[2021] UKFTT 0088 (TC)

TC08070

VALUE ADDED TAX – preliminary issue – application for Tribunal to allow appeal summarily – alleged breach of Article 47 of Charter of Fundamental Rights of the EU – right to a fair trial within a reasonable time – proceedings ongoing for over 13 years – appropriate remedy for breach of "reasonable time" requirement – held: allowing the appeal "summarily" not an appropriate remedy – held: "reasonable time" requirement not itself breached – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: LON/2008/0429

BETWEEN

PACIFIC COMPUTERS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON

The hearing took place on 22-23 February 2021. The form of the hearing was V (video). A face to face hearing was not held because of public health concerns connected with the coronavirus pandemic. The documents to which I was referred were a hearing bundle of 1,618 pdf pages, a 14-page statement of agreed facts and issue, a 5-page witness statement of Mr M Roach (CEO of the Appellant) with an 8-page exhibit, an authorities bundle of 1,303 pdf pages, and a supplementary authorities bundle of 73 pdf pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Alistair Webster QC and Mr Michael Firth, counsel, instructed by Morrisons Solicitors LLP, for the Appellant

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

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. This is a decision on an application by the appellant ("PCL") for the Tribunal summarily to allow the appeal, on the grounds that its right, under Article 47 of the Charter of Fundamental Rights of the European Union (the "EU Charter"), to a hearing within a reasonable time had been breached.

2. The appeal was notified to the Tribunal over 13 years ago, in 2008. It concerns VAT input tax of £435,783.12 arising from 14 transactions – purchases and onward sales of computer processing units and iPods – by PCL that took place nearly15 years ago, in 2006. Input tax credit was denied by the respondents ("HMRC") under principles in the case of *Kittel*, on the basis that PCL knew or should have known that the transactions were connected with the fraudulent evasion of VAT.

3. The appeal was heard in the First-tier Tribunal (FTT) in 2014, and allowed in a decision released in January 2015. HMRC successfully appealed to the Upper Tribunal, which, in 2016, remitted the case back to the FTT to be heard afresh. It did this rather than re-making the decision itself as, in its words (at [86]):

> "The case depends on a proper consideration of the evidence, which includes (as the FTT rightly identified) issues of credibility of witnesses. What is required, and where the FTT erred in law in failing to undertake, is a reasoned analysis of all the evidence, according the evidence its appropriate weight, and coming to a fully-reasoned conclusion."

4. A three-week re-hearing by the FTT was due to take place in February 2021, but was postponed as it could not be held in a safe and fair way either by video or in person, due to the pandemic and the particular circumstances of PCL's witnesses.

5. The Tribunal directed on 13 January 2021 that PCL's application be dealt with as a preliminary matter.

6. PCL's case was that, because there had been a breach of its Article 47 right to a hearing within a reasonable time, the Tribunal should deploy its powers under its procedural rules to allow the appeal summarily – and so give PCL an effective remedy for the breach.

7. HMRC argued that, even if there had been a breach of PCL's Article 47 rights (which they denied), the Tribunal's summarily allowing the appeal would not be the appropriate effective remedy.

8. There were thus two issues to be considered:

> (1) Had there been a breach of PCL's Article 47 right to a hearing within a reasonable time?
>
> (2) Assuming there had been such a breach, is the remedy for the Tribunal to allow the appeal summarily?

ARTICLE 47

9. Article 47 (right to an effective remedy and to a fair trial) of the EU Charter states:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

10. In *Attorney General's Reference No 2 of 2001* [2003] UKHL 68, Lord Bingham gave this rationale for the "reasonable time" requirement in civil proceedings (at [16]):

> "In its application to civil proceedings, the rationale of the reasonable time requirement is not in doubt. The state should not subject claimants to prolonged delay in pursuing their claims, whatever the outcome, nor defendants to prolonged uncertainty and anxiety in learning whether their opponents' claims will be established or not. The ill consequences of delay in civil litigation, immortalised in *Bleak House*, need no elaboration. In domestic law, a battery of statutory limitations, procedural rules and equitable doctrines address the problem. Article 6(1) gives a further remedy to those prejudiced, at the hands of the state, by this pernicious evil."

11. As the above extract illustrates, there is overlap between Article 47 and Article 6 of the European Convention on Human Rights (to which many of the legal authorities cited in this decision refer), which also gives rights to hearing "within a reasonable time". Article 52(3) of the EU Charter deals with the overlap as follows:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the [European Convention on Human Rights], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

12. In *Kamino International Logistics* [2014] EUECJ C-129/13, the Court of Justice of the EU ("CJEU") held that a right under Article 47 may be relied on directly by interested parties before national courts (see at [34, 35]). Similarly, in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, the Supreme Court held that conflicts between Article 47, as a component of EU law, and English law, must be resolved in favour of the former, and the latter disapplied (see at [78]).

WOULD SUMMARILY ALLOWING THE APPEAL BE AN APPROPRIATE REMEDY FOR BREACH OF PCL'S RIGHT TO A HEARING WITHIN A REASONABLE TIME?

EU case law on remedy for breach of the "reasonable time" requirement

13. In *Groupe Gascogne SA v European Commission* [2013] EUECJ C-58/12, the CJEU considered remedies for breach of the Article 47 right to a hearing within a reasonable time, in a case where judgement in the case had already been given:

> "72 First of all, it should be pointed out that, according to the European Court of Human Rights, a failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an entitlement of the party concerned to an effective remedy granting him appropriate relief (see, *Kudla* v. *Poland*, no. 30210/96, § 156 and 157, ECHR 2000-XI).
>
> 73 Although the appellant seeks to have the judgment under appeal set aside in its entirety or, alternatively, to have it set aside in so far as it upheld the fine imposed on the appellant or to have the fine reduced, the Court notes that it has held that, where there are no indications that the excessive length of the proceedings before the General Court affected their outcome, failure to deliver judgment within a reasonable time cannot lead to the setting aside of the judgment under appeal

(see, to that effect, *Der Grüne Punkt – Duales System Deutschland* v *Commission*, paragraphs 190 and 196 and the case-law cited).

74 That case-law is based, in particular, on the consideration that, where the failure to adjudicate within a reasonable time has no effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of the principle of effective legal protection committed by the General Court (*Der Grüne Punkt – Duales System Deutschland* v *Commission*, paragraph 193).

75 In the present case, the appellant has not provided any evidence to the Court from which it may be inferred that a failure by the General Court to adjudicate within a reasonable time could have affected the outcome of the dispute before it.

76 It follows that, contrary to the appellant's claims, the fourth ground of appeal cannot lead, as such, to the setting aside of the judgment under appeal."

14. Damages may be an effective remedy for breach of the right to a hearing within a reasonable time, as the CJEU said in *Groupe Gascogne* at [83]:

"It is therefore appropriate for the Court of Justice to rule that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy."

15. In *Der Grüne Punkt - Duales System Deutschland v Commission (Competition)* [2009] EUECJ C-385/07, cited in the extracts above from *Groupe Gascogne*, the CJEU explained why a claim for damages, rather than setting aside a judgement, was an effective remedy for breach of the right to a hearing within a reasonable time:

"193 In so far as there is nothing to suggest that the failure to adjudicate within a reasonable time may have had an effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of the principle of effective legal protection committed by the Court of First Instance."

194 In addition, as the Advocate General stated at points 305 and 306 of his Opinion, having regard to the need to ensure that Community competition law is complied with, the Court of Justice cannot allow an appellant to reopen the question of the existence of an infringement, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the Court of First Instance concerning that infringement and the administrative procedure relating to it have been rejected as unfounded.

195 Conversely, as the Advocate General stated at point 307 et seq. of his Opinion, the failure on the part of the Court of First Instance to adjudicate within a reasonable time can give rise to a claim for damages brought against the Community under Article 235 EC and the second paragraph of Article 288 EC."

16. Advocate General Sharpston said this in her Opinion in *Groupe Gascogne* (at [124]) regarding the circumstances in which annulling a decision was the only effective remedy for breach of the right to a hearing within a reasonable time:

"Here, I wish to distinguish sharply between cases where the appellant is still able to exercise fully his rights of defence and those cases – one hopes, rare cases – in which the very passage of time has made it impossible for the appellant to get a fair hearing. [footnote below] In those circumstances, the only effective remedy for the breach of the right to a fair hearing within a reasonable time is indeed to annul the decision. But there is no suggestion in the three appeals

that Groupe Gascogne, GSD or Kendrion have been impeded in their ability to argue their appeals effectively.

[Footnote:] Perhaps this is more likely to occur with an individual rather than an undertaking; but the possibility that a key witness for the undertaking might die or become untraceable during the course of over-long proceedings cannot be excluded."

UK case law

17. The majority of the House of Lords in *Attorney General's Reference No 2 of 2001* held that, in a criminal context, and considering the European Convention on Human Rights, where there had been a violation of the "reasonable time" requirement, proceedings should be stayed only where (a) a fair hearing was no longer possible; or (b) it was for any compelling reason unfair to try the defendant (see at [29]). Otherwise, the remedy was such as was effective, just and proportionate, depending on the nature of the breach and all of the circumstances (see at [24]).

18. Lord Bingham in *Spiers v Ruddy* [2008] 1 AC 873 (Privy Council) said this (at [16]) about remedies in situations where there had been a breach of the right to a hearing within a reasonable time – but it was still possible to hold a fair hearing:

"The cases concerned a situation where there has (or may have) been such delay in the conduct of proceedings as to breach a party's right to trial within a reasonable time but where the fairness of the trial has not been or will not be compromised. The authorities relied on and considered above make clear, in my opinion, that such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed. The European court does not prescribe what remedy will be effective in any given case, regarding this as, in the first instance, a matter for the national court."

19. Lord Hope said this about effective remedies for such a breach, in the same case:

"21 The following points do not seem to me now to be in issue. First, article 6(1) contains three separate, distinct and independent guarantees. So under the reasonable time guarantee prejudice, although relevant, need not be established. It is not necessary to show that a fair trial is no longer possible or that for any other reason the proceedings would be unfair: *Porter v Magill* [2002] 2 AC 357, paras 108—109; *HM Advocate v R* [2004] 1 AC 462, paras 8—10, per Lord Steyn. Second, article 13 of the Convention requires that everyone whose rights and freedoms under the Convention have been violated must have an effective remedy. Where the legislature has left it to the courts to decide what that remedy shall be, as is the case under the Human Rights Act 1998, the court has a discretion to choose the remedy for the unlawful act which it considers just and appropriate: *Attorney General s Reference (No 2 of 2001)* [2004] 2 AC 72, para 24, per Lord Bingham. Third, ….

22 The most illuminating discussion of the reasonable time guarantee in the Strasbourg jurisprudence has been in the context of article 13. It was that article that was the centre of attention in the series of recent cases which Lord Bingham has analysed. In *Kudla v Poland* 35 EHRR 198, para 158, the court said:

It remains for the court to determine whether the means available to the applicant in Polish law for raising a complaint about the length of the proceedings in his case would have been effective in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.

In *Zarb v Malta* (Application No 16631/04) (unreported) given 4 July 2006, para 48, the court said:

> Remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are effective within the meaning of article 13 of the Convention if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred.

23 I think that the use of the words "or its continuation" in these passages is particularly significant. It is plain that there can be no incompatibility between the Convention right and that which is regarded as appropriate for the purposes of article 13 as an appropriate remedy. It would make nonsense of the Convention for the Strasbourg court to prescribe a remedy that was in conflict with any of the Convention rights. From this it follows that it would not be incompatible with Mr Ruddy's Convention right to a determination of the criminal charges against him within a reasonable time for the Lord Advocate to continue to prosecute him on those charges following the lapse of a reasonable time. But if termination of the proceedings is held not to be the appropriate remedy, steps must be taken to ensure that Mr Ruddy still has the benefit of the reasonable time guarantee that is afforded to him by the Convention right."

Discussion

The law

20. It is clear from the case law that staying a case before it is heard, or setting aside the judgement in a case after it has been heard, is the appropriate relief for a person whose right to a hearing within a reasonable time has been breached, only in particular circumstances. In other circumstances, other reliefs, such as damages and preventing further delay, are the appropriate remedy for such breach.

21. The EU case law concerns situations where judgement in the case has already been given, and establishes that setting aside such judgement would not be an appropriate remedy for breach of the right to a hearing within a reasonable time, where there was no indication that the procedural delay affected the outcome. This is because setting aside the judgement (a) would not remedy the breach (as opposed to damages, which might); and (b) would be unjust, in the sense that the relevant law would not be enforced.

22. The UK case law addresses the position both before and after judgement has been given, and, in the former circumstance, establishes the 'acid test' as whether or not a fair trial can still be held: if it can, then staying proceedings is not the appropriate relief for breach of the right to a hearing within a reasonable time.

23. I consider that the EU and UK cases consistently express the principle that the remedy for breach must be effective and appropriate – and appropriate means, as far as possible, putting the person whose rights have been breached in the position they would have been in but for the over-long proceedings, and/or compensating them for any adverse consequences of the over-long proceedings. Hence, where it is shown that the decision in the proceedings has been – or will be – itself affected by their unreasonable length – in other words, where the applicant has lost, or will lose, the case, but would have won, had the hearing taken place within a reasonable time – then (and only then) the appropriate remedy is of the kind sought in this application ("summary" judgement for the applicant). I consider that the situation where a decision has not yet been made but, it has been shown, will be different to what it would have been but for the over-long proceedings, is equivalent to the situation where it is no longer possible to hold a fair trial (being the terminology of the UK cases). In other cases, however, the appropriate relief for the over-long proceedings will not be "summary"

judgment but rather reliefs that address the respects in which it is shown that the over-long proceedings have affected the applicant adversely.

24. As to the evidence which the applicant must present to persuade the court or tribunal prior to the substantive hearing that the over-long proceedings will change the outcome of the proceedings (causing the applicant to lose, when it would otherwise have won) – Mr Webster sought to draw the inference from the EU cases that the applicant had only to show that the over-long proceedings *may* have this effect. I do not accept this submission. The EU cases found that set-aside was inappropriate because, on the evidence before the court, set-aside (a) would not afford the applicant a remedy for the breach; and (b) would have caused injustice by not enforcing the law. In my view, it would be inconsistent with this reasoning to allow "summary" judgement prior to the substantial hearing on the basis of evidence that indicated no more than that the outcome "may" be affected by the over-long proceedings (as such an approach could lead to no adequate remedy for the breach and/or injustice). Rather, the tribunal must, acting judicially and applying the civil standard of proof, decide whether, considering all the evidence before it, (a) the outcome of proceedings would be different from what it would have been had the hearing taken place within a reasonable time and/or (b) it is no longer possible to have a fair hearing.

25. For similar reasons, I do not accept Mr Webster's submission that even where, on the principles above, the appropriate effective remedy is not "summary" judgment, the FTT should nonetheless summarily allow the appeal, because, as a creature of statute, the FTT has no powers to deliver other appropriate remedies (such as damages) and so this is the only "remedy" the FTT can deliver. It seems to me this approach runs counter to the authorities cited above as to appropriate effective remedies for breach of Article 47 rights; furthermore, it would seem on the authority of *Kamino* cited above that PCL might seek remedies like damages for infringement of its Article 47 rights in national courts whose jurisdiction is not constrained by statute in the way the FTT's is.

Application of the law to PCL's case

26. PCL's position may be summarised as follows:

(1) PCL was prepared, through witness statements of several of its directors and employees at the time, as well as documentary evidence, to produce evidence at the re-hearing of its appeal as to the 2006 transactions and surrounding circumstances, aimed at rebutting HMRC's *prima facie* case that PCL knew, or should have known, that those transactions were connected with the fraudulent evasion of VAT.

(2) PCL was, however, concerned that its evidence may or would be undermined in the process of cross examination at the hearing *more than it would have been, had the hearing been held within a reasonable time*. This was because

(a) questions would be asked of its witnesses in cross examination which the witnesses could not answer in a convincing manner, or at all, because of the fading of their memories *since the latest reasonable time within which the hearing should have been held* (so, for example, if cross-examining counsel took the witness to a document that appeared to conflict with the witness' account, the witness might have forgotten things which could explain the apparent conflict); and

(b) the Tribunal would interpret that inability to answer convincingly as damaging to the witness' evidence on the point in question and/or to the witness' credibility more generally.

(3) PCL submitted that the undermining of its evidence in this manner may or would be to such extent that it would affect the outcome of the hearing (i.e. PCL would lose when it otherwise would have won) and/or the hearing would not be fair (because, had it been held within a reasonable time, the witnesses would have would not have the difficulty described in (2)(a) above).

27. I accept that the fading of PCL's witnesses' memories since the latest reasonable time within which the hearing should have been held (which, for argument's sake, I will here take to be no earlier than January 2014 – the time of the first FTT hearing – which Mr Webster accepted had been held within a reasonable time) *may* have the effect feared by PCL. However, as explained above, it would not be an appropriate remedy for breach of PCL's right to a hearing within a reasonable time, to allow the appeal summarily on account of that possibility.

28. Rather, summarily allowing the appeal would only be the appropriate remedy were I to decide that, on the balance of probabilities, the concerns of PCL expressed at [26(2-3)] above will (rather than "may") come to pass.

29. In making this decision I take the following into account:

(1) memories do fade, and seven years (between 2014 and 2021) is a considerable length of time;

(2) on the other hand, the witnesses have had reason to recall the 2006 transactions and their circumstances at regular intervals since they occurred. In particular:

(a) they produced witness statements in 2011 and 2014;

(b) they gave oral evidence and answered cross examination questions, in some cases at great length (see the Appendix for details), at the first FTT hearing in 2014;

(c) there are transcripts of their 2014 evidence in the tribunal, to which they have access; and

(d) they produced supplementary witness statements in 2018.

30. I note that this is not a case where a party is prevented from producing the evidence it wishes to produce to the tribunal, due to, for example,

(1) supervening events between the events in question in the proceedings and the hearing: an example, albeit extreme, might be where the relevant witnesses have become incapacitated in some way, and the documentary evidence has been destroyed. In such an (extreme) situation, one can see that it would be well nigh impossible to hear that company's appeal fairly – this was the view expressed in Advocate General Sharpston's opinion in *Groupe Gascogne* cited above;

(2) the party only becoming aware, many years after the events in question, that it may have to produce evidence in legal proceedings: here, the process of preparing the appeal for hearing has in effect helped to preserve PCL's witnesses' memories of

transactions that occurred in 2006; hence, they were able to produce witness statements years after the events, in 2011, 2014 and again in 2018.

31. Rather, the concerns here are specifically with regard to the potential undermining of PCL's evidence through cross examination questions, as described above.

32. Given the circumstances, a general concern about fading of memory, even over as long as seven years, is not sufficient to persuade me, on the balance of probabilities, that the concerns of PCL expressed at [26(2-3)] above will come to pass. In the circumstances of this case, PCL's witnesses have some significant safeguards (or mitigants) against what PCL appears to fear:

(1) The witnesses have kept their memories of the 2006 transactions and surrounding circumstances alive over many years through their witness statements and preparation for the hearing – it seems to me likely that their memory of facts which would "explain" important gaps or inconsistencies "revealed" in cross examination in 2021 would be not be materially different from what it would have been in 2014.

(2) Moreover, whether such gap or inconsistency is deemed "important" (and so materially affect the weight accorded to the witness' evidence) will be a matter for the Tribunal, which can itself take into account the fading of memory if it considers that a reasonable explanation.

It thus seems to me improbable that the fading of PCL's witnesses' memories since 2014 will affect the outcome of the substantive hearing or prevent that hearing from being fair.

HAS THERE BEEN A BREACH OF PCL'S RIGHT TO A HEARING WITHIN A REASONABLE TIME?

Case law

33. Numerous European Court of Human Rights ("ECHR") cases establish that the reasonableness of the duration of proceedings is to be assessed in the light of the particular circumstances of the case, and regard is to be had to the following matters: the complexity of the case, the conduct of the applicant, the manner in which the matter was dealt with by the administrative and judicial authorities, and what is at stake for the party.

34. In *Dyer v Watson* [2004] 1 AC 379 (at [52]), Lord Bingham said that, in considering whether the case had been heard within a reasonable time, the first step is to consider the period of time which has elapsed, and whether it gives grounds for real concern:

> "If the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive"

35. Lord Bingham went on to say this about three of the matters to be taken into account in adjudging the reasonableness of the time taken to hear a case:

> "[53] The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate

hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

[54] The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

[55] The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under s 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted 'with all due diligence and expedition'. But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

36. In *Zimmermann v Switzerland* (Case 8737/79, 1983) the ECHR said this about backlogs in the courts and the duties of states to organise their legal systems to comply with the requirement to hear cases within a reasonable time:

"29 The Court would point out in the first place that the Convention places a duty on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 § 1 (art. 6- 1) including that of trial within a "reasonable time". Nonetheless, a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind (see the above-mentioned Buchholz judgment, Series A no. 42, p. 16, § 51, and the Foti and others judgment of 10 December 1982, Series A no. 56, p. 21, § 61).

Methods which may fall to be considered, as a provisional expedient, admittedly include choosing to deal with cases in a particular order, based not just on the date when they were brought but on their degree of urgency and importance and, in particular, on what is at stake for the persons concerned. However, if a state of affairs of this kind is prolonged and becomes a matter of structural organisation, such methods are no longer sufficient

and the State will not be able to postpone further the adoption of effective measures."

37. *Beggs v United Kingdom* (Case 25133/06, 2012) was a case in which the conduct of the parties was of particular significance. At [240], the ECHR made these observations about the need to manage conflicting aspects of the right to a fair hearing within a reasonable time:

> "The Court further considers that in giving due weight to the various aspects of a fair trial guaranteed by Article 6, difficult decisions have to be made by the domestic courts in cases where these aspects appear to be in conflict. In particular, the right to a trial within a reasonable time must be balanced against the need to afford to the defence sufficient time to prepare its case and must not unduly restrict the right of the defence to equality of arms. Thus in assessing whether the length of proceedings was reasonable, particularly in a case where an applicant relies upon the court's responsibility to take steps to advance the proceedings, this Court must have regard to the reasons for the delay and the extent to which delay resulted from an effort to secure other key rights guaranteed by Article 6."

38. The approach taken there by the ECHR, in assessing "the extent of any delay caused by the conduct of the applicant or the conduct of the authorities in the appeal proceedings", was "to examine each stage of the appeal proceedings in turn" (see at [241]).

39. Some of the delay in *Beggs* was attributable to the courts following a procedure that was later held to be incorrect; the ECHR held that, whilst this was regrettable, the state could not be held responsible for the incorrect procedure followed: it emphasised "that it is a fundamental role of the domestic courts to interpret and apply national law. It is not unusual for the courts' examination of statutory provisions to result in the development of the law either in substance or as regards procedural requirements." ([254]).

40. The ECHR was critical of "periods of inactivity" on the part of the judiciary, in *Beggs*, *Zimmermann* ([27]), and elsewhere. The ECHR said this in *Beggs*, stressing the need for the court to take an active role in steering proceedings to a conclusion:

> "266. However, the Court cannot ignore the fact that this state of affairs continued over a period of almost three years, delaying the hearing of the substantive appeal, and that there were nonetheless periods of inactivity on the part of the judicial authorities. It may be that there was very little that the Appeal Court could do in the face of the applicant's persistent attempts to obtain yet further disclosure and his refusal to move to a substantive hearing, and that any efforts by the court to expedite matters would have been frustrated by the applicant's conduct. However, the fact remains that Article 6 § 1 required the domestic court to adopt an active role in steering the appeal to a speedy conclusion, and in particular in the present case, to press for the resolution of the matters concerning disclosure and the fixing of a date for the appeal hearing, particularly in the period following the handing down of the Privy Council decision in *McDonald and Others* in October 2008 (see paragraph 128 above). There is no evidence before the Court that the domestic courts that the court took matters in hand in this way (see *Richard Anderson*, cited above, § 28)."

41. The ECHR said this about the need for an active role in managing proceedings on the part of the courts in *Richard Anderson v UK* [2010] ECHR 145 (cited in the above extract from *Beggs*):

> 28 "Moreover, the Court finds that there were periods of inactivity for which no satisfactory explanation has been given by the Government. The Court is particularly struck by the fact that the first appeal was before the Inner House from 22 September 1998 until 15 March 2001 and there was little or no activity between late 1998 and autumn 1999. It may well

> have been that, as the Government submitted, the parties were involved in other proceedings and settlement discussions. However, the Court finds that these considerations were not sufficient to absolve the Inner House of its own obligation to take an active role in the management of proceedings and to make enquiries of the parties to ascertain their position in respect of the appeal. As the Court has frequently stated, the State remains responsible for the efficiency of its system; the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time-limits and directions or some other method – is for it to decide. If a State allows proceedings to continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay (*Bhandari v. the United Kingdom*, no. 42341/04, § 22, 2 October 2007, together with further references therein)..."

42. The ECHR concluded thus in *Beggs*:

> "273. However, given the periods of inactivity identified above and the failure of the judicial authorities during these periods to take steps to progress matters of their own motion, the Court concludes that there has been a violation of Article 6 § 1 in the present case."

43. A party does not have to raise an allegation of unreasonable delay at the first possible opportunity or, indeed, before the end of the initial proceedings – the CJEU said this *Groupe Gascogne* at [70]:

> "Although a party must be able to raise a breach of procedure where it considers that a breach of the rules applicable is established, it cannot be required to do so at a stage where the full effects of that breach are not yet known. As regards, in particular, a failure to adjudicate within a reasonable time, an appellant which considers that such a failure prejudices its interests is not required to assert that prejudice immediately. Where appropriate, it may wait until the end of proceedings in order to ascertain the total duration of the prejudice and therefore to have all the information necessary to identify that which it has, in its view, sustained."

Background facts (in addition to those in the Introduction)

44. A chronology of the appeal is set out in the Appendix. In summary, the "history" of the proceedings falls into three main periods:

> (1) From the filing of the notice of appeal to the holding of the first FTT hearing (February 2008 to January 2014): a period of six years
>
> (2) From the end of that hearing to the time at which the Court of Appeal refused permission to appeal the decision of the Upper Tribunal: February 2014 to 1 April 2017: just over three years
>
> (3) From the Court of Appeal's refusing permission to appeal to 22 February 2021, the date on which the substantive rehearing in the FTT was due to begin: nearly four years.

45. This appeal is classified as "complex" and involves a large amount of documentary and witness evidence; the initial FTT hearing was presented with 32 volumes of documents; heard oral evidence from nine witnesses; and was heard over12 hearing days. The re-hearing in the FTT is expected to last three weeks.

46. As well as the tax at stake, the ongoing proceedings have also affected PCL's

(1) reputation and ability to attract high calibre staff – since the case concerns whether PCL knew, or should have known, that transactions it took part in were connected with the fraudulent evasion of VAT; and

(2) ability to obtain credit (PCL's account make no provision for losing the appeal).

These may also have had consequential effects on turnover and profitability.

PCL's submissions on unreasonable delays

47. Mr Webster emphasised the overall length of the proceedings and cautioned against "atomising" the overall period. He also submitted that, as time went on, the duty of the courts to act to speed up matters became more pronounced, and so "failures to act" or "periods of inactivity" at later stages of the proceedings are more likely to comprise unreasonable delay, than their equivalent at earlier stages.

48. Mr Webster accepted that the first FTT hearing took place within a reasonable time (although at the "outer limits"). He also accepted that any delay after February 2021 was not unreasonable, as the February 2021 hearing had been postponed (at PCL's request) for good reasons. PCL's allegations of unreasonable delay were thus mainly focused on the second and third periods of the proceedings, which, it said, should have been conducted with greater speed, given (i) that it had (already) taken six years to get to the first FTT hearing, and (ii) the possibility (followed by the actuality) of the Upper Tribunal setting aside the FTT's decision and directing a re-hearing. In particular PCL highlighted the following delays:

(1) In the second period:

(a) the two month delay in the FTT receiving the parties' written closing submissions caused by HMRC submitting further written submissions after PCL's (see Appendix for more details);

(b) the eight months between the FTT receiving the parties' written closing submissions and releasing its decision: this, PCL submitted, was an unreasonable delay of about four months;

(c) the six months between PCL asking the Court of Appeal for permission to appeal and that court deciding to refuse permission: PCL submitted that this was an unreasonable delay of about three months.

(2) In the third period:

(a) the seven months between Court of Appeal's refusing permission to appeal and the holding of a case management hearing on 31 October 2017 – PCL said this should have happened more quickly, given the circumstances;

(b) the 18 months between the Court of Appeal's refusal of permission to appeal and the FTT sending notification of the date of the re-hearing – PCL said this should have happened more quickly, given the circumstances;

(c) the delay caused by the FTT on 4 June 2019 cancelling the hearing due to take place in December 2019. The hearing was subsequently relisted to begin on 5 October 2020, a delay of 10 months. PCL submitted that this delay was wholly unreasonable: the FTT told the parties on 4 June 2019 it had been unable to secure a judge, but this was eight months after the listing was made and just under

six months before the hearing date. PCL submitted that the December 2019 listing should have been preserved by the FTT e.g. cancelling hearings (of more recent appeals) to free up a judge. It said this was a failure of state to provide adequate resources;

(d) the 4½ months (mid June to 1 November 2019) it took for FTT to notify the parties of the 5 October 2020 new hearing date – PCL said that, due to this delay, its counsel did not keep the dates starting 5 October 2020 free, which then caused the hearing to be delayed from October 2020 to February 2021 – a delay of four months.

Discussion

49. As each case turns on its particular facts, I see little value in comparing the time taken in these proceedings to the time taken in various decided cases. Rather, adopting Lord Bingham's approach, which I find consistent with the approach of the ECHR in *Beggs* (see at [241]), I find it is necessary, given the real concern arising from the long period (13 years) that has elapsed since this appeal was notified to the Tribunal, to look at the detail of the delays on the part of the tribunals and courts alleged by PCL and decide whether those delays were reasonable or not.

50. Although PCL's allegations of unreasonable delays focus on the second and third periods of the proceedings, I note that in the first period

(1) three case management hearings were held, in June 2009, June 2010 and May 2012, the first two convened to determine applications by PCL that were resisted by HMRC (and which the Tribunal, following the hearings, granted, at least in part); the third to progress matters to hearing. The scheduling of the case management hearings itself involved delays of a few months, no doubt to co-ordinate the diaries of the parties and their legal representatives; there were further delays of a few months when HMRC asked for hearings to be postponed;

(2) the case management hearings were followed by the issuing of directions to progress the appeal, setting specific deadlines;

(3) scheduling complications for a hearing of over two weeks were no doubt the reason for the gap of over a year between the listing of the first FTT hearing and its commencement;

(4) PCL's submissions did not allege significant periods of inactivity by the Tribunal in the first period, nor is this suggested by the information in the Appendix. Rather, the impression given by this information is that of the Tribunal as "referee" engaged between well-represented parties in quite complex litigation, each robustly (and quite reasonably) defending its rights and advancing its interests. It seems to me the Tribunal was throughout playing the (sometimes difficult) role outlined in *Beggs* at [240], of balancing the need to ensure fairness as between the parties with the need to progress matters to hearing within a reasonable time.

51. Turning now to PCL's allegations of unreasonable delay during the second and third periods, I would observe as follows:

(1) Much of the second period, and all of the third period, came about because of the judicial process of appeal and remittal for a fresh hearing. It is clear that, in principle,

delays caused by these important processes are not unreasonable – indeed, the parties have not submitted otherwise here; and *Beggs* (at [254]) supports this proposition.

(2) The two month delay caused by HMRC's additional written submissions (March to May 2015) cannot be laid at the door of the Tribunal: it responded promptly and robustly to the situation, issuing directions and setting reasonable deadlines.

(3) The eight months taken by the FTT in producing its decision does not in my view indicate unreasonable delay: a great deal of evidence, cross examination, and legal argument had to be dealt with in the decision. There is no indication of inactivity on the Tribunal's part during this time.

(4) The six months taken by the Court of Appeal to decide the application for permission to appeal does not strike me as unreasonable delay, in context: whilst this appeal was dealing with events that, at that stage, had occurred ten years earlier, it was in essence a financial case involving a corporate entity, as opposed to a case involving very sensitive matters like individual liberty, children or vulnerable parties. It would not have been reasonable for this case to "jump the queue" as respects granting of permission to appeal by the Court of Appeal.

(5) I infer from the circumstances, and the history of the case, that most of the seven months between the Court of Appeal's refusal of permission, and the holding of the case management hearing in the FTT (31 October 2017), was attributable to diary management of the parties and their legal representatives; I find it unlikely, on the evidence before me, that this delay represented inactivity on the Tribunal's part. I accept that, given that the proceedings at this stage had been going on for over nine years, the Tribunal might have chosen to be "tougher" on the parties, insisting on convening the hearing on an earlier date (on which one or other party, or their legal representatives, had pre-existing commitments). This would have been the kind of "difficult" decision alluded to in *Beggs* at [240]. However, in all the circumstances, I do not think it was unreasonable of the Tribunal to prioritise fairness, the right of parties to participate in proceedings, and the right to be represented by the counsel of their choice. Hence I do not find that this was an unreasonable delay.

(6) The reasons for the 18 months between the Court of Appeal's refusing permission to appeal, and the Tribunal's notification of dates for the re-hearing, can be found in a combination of the point immediately above, and the directions made following the case management hearing on 31 October 2017. Those directions (summarised in the appendix), in my view, bear the hallmarks of active case management of the kind urged upon the courts by the case law authorities. I have considered whether the Tribunal was too generous in the time allotted for the various actions directed, given how long proceedings had already been going on by that time; however, my thinking on this is essentially the same as in the point immediately above, and so I do not think that these directions, and their enforcement by the Tribunal, can be taken as indications of unreasonable delay on the Tribunal's part.

(7) The ten months' delay caused by the Tribunal's abrupt postponement, in early June 2019, of the hearing listed for December 2019, was the fault of the Tribunal, in that a judge could not be secured for the hearing as listed. I infer from the circumstances that the judge originally "booked" for the hearing became unavailable.

From the information before me, it appears that this was a one-off unfortunate turn of events rather than evidence of a systemic shortage of staff to administer the Tribunal reasonably. PCL argues that the ten-month delay could, nevertheless, have been avoided by the Tribunal cancelling other hearings and so releasing a substitute judge for PCL's hearing: this would have been justified, PCL says, because by this point the proceedings had been ongoing for more than 11 years. I agree that the Tribunal dealt with the situation via its normal procedures rather than "pulling out the stops" to save the hearing dates in the way proposed by PCL (indeed, another "extraordinary" approach the Tribunal could have taken was to identify the earliest date at which a substitute judge was available and list the hearing for then i.e. without accommodating the parties' preferences as to dates). The decision by the Tribunal not to deploy "extraordinary" measures may be questioned, in retrospect – however, I do not think it was outside the realm of reasonable responses the Tribunal could have taken in the situation, and certainly does not indicate "inactivity" on the Tribunal's part. Had there been evidence of this incident being a systemic, rather than one-off, problem in the Tribunal's administration, I may have taken the view that the delay caused by deploying the Tribunal's "ordinary" procedures was unreasonable. But in the circumstances before me, I do not consider that the 10 months' delay caused by this incident cross the line into the realms of "unreasonable" delay.

(8) The Tribunal delayed the start of the rescheduled hearing by four months – from November 2020 to February 2021 – so as to accommodate the availability of PCL's counsel (the November 2020 start date had been fixed based on dates supplied by both parties; but PCL's counsel subsequently became unavailable – which PCL said was justified by the 4½ months it took the Tribunal to notify the parties of the hearing dates). I have again considered whether the Tribunal should have been "tougher" on the parties, given that over 11 years had now passed since the notification of the appeal – and insisted on the November 2019 start date as listed; and again, as above, I have concluded that the delay in accommodating PCL's counsel's availability was not unreasonable, given the need to balance the "fairness" and "reasonable" time aspects of PCL's Article 47 rights (*Beggs* at [240]).

52. Stepping back from the details, I have considered the question put by Mr Webster: how can it be that the hearing of proceedings started more than 13 years ago, relating to events of nearly 15 years ago, can be said to have been held within a reasonable time?

53. Although Mr Webster put the question rhetorically, in my view there is an answer – and one which goes to the reason this right is couched in terms of a "reasonable" time, rather than a fixed period: it all depends on the circumstances. In overview, the key circumstances here that explain why the very considerable time taken is not unreasonable are:

(1) the process of appeal and re-hearing – whilst unfortunate from the perspective of parties awaiting final resolution, this is nevertheless fundamental to doing justice;

(2) the time taken has not, on the evidence before me, been attributable to significant periods of inactivity on the part of the Tribunal or other courts involved – rather, the recurring reasons for time being taken are

(a) judicial processes to achieve fairness between the parties; and

(b) the Tribunal accommodating, in the interests of fairness and the due participation of the parties in the proceedings, the (often busy) diaries of legally represented parties in arranging lengthy hearings.

It is in this context that I have found that the one event in the history of these proceedings that stands out as being the fault of the Tribunal – the Tribunal's abrupt cancellation of the hearing listed for December 2019, on 4 June 2019 - whilst very unfortunate, and the cause of 10 months' delay, did not cause the time taken in these proceedings to become unreasonable.

CONCLUSION

54. As will be seen from the foregoing, I have concluded both that

(1) PCL's Article 47 right to a hearing within a reasonable time has not been breached; and

(2) even if there had been such a breach, the remedy would not be for the Tribunal to allow the appeal summarily.

55. Either of these conclusions would be sufficient to refuse PCL's application that its appeal be allowed summarily.

56. The application is accordingly refused.

PROGRESSING THE APPEAL TO HEARING

57. The parties have informed the Tribunal that the earliest dates that both parties and their preferred legal representatives are available for a three-week re-hearing over consecutive dates is 3 October 2022 to 30 November 2022. As this is a further delay of over 18 months, the Tribunal will wish to be assured that every reasonable effort is being made to consider any alternative arrangements that would allow the hearing to take place sooner. In the meantime, the parties should keep these dates free. The Tribunal intends to issue directions to this effect shortly.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 30 MARCH 2021

APPENDIX: CHRONOLOGY

October 2006	PCL's 09/06 VAT return received by HMRC
February 2008	HMRC issued decision denying PCL the right to deduct input tax
	PCL appealed
April 2008	HMRC served statement of case
August 2008	HMRC served a witness statement
October 2008	PCL requested that HMRC provide certain documentation
November 2008	PCL applied for specific disclosure regarding that documentation
	HMRC objected to PCL's application but provided some of the documentation
	PCL asked Tribunal to list the matter for a case management hearing
December 2008/ January 2009	HMRC provided more of the documentation but not all of it
February 2009	Case management hearing moved (by consent) to June 2009, at HMRCs request
June 2009	Case management hearing held. Directions made: • 14 days after date of directions, HMRC to provide final version of the "means of knowledge" submission • By 23 July 2009, PCL to serve witness statements • By 2 September 2009, HMRC to serve supplementary witness statements with exhibits • By 1 October 2009, PCL to serve its supplementary witness statements with exhibits • No further evidence to be adduced without leave of the Tribunal • Pre-trial review to be listed on the first available date after 1 October 2009
July 2009	HMRC served "means of knowledge" submission
	PCL applied for extension of time to file its evidence, to 12 August 2009. HMRC did not object.
August 2009	PCL applied for further extension of time, until 30 September 2009, to file a witness statement. HMRC did not object.
	PCL sent draft application for further & better particulars to HMRC. HMRC requested more time to reply to the request.
September 2009	PCL agreed HMRC's request for more time and requested an extension of time to serve its witness evidence
October 2009	HMRC provided responses to some (but not all) of PCL's requests for further and better particulars
	HMRC served a further witness statement
November 2009	PCL applied to Tribunal to direct further and better particulars and extension of time to serve PCL's witness statements

December 2009	HMRC objected to PCL's application and provided further response to PCL
January 2010	Case management hearing re: PCL's application listed but vacated due to unavailability of HMRC's counsel
June 2010	Case management hearing held. Directions made: • HMRC to amend statement of case to include full basic particulars; and serve within six weeks • Time for service of PCL's witness statements extended to six weeks from receipt of amended statement of case • PCL opted into the costs regime
August 2010	HMRC served amended statement of case
September 2010	PCL applied for extension of time to serve three witness statements
November 2010	HMRC served a witness statement
January 2011	PCL served witness evidence
June 2011	HMRC served further witness evidence
October 2011	PCL served second set of witness evidence
November 2011	Case management hearing listed for December 2011 vacated at HMRC's request, despite PCL's objection
January 2012	HMRC served second witness statement of one of its witnesses with application that it be relied upon
	PCL served letter conceding the existence of tax losses
May 2012	Case management hearing at which HMRC indicated its intention to apply to adduce further evidence from three witnesses. Tribunal then issued directions: • HMRC given six weeks to make application to serve additional evidence from three witnesses (and put on notice that extension of time for making such application unlikely to be given) • Mechanism put in place for scheduling case management hearing if PCL objected to such application • Timetable set for PCL notifying issues in dispute • Case management directions made for listing hearing, bundles, skeleton arguments
June 2012	HMRC served further amended statement of case
	HMRC applied to rely on further evidence and witness statements
December 2012	Tribunal listed hearing for 20 January to 4 February 2014
July 2013	PCL applied to vacate the hearing due to pressure of work
September 2013	Tribunal refused PCL's application
November, December 2013	HMRC applied to rely upon further evidence
January 2014	PCL served its third set of witness evidence
20 January - 4 February 2014	FTT hearing. PCL's witnesses gave evidence as follows: • Andy Hall – 2½ days • Marc Roach - 2 days

	• Richard Donaldson - ½ day • Leighton Birtchnell - 1 hour.
March 2014	HMRC served written closing submissions
	PCL served written closing submissions
April 2014	PCL filed notice of objection to further submissions made by HMRC (after PCL's written closing submissions)
May 2014	Tribunal issued directions that: • HMRC's further submissions be admitted in the form that they were first sent to the Tribunal but with no amendments • PCL given leave to submit such further representations, if any, in response to HMRC's submissions within 28 days • no further submissions or applications to be made without prior written permission of the Tribunal • Tribunal reserved the issue of the costs occasioned by these further submissions
20 January 2015	Tribunal released substantive decision allowing the appeal
March 2015	HMRC applied for permission to appeal
April 2015	FTT refused permission to appeal
May 2015	HMRC applied to the Upper Tribunal for permission to appeal
June 2015	Upper Tribunal granted permission to appeal
21-22 June 2016	Upper Tribunal hearing
28 July 2016	Upper Tribunal released decision allowing HMRC's appeal, remitting the case to the First-tier Tribunal with the direction that it be re-heard in its entirety by a fresh panel
24 October 2016	PCL applied to Court of Appeal for permission to appeal
1 April 2017	Court of Appeal refused permission to appeal
31 October 2017	Case management hearing in FTT
14 November 2017	Tribunal directed that: • Within two weeks, parties to agree two days in May 2018 to be available for a case management hearing (if necessary) • Parties permitted to rely in the re-hearing on witness statements that were relied upon in the first FTT hearing • PCL to use reasonable endeavours to secure, from solicitors that acted for it on the original appeal to this Tribunal, copies of the witness statements and exhibits that HMRC relied on in the first hearing. • No later than 1 December 2017, PCL to explain: o which, if any, witness statements and exhibits on which HMRC relied in the first hearing it has not been able to obtain from its former solicitors;

	○ an outline of the steps it took to secure those witness statements and exhibits; and ○ of which, if any, witness statements and exhibits on which HMRC relied in the first hearing PCL requires further copies. • No later than 15 December 2017, HMRC: ○ to notify which witness statements relied on in the first hearing they wish to reply upon in the re-hearing; ○ to serve copies of any witness statements relied on in the first hearing of which PCL has notified HMRC that it requires further copies; and ○ to serve any updating witness statements on which they wish to rely in the re-hearing. • No later than 2 February 2018, PCL to notify: ○ which of HMRC's witnesses it requires to be made available for cross-examination at the re-hearing (being those witnesses who were cross-examined at the first hearing). Notice to be accompanied by a high-level summary explanation of why any witness' evidence is disputed when it was accepted by PCL at the first hearing. • No later than 16 February 2018, HMRC to advise if any of the witnesses who are required by PCL for cross-examination are unavailable (given the lapse of time since the first hearing) and whose witness statements will therefore need to be withdrawn and replaced. • No later than 30 March 2018, HMRC to serve any replacement witness statements. Special arrangements made in case necessary for HMRC to withdraw and replace the witness statement of the expert witness • No later than 13 April 2018, the parties to provide a statement (agreed between themselves if possible) as to whether a case management hearing necessary. • No later than 11 May 2018, PCL: ○ to notify which witness statements relied on in the first hearing PCL wishes to rely upon in the re-hearing; ○ to serve any additional or updating witness statements on which PCL wishes to rely in the re-hearing. • No later than 8 June 2018, HMRC to serve any witness statements in reply. • The parties shall use reasonable endeavours to agree between

	themselves (i) a time estimate for the hearing supported by a hearing timetable and (ii) dates in the months of September 2018 to March 2019 when they would both be available for a hearing of this appeal. • Not later than 24 June 2018, both parties shall send a statement detailing: o any agreement that the parties have reached per the above direction; o other standard listing particulars o (if the parties have not been able to reach agreement pursuant to the above direction) their separate views on the anticipated duration of the hearing (together with a draft trial timetable); o (in case the Tribunal cannot list the appeal on dates the parties have agreed between themselves) dates to avoid for a hearing in the months of September 2018 to March 2019.
November 2017	PCL applied to amend above direction so as to provide for a case management hearing in September 2018
December 2017	HMRC objected to PCL's application
	Tribunal refused PCL's application, stating that it would be in touch to list a case management hearing in May 2018
May 2018	PCL served updating statements
July 2018	Tribunal wrote to the parties apologising for not arranging a case management hearing but stating that it did not appear that such hearing was necessary
9 August 2018	Parties sent agreed listing statement to Tribunal, stating (inter alia) that • the parties had agreed a hearing window of 2-20 December 2019 (later than the listing window of September 2018 to March 2019 directed by the Tribunal – but PCL was not available for any earlier consecutive 15-day period) • the parties would keep this window free pending listing of the appeal (and providing dates to avoid up to end of December 2019, in case the Tribunal was unable to list the hearing on the requested dates)
5 October 2018	Tribunal listed the hearing on the December 2019 dates requested by the parties
4 June 2019	Tribunal cancelled the December 2019 hearing as no judge was available to attend. The parties were asked to provide alternative availability dates.
14 June 2019	PCL wrote to Tribunal confirming 5-26 October 2019 as dates both parties were available for a hearing
1 November 2019	Tribunal listed the hearing on dates requested by parties (5-26 October 2019)

21 November 2019	PCL applied to vacate the hearing due to non-availability of counsel
3 December 2019	HMRC objected to PCL's application
9 December 2019	Tribunal wrote to parties, saying (inter alia): "It is regrettable that having been provided with mutually convenient hearing dates on 14 June 2019, the Tribunal was not able to notify the parties that the appeal had been listed on those dates until 1 November 2019. Given the history of the appeal the Judge [Cannan] is surprised that the appellant's representative did not keep the October dates available, and if necessary seek an update from the Tribunal as to when the listing might be confirmed."
12 December 2019	PCL responded to Tribunal, saying (inter alia): "We do wish, however, to place on record our response to the comments of Judge Cannan as you report them to have been. We do so, of course, with the utmost respect, but we cannot regard it as realistic or fair for there to be any criticism of solicitors or counsel in the circumstances. The case itself concerns facts arising in the first half of the last decade. The delay between the decision of the Upper Tribunal and the listing of the rehearing of the case for December 2019, may be fairly characterised as, at the least, regrettable. The case was removed from the list for December 2019 without any consultation and that decision was communicated to us by means of a letter with tick boxes stating that there was no judge available. Why this should have been the case when the trial had been fixed many months before was something which was not explained. The decision to take the trial out was inappropriate not only because of the already egregious delay entailed, but because counsel's diaries had been managed on the basis of the listing. The failure to provide an explanation for the lack of a judge was, yet again, regrettable. We provided alternative dates in June. Whilst an apology for yet further unexplained delay in providing any listing dates for a further four and a half months is welcome, yet again no explanation has been proffered for this unacceptable delay. The listing notified to us was for October 2020 the suggestion that professionals should continue to keep diaries open for the listing of a case when there is no possibility of knowing when that listing might be is, with respect, unrealistic. It is similarly unrealistic to expect counsel's clerks to be constantly on the phone to the tribunal clearing the date of every other case in which they were instructed. The difficulties arise because of the delay in responding to the available dates and in organising a hearing within a reasonable time. If the Tribunal does not have sufficient judges or staff to enable that to be achieved, the consequences for the administration of justice, and the achievement of trials within a reasonable time, are dire. Should the Tribunal be minded to refuse the appellant's application we would respectfully request that the matter be listed for a short hearing."
6 January 2020	Tribunal informed the parties that Judge Cannan considered it to be in the interests of justice to postpone the hearing and relisted the matter for 22

	February 2021 to 12 March 2021
18 September 2020	PCL wrote to the Tribunal asking it to confirm as a matter of urgency that the hearing listed between 22 February 2021 and 12 March 2021 would be going ahead on the dates currently listed in person
22 September 2020	Tribunal wrote saying that due to the latest coronavirus restrictions it was unable to confirm whether the hearing would proceed on the dates listed and in person. The Tribunal directed PCL to re-consider whether the matter was suitable to be heard remotely
12 October 2020	PCL confirmed that it remained firmly of the opinion that the matter was not suitable for determination remotely and asked the Tribunal to inform the parties as to what action it was taking to locate a court room large enough to hold an in-person hearing
9 November 2020	PCL applied for an order summarily allowing its appeal on the basis of delay
30 November 2020	HMRC objected to PCL's application
17 November 2020	PCL wrote to the Tribunal asking it to say within 7 days whether it would be able to confirm that the hearing would proceed in person on the dates currently listed
11 December 2020	PCL requested substantive response to its outstanding correspondence
16 December 2020	PCL told the Tribunal that it now considered that there was insufficient time to properly prepare for the hearing and applied for it to be vacated and relisted between 1 September and 8 October 2021
17 December 2020	Tribunal sought submissions from parties regarding case management issues related to PCL's application for order summarily allowing the appeal on the basis of delay
25 December 2020	Tribunal responded to PCL's letters of 12 October, 17 November and 16 December 2020, giving interim response regarding face to face and video hearing arrangements, and seeking submissions and information from the parties
13 January 2021	Following responses by parties, Tribunal cancelled the hearing listed for 22 February 2021 and directed that PCL's application for the appeal to be summarily allowed on the basis of delay was to be heard (by video) on 22–23 February 2021