Neutral Citation: **[2023] UKUT 00285 (TCC)**

Case Number: UT/2021/000090
UT/2021/000091

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

EXCISE DUTIES –assessment on road hauliers for joint and several liability in relation to excise duty on duty suspended loads in 2006 – preliminary issues hearing before FTT – whether FTT erred in not indefinitely staying proceedings or not barring HMRC in circumstances where both parties agreed fair hearing not possible due to passage of time – no – cross-appeal by HMRC - whether FTT erred in refusing HMRC's strike out application – no –the issue raised by the strike-out (whether findings UT had made in 2016 in relation to the same disputed journeys were determinative) had been previously determined against HMRC in previous FTT proceedings – appeal and cross-appeal dismissed

Heard on: 4 October 2023
Judgment date: 28 November 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Between

ANDREW HOWARD PARNHAM
MARK WILD

Appellants/Respondents

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents/Appellant

Representation:

For the Appellants: Ian Bridge, Counsel, instructed by Keystone Law

For the Respondents: Isabel McArdle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellants are road hauliers who were made liable to joint and several liability excise duty assessments based on HMRC's view that an irregularity arose in the haulier's transport of duty suspended spirits contracted to be delivered from the UK to an Aldi warehouse in Belgium. Mr Parnham was assessed for duty of £484,206. Mr Wild was assessed for £1,302,036. This is an appeal against a decision of the FTT ("**the 2020 FTT**") following a hearing in 2020 published as *Mark Wild (Trading as Mark Wild Haulage) and Andrew Parham (trading A H Parnham Transport v HMRC* [2021] UKFTT 34 (TC) ("**the 2020 FTT Decision**") which dealt with various preliminary issues in Mr Parnham's and Mr Wild's appeals.

2. The substantive proceedings turn on a single factual issue of whether the consignments of spirits contracted to be delivered to the Aldi Warehouse in Belgium in 2006 by the appellants were delivered there or not. Along with other driver/hauliers, the appellant hauliers were subcontracted to undertake the deliveries by the main haulier contractor SDM European Transport Ltd ("**SDM**") on whom excise duty assessments (£6.3m) had also been imposed in SDM's capacity as guarantor of the deliveries under the relevant legislation. Mr Parnham's and Mr Wild's appeals were stayed behind SDM's appeal however SDM's appeal was not finally determined until 2016. Although SDM's initial hearing took place before the FTT in 2010 that decision was appealed to Upper Tribunal in 2013 following which it was remitted back to a different FTT panel. That subsequent decision of the FTT in 2014 was then appealed to the Upper Tribunal. SDM's appeal was not finally determined until the Upper Tribunal remade that 2014 FTT decision in 2015. Delays then occurred in getting the appellants' stayed appeals back on foot. In 2018 HMRC sought, unsuccessfully, to strike out Mr Parnham's and Mr Wild's appeals as lacking a reasonable prospect of success given the findings in the SDM hearing, however the 2018 FTT (Judge Poole) considered those findings in respect of SDM's appeal did not determine the appellants' appeals.

3. The appeal now before us is against the 2020 FTT decision which made determinations on various preliminary issues. In particular, it refused the appellants' application that HMRC should be barred from further participating (the FTT was not persuaded HMRC was at fault). The FTT also refused HMRC's strike out application (which had argued it would be an abuse of process for the appellants argue the same factual issue given that had already been determined in SDM's appeal). This was on the basis that the FTT considered the implication of the factual findings HMRC sought entailed dishonesty on the part of the appellants (that their evidence was untruthful and that they were complicit in a diversion fraud), and that fairness required that allegation was put to the appellants. The findings in SDM's appeal were not determinative. The result of both those refusals by the 2020 FTT was that the substantive hearing would need to proceed to a substantive hearing before the FTT.

4. The appellants, with the permission of the Upper Tribunal, and HMRC, with the permission of the FTT, now appeal the 2020 FTT's decisions refusing their respective barring and strike out applications. (Although the Upper Tribunal hearing had been listed for September 2022 that was postponed due to the period of national mourning.)

5. The appellants' case, in essence, is that in circumstances where, as here, both parties were agreed a fair hearing was not possible (HMRC having indicated a fair hearing was not possible in 2019 prior to the preliminary issue hearing), the FTT should have barred HMRC from participating, summarily allowing the appeals, or else stayed the proceedings indefinitely. HMRC's cross-appeal is that the FTT was wrong not to strike out the case arguing the FTT was wrong to assume that HMRC's case entailed allegations of dishonesty.

LAW

6. There is no dispute around the relevant law underlying the excise duty assessments. This is contained in the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001. Under Regulation 4, an excise duty point arises in the UK where excise goods failed to arrive at their destination and there has been an irregularity. Regulation 7(1) provided:

> "Subject to paragraph (2) below, where there is an excise duty point as prescribed by regulation 3 or 4 above, the person liable to pay the excise duty on the occurrence of that excise duty point shall be the person shown as the consignor on the accompanying administrative document or, if someone other than the consignor is shown in Box 10 of that document as having arranged for the guarantee, that other person."

7. SDM's liability flowed from being a guarantor of the relevant consignments. The appellants' liability arose from 7(2) which provides:

> "Any other person who causes or has caused the occurrence of an excise duty point…shall be jointly and severally liable to pay the duty…".

8. Although it can be seen there is a difference between the basis for liability for SDM and for the appellants (because of the causation element required for the appellants but not for SDM) that does not make a practical difference in the current litigation. That is because the way the appellants put their case centres on a straightforward factual issue of whether the goods arrived at the Aldi warehouse in Belgium. If the goods did arrive at that warehouse then no excise duty point arose and therefore there was no excise duty assessment liability.

PROCEDURAL HISTORY AND FTT DECISION

9. To understand the parties' appeal we need to say a little more about the procedural history of the litigation both in SDM's appeal and in the appellants' appeals. The 2020 FTT set that out with admirable clarity (at [9] to [70]) despite its complexity. For the purposes of this appeal before us, the following further summary will suffice to put the taxpayers' arguments in context.

10. In *SDM European Transport Ltd v HMRC* [2011] UKFTT 211(TC) ("**FTT1**") which was issued in March 2011, following a hearing in September/October 2010, the tribunal (Judge Wallace and Tribunal Member Coles) allowed SDM's appeal. Mr Parnham's and Mr Wild's appeals were stayed behind SDM's appeal. In relation to SDM's appeal, Mr Parnham and Mr Wild both produced witness statements on behalf of SDM, however only Mr Parnham was cross-examined. Mr Wild was called for cross-examination but did not appear. The FTT found all the consignments contracted to be delivered to the Aldi warehouse had been delivered. On appeal to the Upper Tribunal ([2013] UKUT 251 (TCC)) (Judge Sinfield and Judge Hellier) "**UT1**", overturned some of FTT1's findings on *Edwards v Bairstow* grounds on the basis that these could not stand given FTT1's finding that certain of the journey had been impossible (within the timescales indicated by the documents). UT1 remitted the appeal back to the FTT with directions for further determination on whether the journeys were impossible on the evidence that was before FTT1. That was heard by Judge Berner sitting in the FTT ([2014[UKFTT 829 (TC) "**FTT2"**). Apart from one journey, Judge Berner found none (including those undertaken by Mr Parnham and Mr Wild) were impossible. FTT2's decision allowing SDM's appeal gave rise to an appeal to the Upper Tribunal (Judge Bishopp and Judge Cannan) ([2015] UKUT 625 (TCC) ("**UT2**"). That dismissed SDM's appeal (the decision was carried by Judge Bishopp's casting vote with

Judge Cannan dissenting on the test used to decide whether journey were impossible and whether Judge Berner had misapplied the test). UT2 decided (by Judge Bishopp's casting vote) to remake the decision rather than remit it. The point of difference was on whether the evidence needed to be heard from the drivers again, Judge Cannan considered it did on the basis he considered HMRC's case necessarily involved a dishonesty allegation, which needed to be put fairly and squarely to the witnesses whereas Judge Bishopp considered that fairness obligation had been met by the proceedings before FTT1. UT2's remade decision included the conclusion that Mr Parnham's and Mr Wild's journeys could not realistically have taken place. With the consent of SDM, UT2 did not hear from the drivers again when remaking its decision.

11. The outcome, as the 2020 FTT summarised neatly at [48] was that:

> "…it took nearly ten years from the time of the events in question for SDM's case to reach a final conclusion. That final conclusion was that SDM had not proved, on the balance of probabilities that the 63 movements of duty suspended alcohol had arrived at the Aldi warehouse. That conclusion in turn followed a split decision of UT 2, determined by the exercise of a casting vote, that at least some of the 63 movements could not realistically have been completed in the time available according to the evidence, even though the drivers of those consignments had given evidence that they had delivered the goods to the Aldi warehouse. It was further concluded that if some of the loads had not arrived, none of the loads had arrived."

12. On 24 September 2018, HMRC filed an application to strike out the appellants' appeals which included a ground that the findings of fact in the UT2 decision meant the appeals had no reasonable prospects of success. As noted in the subsequent FTT decision in 2018 by Judge Poole ("**the 2018 FTT Decision**"), following a hearing of the application to strike out, the application was advanced on the basis that:

> "As the Upper Tribunal had decided by Judge Bishopp's casting vote that the goods had not arrived, that was determinative of the only real issue in these appeals" ([19] of the 2018 FTT Decision).

13. In the 2018 FTT Decision, Judge Poole noted it was not open to a tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation had put been put to him fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness had been given a fair opportunity to respond to it (per Henderson J as he then was in *Ingenious Games LLP v HMRC* [2015] UKUT 105 (TCC) at [65]). Judge Poole noted that Judge Bishopp considered that requirement was satisfied based on two qualifications but that neither of those qualifications applied in relation to Mr Parnham's and Mr Wild's appeals. First Judge Bishopp noted the core issue was not whether the drivers were party to a conspiracy but whether SDM had discharged the burden of showing the goods had been delivered. Here, however, Judge Poole had noted that HMRC's case was that the appellants were complicit in the fraudulent diversion of the relevant loads. Second, Judge Bishopp had noted that SDM were content for the decision to be remade without hearing from the drivers again whereas it was not clear whether the drivers were content to proceed on the same basis. Judge Poole continued:

> "7. I therefore consider that the findings of fact made by the Upper Tribunal (without actually seeing the witnesses give evidence) cannot be regarded as definitive for the purposes of these appeals, to which the "normal rule" should apply so that the appellants should be given the opportunity of answering the specific allegations of dishonesty which HMRC are levelling against them as a core part of their case.

> 8. I also note that Mr Wild did not even give live evidence in the previous appeal of SDM.
>
> 9. It follows that I do not consider the appeals to have "no reasonable prospect of success". The appellants must at least be given the opportunity of convincing a Tribunal of the truth of their evidence (as the FTT in the first hearing was apparently convinced) in the face of the supposed "impossibility" of the journeys they claim to have made."

14. Accordingly Judge Poole refused HMRC's strike out decision.

The 2020 FTT Decision / reasoning

15. In view of the parties' dispute before us regarding the scope of the preliminary issues hearing, it is necessary to cover the run-up to the preliminary issues hearing before the 2020 FTT in more detail than would otherwise be the case.

16. On 2 September 2019 the appellants filed a notice of objection to HMRC's further strike out application, an application brought on the basis that the same factual issue had already been decided in SDM's appeal. Amongst the arguments that the proceedings amounted to an abuse of process was that the delay meant the appellants could not be afforded a fair trial in circumstances where the events were so long in the past. It was noted that HMRC appeared to have conceded the point.

17. The appellants finally produced grounds of appeal on 18 October 2019. The appellants' primary case was that the goods had arrived at their destination at the Aldi warehouse in Belgium and accordingly no irregularity had occurred. The appellants raised three issues which it described as preliminary issues / grounds requiring determination:

> (1) Whether it was an abuse of process under the doctrine of *res judicata* for the FTT1 findings to be relitigated.
>
> (2) Whether in view of the delay a fair trial could be had and /or it was fair to try the issue. The appellants noted HMRC had appeared to concede that the tribunal could not deal with matters fairly and justly – they agreed that inter alia the delay in proceedings had rendered a fair trial impossible and sought a stay or debarment.
>
> (3) If the appellants could receive a fair trial, the appropriate standard of proof was criminal and the burden rested on the HMRC. The assessment amounted to a criminal penalty for ECHR purposes.

18. Judge Poole issued preliminary issue hearing directions on 7 November 2019 prefacing this with an explanation that:

> "it would be appropriate for the Tribunal to determine, as a preliminary issue, whether in the circumstances it is appropriate for the Tribunal to bar debar HMRC from taking any further part in these proceedings and summarily determine all issues in the appeals against them. The basis upon which the Appellants seek this outcome has been set out in paragraphs [*(1) and (2) above – see [17(3)]*] of the Appellants' grounds of appeal, and developed in their Notice of Objection to Strike Out dated 2 September 2019."

19. The Preliminary issue was described as follows:

> "The question whether HMRC should be debarred from any further participation in these appeals and all issues therein should be summarily determined against them on the grounds set out in the Appellants' grounds of appeal and supplemented in their Notice of Objection dated 2 September 2019 shall be decided as a preliminary issue ("the Preliminary Issue").

20. The appellants' skeleton argument for the preliminary issues hearing, contained a section entitled "Application for Debarment/Abuse of Process referred to FTT Rules 2 (overriding objective) Rule 5 (Case management including power to stay, Rule 8(3) on strike out/ barring (and UT rules and the Tribunal Courts and Enforcement Act 2007 ("**TCEA 2007**").

21. At paragraphs 27 and 28 of that section the appellants stated:

> "The Appellants rely upon the decision of the Upper-tier Tribunal in the case of *Foulser v HMRC* [2013] UKUT (TCC). In broad terms *Foulser* establishes that in respect of alleged unfairness of proceedings, rather than illegality, the FTT has the jurisdiction to ensure natural justice. The Appellants consider such natural justice includes the overriding objective set out in rule 2(2) and dealing with a case fairly and justly. Rule 5(1) & 5(2) provide general powers. Rule 5(3) provides non-exclusive specific examples powers including at 5(3)(e) the hearing of a preliminary issue and (j) stay or sist"…
>
> "*Foulser* provides authority for the proposition that debarment can be ordered under the general powers if to do otherwise would not provide a fair and just disposal of the case. In addition rule 8(3)(c) provides a specific circumstance under which debarment can be ordered with subsequent summary determination where there is no reasonable prospect of the Respondents case succeeding."

22. The submissions set out that there was no reasonable prospect of success of the HMRC resisting the appeals and that the tribunal should therefore debar HMRC under Rule 8(3)(c) and determine the appeals in favour of the appellants. UT2 was argued to be non-binding or *ultra vires* under TCEA 2007, and it was submitted that with no new evidence proposed to be served and the time passed the evidential position would be less clear than 2010 with no realistic prospect of a conclusion being reached that was different from that reached by FTT1, FTT2 and dissenting Judge Cannan in UT2. Under a separate heading "Rule 2 and Rule 5 – the case can longer be dealt with "fairly and justly", the appellants submitted given the delay because the appellants "will unavoidably have a poorer recollection of the detail of the individual journeys they made to Aldi, especially among thousands of other journeys they completed before and since late 2006, it was highly unlikely they would be in a position to add any meaningful detail to that that which was provided to the FTT in 2010". It was submitted a 15 year delay was unfair. The delay was not of the appellants' making – there was an unaccounted for delay between UT2 and 2018, the whereabouts of other drivers was not known, the appellants did not have paperwork from the first hearing, the appellants would need full disclosure of the Belgian evidence to provide explanation that diversion occurred after deliver to Aldi – much of paperwork probably destroyed. The skeleton concluded:

> "46. The Appellants seek an order staying proceedings as an abuse and summary determination of the Appeals in favour of the Appellants pursuant to rule 5(3) of the Tribunal Rules
>
> 47. Further or alternatively the Appellants seek an order barring the Respondents from taking further part in the appeals and summary determination of all issues against the Respondents pursuant to rule 8 (3) (c) & (8) of the Tribunal Rules."

23. The FTT recorded at [69] the appellants' objection of 2 September 2019 and the grounds of appeal produced on 18 October 2019, and noted at [70] the FTT directions of 7 November 2019 which it said had led to the hearing before it. It recorded at [72(1)] the three preliminary issues that the appellants had "initially put forward" which included the issue

"whether in view of the delay it was possible to have a fair trial and/or whether it was fair to try the issue" and the re litigation of facts determined by FTT1 issue and whether the burden of proof lay on HMRC to prove to the criminal standard. It also recorded that Mr Bridge's skeleton argued for debarment on the basis HMRC's case stood no reasonable prospect of success.

24. The 2020 FTT's decision addressed the issues on: 1) burden of proof 2) no reasonable prospect of success 3) fairness/abuse of process, as follows.

(1) *Burden of proof:* the FTT decided the normal civil standard applied with the burden on the appellants. It rejected the suggestion joint and several liability was a penalty noting the nature of joint and several liability was that multiple sums could not be recovered from each person.

(2) *No reasonable prospects of success* -after summarising the parties' submissions the FTT disagreed that HMRC would have no reasonable prospect of success. It reasoned as follows. It noted although HMRC had not expressly alleged dishonesty, that was implicit in the assertion the appellants caused the duty point. The FTT explained at [97]:

> "The alleged liability arises under Regulation 7 because the drivers "caused the occurrence of an excise duty point". This requires that the drivers diverted the loads of duty suspended alcohol and did not deliver them to the bonded warehouse designated in the AADs [*accompanying administrative documents*] and CMRs [*the consignment notes under the Convention on the International Carriage of Goods by Road*], contrary to the evidence given in their witness statements, and in Mr Parnham's case, at the FTT 1 hearing. It necessarily follows that HMRC are accusing the Appellants of lying in their witness statements/at the hearing and of dishonestly diverting the goods."

The FTT did not regard that allegation of dishonesty having been put "fairly and squarely" or otherwise" to Mr Wild or Mr Parnham ([99]). It adopted Judge Poole's reasoning as to why Judge Bishopp's finding that the goods did not arrive was not determinative in the present appeals. The FTT considered it would accordingly be open to a tribunal to reach a different view on the appellants' case on whether the goods had reached the Aldi warehouse. It continued (at [105]:

> "On the other hand, as set out in HMRC's submissions, there are many pieces of documentary evidence which support the Respondents' case and UT 2's decision that the allegedly impossible journeys could not, on a realistic basis have taken place, was based on a careful review of all the evidence, including that of the drivers given to FTT 1, albeit there was no further evidence from the drivers."

(3) *Fairness /abuse of process* - the FTT described the issue (at [109]) as:

> "…whether the Respondents should be debarred or the proceedings stayed on the basis that proceeding would constitute an abuse of process as the cases can no longer be dealt with fairly and justly in accordance with the Tribunal's overriding objective as set out in Rule 2 of the Rules."

25. The focus of the appellants' appeal before us was on how the FTT dealt with this third issue. Here the FTT first addressed its jurisdiction in relation to abuse of process noting the appellants relied on the Upper Tribunal's decision in *Foulser v HMRC* [2013] UKUT 038 (TC). Given this case and how the FTT dealt with is a key element of the appellants' grounds it is convenient to summarise that decision here.

26. In *Foulser*, the taxpayers sought an order debarring HMRC from taking further part in the taxpayers' appeal against a capital gains tax assessment made on them. The FTT refused to debar HMRC. The taxpayers' subsequent appeal was dismissed by the Upper Tribunal (Morgan J). The taxpayers' debarring order application concerned events which took place on the morning of the first day of the taxpayers' hearing which included the arrest of their adviser by HMRC officers. They argued the events of that day amounted to an abuse of process by HMRC which meant it was no longer possible for the FTT conduct a fair hearing of the taxpayers' appeals. The FTT (in *Foulser*) analysed the case-law, which drew a distinction between fairness of the proceedings before the tribunal or court themselves (which were with the court or tribunal's jurisdiction) and fairness of the public authority in pursing the proceedings because e.g. of misconduct or bad faith on the part of the public authority, (which were outside the court or tribunal's jurisdiction because that was a matter for judicial review). The FTT understood the taxpayers' complaint to fall with that second category and was therefore outside of the FTT's jurisdiction. In the light of HMRC's acceptance before the Upper Tribunal that the taxpayers' case had included a submission that fell within the first category, Morgan J proceeded on the basis the FTT had misunderstood the taxpayer's case and allowed the appeal. To assist in forestalling further debate on certain legal points before the FTT Morgan J went on consider 1) whether the FTT could make an order debarring HMRC from resisting the tax assessment appeal even where a fair hearing of that was possible on the ground there was serious wrongdoing by HMRC that would justify the FTT making such order and 2) whether the FTT had any power to make a debarring order apart from the express power in Rule 8 .

27. On 1), Morgan J, consistent with first principles and with his analysis of various authorities in relation to decision of the magistrates' courts in relation to abuse of process, drew the following distinction, explaining at [35] (which the FTT excerpted at [114]):

> "…I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority."

28. Morgan J went on to reject the taxpayers' argument that even if the abuse fell in that case fell within the second category the FTT had an inherent or implied power to prevent such abuse, referring in doing so to a number of the FTT's specific procedural rules.

29. In summary the important distinction *Foulser* highlighted was that where the alleged abuse affected the fairness of the hearing before the FTT that was within the jurisdiction. Where the abuse was the unlawfulness of the public authority asking the FTT to determine the matter that was a matter for judicial review and outside the FTT's jurisdiction.

30. The 2020 FTT here expressed this as follows at [115]:

> "*Foulser* indicates that we have jurisdiction to consider whether HMRC's actions amount to an abuse of process because they have prevented or would prevent a substantive hearing being a fair hearing. We do not have jurisdiction to consider whether HMRC's actions are such that they should not be allowed to pursue the matter to a hearing at all."

31. On 2) Morgan J was not persuaded that the FTT could not debar by using its power under Rule 5 to "regulate its procedure" particularly to deal with the case fairly and justly, in the "somewhat exceptional case" where the FTT considered a debarring order was justified but that for whatever reason the facts did not come within the debarring provisions of FTT Rules 7 and 8.

32. The 2020 FTT referred to the FTT rules to which the UT in *Foulser* had referred and which the 2020 FTT considered relevant (Rule 2, 5, and 8 and 15) noting that *Foulser* allowed the FTT to debar HMRC under Rule 5 if the circumstances did not fall within Rules 7 and 8 and the express power could not be dealt with fairly any other way.

33. The FTT then dealt with the parties' submissions, noting (at [120]) Mr Bridge's submission on behalf of the appellants that the case could no longer be dealt with fairly and justly (going on to outline the reasons advanced for that) and seeking a stay and summary determination in the appellants' favour. When summarising HMRC's submissions it noted (at [134]) "HMRC agreed, in the light of the time which has elapsed, it is not appropriate for the appeals to proceed to a substantive hearing" but that their solution was that the *appellants'* case be struck out.

34. After reminding itself of what was within its jurisdiction the FTT continued (at [148]) that:

> "It should be apparent that in order for there to be an abuse of process, someone must be responsible for the abuse. There is no abuse, and we do not have power to strike out or debar a party, simply because it is asserted that it is not in the interests of justice or fairness for the proceedings to continue, but that state of affairs is not due to the actions of one of the parties."

35. It considered the appellants' submission that *Foulser* established that the FTT had the jurisdiction to ensure natural justice and that *Foulser* provided authority that debarment could be ordered under the general powers if to do so would not provide for fair and just disposal of the case." ([149]). However, it considered "[t]hat [was] perhaps stating the principle too widely". It was clear from the context in *Foulser* that the power to debar only arose where debarment was justified because of HMRC's conduct explaining (at [150]): "it would scarcely be fair or just to prevent a party from participating in proceedings where they were not at fault."

36. The FTT also did not agree that HMRC had been responsible for the unreasonable delay so as to make the hearing unfair or unfair to have a hearing. The FTT agreed with HMRC (at [151]) that the majority of the delay arose from "the long drawn out appeal in *SDM* and the Appellants' decision to stay their case behind it" and (at [157]) that even if HMRC's conduct had been responsible for some delay it was the "nine year delay occasioned by SDM's tortuous journey through the Tribunals" which did the damage.

37. It considered (at [153]) that in view of the detailed history of proceedings it had consider that much of the delay after the Strike Out application (which Judge Poole had refused) "arose from the Appellants' failure to provide their grounds of appeal as required" (although at least part was caused by the illness and retirement of their representative at the time).

38. The FTT considered that to the extent the delay "has made a fair hearing difficult" that that was not the result of an abuse of process by HMRC ([156]). HMRC were not responsible for the delay in the appellants seeking disclosure (the appellants had been invited to submit a disclosure application but had not done so). Nor were the lack of means, Mr Wild's residence in Canada and Mr Parnham's health issues the fault of HMRC. The FTT continued at [158]:

> "We have rejected HMRC's assertion that its case does not involve an allegation of dishonesty for the reasons set out above. In these circumstances the fair and just course is for those allegations to be put to the Appellants in cross-examination and for them to have the opportunity of answering those allegations. In 2018, Judge Poole did not suggest that it would be unfair to proceed to a hearing in order to do that"

39. The FTT thus considered its jurisdiction on abuse of process hinged on finding fault but that the factors relied on to say there could no longer be a fair and just hearing were not caused by HMRC. The FTT accordingly declined to bar HMRC from the proceedings. The FTT also recorded Mr Bridge's argument that it was in any event unfair to proceed with the hearing. Its response (at [164]) was that:

> "To the extent that he is arguing that HMRC's abuse lies in its refusal to withdraw from the appeals because it would be unfair to hold a hearing at all, that falls within the second category of abuse of process identified in *Foulser* and is not within the jurisdiction of this Tribunal."

GROUNDS OF APPEAL

40. The appellants raise the following grounds in summary which we address in turn:

(1) **Ground 1** is that the FTT failed to reach a confirmed conclusion on the critical issue of whether a fair trial of the issues was rendered impossible by the passage of time and the consequences of that.

(2) **Ground 2** is that even if the FTT that a fair trial was possible, it failed to set out how a fair trial was possible or to give reasons for the conclusion against the parties' agreement that a fair trial had been rendered impossible.

(3) **Ground 3** is that the FTT misinterpreted the decision in the case of *Foulser* and in the other cited authorities which, reflecting the tribunal rules and overriding objective in particular, confirmed that the FTT had the authority to stay proceedings where it is not possible have a fair trial. The only order the tribunal could fairly make in such circumstances was to stay.

(4) **Ground 4** is that the FTT erred in focusing on whether HMRC were to blame for the delay. Where the parties were agreed the delay rendered a fair trial impossible the FTT erred by failing to consider the overriding objective of achieving fairness and justice. Where, as here, that could not be achieved, the FTT should have ordered a stay.

Discussion

Ground 1

41. In essence the ground is that the FTT did not deal with the fair trial issue.

42. This ground exemplifies the situation, not uncommon in appeals, where a point that lay in the shadows before the first-instance tribunal and was dealt with accordingly is advanced as the centrepiece of the appeal. The primary case the appellants argued before the FTT was argued within the frame of reference of fault, in particular HMRC's fault. The appellant

wanted HMRC barred and for their part HMRC wanted the appellant struck out. It is true both parties had said that a fair trial was not possible, but neither was arguing as strenuously as one might expect in such circumstances for the tribunal to resolve that in any way other than striking or barring the other. The parties' agreement did not for instance extend to putting forward any kind of consent order explaining how the proceedings before the FTT might be compromised to the satisfaction of both parties in the light of that joint view.

43. Having said that, we consider, looking at the FTT decision in the round, that the FTT did take account of the parties' respective positions but despite that, concluded that it did not agree a fair hearing was impossible. It had the parties' positions before it. It specifically referred to the notice of objection, and grounds of appeal (at [69] and [72(1)] see [23]) and must have been aware from that that the fair trial issue was one of the issues requiring resolution. In concluding its discussion at [161] that HMRC were not at fault the FTT stated it referred explicitly to:

> "…the long delay in progressing this matter and the other factors which the Appellants submit mean there can no longer be a fair and just hearing…".

44. Its ultimate decision refusing the barring order, and refusing the strike out resulted in the appellants' FTT proceedings remaining on foot and awaiting determination at a substantive hearing. That result cannot be reconciled with the FTT endorsing any position that it was impossible to hold a fair hearing. The FTT, instead, acknowledged a hearing would be difficult ([156] – see [38] above). Again, that language is inconsistent with the FTT considering a fair hearing was impossible. Similarly, the 2020 FTT's reasoning at [158] where it rejected HMRC's argument that the case did not entail dishonesty and it noting that the 2018 FTT did not regard it as unfair to proceed to a hearing then (see [38]) is consistent with the 2020 FTT recognising that it would, despite the challenges, not be impossible to continue with a fair hearing of the appellants' appeals.

45. There was also no error in the FTT's sufficiency of reasons on the point. The appellants' case was run primarily on the basis of HMRC's fault, framed as it was by the appellants' reliance on *Foulser* as described above and the FTT therefore rightly focussed its reasoning on addressing that issue. That there was no especially detailed reasoning on why the FTT was determining a fair hearing as not impossible, despite the parties' position, reflected that the issue was not put to the FTT in such clear and stark terms. The FTT's reasoning fairly dealt with how the issues put in contention by the parties before it. We therefore reject this ground of appeal.

Ground 2

46. This ground, in essence, is that even if FTT did deal with issue (which we have concluded above it did), its determination that hearing could go ahead was wrong. This is on the basis the parties had agreed it was unfair and for other reasons.

47. We did not understand either party (rightly in our view) to take the position that simply *because* the parties agreed a hearing would be unfair it must follow that holding a hearing would be unfair. The parties' agreement would obviously be a factor to consider but it would not be conclusive. The FTT *could* clearly reach its own view on that issue. The appellants' submission must therefore be that it *not open* to the FTT, in the circumstances of this case, to reach any finding other than that a fair hearing was impossible.

48. Like the FTT we did not receive any developed submissions on the FTT's power to stay indefinitely and neither party was able to show us authority for a stay (beyond the appellant referring to the criminal stay instance referred to in the authorities referred to in *Foulser*. (See below at [59]).

49. Ms McArdle submitted there was no indefinite power to stay under the FTT's Rules, because it would never be appropriate and would be inconsistent with the objective of dealing with matters without delay. For the reasons we explain below, we do not consider it necessary to decide this issue (in summary because on the facts of this case, we consider the FTT was well entitled to come to the view that a fair hearing was not impossible, despite the parties' view to the contrary).

50. We acknowledge that the procedural history in this case puts this case regrettably at the extreme end of delay. There are undoubtedly difficulties in the witnesses recollecting events from such a long time ago, and not only that but in relation to individual journeys that were said to be undertaken as a matter of routine. But these difficulties must be put in the context of the litigation in these appeals. Both witnesses prepared witness statements in 2008 that were already some time after the events in 2006 and the answers Mr Parnham gave in cross-examination, even in 2010, some four years after the relevant events would have inevitably needed to take account of the difficulties of making recollections in such circumstances. There was no suggestion the difficulty of recollection rendered the hearings in 2010, and 2015 unfair, or that when Judge Poole refused HMRC's strike out application in 2018 a fair hearing would be impossible at that stage.

51. Judge Bishopp in UT2 in 2015 noted these difficulties even in relation to the FTT1 proceedings explaining at [162]:

> "I should add that I recognise the force of Mr Barlow's argument [*i.e SDM's counsel's argument*], reflected in F-tT 1's observation to the same effect, that the drivers were giving evidence of 25 events which had taken place four years earlier, and that most had not been asked about the deliveries until two years had gone by. If the journeys were uneventful it would be remarkable if they could remember very much about them, and I have borne that point in mind when examining what they said…."

52. In any case, that there are difficulties in recollection (that would already have been an issue in FTT1) in 2011, and in UT2 in 2015, would not mean there was *no* value in the appellants' oral evidence. The Court of Appeal in *Kogan v Martin* [2020] EMLR 4 (at [88]) explained there was "line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed". However, the Court emphasised that such fallibility "did not relieve judges of the task of making findings of fact based upon all of the evidence" (emphasis added). The Court of Appeal's judgment was there putting in context the well-known dicta of Leggatt J as he then was in a High Court decision in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities 20 (Europe) Limited* [2013] EWHC 3560 (Comm) to the effect that there was no general principle on the assessment of evidence such that little reliance should be placed on witness recollection. Leggatt J's observations in any case explained that difficulties in recollection did not mean oral testimony served no useful purpose, its value as he saw it lay "in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."

53. Thus the difficulties in recollection were always going to be an issue in the circumstances of this case where even when Mr Parnham's evidence was heard in 2010 recollection would be challenging. Those difficulties will have increased by some increment over time but in the circumstances of this case they are not such that they would require the FTT to have held that it was impossible to hold a fair hearing.

54. The other points regarding the appellants' concerns that disclosure they would otherwise have sought having been curtailed though the passage of time also did not require the FTT hold that a fair hearing would be impossible. The difficulties about getting evidence through international cooperation would apply just as much to a hearing that had occurred closer to the events. The appellants had the opportunity to seek the evidence earlier. Their position is that the adverse result in *SDM* was not conclusive of their appeals. That being the case, they would have needed to be alert to the risk that a time might come when they would need to fight their own appeals and therefore take steps to obtain whatever evidence they considered necessary to do that. If for instance they were concerned relevant CCTV or other surveillance evidence that would corroborate the drivers' account of the journeys would not be preserved, it was open to them to raise those concerns at the appropriate time and seek disclosure then. There was of course a tension between the efficiency and cost reasons the appellants say had led to them agreeing to the stay in the first place on the one hand, and the incurring of costs in a stayed appeal on the other. But it was for the appellants to balance the cost benefits of maintaining the stay of their appeals and not expending resource as against taking active steps in the appeal so as to preserve their position should it become necessary to fight their appeals. The fact they did not take such steps would not have compelled the FTT to view a fair hearing as being impossible.

55. The appellants raised Article 6 ECHR (as it did before the FTT) arguing that Article 6 requires that the hearing is held within a reasonable time and 16 years is not reasonable, and that the party is allowed representation and provided with all relevant information. This is not a point the appellant were granted permission to appeal to the Upper Tribunal on and we do not therefore address it.

56. There was therefore no error of law in FTT not accepting a fair hearing was impossible. It reached a decision that was clearly entitled to in the circumstances. We dismiss this ground of appeal.

Ground 3 and 4:

57. It is convenient to deal with these grounds together. In essence the grounds are that the Tribunal erred in law by misinterpreting the decision in the case of *Foulser* and in the other cited authorities so as to assume that fault was required before a stay order could be made. Mr Bridge argues that the binding decision in *Foulser* (which is reflected in any case in the tribunal rules) confirms that the Tribunal had the authority to stay proceedings where it is not possible to have a fair trial.

58. We reject this ground of appeal. As outlined above at [30] to [39] the FTT considered *Foulser* in detail. It correctly identified that the case was concerned with types of abuse which fell within or outside the FTT's jurisdiction and the FTT's powers in relation to debarment of a party. To the extent *Foulser* mentioned stays of proceedings in *Foulser* this arose in Morgan J's discussion of appeals in relation to magistrates' court decisions concerning stays of prosecution arising out of issues with the prosecuting authority's conduct, so were fault based. So, in discussing *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] AC 42, where the defendant's complaint was that he had been kidnapped rather properly extradited from South Africa, Morgan J explained how the High Court might stay the prosecution as an abuse of process if there had been a disregard of extradition procedures. As already discussed above no authority was cited by either party, for the proposition a case could be indefinitely stayed in cases of delay irrespective of fault.

59. The appellants' notice of objection and oral submissions before us also referred to the Court of Appeal's decision in *Shiner and another v HMRC* [2018] EWCA Civ 31 but that decision simply confirmed that Rule 8(3)(c) could accommodate a strike out by one party on

the basis that it lacked reasonable prospects of success because the other was arguing it was an abuse of process. It was not inconsistent with the FTT holding that for a party to be struck out or in this case barred – the party must have done something wrong, a conclusion we agree must be right. In fact, the discussion in *Shiner* on the FTT's statutory jurisdiction runs contrary to the appellants' position that a stay should have been ordered, given the Court of Appeal's view that the 2009 Rules enabled appeals to be handled quickly and efficiently - see [21]). Making an order which effectively left the appeal pending indefinitely might be difficult to reconcile with that.

60. The appellants' argument that the FTT wrongly assumed that no stay of proceedings could be ordered because the rules did not provide for that, except in cases of fault, is also incorrect. The FTT made no such assumption because, on its analysis of the facts of the case, it did not need to. As discussed above, the FTT disagreed, as it was entitled to, with the contention that a fair hearing was impossible. The issue of the powers under the FTT rules it could or should exercise if a fair hearing was impossible did not arise.

HMRC'S CROSS-APPEAL

61. HMRC's cross-appeal is against the 2020 FTT's decision to refuse HMRC's application which had sought to strike out Mr Parnham's and Mr Wild's appeals.

62. That application was brought on the basis that HMRC considered the appeals were an abuse of process because the appellants were seeking to relitigate the facts which had been determined for the purposes of their case by UT2 in *SDM*. In support, HMRC relied on a Court of Appeal authority *Ashmore v British Coal Corporation* [1990] 2 QB 338 which concerned a large group of applicants who had brought equal pay claims and where the industrial tribunal had ordered that the results in a sample of those claims would be persuasive in relation to the claims stood behind the sample claims. The Court of Appeal agreed that where findings had been made on the evidence in the sample claim cases it was contrary to the interests of justice and public policy to allow those same issues to be litigated again unless there was fresh evidence which justified re-opening the issue. HMRC argued that the appellants here were not presenting any new evidence. The appellants objected to the 2020 FTT hearing the strike-out application given the late stage it was made and argued in any case that was an identical application to the one made before in September 2018 which Judge Poole had dismissed in the 2018 FTT Decision.

63. The 2020 FTT rejected both those points. It permitted HMRC to make the strike-out application and it noted (at [171]) that HMRC's grounds were not the same as the grounds put forward in 2018 where HMRC argued the appellants had no reasonable prospects of success whereas now HMRC were arguing that re-litigation of the facts would be an abuse of process.

64. The FTT declined nevertheless to strike out the appellants' appeals explaining:

> "174. …Judge Bishopp's finding that the goods were not delivered to the Aldi warehouse (the only question of fact which is relevant in these cases) cannot be determinative of that fact in these cases… The "core issue" in these appeals is different from that in SDM and involves an allegation of dishonesty which the Appellants must have the opportunity to challenge. Further the Appellants had no say in the conduct of SDM's case and did not agree to the matter being decided without hearing further evidence."

65. The FTT referred back to its previous reasoning at [67] where it had set out Judge Poole's reasoning for why he had rejected HMRC's submission in the strike out application

before him that the findings of fact in UT2 *SDM* meant the appellants' appeals had no reasonable prospect of success ([see [24] above) and [103] where the FTT had noted:

> "Essentially, UT 2 and, indeed, FTT 1, UT 1 and FTT 2 decided SDM's case, not the Appellants' cases. The core issues are different. Although the Appellants provided evidence for the FTT 1 hearing they played no further part in, and had no say in, the subsequent conduct of SDM's case. They had no opportunity to agree or disagree with the proposal to reconsider rather than rehear the case. They were not given the opportunity to address the allegation of dishonesty."

66. Although the FTT did not specifically refer back to these paragraphs, the explanation for why the core issues in SDM and the appellants' appeals were different was in the preceding paragraphs [94] to [102] where the FTT stated it adopted Judge Poole's reasoning in the earlier strike out refusal as to why Judge Bishopp's finding that the goods did not arrive was not determinative in the present appeals. The FTT preceded that analysis with the following reasoning:

> "94. Although HMRC have not expressly alleged that the Appellants were dishonest, dishonesty is implicit in the assertion that the Appellants "caused" the duty point.
>
> 95. For the purposes of the SDM proceedings before FTT 1 both Mr Wild and Mr Parnham prepared witness statements stating that they had delivered the goods in accordance with their instructions to Aldi at Vaux-sur-Sure in Belgium. Mr Wild emigrated to Canada shortly before the hearing and did not give oral evidence. Mr Parnham attended the hearing and was cross examined on his witness statement.
>
> 96. HMRC's case is that the loads were diverted before they arrived at Aldi as part of a criminal conspiracy involving Belgian nationals and a corrupt Belgian customs official based at the Aldi warehouse. It does not matter whether the goods were slaughtered in Belgium or the UK. Where the place of diversion is not known, the Regulations provide for the duty point to have occurred in the UK so that HMRC is entitled to assess the duty.
>
> 97. The alleged liability arises under Regulation 7 because the drivers "caused the occurrence of an excise duty point". This requires that the drivers diverted the loads of duty suspended alcohol and did not deliver them to the bonded warehouse designated in the AADs and CMRs, contrary to the evidence given in their witness statements, and in Mr Parnham's case, at the FTT 1 hearing. It necessarily follows that HMRC are accusing the Appellants of lying in their witness statements/at the hearing and of dishonestly diverting the goods."

67. As for *Ashmore* the FTT considered that was not applicable:

> "175. ...The facts found by UT 2 in SDM do not determine the facts in the Appellants' cases. Accordingly, it would not be an abuse of process for the Appellants to continue with their appeals."

68. HMRC's case, in its cross-appeal, is that the FTT made a material error of law in finding that HMRC's case against the appellants was one of dishonesty. Ms McArdle underscores the fact the legislation (Regulation 7) underpinning the assessment liability on the appellants is strict and that it does not require any fault or dishonesty to be established. She submits it has never been HMRC's position that the appellants were dishonest and thus necessarily conspired to commit the fraud which led to the alcohol in question disappeared. A finding that the goods did not arrive at the Aldi warehouse in Belgium did not require that the appellants were dishonest in their evidence. The evidence could be inaccurate for any number

of reasons not entailing dishonesty such as the witness misremembering, being confused or misled. Even assuming HMRC's case entailed dishonesty then there was no unfairness in that the cross-examination of Mr Parnham before FTT1 had put to him the journeys could not have happened. It was irrelevant that Mr Wild was not cross-examined; he had the opportunity to attend (having served a witness statement and having been called for cross-examination) and that was sufficient to satisfy any fairness obligations.

69. In response to HMRC's cross-appeal the appellants say the FTT was correct to strike out HMRC's application for the reasons it did and that HMRC's application was itself an abuse of process given Judge Poole's decision that the facts in the Upper Tribunal's decision in *SDM* were not determinative, a decision HMRC had not appealed and which was therefore final. As for HMRC's suggestion their case did not entail dishonesty, Mr Bridge argues it is absurd to suggest the appellants were mistaken; the substantial loads of excise goods could not have been unloaded by mistake or without the dishonest consent or connivance of the appellants.

Discussion: did the FTT err in law in refusing HMRC's strike-out application?

70. Logically, the appellants' point that HMRC's application to strike-out was itself an abuse of process (because it sought to re-litigate the same issue that had been finally determined by Judge Poole in the 2018 FTT decision) precedes the question of whether the FTT erred in considering HMRC's case entailed dishonesty. That is because if HMRC's application was an abuse of process, there would have been no need for the FTT to address the merits of that application. We will therefore address the appellants' submission first.

71. While that submission did not go into detail into the precise legal basis for the alleged abuse, we consider it is plainly capable of falling within the *Henderson v Henderson* type of abuse of process which, as explained by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, reflected the underlying public interest "that there should be finality in litigation". Alternatively, as we canvassed with the parties at the hearing, abuse could lie in a form of issue estoppel, the common issue being the determinative nature of the factual findings in *SDM* on the proceedings in the appellant's appeals. That determination was made in the very same proceedings involving the same parties. The Upper Tribunal's recent decision in *British Telecommunications Plc v HMRC* [2023] UKUT 00122 helpfully sets out the legal bases for the various instances of *res judicata* (see [58] to [62]) including an extract Diplock LJ's judgment in *Fidelitas Shipping v V/O Exportchleb* [1966] 1 QB 630 which made the point that issue estoppel "…operates in subsequent suits between the same parties in which the same issue arises. *A fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined". (As to the diminished role of issue estoppel in tax proceedings because of the *Cafoor* principle mentioned in *BT* that would not be a concern as the issue did not concern tax liability in different periods but precisely the same excise duty assessment in proceedings between the same parties.)

72. Ms McArdle's response relied on contrasting the different bases of the two applications. HMRC's 2018 strike-out application was put on the basis that the findings in *SDM* meant that the appellants' appeals stood no reasonable prospect of success, whereas the current strike-out application turned, she argued, on the different basis of whether the appellants' case represented an *Ashmore* style abuse (that re-litigation of factual issue should not take place without fresh evidence to suggest the answer might be different). The FTT's conclusion in 2018 was thus based on different test that the FTT was not satisfied that the appellants' appeals stood no reasonable prospect of success; a high threshold for the strike-out applicant to show.

73. Judge Poole's finding at [28] of the 2018 FTT Decision was clear. He held that the findings of fact in UT 2 *SDM* (where Judge Bishopp used his casting vote) could not be regarded as determinative for the purpose of the present appeals. It is true the applications were put by HMRC on different bases (the FTT too noted "HMRC's grounds...[were] not quite the same as the grounds put forward in 2018" ([172]). However that does not detract from the fact that the issue that lay at the heart of the 2018 application - whether the factual finding the goods did not arrive in UT2 *SDM* was determinative of that issue in the appellant's appeals (such that the appellants' appeals stood no reasonable prospect of success) - was identical to the central issue in HMRC's application, namely whether the appellants were seeking to relitigate a matter that had already been determined. The different test involved in a "no reasonable prospect of success" was irrelevant because the key issue in the 2018 application was the binary one of whether the factual finding in UT2 *SDM* was determinative. On that the FTT made a decisive, and final (given there was no appeal) finding that the factual finding in UT2 *SDM* was not determinative. (We also note in any case that the reasoning in the Court of Appeal's decision in *Shiner* (at [19] would suggest that an abuse of process argument would be accommodated under Rule 8(3)(c) (no reasonable prospect of success) in any case, so the ultimate test would not be different).

74. Ms McArdle also sought to distinguish Judge Poole's reasoning in the 2018 FTT decision in order to argue that such finding (that UT2 *SDM* was not determinative) did not prevent the 2020 FTT from dealing with HMRC's second strike out application. She argued that insofar as his reasoning relied on HMRC's case involving dishonesty, HMRC were clear their case involved no such allegations.

75. That submission's recourse to the *reasoning* for the finding which is said to be re-litigated is however misconceived as a matter of principle. If, as here, the same issue in the same proceedings between the same parties has already been finally determined, it undermines the whole point of giving that litigation finality if the reasoning for the finding then needs to be reanalysed.

76. Even if the FTT's reasoning was relevant, and it was correct to see HMRC's position on dishonesty has having changed, that would not address the second basis for the 2018 FTT's conclusion that the UT2 *SDM* findings were not determinative. That second basis was that UT2 had been asked by SDM to remake the decision without hearing the drivers again whereas the appellants here had not indicated they were content to proceed on the same basis.

77. We therefore agree with the appellants that HMRC's second strike-out application before the 2020 FTT was an abuse of process in that it sought to re-litigate the same issue which had already been determined finally in the same proceedings before the 2018 FTT.

78. It follows that the FTT was correct to refuse HMRC's strike out application but not for the reasons it gave. The FTT ought, as a prior matter, to have declined the strike out on the basis that it sought to re-litigate an issue that had already been finally determined. As regards the error of law HMRC allege, we agree the FTT was wrong to base its rejection of the strike-out on a view that HMRC's case necessarily involved dishonesty However, that was because the FTT's reliance on that point entailed revisiting the *reasoning* of the 2018 FTT (and agreeing with it) when it was the 2018 FTT's *conclusion* on the issue of the determinacy of the UT2 *SDM* findings which meant HMRC's second strike out application had to be rejected.

79. It is not therefore necessary for us to reach a concluded view on whether the FTT was wrong to rely on a point that HMRC's case necessarily involved dishonesty on the basis of the arguments HMRC raised.

80. In conclusion the FTT was correct to dismiss HMRC's strike out application. It ought to have rejected it on the basis HMRC's second strike out was an abuse of process.

81. We can accordingly deal briefly with the appellants' argument that we had no jurisdiction to consider HMRC's cross-appeal, because no strike out application was before the FTT. While we agree with the appellants it is open to us to consider this argument despite permission having been granted for HMRC to proceed with their cross-appeal (see *CF Booth Limited v HMRC* [2022] UKUT 00217) at [73]), it is clear the appellants' argument must be rejected on its merits. There was an application to strike out, or certainly an application the FTT was entitled to treat as an application, before the FTT. The FTT Decision recorded (at [7]) there was an application to strike out contained the Preliminary Issues Statement of Case of 6 January 2020 (at [52] to [58] of that document) which HMRC had been directed to file by Judge Poole's directions leading up to the preliminary issues hearing. The FTT explained (at [8]) why it rejected the appellants' objection based on no formal application having been served (in short because the appellants had had adequate notice, their objection was very late, and the overlap with the other issues in the hearing). That was an exercise of case management discretion which was plainly open to the FTT and in relation to which the appellants' argument have not identified any error of law.

DECISION

82. The appellants' appeals against the 2020 FTT decision's refusal to bar HMRC are dismissed. So too, HMRC's cross-appeal against the 2020 FTT decision's refusal to strike out the appellants' case is dismissed.

83. The result is that Mr Parnham's and Mr Wild's appeals must proceed before the FTT. The further case management is a matter for the FTT, but we would strongly encourage the parties to cooperate with the FTT in agreeing directions which now get the matter set down swiftly for a substantive hearing.

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Release date: 29 November 2023