had made it clear that the Tribunal should not decide the issue based on the notion of "legitimate expectation", save in special circumstances (e.g. where HMRC had given some undertaking or promise). The Appellant's arguments in relation to "legitimate expectation" therefore proceeded on an erroneous basis. In this case the rules which the parties could reasonably have expected to be applied were the 2009 Rules, unless a direction under paragraph 7 (3) was made. In any event, as Warren J make clear, it was not the expectations of the parties that should drive the Tribunal's exercise of its discretion, but the analysis of the factors giving rise to those considerations.

68. Mr Smith submitted that the following factors should be weighed in the balance according to the principles identified by Warren J:

(1) the length of time after 1 April 2009 that the application for a paragraph 7 (3) direction was made was 21 months;

(2) the fact that the application was made after the conclusion of the appeal;

(3) the fact that the majority (more than 80%) of the Appellant's costs were incurred after 1 April 2009 – according to the Appellant's Schedule of Costs.

69. In relation to the points made in the Appellant's written submissions:

(1) Mr Smith noted that the Receivership Order had been made in December 2010, after the hearing of the Appeal. Significant progress had, therefore, been made in the appeal by that time and the Appellant had expended significant

amounts in costs to prosecute it. Mr Smith did not consider this factor impacted on the discretion contained in paragraph 7 (3).

(2) No satisfactory explanation had been given by the Appellant as to why a prospective application had not been made and the appellant chose to wait until it knew the result before applying for a direction.

(3) The points made by the Appellant about the merits of the substantive appeal did not explain the failure to make a timely application for a paragraph 7 (3) direction. If the Appellant had been so bullish about its prospects of success there would be no reason for failing to make a prospective application.

70. Mr Smith noted that the Appellant, all though referring to the apportionment argument or "split" direction (mentioned by Warren J), was not actively pursuing it there was no application to amend the existing application. Mr Smith argued that apportionment would not be correct because of the time at which the application was made.

Discussion of application of Rule 29

71. The question is whether I should exercise my discretion under paragraph 7(3) to apply Rule 29 in order to ensure that the proceedings are dealt with fairly and justly.

72. I accept Mr Smith's submission, based on the passage from the Tribunal's decision in *Everest* cited above, that the mere fact that an appeal qualified as "current proceedings" was not enough to require the Tribunal to direct that Rule 29 should apply. Nonetheless, paragraph 7 (3) proceeds on the assumption that, in the case of current proceedings, fairness and justice might in some cases require the application of the 1986 Rules (at least in part).

73. I respectfully agree with the view of Judge Berner in *Hawkeye Communications* that I must carry out a balancing exercise, weighing all the factors involved in this case, to reach an overall conclusion whether the application of Rule 29 was required to ensure that the proceedings were dealt with fairly and justly. I do not read the judgment of Warren J in *Atlantic Electronics* as in any disapproving the need to perform this balancing exercise. That balancing exercise, as Warren J made clear, must be conducted on a principled basis.

74. In *Atlantic Electronics*, Warren J considered that the Tribunal should not determine whether to exercise its discretion under paragraph 7 (3) on the basis of legitimate expectation. As he said at paragraphs 55 and 56:

> "The reasonable expectation arises because of the way that the taxpayer is entitled to expect that the discretion will be exercised; it is not the case that the discretion must be exercised in favour of the application of Rule 10 because there is a reasonable expectation that it will be.
>
> …Accordingly, a tribunal must be careful to take account of the expectations of a taxpayer only as a reflection of the factors which lead

> to those expectations and must be careful not to give separate weight to those expectations…."

75. In my view, from 1 April 2009 the Appellant could not reasonably have assumed that Rule 29 of the 1986 Rules would apply absent a direction from the Tribunal. Any expectation or assumption that the costs shifting rules of Rule 29 would apply must have ended on that date. On 1 April 2009 the default position was that Rule 10 of the 2009 Rules governed this appeal. Therefore, after that date the assumption should have been that Rule 10 (and not Rule 29) would apply, absent a direction from the Tribunal. I accept that from 25 September 2008 to 31 March 2009 the Appellant may have assumed that Rule 29 would apply. In my view, however, that is outweighed by the fact that from 1 April 2009 to the hearing date of 11 November 2010 the Appellant could have had no such expectation.

76. Warren J considered that the amount of work and cost undertaken or incurred in the pre-and post-1 April 2009 periods was an important factor. With respect, I agree. From the information available to me, it appears that the large majority of work done by the Appellant's legal advisers was carried out after the 2009 Rules had come into force. The Schedule of Costs produced by the Appellant is not broken down by specific dates and it is, therefore, not possible accurately to compare the value of work done before and after 1 April 2009. However, I note that the fees for work performed between 24 July 2008 and 31 December 2009 were £12,073.20 and the fees for work done in 2010 were £56,081. These periods are obviously slightly inaccurate in that the figure of £12,073.20 includes some costs incurred from the date of the original decision and before the appeal was lodged (which are not recoverable) and eight months when the 2009 Rules were applicable. Nonetheless, it is clear that the bulk of the costs were incurred during the period when, because no application had been made for a direction that Rule 29 should apply, the reasonable assumption to make would have been would have been the 2009 Rules (no costs shifting) would apply.

77. Similarly, when carrying out the balancing exercise, I have taken account of the fact that the period from the commencement of this appeal to the hearing involves a period of approximately 2 years. The Notice of Appeal was dated 25 September 2008. The proceedings had been underway for only six months before the 2009 Rules came into force. The period from 1 April 2009 to the date of the hearing (11 November 2010) was approximately 18 months. Therefore, the proceedings mainly took place in the post 1 April 2009 period – a period when the 2009 Rules were in force.

78. Therefore, in respect of the proportionate work and expense incurred and the relative length of time before and after one April 2009, the balance suggests that it should be Rule 10, not Rule 29, which should apply.

79. We have had no clear explanation why an application for a direction that Rule 29 should apply was not made by the Appellant until after the hearing. Like Judge Berner in *Hawkeye Communications* (paragraph 23), I believe that this is a factor that can be taken into account. In his written submissions Mr Jones stated the Appellant's delay in applying for costs "was because, until advised by counsel, it had not appreciated that it would not, almost as of right, get its costs consequent upon the successful appeal." I do not regard that as a sufficient explanation. The Appellant could have applied for a

direction under paragraph 7 (3) at any time after 1 April 2009. As far as I am aware, it was at all times legally represented. It did not, however, do so. The fact that it was under a misapprehension as to the costs regime cannot be relevant.

80. This application has been made after the result of the appeal has become known. I do not think it is fair for a party to adopt a "wait and see" approach on the question of costs. Warren J adopts a similar approach in his judgment (see, for example, paragraphs 41 and 50). I do not agree with Mr Jones's submission that this is "a superficial point" in view of the "overwhelming likelihood" that the Appeal would be successful. After all the evidence (including the various practice statements published by HMRC) and the arguments of counsel had been considered, it may well have been "plain", as we said, that the appealed decision was *Wednesbury* unreasonable, but this applies a very considerable degree of hindsight. In any event, the confidence of the Appellant in the merits of its case does not justify it in refraining from clarifying the costs position until after the decision.

81. In my view, the appeal would most probably have been categorised as Complex. I consider that the appeal raised a complex issue i.e. whether the decision taken by HMRC was *Wednesbury* unreasonable. It involved a careful analysis of the decision-making process, a review of the quite complex HMRC public statements and some carefully nuanced arguments put forward by counsel. On this hypothesis (ie that the appeal had commenced after 1April 2009), it would have been open to the Tribunal to have awarded costs in favour of the Appellant provided the Appellant had not exercised its opt out. It is, however, impossible to say in hindsight whether the Appellant would have exercised this right. Having won the appeal, the Appellant now seeks its costs but would it have exercised its right to opt out of the costs regime within the 28 day period from receiving notice that the case had been allocated to the Complex category (Rule 10 (1) (c) (ii))? It seems to me that this uncertainty reduces the weight to be given to this point in the overall balancing exercise to be carried out in order to determine whether I should exercise my discretion in paragraph 7(3).

82. Furthermore, had this been categorised as a Complex case, the opt out would have had to be exercised at an early stage (i.e. within the 28 day period) so that in the run-up to the hearing and during the hearing itself – periods which typically see the bulk of time and effort being expended by each party's legal team – the costs position would have been clear. But in this case, there was no clarity. No application was made to identify the applicable costs regime. The application has only been made after the event. It seems to me, therefore, that this also weakens the analogy which the Appellant draws with the position under Rule 10 (1) (c).

83. For these reasons, therefore, my conclusion is that I should decline to exercise my discretion under paragraph 7 (3) Schedule 3 to the Transfer Order to apply Rule 29 of the 1986 Rules.

Rule 10 application

Arguments for the Appellant

84. Essentially, Mr Jones submitted that it was obvious that the appealed decision was unreasonable. Mr Dyer had taken only the criminal convictions into account. As the Tribunal said, in paragraph 118 of its Decision, it was "plain" that Mr Dyer only had taken the criminal convictions of Mr Singh and Mr Windsor into account. HMRC knew (or ought to have known) that they had no reasonable prospect of winning. Furthermore, HMRC sought to adduce further reasons to support its decision which the Tribunal excluded (see paragraph 14 of the Decision). This was a clear indication that HMRC knew or should have known that it had no realistic chance of winning, but HMRC still sought to contest the appeal even after the exclusion of the additional evidence.

85. Mr Jones said that HMRC's subsequent refusal of a WOWGR registration, where HMRC failed to take account of any or all of the matters which the Tribunal had directed it to do so, was indicative of HMRC's unreasonable approach.

86. Accordingly, Mr Jones submitted that HMRC had acted unreasonably in defending and conducting the proceedings.

Arguments for HMRC

87. Mr Smith submitted that the application could not be granted because of the terms of paragraph 7 (7) of Schedule 3 to the Transfer Order. This precludes any order for costs being made if it could not have been made before 1 April 2009, i.e. under the 1986 Rules. There was no provision in the 1986 Rules by which the Tribunal could award costs to any party based on the unreasonableness of the other. Therefore, an award of the whole of the party's costs under Rule 10 (1) (b) could not be made in "current proceedings". Mr Smith referred to the decision of this Tribunal in *Surestone, supra,* at paragraph 14 where Sir Stephen Oliver said:

> "The effect of paragraph 7(7) of Schedule 3 to the TTF Order is that the making of a direction under rule 10(1) of the 2009 Rules relating to costs is not (in the circumstances to which this application relates) open to this Tribunal. None of the situations in rule 10(1)(a)-(c) applies. The 1986 Rules under which a costs award could have been made ceased to have effect at the end of March 2009. Likewise the 1994 Special Commissioners Rules, which contained no power to make costs awards (save where one party had behaved wholly unreasonably), ceased to have effect. "

88. Mr Smith further submitted that the application confused the finding of substantive *Wednesbury* unreasonableness on the part of HMRC, in taking the decision to refuse WOWGR registration, with procedural unreasonableness in defending HMRC's position. Mr Smith said that HMRC had relied on a number of perfectly respectable lines of argument before the Tribunal (summarised in paragraphs 86 to 96 of the Decision). This presented a properly arguable case by which the appeal

could have been dismissed. It was not unreasonable for HMRC to defend their position simply because they lost the appeal.

89. As regards the Appellant's suggestion that it should always have been apparent to HMRC that they would lose the appeal, this was an illegitimate use of hindsight. The Tribunal did not find that HMRC's defence of the appeal was hopeless but, instead, gave full and proper consideration to HMRC's arguments.

Discussion of the application of Rule 10

90. I do not consider that I should award costs to the Appellant under Rule 10 (1) (b). HMRC's defence of the appeal decision was not in my view unreasonable. As summarised in our decision, HMRC advanced a number of respectable arguments. The fact that those arguments did not find favour does not mean that HMRC's arguments were wholly without merit to such an extent that an award of costs under Rule 10 (1) (b) would be appropriate. It may be that having heard all the evidence and the arguments of counsel that it was clear that the appealed decision was *Wednesbury* unreasonable, but to say that HMRC should have been aware that its position was not defensible involves a very considerable measure of hindsight. In my view HMRC had an arguable case and it was not unreasonable to put it forward.

91. The test in Rule 10 (1) (b) is simply whether a party "has acted unreasonably in bringing, defending or conducting the proceedings." It is different from the old test which applied to proceedings before the Special Commissioners which required a party's conduct to be "wholly" unreasonable. There is, therefore, a lower threshold for the award of costs in circumstances of unreasonable conduct before this Tribunal. That said, I do not think the test of unreasonableness in Rule 10 (1) (b) should become a "backdoor" method of costs shifting. The test is simply one of unreasonableness in all the circumstances of the case, but it would not be appropriate, in my view, to apply that test with a too-ready resort to the benefit of the hindsight. It is easy to be wise after the event.

92. For this reason, I decline to award costs to the Appellant pursuant to Rule 10.

93. As regards Mr Smith's argument that paragraph 7 (7) of Schedule 3 to the Transfer Order precludes me from making an award of costs under Rule 10, I disagree. It is true that paragraph 7 (7) acts as a limitation on the operation of Rule 10,but it does not preclude the Tribunal from making an award of costs under Rule 10 in appropriate circumstances. As the Tribunal pointed out in *Everest, supra,* at paragraph 98, paragraph 7 (7) prevents the Tribunal from awarding costs where prior to 1 April 2009 the powers contained in Rule 10 did not exist. For example, there was no ability to award costs in General Commissioners cases and before the Special Commissioners there was only jurisdiction to award costs in the case of "wholly unreasonable" conduct (not the lower standard of unreasonable conduct found in Rule 10).

94. Rule 29 of the 1986 Rules, however, conferred on the VAT and Duties Tribunal a general power to award costs. There is no doubt in my mind that the Tribunal could

award costs in circumstances of unreasonable behaviour as well as awarding costs which simply followed the event. However, in the light of my decision that HMRC's defence and conduct of the Appeal was not unreasonable, it is unnecessary for me to venture any further opinion on this point.

Split direction

95. I have, so far, considered the arguments in the manner in which they were presented by the parties. Both the Appellant and HMRC argued for an "all or nothing" approach: HMRC arguing for the application of Rule 10 and the Appellant arguing for the application of Rule 29, in each case for the whole period of the appeal (i.e. from the date that the appeal was lodged to the Tribunal's decision).

96. As Warren J noted in *Atlantic Electronics* it is open to the Tribunal, if it considers it would be fair and just to do so, to make a "split" direction applying Rule 29 to the period prior to 1 April 2009 and Rule 10 to the period from 1 April 2009 to the date of the Tribunal's decision. Furthermore, it is open to the Tribunal to make this direction even if neither party seeks it if the Tribunal considers that it is necessary to ensure that proceedings are dealt with fairly and justly.

97. There are attractions to this approach. Until 1 April 2009 the costs position of the appeal was governed by Rule 29 and, thereafter, by Rule 10. A split direction would recognise this reality.

98. Do I therefore think that a split direction should be made to ensure that these proceedings are dealt with fairly and justly? I do not consider that such a direction would be appropriate in the circumstances of this case. I think there would have been merit in such a course of action if an application had been made within a reasonable time after 1 April 2009. But where the application is made after the conclusion of the appeal I think it is simply too late. After the length of time that has elapsed from one April 2009, my view is that it is fair and just that Rule 10 should apply to the proceedings as a whole.

Conclusion

99. For the reasons given above, I have decided that no award costs should be made either under Rule 29 of the 1986 Rules or under Rule 10 of the 2009 Rules.

100. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 27 March 2012

Amended pursuant to rule 37 of the Tribunal Procedure (First tier Tribunal) (Tax Chamber), Rules 2009 on 31 March 2012