[2022] UKUT 00116 (TCC)

Appeal number:
UT/2021/00069

Procedure— whether Respondent in UT appeal needs UT's permission to argue new point that was not argued before the FTT – yes – permission to raise new point (on estoppel by convention) refused

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

WYATT PAUL **Appellant**

-and-

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in chambers, on 25 April 2022

Keith Gordon, counsel, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

Written submissions made within HMRC's Rule 24 response of 14 March 2022 which raised the new argument, appellant's Rule 25 reply of 16 March 2022 objecting to it. The Tribunal also considered HMRC's response, pursuant to the Tribunal's direction, of 12 April 2022 and the appellant's reply of 19 April 2022.

DECISION

Introduction

1. This decision concerns whether respondents, in this case HMRC, in an appeal before the Upper Tribunal against an FTT decision, need the Upper Tribunal's permission to raise a new argument that was not argued before the FTT, and if so whether such permission should be granted.

2. The appellant's appeal is against the FTT Decision *Wyatt Paul v HMRC* [2020] UKFTT 415 (TC). The FTT Decision dealt with the availability and timing of US tax relief to Lloyd's underwriters and also whether HMRC's enquiry process was invalid because various provisions in the Taxes Management Act 1970 ("TMA 1970") had not been complied with. The FTT dismissed the appeal. While the appellant sought, and obtained, permission to argue a number of grounds before the UT, all but one was subsequently dropped.

3. The sole remaining round of appeal pursued at a substantive appeal hearing, yet to be listed, concerns whether a notice of enquiry not posted to the appellant's address in accordance of s115 TMA 1970 was properly served, and whether the notice was "received", given awareness of the notice arose through the appellant's advisers. In their Rule 24 response of 14 March 2022, HMRC dispute these points amount to errors of law but also raised a new argument, which the appellant objects to. That argument is that the appellant was estopped by convention from denying that a valid enquiry had been opened in accordance with the Supreme Court's decision in *Tinkler v HMRC* [2021] UKSC 39. Both parties were content for the matter to be decided on papers. The FTT decision too was decided on the papers. As required by Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that required the parties' consent, and that the FTT consider that it was able to determine the matter without a hearing. There is no suggestion that Rule 5A (Coronavirus temporary rule (decisions without a hearing)) was applied.

Do HMRC need the UT's permission to argue the new point?

4. It is worth clarifying at the outset that the permission at issue does not arise out of HMRC seeking to cross-appeal, or needing to have, cross-appealed the FTT Decision. HMRC won on both the enquiry validity and substantive liability issues before the FTT.

5. The appellant objects to HMRC raising the estoppel argument because it is a new point that was not argued before. He notes that HMRC had not even applied for permission, and submits that even if they did, the application should be resisted given the fact-sensitive nature of the estoppel issue, and because no specific evidence was or findings of fact were made on the issue before the FTT.

6. The appellant points to the considerable authority on the relevant principles regarding admitting a new point in an appeal. In *Singh v Dass* [2019] EWCA Civ 360, Haddon-Cave LJ set out the principles, first that an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court, and second that:

> "…an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial."

7. The third principle concerned pure points of law which is not relevant as the estoppel by convention argument engages issues of fact.

8. The appellant also relies on May LJ's judgment (at [52]) of *Jones v MBNA* [2000] EWCA Civ 51 (set out in full below at [12] below and the rule referred to in *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337 ([23]) that:

> "…if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards…"

9. HMRC does not take issue with the content of these principles; they simply say the principles are not relevant. They submit the case-law is concerned with the situation where a party loses at first instance and seeks to rely on new argument, on appeal, which the other party, who was successful, is then asked to meet. They highlight the following passage from the extract from May LJ's judgment (at [52]) in *Jones v MBNA* which the appellant relies on, that it was:

> "…not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis"

10. HMRC emphasises that both *Jones v MBNA*, and *Singh v Dass*, concerned new points raised by the appellant on appeal. They point to the lack of authority applying the principles regarding new points in *Jones* to the position of a respondent on appeal who was successful below. HMRC, as the respondents in an appeal regarding a decision in relation to which HMRC were successful, do not, it is submitted, accordingly need even to ask for permission.

Discussion

11. While HMRC are correct that the facts of the above cases are restricted to situations where the appellant sought to run a new point, I reject the contention that this is of significance as far as the statement of principle in those cases are concerned.

12. In agreement with the appellant, I consider the propositions advanced are broader and apply to both parties. The underlying rationale expressed for the principle in *Jones*, that "litigation should be resolved once and for all", for all the reasons set out in the full extract of [52] below, would apply equally to both parties in an appeal. The reasoning also discusses the principles, and the rationale (underlined below) for them in "party-neutral" terms, as the appellant put it, and as, for example shown in the full extract of [52] (emphasis added).

> "52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally **each party** should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally **a party** cannot raise in subsequent proceedings **claims or issues** which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. **Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all,** and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view, this is not such a case."

13. Other expressions of the relevant principles are also similarly expressed in a "party-neutral" way: (*Singh v Dass* at [15] – [18] and *Notting Hill Finance v Sheikh* [2019] EWCA Civ 1337 [23] (at [6] and [8] above).

14. These points, regarding the non-party specific rationale, for an appellate court or tribunal's control over new points, and the way in which the relevant principles have been explained, are sufficient to address HMRC's argument that the principles are restricted to appellants who argue new points. Further reinforcement may also be drawn however from the Court of Appeal's discussion of the new points sought to be raised in *Sivier v Riley* [2021] EWCA Civ 713, which the appellant referred to in his reply of 19

April 2022. The appeal before the Court of Appeal was an appeal by the defendant against a High Court decision striking out all of his defences. In response to the entirely new points the defendant, who was the respondent to that appeal, sought to argue in their Respondents' notice, Warby LJ (with whom Henderson LJ and Dame Victoria Sharp P agreed) held:

> "…We do not usually allow entirely new points to be taken on appeal. It is often procedurally unfair to do so, and normally wrong because appeals are by way of review not re-hearing. Ordinarily the place for arguments to be given their first run-out is the court of first instance. Any appeal would then be a first appeal. For those reasons I would be averse to upholding the Judge's decision on any of these addition or alternative bases"

15. While this discussion has so far focussed on principles developed in relation to litigation in the courts, the particular tribunal context surrounding such principles over control over new points arises should not be overlooked. This is the Tribunal's Rule 5[1] case management discretion over the conduct of proceedings. The above case-law principles guide the exercise of that discretion, which, in accordance with the overriding objective, must be exercised so as to deal with cases fairly and justly.

Should HMRC be allowed to run the estoppel point?

16. The parties' submissions addressed the two principles set out in *Singh v Dass* (at [6] above). As to the first, there is no dispute HMRC could have raised the estoppel issue before the FTT but that they did not. As the appellant points out, HMRC were a party to the *Tinkler* litigation. The estoppel by convention ground in relation to validity of closure notice arguments was raised before the FTT there right from the start of the litigation. HMRC raise other points, to the effect that the tribunal should be wary of not allowing the new point, which I deal with later.

17. The main source of disagreement is around the second principle set out in *Singh v Dass* regarding the necessity of new evidence, or that the conduct of the first instance hearing regarding the evidence would have been different. The appellant submits that evidence would need to be adduced by both sides. That evidence would probably have been tested under cross-examination whereas the parties consented to the matter being decided on the papers. HMRC submit there is no difficulty regarding the need for further evidence. Their position is that all the evidence needed to determine the estoppel point was already before the FTT in the form the appellant's unchallenged witness evidence, which HMRC are content to accept, and other documentary evidence.

[1] The Tribunal Procedure (Upper Tribunal) Rules 2008

18. It is helpful at this point to set out the findings that would need to be made, if permission to run the new point were granted, in order for HMRC to establish the estoppel by convention together with what HMRC's response says on these which is very much inspired by the similarity they argue this case has with the relevant facts in *Tinkler*. As explained in the Supreme Court's decision in *Tinkler* ([52]) these findings derive from the summary of principles in *HMRC v Benchdollar* [2009] EWHC 1310 (Ch) (at [52]) as amended by *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023.

> (1) *There was a common mistaken assumption expressly shared (and per Blindley Heath) "something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption":* HMRC's case is that both parties share a mistaken common assumption that a valid enquiry had been opened. The appellant's representatives had made manifest to HMRC that they were sharing, and acting on, that common assumption by engaging in correspondence with HMRC in relation the appellant's tax liability so that they "crossed the line".
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> (2) *The expression of the common assumption by the party alleged to be estopped must be such that that party may properly be said to have assumed some element of responsibility for it (conveying to other party that that party expected the other to rely on it):* HMRC say the appellant's representative "assumed some element of responsibility" for the common assumption and for HMRC's reliance on it.
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> (3) *the person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than upon the party's own independent view of the matter*: HMRC submit HMRC were relying, as the appellant's representative must have expected and intended, on the affirmation of the common assumption in relation to their subsequent mutual dealing.
>
> (4) *That reliance must have occurred in connection with some subsequent mutual dealing between the parties*: HMRC say their reliance on the common assumption a valid enquiry notice had been served was in connection with carrying out the enquiry which included mutual dealing in the form of detailed correspondence.
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> (5) *Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped sufficient to make, it unjust or unconscionable for the person alleged to be estopped to assert the true legal or factual position*– HMRC did not send another notice of enquiry within the relevant time limit. If the enquiry was invalid, the closure notice would also be invalid and the Appellant would succeed in his appeal. Similar to the facts in *Tinkler,* the appellant's unchallenged evidence was that he was informed of the enquiry by the letter sent to his accountants

which included a copy of the enquiry. It was unconscionable for him to raise the point for the first time eight years later.

19. The appellant submits these criteria are largely subjective, and had the relevant questions been live before the FTT, this would have led to the FTT reaching its conclusions on the basis of evidence which the appellant would have had a chance to test in cross-examination. While HMRC cross-examination would only be relevant to the appellant's own evidence, given the extent of the elements of estoppel which related to matters solely within its knowledge, such as reliance, HMRC would succeed only if they adduced evidence of their own (which the appellant would have had the right to test). It is submitted the UT cannot fairly reach a view on these matters on the basis of the facts found to date. The UT cannot be sure whether further evidence might have been adduced and the appellant should not be put to the expense of ascertaining whether further evidence might have been adduced. Given the passage of time (it was 3 years since the appellant's first witness statement) he is prejudiced by the potential loss of documentary evidence that he could have relied on in the FTT to refute the estoppel.

Discussion

20. I start by considering the first aspect of the principle (2) in *Singh v Dass*. Would the new point necessitate new evidence? The straightforward answer, if that question is taken at face value, and to be addressed to the position now, as opposed to imagining what the position might have been if the point was before the FTT, is no. The burden is on HMRC to establish the elements of the estoppel. Their stated position now is that all the necessary evidence was before the FTT. The appellant does not identify what areas of evidence that would be necessary for him to respond to the estoppel point. Similarly, as regards the formulation from *Notting Hill Finance,* which asks whether there is evidence that could have been adduced, "which by any possibility would prevent the point from succeeding", no such evidence has been identified. Nor is it clear what the nature could be of any documentary evidence that might have been available at the time of the FTT hearing but which is now not. I acknowledge the appellant's point that they should not be put to the cost and trouble of ascertaining what further evidence might have been adduced. The difficulty though, is that without at least some more specific indication of the nature and subject area of the potential evidence, the tribunal has no reliable basis to be satisfied that new evidence is necessary, or that even "by any possibility" there is any evidence the appellant would have adduced which would have stopped the estoppel point succeeding.

21. On the face of it, I can see that, as it appears was the case in *Tinkler,* many of the relevant elements, even if they involve subjective matters on the part of each party to the estoppel, might nevertheless be inferred by considering the train of correspondence between HMRC and the appellant's representatives over the relevant period. However, it is at least possible that some aspects would not. For example, in *Benchdollar* principle (3), whether HMRC in fact have relied upon the common assumption, to a sufficient extent, *rather than HMRC's own independent view* of the matter might involve

evidence of the HMRC's internal practice and processes at the relevant time where it is not clear, certainly from the FTT's findings at least, that such specific evidence on the point was led before the FTT. For present purposes, though, it matters not whether HMRC's position turns out to be right, just that, as things stand, no new evidence is required if HMRC run the point in the way they propose to.

22. By contrast, the analysis on the second (and alternative) aspect of principle (2) in *Singh v Dass* (whether the new point would have resulted in the trial being conducted differently with regards to the evidence at trial) points clearly in favour of the appellant's case that the new point should be disallowed. If the estoppel point, entailing all the evidential elements outlined above, had been raised before the FTT the appellant rightly points out that he might have not foregone his right to an oral hearing. It is also possible, given that the relevant FTT rule (Rule 29 (1)(b)) requires the FTT to consider that it is able to decide the matter without a hearing, even if the parties consent, that the FTT's own analysis on whether it was able to deal with the matter on the papers would be different too. If the new point on estoppel had been raised, the appellant would undoubtedly have sought, and took advantage of, the opportunity to cross-examine the HMRC officer who gave evidence on behalf of HMRC. I am not equipped to consider whether that would have yielded any relevant findings either way but the crucial point for present purposes is that I am satisfied the FTT's determination would have been conducted differently with regards to the evidence.

23. HMRC make the point that in *Tinkler* the taxpayer's evidence was not really challenged and was accepted by the FTT, and that there was not any significant challenge to the evidence of the other witnesses. I agree with the appellant however that the approach parties have taken to cross-examination in another case is irrelevant. It is plain the strategy taxpayers and representatives take on one case, albeit on a similar issue, but a fact sensitive one nonetheless, will not provide any reliable template to the strategy which might be adopted in different cases with different taxpayers and representatives.

24. HMRC also argue that if permission is refused, this will put the UT in the difficult position of ignoring the binding Supreme Court's decision in *Tinkler* which concerned very similar facts. They submit this course is not open to the UT as a superior court of record whose decisions bind the FTT. If HMRC had not raised the estoppel argument they suggest the UT may have needed to do so itself.

25. I reject this submission. The UT will resolve the issues determined to be before it. If the new point is not admitted, even it is assumed the relevant facts in the current appeal and in *Tinkler* are materially the same, there will be no conflict. The Supreme Court's decision on estoppel will not be binding if this UT case turns out not to be a case in which the estoppel point is argued. There will be no difficulty regarding the precedent set for FTT cases. The Supreme Court decision will continue to be binding, as appropriate, in relation to cases where estoppel by convention falls to be determined. Any UT decision in this matter, if it excluded the estoppel point, would not. That

different outcomes might be reached on similar facts follows from the different issues that fall within the scope of determination in the respective cases. That in turn follows from what issues the parties raise or the court or tribunal allows them to raise. While there may be circumstances where, having squared any issues of procedural fairness to the parties, the UT might raise points of its own volition, no explanation or authority is cited by HMRC for why the UT would raise the estoppel point here if HMRC did not.

Conclusion

26. Drawing back to consider whether it is fair and just to admit the new point on estoppel, it is clear given that the new issue will involve findings of fact, and that the first two principles set out in *Singh v Dass* will therefore provide instructive guidance on the tribunal's case management discretion. Having regard to those, it is also clear, firstly that HMRC could have argued the point before the FTT but did not, and even more significantly, that if they had, the hearing before the FTT, with regards to evidence that was before the FTT, would have been conducted differently. These features, in my judgment, are powerful indications that permission to argue the estoppel point should be refused. For the reasons explained, none of the other points HMRC raise, persuade me to reach a different view.

27. I therefore decide that the permission, which I have held is necessary for HMRC to obtain in order to argue the estoppel point, is refused.

Signed on Original

SWAMI RAGHAVAN

UPPER TRIBUNAL JUDGE

RELEASE DATE: 25 April 2022