TC02022

Appeal number: LON/2007/1027

Procedure – application for recusal of judge from proceedings part-heard – apparent or perceived bias – pre-determination of issue or pre-disposition – whether judge would approach relevant decision with a closed mind and without impartial consideration of relevant issues – issue whether witness was an expert – earlier decision of judge in separate proceedings – previous findings in separate proceedings regarding owner/director of company carrying out due diligence for appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRICOR PLC **Appellant**
(formerly PNC TELECOM PLC)

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 9 May 2012

Ian Bridge, instructed by Morgan Rose , for the Appellant

Christopher Foulkes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Appellant, made on 26 April 2012, that Judge Tildesley be recused from this appeal on the basis of a real danger of apparent and/or perceived bias on two grounds:

(1) In *Edgeskill Ltd v Revenue and Customs Commissioners* [2011] UKFTT 393 (TC) the Judge ruled, following argument, that the evidence of Mr John Fletcher qualified as expert evidence. The same issue falls to be determined in this case and the Judge will have closed his mind to this issue, or not be impartial in this respect.

(2) Also in *Edgeskill*, the Judge heard evidence from a Mr Plowman, the director of Veracis Limited, and reached "certain unfortunate conclusions" about him. The Appellant relied upon "due diligence" reports from Veracis Limited in this case and the Judge may therefore take an unfavourable view of this evidence.

2. This appeal is one of a number of appeals that have come before the Tribunal on the question whether the Respondents are correct in denying VAT input tax recovery in respect of certain transactions in mobile phones on the ground that, in this case, the Appellant's deals were connected to the fraudulent evasion of VAT and that the Appellant knew or should have known of that connection. These cases have become known as MTIC (missing trader intra-community) fraud cases. In this case the amount of VAT denied to the Appellant on this basis is £1,847,976.83.

3. This appeal is currently part-heard. The Tribunal (Judge Tildesley and Ms Helen Myerscough) began hearing the appeal on 9 January 2012. The evidence was heard before the Tribunal between 11 January 2012 and 27 January 2012. Closing submissions were adjourned until 9 and 10 May 2012. During the adjournment the Appellant instructed counsel and solicitors in place of Mr David Tunney, a non-legally qualified representative who had represented the Appellant at the January hearing.

4. The Respondents produced Mr Fletcher as an expert witness. His evidence included his opinions on the legitimate grey market in the trading of mobile phones, and on the Appellant's transactions. He was extensively cross-examined by Mr Tunney. The admissibility of Mr Fletcher's evidence is challenged on the ground that he is not an expert in relation to the matters covered in his evidence.

5. The Appellant's application that the Judge recuse himself having been received by the Tribunal, it was determined that the application would be heard on the first of the two days allocated to closing submissions. Mindful of the comments made by Ward LJ (with whom Mummery and Wilson LJJ agreed) in *El-Farargy v El Farargy and others* [2007] EWCA Civ 1149 (at [32]), the Tribunal made arrangements for me to determine this application, rather than require Judge Tildesley to decide the matter of his own recusal.

6. At the end of the hearing on 9 May 2012 I informed the parties of my decision that the Appellant's application was refused. I gave brief oral reasons for my decision. Mr Bridge, for the Appellant, then told me that the Appellant would wish to seek permission to appeal my decision. I have therefore released this full written decision.

The law

7. Apart from one matter, there was no material dispute as to the law to be applied in an application of this nature. It was accepted that the test is whether, from the point of view of the fair-minded and informed observer, there is a real possibility that the Tribunal or one of its members are biased in the sense of approaching the relevant decision with a closed mind and without impartial consideration of all relevant issues (see *Costas Georgiou v London Borough of Enfield* [2004] EWHC 779 (Admin) per Richards J at [31], referring to *Porter v Magill* [2002] 2 AC 357).

8. In his submissions before me Mr Bridge sought to clarify references made in his skeleton argument to bias. He said that, in the context of this application, this amounted to pre-determination of the issue in question. However, there were, he said, two elements to his submission. The first was pre-determination, as regards the previous decision of the Judge as to whether Mr Fletcher was an expert; the second was the fact that, throughout the January proceedings, the Judge made no reference to that ruling, nor to the fact that the Judge had, shortly before the January hearing commenced, issued a decision refusing the appellant in *Edgeskill* permission to appeal to the Upper Tribunal on, amongst others, that ruling.

9. In light of the arguments before me, it is important to appreciate what is meant by pre-determination in this context, and what distinction, if any, can be drawn between that and pre-disposition. In this respect the parties differed. For the Respondents, Mr Foulkes submitted that pre-determination amounted to having a closed mind and the making of a decision on the outcome of a case too soon, before all the relevant evidence and arguments. If that were perceived by the fair-minded observer, then that would be a case of apparent bias. That was to be contrasted with pre-disposition, that is to say having a view on a possible outcome but being willing to listen and consider all relevant matters, which would not lead a fair-minded observer to conclude that the judge had a closed mind.

10. Mr Bridge urged upon me a narrower view of pre-disposition, essentially confined to a state of affairs. Examples he gave were membership of a political party, having certain political leanings, and being religious or being an atheist. He argued that all judges have pre-dispositions of this nature which have to be put aside when reaching judicial decisions. He submitted that a decision in another case that a particular individual is an expert is not a mere pre-disposition, but can only be described as a pre-determination.

11. In my judgment the formulation which Mr Bridge urges me to adopt is too narrow. Pre-disposition, in my view, is apt to describe not only a judge's inherent views and opinions, some might say prejudices, but also a preliminary, but not fixed,

view that the judge might have adopted prior to or in the course of a hearing, whether as a consequence of having read the parties' skeleton arguments, having heard initial submissions or from experience of similar issues in other cases. So long as the judge is nevertheless open to argument, and as a result open to the possibility that the preliminary view might be wrong, that is not a pre-determination, but a mere pre-disposition.

12. For my own part, I do not consider that the distinction between pre-determination and pre-disposition is any different from the distinction between the judge having an open or closed mind. That is the test derived from *Porter v Magill* and *Georgiou v Enfield*, and I see no reason to apply any different, or nuanced, test.

13. In concluding thus I derive support from the judgment of the Court of Appeal in *Locabail v Bayfield* [2000] QB 451 at [25]. Every application of this nature must be decided on the facts and circumstances of each case. However the Court provided helpful illustrations of factors which might, on the one hand, and might not, on the other, give rise to a real danger of bias. I note in particular that the Court suggested that previous judicial decisions would not ordinarily found a soundly-based objection, and that these were grouped alongside matters such as the judge's social and educational background, political and other associations and extra-curricular utterances: states of affairs that are pre-dispositions. This was contrasted with cases where the credibility of an individual could be significant to the decision in the case and the judge had rejected the evidence of that individual in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion and cases where on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.

The status of Mr Fletcher

14. Although a significant portion of the argument was directed to the question of whether Mr Fletcher is an expert witness, and that question forms the context in which this application is made, it is not itself the subject of the application. I do not address that question, and I make no observations in this decision on the competing arguments. However, I record that at the outset of the hearing before me I informed the parties that I had previously, in an unpublished decision on an interlocutory application in the First-tier Tribunal case of *Prizeflex Limited v Revenue and Customs Commissioners* decided that the evidence of Mr Fletcher in that case was expert in nature. I provided the parties with copies of my decision on that interlocutory application.

15. Nor do I make any observations on procedural issues related to Mr Fletcher's evidence, including the application of CPR Part 35, either generally or in this particular case. Those are matters that in my judgment do not touch upon the present application.

Edgeskill

16. In *Edgeskill* the Tribunal (Judge Tildesley and Mr Christopher Jenkins) decided (at [41]) that Mr Fletcher had significant strategic experience in the trading of mobile phones which, together with his extensive research and the support of his research team, made him a competent expert witness. In doing so they rejected an argument of the appellant that Mr Fletcher's evidence was irrelevant as a matter of law except his admission that there was a grey market in the international wholesale of mobile phones ([40]). The Tribunal added a footnote to its summary of this argument to refer to the tribunal decision of *Excel RTI Solutions Limited (in administration) v Revenue and Customs Commissioners* [2010] UKFTT 519 (TC), a decision of Judge Wallace. The Tribunal went on to say (at [43]) that Mr Fletcher's evidence was helpful in assessing the credibility of evidence given for the appellant in that case by a Mr Rashid on the way in which he ran the appellant's business.

17. The Tribunal found (at [493]) that the length of the relevant deal chains made no commercial sense and in the same paragraph referred to the view expressed by Mr Fletcher that the longer the chain (of transactions between traders in a particular batch of mobile phones) the smaller the available margin for each individual trader and that "Mr Fletcher's evidence countered the [appellant's] retort that HMRC with its criticisms of the long chains had failed to understand the nature of the business". Finally, at [540] the Tribunal adopted HMRC's analysis of the appellant's "misfit with the four trading opportunities" (that is, in the legitimate grey market) "identified by Mr Fletcher".

18. The appellant in *Edgeskill* applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal on a number of grounds. Judge Tildesley refused permission, although permission has subsequently been granted by the Upper Tribunal (as it happens by me). In a lengthy decision notice, issued to the parties on 16 December 2011, the Judge dealt with all 14 of the grounds of appeal put forward by the appellant, two of which related to the evidence of Mr Fletcher. In that regard the Judge rejected the application on the basis that "[t]he Tribunal considers its decision to admit Mr Fletcher's evidence was rational and justified having regard to the circumstances of the case".

The January hearing

19. Mr Bridge took me to a number of passages in the transcript of the January 2012 hearing in this case. I set those out in full so as to provide a complete picture of the submissions that are made.

> **Day 5: 18 January 2012**
>
> MR FOULKES: May I clarify one thing, just so we don't expend any unnecessary time tomorrow. My understanding of your instruction, sir, or request, should I say, of the Commissioners in respect of Mr Fletcher, is that he be taken in chief to deal with his expertise?
>
> CHAIRMAN (Judge Tildesley): What I would like you to deal with specifically, Mr Foulkes, for the Tribunal's benefit – first of all, I'm

> aware Tribunals have taken different views about the status of Mr Fletcher's evidence. There is one decision, in particular which is often quoted, and that's the one of Judge Wallace[1], and I'm sure you are familiar with that decision. I would like you to address specifically the points that Judge Wallace has made in his decision. Unfortunately I do not have a copy of it, but I assumed that you –
>
> MR FOULKES: We have copies of a number of authorities dealing with this issue and I am sure one is indeed Judge Wallace. We have also made sure Mr Tunney is aware of a very recent one by Judge Cornwell-Kelly in a case called HT Purser[2], of which I am sure you are aware.
>
> CHAIRMAN: I am not aware.
>
> MR FOULKES: We will include that in the bundle and we have made sure Mr Tunney is aware of it because it's in his favour. It's in the appellant's favour so we have made sure they know about that.
>
> CHAIRMAN: It's not just, as it were, dealing with decisions. I'm asking for HMRC to establish why they say Mr Fletcher is an expert witness, although in this particular case there is a slight difference, in that Mr Fletcher seems to comment specifically upon the appellant's case. I am not sure whether that is from the capacity of expert witness or actually a witness of fact, but I'll leave that for you to persuade the Tribunal. I have not given it any thought.

20. I pause at this stage to address one area of controversy arising out of the comment of the Judge that he had "not given it any thought". This was criticised by Mr Bridge on the basis that in *Edgeskill* itself and in refusing that appellant's application for permission to appeal as recently as December 2011, the Judge had indeed given the question of Mr Fletcher's evidence quite detailed thought. In effect, Mr Bridge was submitting that the Judge was being disingenuous.

21. This is in my view a clear mis-reading of the transcript. The judge's comment that he had not given any thought to the matter clearly related to the particular point of the capacity in which Mr Fletcher had made specific comments on the Appellant's transactions, and not to the general question of whether Mr Fletcher was an expert. This particular question did not arise in *Edgeskill* (see *Edgeskill* at [41]), as Mr Fletcher's evidence in that case did not explicitly refer to the appellant's individual transactions. I therefore reject Mr Bridge's characterisation of the Judge's comments in this regard.

22. The transcript for Day 5 continues:

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[1] It is agreed that the Judge's reference is to *Excel RTI Solutions Limited (in administration) v Revenue and Customs Commissioners* [2010] UKFTT 519 (TC), in which Judge Wallace concluded that there was considerable force in the submissions of counsel for the appellant that Mr Fletcher's evidence did not qualify as expert evidence, and that the Tribunal did not place any substantial reliance on it.

[2] *H T Purser Limited v Revenue and Customs Commissioners* [2011] UKFTT 860 (TC). In that case the Tribunal made a specific finding that Mr Fletcher was not an expert witness for these purposes.

MR FOULKES: Certainly, sir.

CHAIRMAN: But it's certainly a different –

MR FOULKES: I am thinking about the procedure tomorrow, would you wish for Mr Fletcher to give evidence of his expertise and then for submissions to be made before he goes any further, or would you – is there a different course?

CHAIRMAN: I would prefer to deal with it all together.

MR FOULKES: So we will hear his evidence then deal with it in submissions in due course.

CHAIRMAN: Yes.

MR FOULKES: Thank you.

CHAIRMAN: If we come to the conclusion that his evidence is to be – he is not an expert witness and we exclude that evidence, for the sake of argument, I think that can be done at the end.

MR FOULKES: Understood, certainly sir.

CHAIRMAN: I do not think the appellant would be prejudiced by that in any way, because I think probably the appellants are aware that, certainly this tribunal, has sat on a number of similar cases and we have heard Mr Fletcher's evidence on a number of occasions.

MR FOULKES: Certainly, sir.

CHAIRMAN: So if the appellant has any concerns of our abilities to exclude evidence, even though we've heard it either before or during the currency of this hearing, please be assured that we are well used to making those decisions, and that is the reason –

MR TUNNEY: I have seen that, sir, that is not a problem.

CHAIRMAN: Well you have been appointed. I think in the interests of justice, and also for the efficiency of the trial proceedings, I would ask you [*my comment: this is evidently addressed to Mr Foulkes*] to establish your case, where there's an expert witness, by submissions and Mr Tunney can make observations. But we will not be making a decision upon that until after the hearing.

MR FOULKES: That's very helpful. I now understand. So we'll be calling him in a normal way, essentially we will be adopting his evidence, I will not take him in chief. Thank you. I should add, again, so that everybody is aware, that in those submissions when they're made, we would argue that even if the Tribunal were to conclude that he was not an expert, that does not mean his evidence is necessary [sic] irrelevant. There is authority on that point as well from the Chancery Division I think, or Sir Andrew Park in any event.

CHAIRMAN: I think it would be helpful to have full argument.

MR FOULKES: Just so that everyone is aware of that before we hear him, we will seek to rely on it whatever its classification.

CHAIRMAN: Mr Tunney, any comments?

MR TUNNEY: No comments, sir.

CHAIRMAN: So he's scheduled to come at 9.45?

23. The expertise of Mr Fletcher was specifically raised by the Judge during the evidence of Mr Fletcher given on the following day. Mr Bridge took me in particular to the following passages from the transcript:

Day 6: 19 January 2012

Clarification regarding intervention by THE CHAIRMAN

CHAIRMAN: Mr Tunney, it may be helpful to amplify on my comments before the recess. I am doing this, not to be critical, but to explain the Tribunal's dilemma. There appears to be, to the Tribunal, three levels of challenge to Mr Fletcher's evidence. The first one is that he's not qualified to give an expert opinion. Now, in respect of that, the Tribunal is going to look at that particular matter, we are going to hear submissions in relation to that, because of previous Tribunal decisions, because there is a whole mixture, and clearly you may or may not have something to say in relation to that. On that issue, what may be relevant, and you may feel you've already covered that, is questions about Mr Fletcher's expertise in that particular area.

24. The Judge goes on at this point to explain the Tribunal's queries on the other two potential areas of challenge: that Mr Fletcher's analysis of the profit opportunities in the grey market is wrong, and his analysis in relation to the Appellant itself.

25. Mr Bridge also referred me to the following passage from Day 6:

MR FOULKES: ... can I just raise an issue, and that's this: as you sir identified a little earlier today, submissions will be made in respect of the expertise point. Mr Tunney has made – or asked questions of the witness that were clearly directed at that issue. But, clearly, I simply want to make plain at this stage that any submissions that are made to this Tribunal in due course must be based on the evidence that's been heard in this Tribunal. Although there have been a number of authorities in different directions on this issue they are not sources of evidence. I am anxious that anything that needs to be put on behalf of the appellant in order to base its submissions to you and to Ms Myerscough in due course, is dealt with in evidence. It's not for me to raise issues that have not been raised, but I am also anxious that things are dealt with properly and fairly and that sufficient matters have been –

CHAIRMAN: I think I have given Mr Tunney sufficient steer. Is there any questions that you want to ask in respect of Mr Fletcher's expertise, other than what you've asked because I think you're principal question you have asked is that he has no direct experience in wholesaling trade.

MR TUNNEY: I would think that that general point is the main one, linked to all the subsidiary issues. I would hope that all the subsidiary issues that I have put in relation to the simple differences of opinion – and I could formally say to Mr Fletcher that we do not accept that your

> expertise is sufficient to embrace the sort of trade in which PNC has engaged itself. Your experience appears to be at a much higher level, and therefore we should place more reliance on the real life experience of the directors in preference to yourself.
>
> A. (Mr Fletcher): I think in answer to that, I've explained through my witness statements the methods that I've used to assemble the information. The experience that I have is clear and I have not sought to shy away from the fact that I have not been directly involved in the trading of phones in the grey market as PNC has been. But my view is that I have sufficient knowledge of the distribution market and of the way in which the opportunities for grey market trading arise, that my evidence is of assistance to the Tribunal.
>
> CHAIRMAN: Thank you.
>
> MR FOULKES: One question that was raised in cross-examination was a link between KPMG and Nokia. That was established, but nothing was put to the witness about why that might be significant. If it's suggested that that link has relevance, it ought to be put to the witness as to why, so he can answer it.
>
> CHAIRMAN: Do you want to develop it further?
>
> MR TUNNEY: I do not think it's necessary to develop it further, sir. I think it would be impolite.

26. Mr Bridge also referred me to a further passage, this time from Day 7, in which the Judge raises questions of Mr Fletcher. In particular, the Judge asks Mr Fletcher to explain how his analysis stands up to the facts, referring to the fact that there is no dispute that the deals have been done and that the Appellant has made profits from those deals, and specifically asks Mr Fletcher whether it crossed his mind that if the profits were made, then Mr Fletcher's analysis is completely wrong.

27. In these circumstances Mr Bridge submits that the Appellant cannot receive a fair hearing from the Tribunal as currently constituted. He says that regrettably what emerges from the transcripts, particularly the fact of the Judge not having alluded at all to the Tribunal's decision in *Edgeskill* and his own decision in refusing permission to appeal in that case, gives rise to a fear of bias, in the sense of pre-determination. There is at the very least, he argues, a perception of bias by reason of the previous decisions.

28. Mr Bridge recognised that, as appears from *Locobail*, judges are rarely perceived to be biased on the basis of previous judicial decisions. It is in the nature of the judge's role that the judge will bring an open mind to each new case. But Mr Bridge submits that in these, what he described as "unique", circumstances, it is the precise decision to be ruled on in this case that the Judge has determined in a previous case. He argues that the question of whether evidence of Mr Fletcher is admissible in each of those cases is the same question.

29. On this point, as appears from the transcript of Day 6 that I have extracted above, the question of admissibility, independently of the question whether Mr Fletcher can properly be an expert witness, remains an open one. It is not a question

that I need to, or indeed should, resolve at this stage. But in order to put myself in the position of the fair-minded and informed observer assessing whether there is a real possibility of bias or pre-determination, I assume for this purpose that the fair-minded observer would have in mind the possibility that the questions are identical.

Conclusions on pre-determination

30. This is an important application in an appeal of great significance to the Appellant and those associated with it. As well as the appeal concerning a substantial financial sum, there is the inevitable prospect of stigma attached to connection to or knowledge of fraud. Any suggestion of judicial bias, in the widest sense, must be considered with the utmost seriousness.

31. Having given full consideration to the materials provided to me, and to the helpful submissions advanced by Mr Bridge and Mr Foulkes, I have come to the firm conclusion that this application falls to be refused.

32. As I described earlier in this decision, the law talks of the fair-minded and informed observer. In my view, that fair-minded and informed observer would be aware of the ability of a judge to listen to argument, to take account of different circumstances arising in different cases and different factual backgrounds and not to be wedded to a particular view that might have been adopted in another case.

33. The fair-minded observer, looking at the interventions of the Judge in this case, as set out in the transcript, would not conclude – as Mr Bridge asserted – that these were the actions of a judge preparing the ground or in any way justifying, in advance, a decision that had already been taken. I reject Mr Bridge's suggestion that the Judge's questioning of Mr Fletcher was merely "dotting the i's and crossing the t's", and in my judgment the fair-minded observer would take the same view.

34. Taking the Judge's interventions as a whole, the fair-minded observer would conclude, as I do, accepting Mr Foulkes' submissions in this regard, that the comments of the Judge were entirely apt to require the Respondents to demonstrate, in the light of a number of contrary authorities, that Mr Fletcher was an expert in the relevant field. In addition, the judge's comments, particularly those addressed to Mr Tunney, were wholly appropriate to assist Mr Tunney, as the Appellant's representative, and having regard to his lack of legal qualifications, to challenge any such submissions made by the Respondents.

35. All the evidence I have seen from the transcript points in the direction of the Judge having an open mind, open to further submissions in the light of the evidence. The fair-minded observer, who would of his nature be fully informed of the previous decisions of the Judge and of the Tribunal of which he was a member, would not in my view conclude that the judge had pre-determined the issue. The Judge makes very plain that he is open to the possibility of the exclusion of the evidence, and that in that event the Tribunal will have no difficulty in disregarding it.

36. Mr Bridge particularly criticised the Judge for not referring, in the context of the differing conclusions reached by a number of differently-constituted Tribunals, to his own conclusion on the question of Mr Fletcher's expertise in *Edgeskill* and his rejection of the appellant's ground of appeal on that issue in that case. I have considered very carefully that submission, but I see no force in that criticism. It does not in my view, show that the Judge has pre-determined the issue, or demonstrate any lack of impartiality on the part of the Judge. It is entirely consistent with the Judge having or retaining an open mind. Unlike Mr Bridge, I am unable to conclude – and I find that a fair-minded observer would likewise be unable to conclude – that the failure by the Judge to specifically raise the previous findings gives rise to grave concerns as to the Judge's impartiality.

37. A fair-minded observer would not, in my view, conclude on this basis that the Judge had pre-determined the issue, and was concealing that pre-determination. In other words that the Judge was doing something that would be wholly contrary to the ordinary instincts of a judge for whom fairness in the proceedings was paramount. The fair-minded observer would take account of the fact that there is nothing in the conduct of the proceedings to suggest otherwise than that the Judge has acted with scrupulous fairness throughout. The fair-minded observer would conclude, as I have, that the Judge did not bring his own decisions in *Edgeskill* to mind because he had an open mind about the issue of Mr Fletcher's evidence in this case. I agree with Mr Foulkes that for that reason it was evidently not apparent to the Judge that this was a case of potential or actual bias.

38. Mr Bridge argues that this is a unique case, on the basis that the Judge is asked to decide the very same question that he decided in *Edgeskill*. I have, as described above, assumed for this purpose that this is the case, and that the fair-minded observer would make the same assumption. However, even on that assumption, I do not consider that this can distinguish this case from the reference to previous judicial decisions in *Locobail*. There is no evidence that the Judge had a closed mind; all the evidence points to the contrary.

39. The judge cannot in my view be said to be biased towards his own earlier decision. The fair-minded observer would take into account the judge's oath, his training and experience, and would not assume, as in my judgment the Appellant's submission does, that the Judge might cling to a previously held view out of fear of embarrassment or criticism. To do so in the absence of any evidence that this is the case would, in my view, ignore the fairness that must be attributed to the observer.

40. In summary, I see no basis for concluding that Judge Tildesley had anything other than an open mind as regards the issue of whether Mr Fletcher is an expert witness, and the admissibility of Mr Fletcher's evidence. The fact of the judge's earlier decisions in *Edgeskill* does not, in my judgment, amount to pre-determination of the issue. At most those earlier decisions might give rise, in the mind of the fair-minded observer, to a risk that the Judge might be pre-disposed to the earlier conclusion but, on the evidence of the Judge's conduct of the January hearing, the fair-minded observer would conclude that the Judge would not only be prepared to hear argument and submissions to the contrary, but to actively require the

Respondents to make submissions and to encourage the Appellant to argue against those submissions. There is in my judgment no suggestion in the evidence before me that the Judge had a closed mind or approached the question of Mr Fletcher's evidence with anything other than impartial consideration.

Veracis Limited

41. I turn now to the second limb of the application, concerning the conclusions reached by the Judge in *Edgeskill* about Mr Plowman of Veracis Limited and his evidence in that case. I can deal with this quite shortly.

42. At the outset of the hearing the Judge made it known that he had previously heard evidence from Mr Plowman, the owner and director of Veracis Limited. In *Edgeskill*, at [279], in a section headed Due Diligence in which the Tribunal considered evidence of both Mr Rashid and Mr Plowman, the Tribunal said:

> "Mr Plowman in cross examination made the curious statement that he did not want to get more evidence in. He was in enough trouble already."

In its decision the Tribunal expressed certain reservations about the evidence of Mr Plowman, but also stated (at [574] that it attached weight to the contents of the Veracis reports and Mr Plowman's evidence that the Appellant should make an informed choice on their contents. However, the Tribunal also found that there was scant evidence that Mr Rashid ever took an informed decision. His decision, the Tribunal found, was always to do business.

43. Mr Plowman is not a witness in these proceedings. Nevertheless Mr Bridge submitted that it was possible that the Judge had reached certain conclusions about Mr Plowman and Veracis as a result of what he had heard or seen in other proceedings. He referred to certain questions raised by the Judge in these proceedings on 25 and 26 January 2012, concerning whether Veracis actually prepared the reports they produced for the Appellant, and whether Veracis were properly appointed by the Appellant.

44. Mr Foulkes told me that in this case the Appellant produced reports from Veracis Limited. There was some confusion about how it had sourced some other documents (credit reports) and Mr Andrews, giving evidence for the Appellant, concluded in respect of at least one such report that he had obtained it ex post facto from an associate unrelated to the Appellant. In these circumstances, said Mr Foulkes, when there was similarly some confusion about when the Veracis reports were obtained, the Judge asked whether there was a diary entry or letter of instruction available which might assist.

Conclusions on Veracis Limited

45. There is nothing in the submissions advanced on behalf of the Appellant that comes close to demonstrating, by reference to the comments of the Judge in *Edgeskill*, any possibility of risk of actual or perceived bias against the Appellant when dealing with the Veracis evidence in this case. The circumstances described fall squarely into the category of cases described in *Locobail* in the following terms (at [25]):

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness unreliable, would not without more found a sustainable objection."

46. There is nothing more to this ground of the application, and it must accordingly fail.

Decision

47. For the reasons I have given I refuse the Appellant's application.

Application for permission to appeal

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.

I should note that I rejected an application by the Respondents to truncate the period of 56 days for an application for permission to appeal. However, I would nevertheless urge the Appellant, in the interests of settling a question of this nature as soon as possible, to endeavour to make any such application at the earliest opportunity.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 16 May 2012