



TC07787

PROCEDURE – application to set aside decision (or part) under Rule 38 of the F-tT Tax Chamber Rules 2009 - documentary and other procedural irregularities under Rule 38(2(a)-(c) established - not in the interests of justice to set aside the decision or part of it - application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2015/06894

BETWEEN

JULIAN MAPLES

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted remotely by video in private on 7 July 2020

The Appellant in person

Mr Paul Marks of HMRC's Solicitor's Office & Legal Services for the Respondents

DECISION

INTRODUCTION

1. This is an application by Mr Maples (or the “**appellant**”) (the “**set aside application**”) made on 24 August 2019, to set aside a decision of the First-Tier Tribunal (“**FTT**”) (Judge Harriet Morgan) released on 12 April 2019 (the “**Decision**”). By the Decision the FTT dismissed the appellant’s application of 4 June 2017 that the respondents (or “**HMRC**”) be barred from taking any further part in the proceedings (the “**barring application**”).
2. The set aside application was heard in private pursuant to an earlier direction by the FTT that all hearings in these proceedings should be held in private.

BACKGROUND

3. The underlying issue in these proceedings concerns a payment (the “**leaving payment**”) made to the appellant on his retirement in or around 31 January 2004, from the partnership Addleshaw Goddard (“**AG**”). The leaving payment amounted to £393,000, and was treated by the appellant as a payment of a capital sum. He returned it as such in his 2004 tax return. He accounted for capital gains tax on it. Following an enquiry into the partnership return submitted by AG for the accounting period to 30 April 2004, HMRC opened an enquiry into the appellant’s 2004 tax return. Following closure of that enquiry, HMRC issued a discovery assessment on 1 April 2010 in which they assessed the appellant to income tax on the leaving payment. On 25 November 2015 the appellant appealed against this assessment to the tribunal and on 4 June 2017 made the barring application. That was heard on 28 November 2017 and the Decision was released on 12 April 2019.
4. From the foregoing brief chronology, it will be appreciated that the underlying issues have yet to be substantively considered by the FTT. There are two fundamental issues. Firstly whether HMRC’s discovery assessment is valid. And secondly, if it is, whether the leaving payment is subject to capital gains tax or income tax.
5. The central issue which the Judge had to determine in the barring application was whether the (deliberate in the appellant’s view) destruction of documents relevant to these two issues, by HMRC, meant that HMRC had no real prospect of succeeding in the proceedings and should be barred from taking any further part in them.
6. The issue which I have to determine is whether to set aside the Decision in whole or in part.
7. The set aside application is governed by Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules (“**Rules**”) 2009 which provides as follows:

“38(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if-

 - (a) the Tribunal considers that it is in the interests of justice to do so; and
 - (b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are-

- (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
 - (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
 - (c) there has been some other procedural irregularity in the proceedings; or
 - (d) a party, or a party's representative, was not present at a hearing related to the proceedings.
- (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.
- (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

THE PARTIES POSITIONS IN BRIEF

8. Whilst I set out the parties respective positions in detail later in this decision, it is worth dealing with them briefly at this stage.
9. The appellant submits that there were general procedural irregularities (under Rule 38(2)(c)) ("**general procedural irregularities**") as well as specific documentary irregularities under Rules 38(2)(a) and (b) ("**documentary irregularities**"). These documentary irregularities meant that the Judge in the barring application did not have full and complete information when she considered that application. The general procedural irregularities resulted in the appellant not being given an opportunity to answer issues raised either by HMRC or by the Judge herself. Although he does not say so explicitly, it is implicit in his submissions that it is in the interests of justice to set aside the Decision.
10. HMRC deny that there have been any general procedural irregularities or documentary irregularities. But even if there were, they were not relevant to the issues that the Judge had to consider in the barring application (even though they might be highly relevant when considering the underlying issues in these proceedings). All the Judge in the barring application had to consider was whether HMRC's position was fanciful. And in any event it is not in the interests of justice to set aside the Decision.

SOME GENERAL POINTS ON RULE 38

11. Neither party has drawn my attention to any case law which considers the application of Rule 38, but I have read the cases of *Daksha Fraser v HMRC* [2012] UKFTT 189 and *Paul Daniel v HMRC* [2014] UK FTT 916 ("**Daniel**"). Whilst these cases are not binding on me I agree with the following general principles which they contain:
- (1) Rule 38 is intended to deal with procedural irregularities.
 - (2) The test is whether a fair-minded observer would say that the case has been decided in a way which could not reasonably have been anticipated.

(3) Rule 38 does not provide a means of challenge to the decision itself or the reasons on which it is based. It does not open the door to a wholesale re-examination of the evidence.

(4) This Tribunal should be mindful to avoid acting as an appeal tribunal and stray into territory which should be more naturally dealt with by way of an appeal to the Upper Tribunal.

(5) In considering an application under Rule 38, I can only consider whether it is in the interests of justice to set aside the decision under Rule 38 (1)(a) if one of the conditions of Rule 38(2) is satisfied. If no such condition is satisfied, the interests of justice provision have nothing to bite on. It is not an alternative or freestanding ground for set-aside.

(6) “8. For an application to succeed under rule 38 there has to be a procedural irregularity, and the Tribunal must consider that it is in the interests of justice to set aside the decision or part of it. There are two general points to be made on the application of rule 38. The first is that there must be a link between the procedural irregularity and the injustice that must be remedied by a set aside. It is not sufficient for an applicant to identify a procedural irregularity, and then to make a general, and unrelated, attack on the findings of the Tribunal. Such a challenge should more properly be made by way of an appeal. Secondly, in considering the interests of justice, the Tribunal must have regard to all the circumstances, and not just the procedural irregularity and what has flowed from it. Those circumstances include the availability of an appeal to the Upper Tribunal, and consideration of whether that would best achieve justice in a particular case.”
(Daniel)

(7) The wording of Rule 38(2)(c) “there has been some other procedural irregularity.....” makes clear that the documentary irregularities are specific examples of general procedural irregularities.

12. To the foregoing general principles, I would add that when considering the documentary irregularities, I need to consider two points. Firstly whether the documents “relate” to the proceedings (and I would add here that this is a very broad term and, for reasons given later in this decision, I do not consider that, as HMRC seem to suggest, that “relate” should be read as being “relevant to the issues in” the proceedings). And secondly whether those documents were sent to the relevant person at an “appropriate” time. What is appropriate will depend on all the circumstances of a particular case.

THE PARTIES SUBMISSIONS

13. I am grateful to both the appellant and to Mr Marks for their thorough and helpful written and oral submissions. Whilst I have carefully considered these in reaching my conclusions, it has not been necessary to refer in detail to each and every argument advanced by them.

The appellant’s submissions

The documentary irregularities

14. As regards the Rule 38(2)(b) condition, namely that certain documents relating to the proceedings were not sent to the Tribunal at an appropriate time, the appellant submits

that the listing information required the parties to agree a bundle (“**bundle**” or “**bundles**”) for the hearing. He accepts that HMRC were not obliged to produce that bundle but they had agreed to do so. He asked HMRC to include certain documents in that bundle namely (and importantly):

- (1) The whole of his notice of appeal (the “**notice of appeal issue**”).
 - (2) All of the correspondence between himself and HMRC Officer Sunil Jethwa (“**SJ**”) (the “**SJ correspondence**”).
15. If the whole of his notice of appeal (which runs to several hundred pages) had been included in the bundle, the Judge would have seen all details relating to the acceptance of his tax return by Officer Caroline Dartnall, which relates to his submission that because Officer Dartnell had accepted his return, HMRC could not then subsequently raise a discovery assessment (the “**Caroline Dartnall point**”).
 16. SJ was the HMRC Officer who was deputed to deal with the appellant’s Data Protection Act request for information. These documents would have shown the Judge the difficulties which the appellant faced in obtaining this information from HMRC.
 17. The appellant had left AG in difficult circumstances and it was not possible for him to correspond directly with AG. AG’s position was important to the technical issues under consideration in the appeal and the only way that the appellant could obtain information about their position was via HMRC who were investigating the partnership’s tax position and had conducted interviews with the managing partner of AG. The appellant had obtained, from HMRC, copies of documents which related to the communications between HMRC and the managing partner (and with AG generally) and, in an email dated 14 November 2017, he sent that information back to HMRC with a request that it was to be included in the bundle (which it was not). One of the items of correspondence which should have been included in the bundle was a letter to HMRC dated 7 September 2009 in which the appellant raised the Caroline Dartnall point. The Judge should therefore have been made aware of this, and also that from that date, HMRC should have retained documents relating to that point which they now say they have (properly) destroyed.
 18. Three case reports which HMRC had included in their original bundle of documents which they had sent to the tribunal on or around 5 October 2017 had not been included in the bundle of authorities which were handed to the Judge on the day of the hearing of the barring application. These cases contained dicta which the appellant considered were of assistance to his case regarding disclosure of information in litigation.
 19. As regards the Rule 38(2)(a) condition namely that certain documents relating to the proceedings were not sent to or not received at an appropriate time by the appellant, the appellant submits that he only received the hearing bundle on the morning of the hearing. This meant that he was unable to identify missing documents and also unable to assist an HMRC witness, Officer Battcock, to find documents whilst giving his evidence.
 20. Furthermore HMRC delivered their skeleton argument only 4 working days before the hearing despite the Judge having ordered earlier delivery.

The general procedural irregularities

21. Turning now to the general procedural irregularities, the appellant submits as follows.

22. One of the reasons why the Judge comments in her Decision that she (paraphrased here) cannot see any scope for arguing that by dint of Caroline Dartnall's acceptance of his return in 2004, HMRC are precluded from raising a discovery assessment, was because the Judge had not seen his full notice of appeal.
23. The Judge, in her Decision, refers to a letter from Mr Baker (the appellant's alleged accountant at the relevant time). Her take from the letter is that Mr Baker did not act for the appellant, yet the appellant has not seen such a letter. He surmises that it might have been a letter dated 26 July 2004, but this was not something that the Judge raised at the hearing and the appellant did not realise that she was planning to rely on that letter. Had he realised it, the appellant would have referred to other correspondence, which he would have put to the Judge, showing that, to the contrary, Mr Baker was acting for him at the relevant time.
24. Finally, Officer Battcock was deemed by the Judge to have given "credible evidence" regarding a meeting that he had had with Mr Jones (AG's managing partner) in 2009. That meeting concerned, amongst other things, how Mr Jones was managing out AG partners. Officer Battcock sent a note of that meeting to the appellant and approximately six months later a further document which the appellant describes as a "statement of case" was compiled, by Officer Battcock which contained six detailed pieces of information which Mr Jones had apparently given to Officer Battcock. These were not in the notes of meeting (or at least some of them were not). The appellant had been in correspondence with Officer Battcock concerning the omitted information whose evidence to the Judge was that he might have destroyed his handwritten notes of the meeting. At the hearing, the Officer admitted, in giving evidence, that he could not explain how he came to ascribe some of the statements to Mr Jones in that statement of case. The appellant thinks that that admission was not heard by the Judge since if she had heard it is difficult to see how she could say in her judgment that "*he did not keep his handwritten notes because he considered the later written note contained an accurate record*". The Officer had conceded, by that admission, that he could not otherwise explain how he came to remember all the statements he had accorded to Mr Jones in the statement of case.

HMRC's submissions

General

25. Mr Marks submitted that this was an unusual case in that the set aside application was being brought against a decision which had been made in a preliminary (rather than a final) hearing. When considering the barring application, case law shows that the Judge should not conduct a full or even a mini hearing. The law relating to strike out is highly pertinent and to succeed the appellant would have needed to establish that the respondents' case was fanciful, or imaginary, or untenable, or that it was bound to fail. To consider this a Judge considering the barring application needed evidence only that a relevant decision had been made and appealed (in other words there had been a discovery assessment), the basis on which the respondents had made the discovery assessment, and the evidence which supported their assertion that a valid discovery assessment had been made at an appropriate time. It was his view that this evidence comprised simply HMRC's statement of case, and the witness statements (along with the associated relevant documents).

26. The appellant's basis for the barring application was that HMRC had no reasonable prospect of establishing the facts necessary to support their opposition to his appeal due to the destruction of documents which the appellant alleges had been deliberately destroyed. These destroyed documents would have shown that the respondents' discovery had been made earlier than the discovery assessment which was made in April 2010.
27. In order to demonstrate that the respondents had no real prospect of opposing the appellant's claim that the discovery had been made earlier than April 2010, he would need to establish that documents firstly existed to support this claim and also that they had been deliberately destroyed.
28. However his barring application was doomed to fail given that even if the Judge had decided that the discovery had been made before April 2010, the case would have been stood behind the case of *Raymond Tooth* which is currently being considered by the Supreme Court.
29. The procedural irregularities (if any) must therefore be seen in the context of the issues which the Judge needed to consider in the barring application and not through the lens of a full trial. In this context, there were no procedural irregularities, nor late service of documents, since the irregularities or late service (if any) were not relevant to the evidential issues that the Judge needed to consider in the barring application even if they might be relevant had the Judge been conducting a full trial of the issues.

The documentary irregularities

30. Mr Marks submits that the full notice of appeal is only relevant to a hearing of the substantive issues and was not relevant to the issues which the Judge needed to consider in the barring application. In any event the full notice of appeal had been filed by the appellant with the tribunal and therefore had been sent to it at an appropriate time. The three case reports which were omitted from the bundle which was brought to the tribunal on the day of the hearing had been in an earlier bundle which had been submitted to the tribunal on 5 October 2017. HMRC's skeleton was not served late since it was served within the extension which HMRC had sought and been granted for service. The bundles were brought to the court on the day in accordance with the listing information. No directions have been made concerning filing or exchange of witness statements, and in the absence of that HMRC had sought directions from the tribunal. Having heard nothing by 21 November 2017 regarding filing of witness statements, HMRC filed its statements (but not the exhibits). Even if the appellant had not received electronic copies of these exhibits prior to the hearing, hard copies were given to him at the hearing and little prejudice had been caused to the appellant since these exhibits consisted mainly of correspondence between the appellant and HMRC of which the appellant was aware. The correspondence which the appellant alleges was omitted from the bundles including the SJ correspondence was not relevant to the issues which the Judge had to consider in the barring application since they would not have had an impact on the Judge testing whether HMRC's defence was based on an "absence of reality". The appellant made no application to adjourn the hearing on the basis that documents which he had anticipated being in the bundle were not in the bundle, nor that the bundles or any other documents had been served late on him.

The general procedural irregularities

31. As regards the general procedural irregularities, HMRC submit that the documents omitted by not including the full notice of appeal in the bundle, were not relevant to testing the fanciful nature of HMRC's defence which was the issue in the barring application. The appellant had the opportunity of cross-examining HMRC's witnesses at the hearing and the Judge was able to ask questions of them too. So she was able to come to a conclusion regarding the substance of HMRC's position on the basis of that evidence. Whether that evidence was sufficient to establish that, on the balance of probabilities, the discovery was made in April 2010 was not the issue which the Judge had to consider. That is the issue for a full trial. If the appellant disagrees with the conclusion that the Judge came to on the evidence before her, then that is a matter for appeal to the Upper Tribunal and not for this set aside application.
32. Furthermore the Judge is entitled at the hearing to "take her own advice" and deal with matters that were not necessarily raised by either party at the hearing. By doing this, the Judge does not generate a procedural irregularity.
33. She could therefore consider the letter from Mr Baker, and in any event this is something which should be dealt with at the final hearing and was not relevant to whether HMRC should be barred from defending the proceedings.

Interests of justice

34. In addition to the general points set out above, Mr Marks made the following specific points regarding the interests of justice consideration.
35. Whether the respondents deliberately destroyed documents which would have shown an earlier discovery should be tested at a final hearing when the regular "balance of probabilities" test is relevant.
36. For the purposes of the barring application, the appellant must show that the respondents defence must fail at trial, and in the absence of that the matter should be tested at a full trial.
37. It would not be in the interests of justice to set aside the Decision simply because documents supporting the appellant's submissions (which were not relevant to the testing of the substance of HMRC's defence) were not sent to the appropriate person.
38. Setting aside the Decision would necessitate a rehearing, which would delay proceedings of the matter which has already been delayed some nine years from the original decision. Witnesses memories (particularly where the burden is on HMRC to show carelessness) are already "strained" and further delay would present a very real threat that evidence would further deteriorate.
39. One of HMRC's Officers required to give evidence has already retired and another is due to retire shortly. Although the retired Officer is prepared to come back and give evidence, further delay might result in replacement witnesses having to be called which would have an impact for both parties.
40. The appellant, notwithstanding his failure to bar HMRC's opposition, still has the opportunity of presenting his arguments regarding the timing of the discovery assessment and the destruction of documents at a full hearing.

DISCUSSION

The documentary irregularities

41. The provisions of Rule 38(2)(a) and (b) require me to consider which documents relate to the proceedings and what comprises an appropriate time.
42. I remind myself that it is for the appellant to establish the existence of these conditions, on the balance of probabilities, and that he should also establish a link between these conditions and the injustice which he says resulted from the satisfaction of those conditions.
43. As I have mentioned above, “relating to” (which is the statutory wording) is to my mind a very broad term. I also consider that the word “sent” is to be construed broadly and so includes the handing over of documents and not only the sending of them by mail or courier, or via some electronic or other medium. The Rule is designed to deal with procedural irregularities, and these provisions are intended to ensure that the parties and the court are in possession of the related documents so that there can be a fair trial. It seems to me irrelevant how that is achieved. For example, in this case, had the bundles been physically handed over by an Officer of HMRC to the appellant several days before the barring application, I can see no grounds for the appellant alleging satisfaction of the Rule 38(2)(a) and (b) conditions on the basis that they were not “sent” to him. And I have no doubt that the appellant would not seek to bring such a complaint.
44. It is clear from both the Decision and also from the appellant’s skeleton arguments which he prepared for the barring application, initially on 6 October 2017 and then, via two further editions, the version which he handed to the tribunal on the day of the hearing on the 28 November 2017, that it was his view that by deliberately destroying documents HMRC had no reasonable prospect of establishing the facts necessary to support their assertion that the discovery assessment had been made on 1 April 2010 and not earlier.
45. It is my view, therefore, that any documents which relate to the discovery assessment or the destruction of documents are within the ambit of the phrase “relating to the proceedings”.
46. I am not persuaded by Mr Marks’ submissions that because the Judge in the barring application only had to decide whether HMRC’s position was fanciful (this is shorthand for the case law tests which were discussed in the Decision and in Mr Marks’ submissions and should not be treated as the definitive test which is of course more nuanced), it is only those documents which the Judge needed to see for the purposes of that test which fall within Rule 38 (2) (a) and (b). Whilst I accept that what the Judge had to decide in the barring application is a highly relevant circumstance for the purposes of my consideration of the interests of justice, I do not accept that it cuts down the scope of the documents which come within the ambit of “relating to the proceedings” for the purposes of the Rule 38(2) documentary conditions.
47. It is my view that the whole of the appellant’s notice of appeal, the SJ correspondence, and the correspondence showing HMRC’s awareness of his interest in the documents all relate to the proceedings. The notice of appeal sets out the appellant’s case in full. It is the basis of his appeal. Whilst some of its contents may relate, only peripherally, to his core case, all of it relates to the proceedings. It is the basis for the proceedings. Given that one of the salient issues in the proceedings as the timing of the discovery, and, as a secondary issue, the destruction of documents, any documents which relate to either

relate to the proceedings. The SJ correspondence and the correspondence which illustrate HMRC's awareness of the appellant's interest in the documents relating to the proceedings (both of which he deals with, at some length, in his skeleton argument of 28 November 2017) relate to the destruction of documents point and HMRC's motives for their destruction. And so relate to the proceedings.

48. Furthermore the appellant specifically asked HMRC to include these documents in the hearing bundle.
49. In an email to HMRC on 22 November 2017 the appellant says "*I see I will need at the hearing next week to refer the Tribunal to my appeal. Please could you include it in the bundle you will be preparing for the hearing*". Unfortunately the full notice was not included.
50. On 8 October 2017 the appellant had emailed HMRC sending HMRC the SJ correspondence saying that "*I presume at some point I should let you have for the hearing bundle, details of any documents to which I might need to refer at the forthcoming hearing..... I thought I should let you have my documents now... These are attached apart from the document sent to me by Sunil Jethwa pursuant to his disclosure under the Data Protection Act. Unfortunately they were almost all hard copy but HMRC will have retained copies.*"
51. I can see nothing in the directions on 23 August 2017 which deals with responsibility for bundling. And the notice of hearing letter simply says that the parties should agree a bundle for the hearing. It does not say who has responsibility (if anyone) for creating that bundle nor when it should be served by the creator on either the tribunal or the other party. But in having taken on the responsibility for creating the bundle, as Mr Maples says, it should contain all documents which were agreed to go into that bundle, and it was up to HMRC to include in the bundle all the documents which Mr Maples had asked HMRC to include (or, to indicate following his request for that inclusion, their disagreement to that inclusion, on the basis for example of what they now say, namely that they were not relevant to the barring application).
52. I am not blaming HMRC for failing to include these documents in the bundle. It seems to me from an examination of the relevant directions and email exchanges, that HMRC were not entirely clear what was required of them, in certain circumstances, and certainly as regards the submission of witness statements, they commendably sought to clarify what their obligations were. And, as was suggested by Mr Marks, it was open to Mr Maples at the hearing to seek an adjournment on the basis that if they were relevant to his case, their exclusion would cause him prejudice. And he made no such application.
53. But as things turned out these documents were not sent to the tribunal which they should have been.
54. I now need to consider what was an appropriate time for them to be so sent. The use of the word "an" rather than "the" strongly suggests to me that there is no single time when the documents must be sent. Having sent them once, I do not believe that that is an end to it if there is another appropriate time when they should be sent.
55. To my mind, the appropriate time for the sending of these documents was at or around the time of the barring application. The important thing was that those documents were made available to the tribunal and to the other parties at or around the time of the barring

application so that they (in the case of the parties) had time to prepare their case and (in the case of the tribunal) the Judge had all the information available to her. The fact that the full notice of appeal had been sent to the tribunal when Mr Maples made his original appeal does not mean there is not another appropriate time for their sending. Clearly all the documents which relate to the issues in proceedings should be included in the bundle which is given to the tribunal at or prior to the hearing. The Judge should not be expected, unless he or she is specifically directed to documents not included in the bundle, to scrutinise such documents off his or her own bat.

56. So an appropriate time for the inclusion of the full notice of appeal, the SJ correspondence, and the correspondence showing HMRC's awareness of the appellant's interests in its documents was at or around the time of the barring application, and they should have been included in the bundle provided for that hearing by HMRC.
57. I deal with the timing of the provision of that bundle, below.
58. The same goes for the three case reports which had been included in the respondent's authorities bundle of 5 October 2017 but which were not in the bundle given to the tribunal for the barring application. Again, I deal with the consequences of this later in this decision, but I think the appellant could justifiably expect that cases that he had thought would be included in HMRC's bundle, on the basis they had been included in an earlier bundle, would be before the court in the bundle it had to consider at the barring application. And I do not accept HMRC's submissions that because the 5 October 2017 bundle had been sent to the tribunal in October 2017, and a hard copy was, apparently, available on the day of the barring application, those documents were sent the tribunal at an appropriate time. There were clearly sent an appropriate time in October 2017, but they should also have been sent at a second appropriate time namely prior to the barring application. And the appropriate format of those documents was in the hearing bundle for that application.
59. So far I am with the appellant in that the documents which he says relate to the proceedings and which were not included in the bundle for the barring application fall within the ambit of Rule 38(2)(b).
60. But, as I have said above, there needs to be a link between the absence of these documents in the bundle and the injustice which he says can only be remedied by setting aside the Decision.
61. I have considered in some detail the appellant's skeleton argument of 28 November 2017 which was the version which he handed up to the tribunal on the morning of the barring application.
62. From that it is clear that he was raising; the Caroline Dartnall point; the fact that in his view HMRC had deliberately destroyed documents (although he use the phrase that the destruction could not have been inadvertent and gives reasons for that submission - see for example paragraphs 3.5.1.1, 3.5.1.2.3, 3.5.1.3, 3.6 and 3.7 of that document); he refers to selected extracts from the SJ correspondence; and also refers to five cases (namely *Race*, *Swain v Hillman*, *David Bignell*, *the Ophelia*, and *Anthony Peter Broughton-Head*).
63. But nowhere in that submission does he consider or refer to the documents which were not included in the bundles for the hearing. I can see no reference in that submission to

paragraph 7 of section C of his notice of appeal which in his submissions before me he claims is highly relevant to the Caroline Darnall point. He did not refer to any of the three cases which were not included in the hearing bundle. Although he refers to some of the SJ correspondence (and commendably includes extracts therefrom in that skeleton argument) it seems to me that those extracts and references are to pieces of the SJ correspondence which were included in the hearing bundle for the barring application. For the set aside application hearing before me I was provided with a number of bundles, one of which included the full SJ correspondence. I was told by Mr Marks (and this was not challenged by the appellant) that approximately 100 pages of the 500 or so pages so included had been included in the barring application hearing bundle. And the references that the appellant makes in his skeleton argument are to documents in those 100 pages.

64. Furthermore in his submissions to me at the set aside application, the appellant did not take me to a single piece of missing correspondence or any of the missing documents, and make a submission that because they were absent from the hearing bundle at the barring application, he was unable to present his case fully at the barring application.
65. His complaint is that, broadly speaking, because they were not in that bundle the Judge did not have an opportunity to consider them. But I cannot see anywhere that he drew the attention of the Judge at the hearing to any deficiencies in the bundle and the prejudice that he had therefore suffered in that he could not present his case fully and completely. I cannot see in his skeleton argument of 28 November 2017 any reference to documents which were not before the tribunal at the barring application. The appellant has provided as part of his submissions for the set aside application a useful note of the barring application which he made at or around the time of that application in which he records his view of the proceedings. From this it seems that he made his application first and handed up and spoke to his skeleton argument of 28 November 2017. There is nothing in the note (and he made no submission at the set aside application to this effect either) that even though the bundles had been served on him only that morning, when making his submissions at the barring application, with reference to the bundles, he came across documents which he anticipated would have been the bundles but were not so included. He seems to have made his submissions on the basis of his skeleton argument and raised no point to the Judge that documents which he anticipated being in the bundle were not so included.
66. So the question is whether the appellant has established the requisite link between the absence of the documents in the bundle and the injustice which he believes has been visited on him by the Decision. I think, on balance, that he has, notwithstanding the comments I make above regarding his lack of submissions in the set aside application regarding prejudice that he has specifically suffered as a result of the absence of those documents. As I say, his complaint is largely that the Judge did not have the full suite of documents before her to which she could have referred had she chosen to do so. The test is not one of prejudice (at least at this stage of the Rule 38 analysis). There is clearly a general link between the documents which were not in the bundles, the appellant's case and the issues in the proceedings. He had raised all of these issues in his skeleton argument, and to my mind all documents which relate to those issues should have been before tribunal at the barring application. This includes the three cases, even though the appellant makes no submission that the Judge, in her Decision, came to an incorrect conclusion of the relevant law. Had he done so, of course, this would be a matter for an appeal to the Upper Tribunal point of law rather than for me on the set aside application.

67. I now turn to the second of the documentary irregularities namely late service on him under Rule 38(2) (a) of the bundles, HMRC skeleton, and the delivery of exhibits for the witness statement of Officer Aley.
68. As regards the bundles, as I have said above, there were no directions as to who should compile an agreed bundle but HMRC assumed that responsibility. There were no directions regarding service of the bundle on the appellant. Given the volume of information which the appellant required to be included in the bundle, and indeed the volume of information which related to the proceedings, I am not at all surprised that HMRC were only able to attend to service of the bundle on the appellant a few days before the hearing. Unfortunately because of IT issues, the appellant was unable to open the e copies of the bundles and so it was not until the morning of the hearing that he received the bundles in hardcopy form. Whilst this is not an ideal time, I think it is an appropriate time.
69. I appreciate that it did not give the appellant much time to go through the bundles prior to the hearing. However as far as he was concerned, it contained all the information that he had asked HMRC to include in it. So all the documents to which he wished to refer in his submissions were, as far as he was concerned, before the tribunal. I have made this point above in that I can see nothing in his submissions to the tribunal which required reference to documents which were not in the bundles. But for the purposes of considering the appropriate time for providing him with the bundles, his understanding of what was in them is relevant.
70. Of course, the absence of those documents does mean (since I have found that they relate to the proceedings) that the bundles were inadequate and thus that those documents which were missing were not sent to the appellant at an appropriate time.
71. And so as regards those documents it is my view that there has been a documentary irregularity within Rule 38(2)(a).
72. Having reviewed the correspondence between HMRC and the tribunal, I can see that the respondents applied to the tribunal for an extension for submitting their skeleton (on 21 November 2017), I cannot see that that extension was granted (unsurprisingly given its imminence to the hearing date). But I still believe that their skeleton was given to the appellant at an appropriate time. He had adequate time to consider it and clearly had done so prior to the hearing. Similarly, as regards the exhibits to Officer Aley's statement, although they were not provided with a statement itself and were only given to the appellant at the hearing, HMRC submit that the appellant already had of the correspondence which comprised the exhibit, in his possession. It is my view that a combination of that, together with the delivery of the exhibit itself on the morning of the hearing means that the document was sent to the appellant at an appropriate time.
73. So my conclusion on the Rule 38(2)(a) irregularity is that there was an irregularity in relation to the documents which the appellant had asked to be included in the bundle for the hearing and were not so included in the bundle delivered to him on the morning of the hearing. But there were no such irregularities in the service of HMRC skeleton nor the exhibits to Officer Aley's witness statement.

The general procedural irregularities

74. I turn now to the general procedural irregularities under Rule 38(2)(c). The appellant's case is that the Judge raised points that HMRC had not raised and these are ones which he was not given an opportunity to answer. I am afraid for the appellant that as regards the first two of these, I am unsympathetic.
75. The first of these irregularities concerns the Caroline Dartnall point. As I have said above this was raised by the appellant in his skeleton argument for the barring application. In the barring application the burden of proof rested with him. He had to show (as he set out at paragraph 2 of that skeleton) what he described as the central ground of his application, namely that by its own destruction of so many documents, HMRC had no reasonable prospect of success in the proceedings and should be barred from taking any further part in them. It was therefore incumbent on him to lead evidence to show that the respondents had no such reasonable prospect of success, and to do this he should have provided to the tribunal, and made submissions on, all the evidence on which he sought to rely concerning the Caroline Dartnall point. I cannot see that on this point he was ambushed either by HMRC or by the Judge. It is for him to put the relevant evidence forward (including, as I have said above, paragraph 7 of section C of his notice of appeal which was absent from the hearing bundle but which was clearly relevant to his submissions; and so I would have thought he would have specifically drawn the Judge's attention to it, and indeed its absence from the hearing bundle, but there is no evidence that he did so). It was for the appellant to put forward his complete case concerning the central ground of his application, and the Judge could justifiably expect that he had done so in his submissions backed up by the appropriate documentary evidence. So too could HMRC. I can see no procedural irregularity in the Judge taking points in regard to appellants submissions on his case even if there were points that HMRC had not raised.
76. I would be more sympathetic, and indeed it might be a procedural irregularity, if the appellant had not raised the Caroline Dartnall point at all, but the Judge of her own volition had gone on to make findings about it without referring to the parties. But this was not the case. The Judge was entirely free to consider the evidence before her and to decide which pieces of evidence she considered to be of importance, and on that basis come to findings of fact.
77. If the appellant considers that those findings are inconsistent with the evidence, then his appropriate remedy is not to seek to set aside the Decision but to make an appeal to the Upper Tribunal.
78. I take much the same view of the point which the appellant raises concerning the letter from Mr Baker. At paragraph 5.2.1 of his 28 November 2017 skeleton argument, the appellant says that "*it is one of my defences to HMRC's claim that I was careless that Louis Baker advised me in relation to my return to HMRC of the contested payments. And were this to be proved to be correct then I believe it would be a complete defence to the claim.*"
79. It is clear from this that the involvement of Mr Baker was of fundamental importance to the appellant's arguments that HMRC should be barred from taking any further part in the proceedings. If he could show that Mr Baker had advised him, it was the appellant's view that he had a complete defence and, logically it would follow that HMRC had no reasonable prospects of success in defending the claim and should be barred.

80. I would have thought, therefore, that he would have led all the documentary evidence that he could lay his hands on to show that Mr Baker was advising him and to defeat HMRC's claim that he was not.
81. This is not a point on which the appellant was ambushed by the Judge. The appellant surmises about the letter to which the Judge refers in the Decision. And suggests that had he understood that certain letters were going to be referred to or considered by the Judge, he would have provided evidence to the Judge to show that Mr Baker had acted as his agent. But that evidences a misunderstanding of the proceedings. It was for him to lead all his evidence to show that Mr Baker was his agent. And if the Judge, having heard that evidence, decided to accept certain parts of that evidence and not others, and made findings of fact on that basis, that is a matter for her (subject to the appellant's right, if he considers that she has come to an unreasonable conclusion, to bring an appeal to the Upper Tribunal). I can see no procedural irregularity concerning the letter from Mr Baker. In making this submission, the appellant says that he could have referred the Judge to a letter from Mr Baker to himself in March 2004 asking for payment of fees. I am at a loss to know why he did not lead that evidence from the start along with additional evidence supporting his claim that Mr Baker was his agent, given the importance to him of that point. The fact that he failed to do so simply means that he did not put his case forward as well as he might have done, and this failing should not now be categorised as some form of procedural irregularity. I reject the appellant's submission that it is.
82. I now turn to the final general procedural irregularity concerning Officer Battcock's evidence. My understanding of the appellant's submission is that the Judge did not actually hear what Officer Battcock said at one stage in his evidence when he made what the appellant considers to be an important admission concerning the destruction of a document out of the Judges' hearing. His complaint is not therefore that the Judge heard that admission and came to an irrational conclusion (which, once again, is not something which I can deal with in the set aside application but is more appropriate to an application to appeal to the Upper Tribunal). The appellant is saying that the Judge did not hear that admission. This could clearly be a procedural irregularity.
83. I have simply no idea whether the Judge heard the admission and took it into account when coming to her conclusion. The appellant thinks that this is inconceivable given the conclusion she came to and so she cannot have heard it.
84. The only evidence I have that the Judge might not have heard it is the evidence given by the appellant in the set aside application. It was not opposed by Mr Marks. Mr Maples' notice of hearing simply say that "NB eventually conceded that his point might be wrong." There is no suggestion in those notes of meeting that this admission was somehow given "sotto voce" and thus was not heard by the Judge. However, for the purposes of this application, I am prepared to accept Mr Maples' submission that it was not so heard, and thus it is my view that this was a general procedural irregularity.

The interests of justice

85. Having come to the conclusion that there were documentary irregularities and a general procedural irregularity in the Decision, I must now consider the second stage in the process, namely the application of Rule 38(1)(a). This Rule requires me to consider whether it is in the interests of justice to set aside the Decision (or indeed part of it).

86. In considering whether it would be in the interests of justice to set aside the Decision I must take into account all the circumstances, not just the documentary and general procedural irregularities.
87. I have decided that it is not in the interests of justice to set aside the Decision or any part of it. In coming to that conclusion, I have taken into account the following:
- (1) The barring application was not the substantive hearing. It was not a full trial. The evidence that was missing from the barring application will be in the bundles for the full trial. They would also be in the bundles for any retrial that I ordered if I were to set aside the Decision. It is in the interests of justice that that evidence now forms the basis for a full trial at which the discovery issues, including the destruction of documents point, as well as the nature of the leaving payment can be comprehensively dealt with.
 - (2) The leaving payment was made in 2005, the discovery assessment in 2010 and we are now in 2020. It is in the interests of justice that this matter now proceeds to a substantive hearing without further delay. There might, in any event, be a delay since I have no doubt that the substantive hearing will be postponed until the Supreme Court has handed down its decision in *Tooth*. However, once that decision has been handed down, the full trial of the issues in this appeal should then be heard as soon as possible.
 - (3) It was not the purpose of the barring application to conduct a trial of the issues let alone a mini trial. Its purpose was to test whether HMRC's defence was fanciful. This is a low bar, and the appellant has not suggested that the Judge applied an incorrect test. The absence of the documents from the bundle which I have found to be documentary irregularities were only of peripheral relevance to the application of this test.
 - (4) The appellant has not demonstrated to me that if these documents had been in the bundle, he would have drawn the Judge's attention to some (or all) of them and was prevented from so doing by their absence. No reference is made to the missing documents in his skeleton argument of 28 November 2017, and he made no such submissions to me. His complaint was that because those documents were not in the bundle the Judge did not have an opportunity to consider them. And that had she done so, she might have come to a different conclusion. But it is incumbent on the appellant to put his best case forward, and the issues concerning the Caroline Dartnall point, and the Mr Bakers role as adviser should have been put squarely to the Judge at the barring application. Had the appellant done this he would have realised that the documents on which he needed to rely for that application were not in the bundle. And if these points were as important as he now makes out they were, he could (and indeed should) have sought an adjournment. He did not do so. He can, however, now deal with both of these points in detail if the matter proceeds to a full trial.
 - (5) The appellant has not submitted that because of the documentary or general procedural irregularities the Judge would necessarily have come to a different conclusion.
 - (6) HMRC have the burden of proving that the discovery assessment was a valid in time assessment. This evidence will come from their Officers whose memories are fading with the passage of time. One Officer has retired, another is to do so shortly. Further delay which would result if I were to order a rehearing, will adversely affect the quality of HMRC's evidence if the matter proceeds to a full hearing.

(7) Whilst the barring application might have rehearsed those Officers in the giving of their evidence, it has also enabled the appellant to test those witnesses and he is now in a position to put inconsistencies to them at the full trial. For example, the admission made by Officer Battcock. It is in the interests of justice that the “re-examination” of these witnesses is dealt with at a full hearing and not at another barring application.

(8) As Mr Marks has pointed out, the set aside application is unusual since it is not seeking to set aside a “full” decision. The appellant has had one bite at the cherry. He has sought to win his appeal by showing that HMRC has only a fanciful chance of successfully opposing it. The Decision is that they have a better than fanciful chance. The appellant is entitled to a second bite. It is, in my view, in the interests of justice that this should be at a full trial and not at a rehearing of the barring application.

(9) The appellant has a right of appeal on a point of law to the Upper Tribunal. I have suggested elsewhere in his appeal if his submissions are that the Judge has got the law wrong, then his appropriate remedy is to bring that appeal and not to have the Decision set aside.

88. And so for the foregoing reasons I have concluded that:

(1) There were documentary and general procedural irregularities in relation to the barring application; however

(2) It is not in the interests of justice to set aside the Decision or any part of it.

DECISION

89. I refuse the appellant’s application to set aside the Decision in whole or in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 23 JULY 2020