

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Tax and Chancery Chamber of the Upper Tribunal
Judge Bishopp

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2016

Before:

LORD JUSTICE MOORE-BICK
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE RICHARDS
and
THE SENIOR PRESIDENT OF TRIBUNALS

Between:

BPP Holdings	<u>Appellant</u>
- and -	
The Commissioners for Her Majesty's Revenue and Customs	<u>Respondent</u>

Mr. Sam Grodzinski QC (instructed by **Simmons & Simmons LLP**) for the **Appellant**
Miss Jessica Simor QC (instructed by **HMRC Solicitors office**) for the **Respondent**

Hearing date: 16 December 2015

Judgment

The Senior President of Tribunals:

1. This is an appeal by BPP Holdings Limited [“BPP”] against a determination made on 3 November 2014 by Judge Bishopp in the Tax and Chancery Chamber of the Upper Tribunal who allowed an appeal against a determination made by Judge Mosedale in the Tax Chamber of the First-tier Tribunal (FtT). It is accordingly a second appeal to which the test in CPR 52.13 applies. Permission to appeal was given by Judge Bishopp who recognised that the key question raised in the appeal is “a matter of considerable importance to practitioners and the tribunals themselves”.
2. The FtT debarred The Commissioners for Her Majesty’s Revenue and Customs [“HMRC”] from further participation in the proceedings that were before it and the UT decided that the FtT had made an error of law in that determination so that it was permissible to set it aside and re-make it. The UT decided that HMRC should not be debarred. The issue before us is whether the FtT was right to debar HMRC from further participation in the substantive proceedings before the FtT for their serious and prolonged breach of an order requiring them to give proper particulars of their pleaded case against BPP. The key question is the proper approach of tax tribunals in cases where there has been breach of an order.
3. The substance of the three cases before the FtT was the chargeability to VAT of the supply of books and other printed materials by the second appellant, BPP Learning Media Limited, in the circumstance that other BPP companies (BPP Professional Education Limited and BPP University College of Professional Studies Limited) made those supplies. It was argued by HMRC that the supply of printed matter and the supply of education were indissociable from each other and accordingly chargeable to VAT as part of a composite standard rated supply of education services. In an ordinary case the supply of books and printed materials would have been zero rated under section 30 and Group 3 of Schedule 8 of the VAT Act 1994 [‘VATA 1994’].
4. Two of the three FtT cases were conceded by HMRC in April 2014 following the decision of the FtT in *Kumon Educational UK Co. Ltd v HMRC* [2014] UKFTT 109 (TC) but one remains to be determined. It is said that the novelty in that case arises from the fact that from 19 July 2011, section 75(1) of the Finance Act 2011 amended the notes to Group 3, Schedule 8 VATA 1994 to remove zero rating of printed matter in particular circumstances. The remaining case will be the first case to consider the meaning of notes 2 and 3 to Group 3.
5. The procedural background is set out in full in the FtT and UT judgments and I shall only set out in this judgment a summary of the facts necessary to illustrate the key issue:
 - a. HMRC delayed service of their Statement of Case and failed to plead the facts on which they relied to justify their contention that the supply should be treated as part of a standard rated supply of education services with the consequence that BPP served a detailed Request for Further Information;
 - b. HMRC agreed to provide replies to each of the requests but refused to commit themselves to a timetable for the replies. In consequence, Judge

Hellier made an order in the FtT on 15 January 2014 directing HMRC to file their replies by 31 January 2014;

- c. HMRC failed to comply with Judge Hellier's order and provided replies that were manifestly inadequate with the consequence that BPP applied to the FtT for a debarring order;
- d. HMRC failed to remedy their breach for several months causing further delay.

6. HMRC submit that they had repeatedly explained the facts they relied upon in pre-litigation correspondence and also that the application of the notes to Group 3 Schedule 8 VATA 1994 were well understood by BPP who had not questioned them for some 14 months after 19 July 2011 when they came into effect. There is no cross appeal by HMRC about what are the relevant procedural facts and, accordingly, those must be taken as read by this court. It is not for this court to re-consider the procedural facts in the absence of a cross appeal.

7. HMRC also submit that the behaviour of BPP is relevant to the procedural background in that from the outset of the case management issue between the parties, BPP sought to pursue an 'unless order' in the following terms: *"If the Respondents fail to comply with [the request for further information within 14 days] the appeals shall be allowed without further order"*. BPP did not achieve an order in those terms. On 15 January 2014 Judge Hellier granted a conditional order in the following terms:

"If [HMRC] fail to provide replies to each of the questions identified in the Appellants' Request for Further Information by 31 January 2014, [HMRC] may be barred from taking further part in the proceedings."

8. It is right to observe that the order was not a 'final order' or an 'unless order'. It was a conditional order warning of the possible consequence of non-compliance of the kind described in rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ['FtT Rules'] (see below). An unless order was within the power of the FtT by reason of rule 8(1). I acknowledge that in making the order that he did, Judge Hellier had declined to make a rule 8(1) order and that as a consequence HMRC were not automatically debarred from taking any further part in the proceedings. BPP's submission, had it been accepted, could have potentially afforded disproportionate weight to non-compliance.

9. Judge Hellier's order was not appealed and the positive and negative factors that compelled him to make such an order are not for reconsideration by this court. I do not intend to go behind an un-appealed, regular case management order in effect to determine whether it should have been made. Compliance must begin with the fact that a regular order was made even if one or all of the parties would rather it had not been made. The principle of collective proportionality may demand that an order is made in an individual case that has as one of its purposes the wider interests of justice than those engaged in the individual case before the tribunal.

10. As respects other factors that were in play, the FtT and the UT were at one in holding that there was no excuse for HMRC's failures. In the FtT Judge Mosedale held without complaint from the UT that:

[75] "I did not leave the hearing with any clear understanding of why this default had occurred [...] I consider that anyone reading the Reply should have known it was inadequate as, so far as the Notes (2) and (3) point [i.e. The position following amendment to the VAT Act], as well as other issues, it failed to state a single fact on which HMRC relied.

[77] [...] Moreover the Reply as a whole failed to deal with the factual matters HMRC relied on to establish that there was a single supply for the pre-2011 position as well as post 2011 position.

[78] HMRC were represented by HMRC solicitors' office throughout. I consider it should have been obvious to a lawyer that the Reply delivered on the due date did for not comply with Judge Hellier's Order."

In the UT Judge Bishopp held as follows:

[26] "Miss Simor [counsel for HMRC] did not offer any explanation for the default and I agree with Judge Mosedale that a competent lawyer, mindful of the fact that HMRC had agreed to provide the information and of Judge Hellier's direction, should have realised that the reply was insufficient. Miss Simor also offered no explanation of HMRC's failure to remedy the insufficiency when BPP's application for a barring order was issued".

11. The summary that I have set out from the judgment of Judge Bishopp does not do justice to the firm and critical analysis of HMRC's failures which he sets out at [47] to [51] of his judgment. He described their position as being "difficult if not impossible to understand", "inadequate" and "unhelpful". Their approach demanded an explanation and yet nothing convincing was provided. Accordingly, without application in an appropriate way, and there is no such application, it is not open to HMRC to argue in this court either that there had been de facto compliance or that there was a reason for non-compliance that justified their conduct. It is likewise not open to HMRC to argue in this court that there has been no prejudice consequent upon the default because there is no basis to go behind the conclusions of the FtT and the UT on that question. Judge Mosedale held that:

[73] " There is very clear prejudice to the appellant in not knowing HMRC's case. Litigation is not to be conducted by ambush. The appellant has the right to be put in the position so that it can properly prepare its case: it needs to know HMRC's case not only before it gets to the hearing but before it prepares its witness statements and really before it prepares its list of documents.

[74] It accepts that, since Mr Singh's skeleton was served, it now knows HMRC's case, but it knows it very late. So the real prejudice to the appellant is in the delay. Only now can the parties proceed to exchange list[s] of documents and witness statements. While the directions were issued in January, they were issued to correct a failure in the SOC. The SOC was due on 2 October 2013, so it is in my view fair to say that HMRC's continued failure to make a proper statement of their case has delayed the progress of this appeal by about 8 months."

Judge Bishopp also held that:

[59] "There has been prejudice to BPP, in that it has been put to expense in securing the information it required, and has suffered a significant, unnecessary and unwarranted delay in the process. There has been little, and in most respects, no explanation of the failure by HMRC to do what was required of them. It follows that HMRC attract little sympathy."

12. In written submissions HMRC questioned the motive of BPP in pursuing this appeal with the attendant loss of the fixture that had been listed for the hearing of the substantive issues. They are entitled to make submissions about the effect on the hearing of the appeal but their submission on the position taken by BPP involves questioning the merits of the substantive case. That is a factor which they concede is not one that can generally be argued under CPR 3.9, that is, as to whether relief from sanctions should be granted (see *R (Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [47] per Moore-Bick LJ).
13. In their written submissions to this court HMRC seek to rely on their skeleton argument dated 13 June 2014 filed before the FtT as being a sufficient disclosure of the information that was necessary to reply to BPP's Request for Further Information. Without commenting on whether the disclosure made was a sufficient reply, it is elementary that unless accepted by the taxpayer or the tribunal, an assertion in a skeleton argument, unlike a witness statement or a formal Reply to a RFI, is not backed by a truth statement and is not evidence. HMRC have not asked this court to consider any additional evidence and accordingly that is not a factor they can pray in aid of their position.
14. HMRC's appeal to the UT was of course in respect of a case management decision. It is common ground that an appellate tribunal should be slow to interfere in such decisions and the UT cannot do so unless the FtT erred in law in exercising its broad discretion.
15. There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was

promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.

16. The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3296 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.
17. In *McCarthy & Stone* Judge Sinfield held that it was appropriate for the tribunals to follow the *Mitchell* approach. His reasoning expressly recognised that the CPR do not apply to the tribunals and that there were clear differences in the words used in the Tribunal Procedure (Upper Tribunal) Rules 2008 ['UT Rules'] and in the CPR. At [42] to [45] he held:

[42] "In my view, the new CPR 3.9 and the comments of the Court of Appeal in *Mitchell* and *Durrant* clearly show that courts must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. [Counsel for HMRC's] answer to this point was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR 1 is in different terms to the overriding objective in r 2(3) of the UT Rules. From 1 April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and at proportionate cost. CPR 1 also provides that dealing with a case justly includes ensuring that it is dealt with expeditiously. [Counsel for the taxpayer] submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.

[43] I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, i.e. more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR...

[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an

extension of time to a party who has failed to comply with a time limit in the UT Rules.”

18. In *Leeds* Judge Bishopp took a different approach and reasoned that until the Tribunal Procedure Committee decided to introduce changes similar to CPR 3.9 in the UT Rules, it was not open to a tribunal to apply by analogy changes in the CPR as if they had also been made to the UT Rules. At [18] he held:

[18] “It is plain that the changes to the overriding objective of the CPR and to rule 3.9 were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts: see *Mitchell* at [34] to [51], and *Durrant* at [3]. The Tribunals Procedure Committee, which is charged with the duty of drafting the rules of procedure used in the tribunals (see the Tribunals, Courts and Enforcement Act 2007 s 22(2)) has not, so far, thought fit to introduce similar changes to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their adoption in the Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce changes in practice without warning.”

19. In this case Judge Bishopp reasoned his conclusion on the key question in the following way:

[40] “I recognise, as did Judge Mosedale, that if one assumes it applies to proceedings in the FtT at all, *Mitchell* is only indirectly in point, though there is obviously close parallel between the factors to be considered when determining whether a sanction should be imposed, and those which come under consideration when determining whether relief from a sanction already imposed should be granted. Mr Grodzinski argued strongly that the judge had taken care to put *Mitchell* to one side because it was only of indirect relevance, but in my judgment there can be no real doubt that she did apply what was said in that case, even if by analogy. What she said at [63], [65] and [69], set out above, is consistent only with the conclusion that she attached significant, albeit not paramount, weight to the specific factors identified at paras (a) and (b) of rule 3.9 of the CPR, namely the conduct of the litigation with efficiency and at proportionate cost and, perhaps more pertinently in this case, the need to ensure compliance with rules and directions. If I am right in what I said in *Leeds City Council* such an approach is incorrect: there is no warrant, in the F-tT, for giving particular weight to those factors such that they play a disproportionately prominent role in the application of the overriding objective, to which I come shortly.”

20. Although the conflicting decisions of the UT looked to the position under the UT Rules, the equivalent rules in the First-tier Tribunal are just as relevant and as can be deduced from the wording, the argument about their effect must be the same. Save

for the substitution of 'Tribunal' by the description 'Upper Tribunal', rule 2 of the FtT Rules and UT Rules are in identical terms:

“Overriding objective and the parties’ obligation to co-operate with the Tribunal

- (1) The overriding objective of these rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes-
 - a. Dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - b. Avoiding unnecessary formality and seeking flexibility in the proceedings;
 - c. Ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
 - d. Using any special expertise of the Tribunal effectively, and
 - e. Avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it-
 - a. Exercises any power under these Rules; or
 - b. Interprets any rule or practice direction.
- (4) Parties must-
 - a. Help the Tribunal to further the overriding objective; and
 - b. Co-operate with the Tribunal generally.”

21. I shall return in due course to the plain meaning of those words. The tax tribunal rules follow a standard form for the FtT and UT chambers and accordingly the same overriding objective is to be found in the rules enacted for each.

22. By way of comparison with the tribunal rules, the overriding objective in the CPR at rule 1.1 is as follows:

“The Overriding objective

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable-
 - a. Ensuring that the parties are on an equal footing;
 - b. Saving expense;
 - c. Dealing with the case in ways which are proportionate-
 - i. to the amount of money involved;
 - ii. to the importance of the case;
 - iii. to the complexity of the issues; and
 - iv. to the financial position of each party;

- d. ensuring that it is dealt with expeditiously and fairly;
- e. allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- f. enforcing compliance with rules, practice directions and orders."

23. There is no equivalent provision to that found in CPR 3.9 in the tax tribunals rules. As already described the application in this case came to be made under rule 8 of the FtT Rules. This is the provision that provides for the striking out of a party's case which is applied to a respondent as an order barring them from taking further part in the proceedings. A barring order can be lifted on application. The rule provides for an 'unless order' where the strike out would be automatic in consequence upon a failure to comply and a 'conditional order' where strike out may be the consequence of non-compliance, as follows:

"Striking out a party's case

- (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
- (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –
 - (a) does not have jurisdiction in relation to the proceedings or that part of them; and
 - (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
- (3) The Tribunal may strike out the whole or a part of the proceedings if –
 - (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
 - (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; and
 - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
- (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
- (5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
- (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.
- (7) This rule applies to a respondent as it applies to an appellant except that

–

- (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
 - (b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.
- (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.”

24. For completeness, CPR 3.9 is as follows:

“Relief from sanctions

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-
 - a. For litigation to be conducted efficiently and at proportionate cost; and
 - b. To enforce compliance with rules, practice directions and orders.
- (2) An application for relief must be supported by evidence.”

25. It is also worth recollecting that although the UT’s appellate jurisdiction derives from the power under section 11 of the Tribunals, Courts and Enforcement Act 2007 [‘TCEA 2007’] to hear an appeal on any point of law arising out of a decision made by the FtT, by section 25(1)(a) of that Act the UT has in England and Wales the same powers, rights, privileges and authority as the High Court. Furthermore, by section 3(5) of that Act the UT is a superior court of record. The UT’s rulings on points of law are binding on the FtT and it is both the practice of and a power inherent in that court to give appropriate guidance. If there is any doubt about that it is resolved by reference to section 25(3)(b) TCEA 2007 which expressly states that the powers, rights, privileges and authority conferred by section 25(1) shall not be taken “to be limited by anything in the Tribunal Procedure Rules other than an express limitation”. There is no relevant express limitation.

26. The appellant’s submissions on the key question are as follows:

- a. There is nothing in section 22 or schedule 5 TCEA 2007 that it is inconsistent with the principle that the UT as a superior court of record under s 3(5) TCEA 2007 is able to give guidance which unless excluded for any other reason would include the approach to breaches of orders;
- b. Provided that there is no contrary or inconsistent provision in the tax tribunal rules, there is no principle that guidance has to be derived from or wait for the emergence of a rule before it can be given by the UT;

- c. There is nothing in the difference in the wording of the CPR and the tax tribunal rules which suggests that the wording of the tax tribunal rules is contrary to or inconsistent with the approach in *Mitchell* and *Denton*;
 - d. As Judge Bishopp observed in *Leeds* at [16] “For some years it has been the practice in [the UT] and in the Tax Chamber of the FtT, to look to the CPR for assistance on matters about which the tribunal rules are silent.”; and
 - e. The guidance in *Mitchell* and *Denton* is as relevant to the tribunals as it is to the courts.
27. In any event, the appellant submits that Judge Bishopp was wrong to have come to the conclusion that Judge Mosedale had given non-compliance a “disproportionately prominent role in the application of the overriding objective” given that he had earlier in his determination noted correctly that Judge Mosedale had attached “significant, albeit not paramount weight” to HMRC’s non-compliance. On any basis, as Judge Bishopp accepted (at [44]), non-compliance was not an irrelevant factor and there was an appropriate approach to the question of judgment that was before the FtT namely to balance the various factors that expressly included the reasons for non-compliance which were non-existent and the question of prejudice which the FtT and the UT found against HMRC.
28. Putting to one side HMRC’s submissions about the background facts that are not available to them in this court, they make the following submissions on the key question:
- a. The weight given to the factors set out in CPR 3.9 (a) and (b) by Judge Mosedale that is, the need to ensure compliance with rules and practice directions, which was “*significant, albeit not paramount*” was nevertheless disproportionate because it was the only factor that militated in favour of imposing a barring order;
 - b. The tribunal rules have not been amended as have the CPR to mandate a stricter approach to compliance and accordingly the approach of the UT in *Leeds* is to be preferred to that in *McCarthy & Stone*;
 - c. The preferred approach is mirrored in a number of FtT and UT decisions since *Leeds* including in the Competition Appeal Tribunal (which is a body independent of the FtT and the UT);
 - d. When Judge Mosedale made her decision in the FtT she was bound by the approach of the UT in *McCarthy & Stone*;
 - e. Barring a party is analogous to striking out and if the CPR approach is to be followed it should be that contained in CPR r3.4(2)(c) i.e. by considering an alternative remedy unless the default has made it impossible for a fair hearing to take place: in this case where a conditional rule 8(3)(a) order had been made, a proportionate remedy would have been an unless order under rule 8(1) and/or a costs order;
 - f. The consequence of the barring order was a) to prevent a fair and just hearing on the merits, b) remove HMRC’s ‘entitlement’ to put their case, c) hand BPP a windfall to which they were not entitled and d) potentially

lead to a decision on the VAT status of a supply that is erroneous and accordingly contrary to the public interest;

g. The non-compliance by HMRC was unfortunate but not intentional.

29. It is important to record what Judge Mosedale acknowledged in the FtT. She was careful to identify (at [60]) that she was making a decision about whether barring should be applied as a sanction rather than considering whether to grant relief from a sanction already applied. Furthermore, she did not equate a rule 8(3) conditional order with a rule 8(1) unless order. Whether on the basis of the difference in the nature of the application or the wording of the rules, she was careful to remind herself that the decision in *Mitchell* was not strictly relevant to the judgment she had to make and that the relevance of the guidance given in the authorities was constrained to how the FtT should apply the overriding objective.

30. Judge Mosedale's conclusion was stated at [95] and [96] where she held:

"[95] There is no presumption that I will order HMRC to be barred. I must simply weigh all the factors: if I am in doubt whether barring is appropriate, I think I must err on the side of not barring HMRC. My objective in exercising my discretion is the overriding objective of dealing with cases fairly and justly'

[96] While the factors identified in *Mitchell* are not directly relevant, for the reasons I have given, I have to give significant weight when considering the overriding objective to the importance of compliance with directions of the tribunal and avoiding unnecessary delays and expense. [...]"

31. Her reasoning is set out at [59] to [65] as follows:

"[59] What Mr Singh [counsel for HMRC] did say was that the *Mitchell* line of authority was not relevant to an application to strike out a party under Rule 8(3)(a). Strictly, Mr Singh is right. The *Mitchell* line of cases (including *McCarthy & Stone* and *Compass*) relate to what considerations the court apply when there is an application for relief from sanctions. Comparable considerations to those in *Mitchell* might apply where this Tribunal is considering an application for reinstatement after an appeal has been automatically struck out following breach of Rule 8(1) unless order.

[60] Here, in contrast, no sanction has as yet been applied to HMRC. HMRC is in breach of the January directions but it has not been barred or had any other sanction applied. HMRC are not applying for relief from sanction. On the contrary, it is the appellant's application that the Tribunal bar HMRC out for a breach of a Rule 8(3)(a) unless order. The question for me is whether I ought to apply the sanction of barring.

[61] I consider, however, while *Mitchell* is not strictly relevant, nevertheless it contains some useful guidance that when considering the overriding objective of dealing with cases fairly and justly.

[62] At [45] of *Mitchell* Lord Dyson said that the court must proceed on the assumption that the sanction was properly applied and the applicant must justify its claim for relief. That guidance is obviously inapplicable to this situation. No sanction has yet been applied and I must not assume that barring is the appropriate sanction for the breach of the unless order.

[63] But I consider that the guidance in *Mitchell* is relevant in this appeal in so far as it stresses that in consideration of the overriding objective, significant weight should be given to the factors (a) and (b) of CPR 3.9 to ensure fair and just hearings.

[64] What did he mean by this? While Lord Dyson at [36] and [37] said these two factors were of ‘paramount importance’ and that other circumstances should be ‘given less weight’ nevertheless, even where CPR 3.9 was concerned, it was clear he did not mean that these two factors would always outweigh other factors as CPR 3.9 itself said all relevant factors must be considered.

[65] I conclude that in considering whether to grant the appellant’s application to bar HMRC from further participation in this appeal I must consider all relevant factors. I will include in my consideration factors (a) and (b) from CPR 3.9 and accord them significant weight as part of my consideration of the overriding objective to deal with cases fairly and justly.”

32. It is plain that Judge Mosedale did not directly apply the CPR or the subsequent authorities that give guidance on CPR 3.9. She was careful to make it clear that her consideration of the same was limited to whether the guidance contained in them was relevant by analogy to the application of the overriding objective in the tax tribunal rules. She was careful to distinguish the nature of the application before her from one under CPR 3.9. Most importantly, she distinguished the guidance before applying a nuanced version of it to the overriding objective in the tax tribunal rules. In the circumstance that the tax tribunal rules are silent on the question, did she make an error in law in according the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders significant weight as part of her consideration of the overriding objective?
33. For the reasons I set out below, I do not think that she did, with the consequence that the UT should not have intervened.
34. HMRC made a virtue of the submission that to afford non-compliance significant weight was plainly a material error of law in light of the decision of the UT in *Leeds* because “once one puts aside the notion, engendered by *Mitchell* before it was explained in *Denton*, that the enforcement of rules and directions is a factor of

particular importance, to be afforded substantial weight” then the “failings [of HMRC] are not so grave as to warrant a barring order”. With respect to the UT in *Leeds* where the words cited were coined, that is to put the cart before the horse.

35. The UT is a superior court of record. In like manner to the High Court, it can take its own view on interpretation and can develop its own precedent. The UT is not precluded from giving guidance on practice and procedure simply because the Tribunal Procedure Committee has not done so in the form of a rule. Furthermore, as I remarked at [25], the UT’s powers are not to be taken to be limited unless they are expressly so in the Rules and they are not. Of course there is significant merit in identifying and implementing new practices and procedures through the TPC, not least to ensure that there is consultation in an appropriate case, that the implications, including the financial implications, of change are considered and there is both adequate notice of change and consistency in its application, but none of those factors militate against the UT giving guidance in an appropriate case. There is nothing about this case, or for that matter *McCarthy & Stone* or *Leeds*, that suggests they were inappropriate cases in which interpretative guidance could be given.
36. HMRC are content that the UT relies upon the CPR by analogy where it suits their purposes, for example, as to the discretionary power to strike out in rule 8.3(c) FtT Rules, in which circumstance the UT has recently held that the approach under CPR 3.4 is helpful (see *HMRC v Fairford Group* [2014] UKUT 329 at [41] and their reliance on *Abdulle v Commissioner of Police for the Metropolis* [2014] EWHC 4052 (QB) and the decision in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC). The irony in that circumstance is not lost on this court.
37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal’s orders, rules and practice directions are to be complied with in like manner to a court’s. If it needs to be said, I have now said it.
38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in

getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

39. I found the approach of HMRC to compliance to be disturbing. At times it came close to arguing that HMRC, as a State agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour. I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not.
40. If there is nothing in the policy argument, then the only complaint that there can be about the exercise conducted by Judge Mosedale is as to weight, that is that she afforded two factors substantial weight when it was inappropriate to do so. That is an insubstantial basis for a second appeal on a point of law. Matters of weight are for the first instance tribunal, subject to an overall test of *Wednesbury* unreasonableness.
41. It is plain that Judge Mosedale took into account all relevant factors. It is not alleged that she fell into error by failing to do so. Two of the factors that might have predisposed the tribunal to come to a different view were found in BPP's favour, namely not only was there no good reason for non-compliance, there was no reason at all and further, prejudice had been occasioned as a consequence i.e. significant delay and expense. The balance was stark on the facts. It is accordingly wrong to say that non-compliance was the only factor that militated in favour of a barring order. The lack of any reason for non-compliance and the finding of prejudice were also relevant factors.
42. In any event, and given my conclusion on the legal policy question that has been raised, it is in my judgment an appropriate reflection of the purpose of the overriding objective that compliance and the efficient conduct of litigation at a proportionate cost are given the weight accorded to them by the FtT in this case.
43. If HMRC have a difficulty with compliance they should, where possible, make application to the tribunal to be relieved of compliance on the basis of some alternative proposal which should be canvassed with the taxpayer prior to the application. The reasons for non-compliance and the merits of the alternative should be explained. HMRC had no good reason indeed no stated reason at all for their non-compliance.
44. The UT found support for its decision to overrule the FtT in the decision of Morgan J in *Data Select* supra. This is not an appropriate case to analyse the decision in *Data Select*. Suffice it to say that the question in that case was the principle to be applied to an application to extend time where there had been no history of non-compliance. In this case, HMRC neither acknowledged that they had breached a time limit nor made an application for an extension of the same. In my judgment,

therefore, the question in this case turns on an antecedent principle of compliance. Had I been minded to analyse *Data Select*, that would have created a further difficulty for HMRC. Morgan J applied CPR 3.9 by analogy without waiting for the TPC to amend the UT Rules in just the manner I have suggested is appropriate.

45. For the reasons I have given, I would allow this appeal and restore the order made by the FtT.

Lord Justice Richards:

46. I agree.

Lord Justice Moore-Bick:

47. I also agree.