Appeal ref: FTC/33/2013

VALUE ADDED TAX — Upper Tribunal Rules – application for costs against Representative – unreasonable conduct – application successful

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LIFELINE EUROPE LIMITED

Appellant

- and -

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

Tribunal: Mr Justice Warren

Sitting in public in London on 9 February 2016

Ms Jenny Goldring, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Mr Andrew Young, counsel, instructed by D&S VAT Consultants for the Appellants

DECISION

Introduction

1. This is an application by the Respondents ("**HMRC**") for an award of costs against both the Appellant ("**Lifeline**") and its representative D&S VAT Consultants ("**D&S**"). The leading light and director of Lifeline was, and so far as I know remains, a Mr Haried. Mr Andrew Young appears for both Lifeline and D&S; Ms Jenny Goldring appears for HMRC. The application relates to part of the costs of an appeal to the Upper Tribunal, which was heard by Judge Sadler and me some time ago, our written decision ("**the Decision**") dismissing Lifeline's appeal being released on 24 March 2014. The application for costs was made within the relevant time limit. The reasons for the delay in the application actually coming on for hearing appear below.
2. The underlying tax appeal was an appeal against the denial by HMRC of the right to deduct input tax of some £2.4 million. That denial was on the basis that Lifeline's transactions were connected with Missing Trader Intra Community ("MTIC") fraud and that Lifeline knew, or should have known, that they were so connected.
3. Ordinarily, costs application should be dealt with succinctly and would not justify a lengthy written decision. The application in the present case is in a different category as HMRC level serious criticism against a professional person in the conduct of his business. I consider that D&S are entitled to expect a decision from me which deals in some detail with the criticisms made against them.

The costs regime

4. In the present case, there was no costs-shifting regime in place in respect of the costs of the appeal before the First-tier Tribunal. HMRC do not, in their present

application, seek to recover any of their costs of that appeal. What they do seek to recover is their costs of the appeal against Lifeline. But because Lifeline is likely to be unable to meet any costs order, HMRC also seek a costs order in respect of part of their costs against D&S.

5. The costs of proceedings in the Upper Tribunal are dealt with in section 29 of the Tribunals, Courts and Enforcement Act 2007 and in rule 10 of the Upper Tribunal Rules. The present application falls to be dealt with in accordance with the Rules as they stood at the time of HMRC's application. Section 29 is widely drafted, providing, among other matters, in subsection (1) that the costs of and incidental to all proceedings in the Upper Tribunal shall be in the discretion of the Upper Tribunal and in subsection (2) that the Upper Tribunal shall have full power to determine by whom and to what extent the costs are to be paid. Those provisions have effect, however, subject to the Tribunal Procedure Rules. The power to make a costs order against a party or a non-party, such as D&S in the present case, is found in section 29. The circumstances in which that power may be exercised are constrained by the Upper Tribunal Rules in proceedings before the Upper Tribunal.

6. Rule 10 provided, materially, as follows:

> "10(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—
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> (a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal; or
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> (b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses)."

7. Rule 10 is of general application and is not restricted to proceedings in the Tax and Chancery Chamber of the Upper Tribunal. In the case of proceedings on

appeal from the Tax Chamber, the Upper Tribunal's powers under section 29 are not constrained by Rule 10. Rule 10(1)(a) appears to be of perfectly general application; it does not appear to be restricted to costs orders against a party.

8. In contrast, the Upper Tribunal's powers on an appeal from, for instance, the General Regulatory Chamber, are constrained so that there is no general power to make a costs order, whether against a party to the appeal or against a third party. However, the power under section 29 may be exercised in a case which falls within Rule 10(1)(b). For instance, under Rule 10(1) of the General Regulatory Chamber Rules, that Chamber may not make a costs order (that is to say pursuant to section 29) except in specified circumstances, one of which (see Rule 10(1)(b)) is if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. This exception appears to be limited to costs orders against parties to the proceedings and does not include a representative. This same power is available in the Upper Tribunal under Rule 10(1)(b) of the Upper Tribunal Rules. It can be seen, therefore, that in some cases, it is necessary to rely on Rule 10(1)(b) of the Upper Tribunal Rules in order for the Upper Tribunal to make an order for costs.

9. I said in paragraph 7 above that Rule 10(1)(a) of the Upper Tribunal Rules does not appear to be restricted to costs orders against a party to the appeal. That, in my view, is the correct reading of Rule 10(1)(a) so that it is open to the Upper Tribunal to make a costs order against a non-party without the need to rely on Rule 10(1)(b). That power must, of course, be exercised in a principled way. Save, perhaps, in an exceptional case which it is not easy to envisage, there must be established, I consider, conduct in relation to the proceedings on the part of the third party which is unreasonable.

10. But if I am wrong in my view that Rule 10(1)(a) results in the Upper Tribunal being able to make a costs order against a non-party, the Upper Tribunal clearly has power on an appeal from the Tax Chamber to make a costs order against a representative of party where Rule 10(1)(b) applies. That Rule allows the Upper Tribunal to make an order in the same circumstance as the Tax Chamber could do so. As to those circumstances, Rule 10 of the Tax Chamber Rules governs the position. That Rule provides that the Tax Chamber may only make a costs order (again in exercise of the powers conferred by section 29) in specified cases, one of which (see Rule 10(1)(b)) is if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings. There is power, therefore, to make a costs order (under section 29) against a party's representative. It is nonetheless clear, in my view, that for an order to be made against a representative, unreasonable action on the part of that representative must be established; it is not enough that the party has acted unreasonably.

11. It does not matter much whether Rule 10(1)(a) or Rule 10(1)(b) is to be relied on by HMRC in the present case. The upshot is that a costs order can be made against D&S if, but in my view only if, D&S have acted unreasonably in conducting the appeal before the Upper Tribunal.

12. Before turning to the history of the proceedings, I record that it is common ground that a costs order made in reliance on Rule 10(1)(b) is compensatory and not punitive: see *Davidson v John Calder (Publishers) Ltd* [1985] ICR 143. On the facts of the present case, I consider that the same approach should be adopted in relation to Rule 10(1)(a).

13. Further, I accept Ms Goldring's submission, based on *Yerraklava v Barnsley*

Metropolitan Borough Council [2011] 1 Costs LO 74, that there need not be a precise causal relationship between the unreasonable conduct and the specific costs although the award must at least broadly reflect the effect of the conduct in question.

The history of the proceedings

14. In order to deal with HMRC's application, it is necessary to say something about the history of the proceedings both in the Upper Tribunal and in the First-tier Tribunal. So far as material, this is summarised in Ms Goldring's skeleton argument which is reflected closely in the following paragraphs of this decision.
15. Lifeline appealed to the First-tier Tribunal, which in a decision released on 28 June 2012, dismissed the appeal. It found that Lifeline "knew" that its transactions were connected with VAT fraud, specifically MTIC fraud.
16. Lifeline appealed to the Upper Tribunal on a point of law, namely "that on a proper construction of Community law, an alleged tax loss in a different supply chain is too remote to enable the national court to refuse Lifeline the right to deduct input tax". This was the only ground of appeal for which permission had been given. Judge Sadler and I heard the appeal on 10 March 2014 and our decision was released on 24 March 2014. We dismissed the appeal and refused permission to appeal to the Court of Appeal.
17. HMRC served a notice of application for costs based on unreasonable conduct together with a schedule of costs on 16 April 2014. The sum claimed amounted to just under £28,000.

18. On 6 August 2014, Lifeline's application for permission to appeal to the Court of Appeal was stayed pending the outcome of an appeal to that Court in *Fonecomp v HMRC* which broadly speaking dealt with the same legal point.

19. Lifeline and HMRC made a joint application to vacate a hearing listed to deal with the costs application (originally listed for 29 September 2014) pending resolution of Lifeline's application for permission to appeal to the Court of Appeal. This application was granted on or around 3 September 2014.

20. Fonecomp's appeal to the Court of Appeal was dismissed on 3 February 2015. An application for permission to appeal was made to the Supreme Court on 3 March 2015 and on 29 May 2015 permission to appeal was refused. Following this decision, Lifeline's application for permission to appeal to the Court of Appeal was also dismissed on 22 July 2015.

21. An addendum to HMRC's application for costs was served on 6 October 2015. In that addendum, HMRC indicated that they no longer relied upon one of the grounds in their application, namely that "[Lifeline] pursued a wholly unmeritorious appeal". The concession was made (whether generously, as Ms Goldring suggests, or not, I do not need to decide) on the basis that Fonecomp was given permission to appeal to the Court of Appeal (on an almost identical point of law as that raised by Lifeline) although ultimately the Court of Appeal dismissed Fonecomp's appeal.

22. HMRC's application for costs, which had been stayed pending resolution of Lifeline's application for permission to appeal to the Court of Appeal, was then re-listed for a hearing on 9 December 2015. The hearing was vacated due to Counsel for the Appellant being unavailable. The application eventually came on before me for hearing on 9 February 2016.

The amount of the claim

23. HMRC's position, in the light of the addendum, is that it is appropriate for there to be a deduction from the total amount claimed to reflect the concession made. Ms Goldring submits that the simplest and fairest way to reflect this is for HMRC to be awarded the costs of their Solicitors' Office for an abridged period, namely the 2 months prior to up to and including the hearing on 10 March 2014 as opposed to the costs for the entire duration of the appeal. The figure for the Solicitors' costs is then £6,687.

24. In addition, HMRC claim Counsel's fees only in respect of the preparation and conduct of the hearing in the Upper Tribunal, fees incurred during February and March 2014, and do not claim Counsel's fees for the whole of the appeal. There are three fee notes, for £1,150.00, £6,810.00 and £90 (exclusive of VAT in each case). From the figure of £6,810.00 should be deduced £800 which relates to the costs of HMRC's original costs application, which it is conceded are not recoverable.

25. The total costs now sought are therefore in the sum of £13,937. This, in Ms Goldring's submission, will broadly reflect the additional and unnecessary costs incurred by HRMC as a result of the unreasonable conduct of Lifeline and D&S

26. I should make the point here that the application with which I am dealing is an order for costs on the basis of unreasonable conduct on the part of both Lifeline and D&S. Each of them can be liable under this heading only in respect of their own unreasonable conduct. As against Lifeline, however, it is not necessary to establish unreasonable conduct in order for there to be an award of costs against it. As the losing party to the appeal, it ought, in principle, to be liable for the entirety of the costs of the appeal. I do not understand Mr Young to oppose an order for

costs against Lifeline. Unreasonable conduct only needs to be relied on by HMRC in relation to the order sought against D&S.

27. Nonetheless, Lifeline's conduct may have been unreasonable so that, assuming D&S have also been guilty of unreasonable conduct, it may be necessary to apportion the costs incurred as a result of the cumulative unreasonable conduct between Lifeline and D&S although, if the facts warrant it, each of them could in theory be liable for 100% of the costs incurred as the result of unreasonable conduct. Under section 29(2) Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal has power to determine by whom and to what extent costs are payable. Ms Goldring's submission, on the particular facts of the present case, is that the costs should be apportioned equally between Lifeline and D&S. That submission, I think, was made in the context of an application which related only to unreasonable conduct. But, as already explained, Lifeline is properly to be made liable for the entirety of the costs as the losing party. What the submission comes to, it seems to me, is that D&S should be liable for one half of the costs which, as a result of the combined unreasonable conduct of Lifeline and D&S have been unnecessarily incurred in the two months before the hearing, that is to say, one half of the figure of £13,937, *ie* £6,968.

HMRC's submissions - summary

28. HMRC put forward four principal reasons why Lifeline and D&S should be made liable, by reason of having acted unreasonably, for those costs. I list those reasons before turning to Ms Goldring's more detailed submissions:

    a. Lifeline's position (for which D&S must take responsibility) with regard to which legal arguments being pursued fluctuated repeatedly. This resulted in HMRC spending unnecessary time preparing for the appeal and

drafting a detailed skeleton argument in response to numerous legal arguments, most of which were not pursued. In particular, a substantial amount of time was spent by HMRC in responding to the single ground of appeal for which Lifeline had obtained permission (which I will refer to as "**the Kittel contra-trading ground**") and to an argument based on the Bill of Rights (neither of which were pursued save for a discrete argument about the impact of two cases, namely *Dixons Retail plc v HMRC* (Case C-494/12) ("***Dixons***") and *Maks Pen EOOD v Direcktor na Dirktsia Obshalvane I danachno-osiguritelna praktika Sofia* (Case C-18/13) ("***Maks Pen***").

b. Lifeline and D&S did not seek to progress Lifeline's own appeal and only responded when applications for unless orders were filed. It failed to comply with directions and to reply to correspondence. This required additional work by HMRC in terms of correspondence and drafting of unless orders simply to progress the appeal.

c. Lifeline and D&S sought an adjournment based upon the non-availability of Counsel, which was refused. It then sought to resurrect the application to adjourn without providing evidence to support the application. HMRC spent unnecessary time dealing with the requests for adjournments and pointing out the flaws in the application, all of which was unnecessary, especially given the appearance of Counsel at the final hearing.

d. The background to the appeal in the Upper Tribunal is of note. Lifeline put HMRC to the cost of replacing leading Counsel in the original appeal (due to an adjournment) and then the cost of proving its case in the absence of Lifeline, prior to the unreasonable conduct detailed above.

29. The detailed submissions which follow need to be read in the context of the extent of the instructions which Lifeline had given to D&S and to Mr Young. At the core of HMRC's case is that D&S were not properly instructed so that D&S (and Mr Young) were acting in the absence of proper instructions. Ms Goldring points out that neither the Upper Tribunal nor HMRC were told of the difficulties which D&S were facing and suggests that, had they been told, the appeal could have been managed in a more sensible and proportionate matter with the avoidance of a lot of unnecessary work on the part of HMRC and Ms Goldring.

HMRC's submissions – detailed submissions

a. Fluctuating legal arguments

30. On 19 March 2013, Lifeline had obtained permission to appeal to the Upper Tribunal on a single ground namely the Kittel contra-trading ground. See further at paragraphs 68 and 69 below.

31. However, a number of other appeals concerning MTIC fraud, in particular appeals relating to contra-trading, were proceeding through the tribunal system. On 29 January 2014, HMRC made what has been referred to as a group strike-out application in relation to a number of those appeals, including Lifeline's own appeal. That application sought to strike out the appeals insofar as they were based on the Kittel contra-trading ground. The application was heard by Judge Bishopp. Mr. Young appeared at that hearing on behalf of Lifeline. He had in fact been involved on behalf of taxpayers in a number of VAT cases concerning MTIC fraud and was familiar with the issues. At the hearing, Mr Young raised an argument based on the Bill of Rights; this was the first occasion on which it had been raised in the Lifeline appeal. The argument was to the effect that Lifeline had rights under the Bill of Rights which could only be taken away by Parliament

expressly putting a provision to that effect in a statute, which had never been done. Judge Bishopp's immediate response when Mr Young raised the argument was to observe that Lifeline wanted to run an argument to the effect that there was no statutory authority for what HMRC had done and to remark that there was no permission to run that argument. After a short interchange with Mr Young, Judge Bishopp expressed his view that Lifeline was stuck with the single ground of appeal for which permission had been granted, adding that Lifeline could make an application at the beginning of the hearing in March to enlarge the grounds of appeal.

32. It was not until 3 March 2014, a week before the appeal was listed in the Upper Tribunal and a year after permission to appeal had been granted on the Kittel contra-trading ground, that Lifeline served a notice of application to include a ground of appeal relating to the Bill of Rights.

33. Lifeline's skeleton argument for the appeal, also served on 3 March 2014, continued to pursue the original ground of appeal and, according to Ms Goldring, as well as addressing the Bill of Rights argument, raised numerous other legal arguments for which leave had not been granted. Mr Young disputes that, contending that those other legal arguments were all part and parcel of the argument relating to the Kittel contra-trading ground for which permission had been granted. This is consistent with Lifeline's position as set out in an email on 4 March 2014 at 16:45, where it stated that 14 of the 26 authorities in its skeleton argument related to the "original ground" of appeal.

34. In the light of the skeleton argument, which it had received, and the email to which I have just referred, HMRC commenced the preparation of their skeleton argument on the basis that the Kittel contra-trading ground was still being

pursued. It was also necessary for them to address the new Bill of Rights ground of appeal having every reason to think that Lifeline would seek to extend its grounds of appeal to include the point; and it was necessary for them to deal with the numerous other legal arguments being raised which, on HMRC's case, were new arguments for which permission to appeal was also needed. They could not safely proceed on the basis that the Upper Tribunal would refuse to allow the additional arguments to be run or that it would grant an adjournment for HMRC to deal with them.

35. Ms Goldring submits that, on 5 March 2014, there was then a complete change of position by Lifeline. On that date, D&S, on behalf of Lifeline, issued an application (copied by email to HMRC on 6 March) to the Upper Tribunal in which, not only did they ask for a stay of the appeal behind the Fonecomp's appeal to the Court of Appeal, but also they put forward an alternative proposal, namely that the Upper Tribunal should dismiss the appeal (on the basis that the Upper Tribunal was bound by its previous decisions on the Kittel contra-trading ground) and should then grant permission for Lifeline to appeal to the Court of Appeal on the same grounds as those advanced by Fonecomp which was then in the course of applying for permission to the Court of Appeal in its own case. Ms Goldring suggests that, by this stage, the position of Lifeline regarding whether the additional "Bill of Rights" ground was being pursued or indeed whether leave was being sought in respect of that or the other legal arguments had become unclear. There was no mention of the Bill of Rights ground in the application dated 5 March 2014 itself or the email to HMRC.

36. I agree that Lifeline's position was unclear; I would add that it was confused. I find it hard to understand how Lifeline could both accept that its appeal should be

dismissed with permission to appeal being granted on the same grounds as Fonecomp's appeal and at the same time keep the Bill of Rights point (or any other point) open for the Court of Appeal without the Upper Tribunal having addressed it and given an appealable decision. Indeed, the basis of the alternative proposal to dismiss the appeal was that the Upper Tribunal was bound by its previous decisions on the Kittel contra-trading ground to dismiss the appeal. There was, however, no decision on the Bill of Rights point in the Upper Tribunal, which was not then bound by any authority to dismiss the point. Accordingly, the suggestion that the appeal should be dismissed because of binding authority was a tacit indication that the Bill of Rights point was not being pursued. Further, paragraph 19 of the application states that Lifeline's arguments are substantially the same as the arguments in Fonecomp's appeal; Fonecomp's arguments did not include anything about the Bill of Rights, which is another indication that the Bill of Rights point was not being pursued by Lifeline.

37. There was a further change of position by Lifeline at the hearing on 10 March 2014. The application to vacate the hearing was not pursued; nor was the alternative suggestion of dismissing the appeal pursued. Instead, the Kittel contra-trading ground was resurrected on a limited basis by reference to the two cases of *Dixons* and *Maks Pen* which Mr Young argued gave rise to a need for a reference to the CJEU to obtain clarification of its judgment in *Kittel*. The Bill of Rights ground and other legal arguments were not pursued. Judge Sadler and I considered that those two cases did not assist Lifeline and declined to make a reference. We accordingly dismissed Lifeline's appeal and refused permission to appeal. Our decision was released, as I have said, on 24 March 2014.

38. Lifeline's skeleton argument before us (which was submitted late) referred to

numerous legal authorities (copies of which were provided only on the morning of the hearing), which HMRC had had to collate, digest and address in their skeleton argument. Most of these related to the Kittel contra-trading ground in the wider sense and other legal arguments (including the Bill of Rights point), which were not subsequently pursued at the hearing.

39. Further, during the course of the hearing on 10 March 2014, it appeared to be suggested by D&S that Lifeline's skeleton argument of 3 March 2014 had been "cobbled together" by the principal of D&S, Mr Smallwood, from skeleton arguments in other cases in which he had been involved with Mr Young. Ms Goldring suggests that it was this approach which no doubt resulted in the citing of numerous authorities and legal arguments to which HMRC were required to respond but which were not relevant in the event at the final hearing.

40. Ms Goldring took me through Lifeline's skeleton argument dated 3 March 2014 in order to demonstrate how far it went beyond what was needed to deal with the single ground of appeal for which permission to appeal had been given, namely the Kittel contra-trading ground. I do not propose to go through that skeleton argument in this decision in any detail. It runs to 76 paragraphs. Paragraphs 1 to 34 go, essentially, to the Kittel contra-trading ground in relation to which HMRC now concede that the appeal was not wholly unmeritorious. Later paragraphs, however, raise some new points not subsumed within the Kittel contra-trading ground. Clearly the Bill of Rights point is not subsumed. But nor, in my view, are the various points raised in relation to proportionality, effectiveness and fiscal neutrality; and although these are connected, in a broad sense with the Kittel contra-trading ground, in that they all concern Community/EU law rather than domestic law, they are separate points for which permission to appeal had not

been granted.

41. The response to that skeleton argument was HMRC's own skeleton argument dated 7 March 2014. This ran to 81 paragraphs. In the first section, it contained HMRC's opposition to Lifeline's application (made on 5 March 2014) to stay the appeal pending the decision concerning permission to appeal in Fonecomp's appeal. In the next section, it contained HMRC's objections to the raising of additional grounds of appeal. The focus there was principally on the Bill of Rights point, but added that HMRC "discerns numerous other points/grounds of appeal" to which objection was taken. The skeleton argument then went on to address the Kittel contra-trading ground

42. At paragraph 48*ff*, HMRC's skeleton argument went on to address *Dixons* and *Maks Pen*, under a heading "Additional points raised regarding contra trading (for which permission to appeal has not been sought)". I do not agree with the words in parentheses in that heading; I consider that the points raised in relation to those two cases did fall within the scope of the permission to appeal which had been granted albeit that Judge Sadler and I decided that they did not qualify what the CJEU had said in earlier cases or give rise to a need for a further reference.

b. Failure by Lifeline to progress its own appeal, to comply with directions and to respond to correspondence, thus occasioning additional cost

43. It is said that Lifeline repeatedly breached the directions of 15 July 2013 concerning lists of and provision of documents in the months leading up to the appeal hearing on 10 March 2014. HMRC were thus required to chase Lifeline and draft applications for orders to progress Lifeline's own appeal.

44. Ms Goldring's skeleton argument addressed one particular failure, namely a failure in relation to the provision of a list of documents by Lifeline. In the absence of a list, HMRC applied for an "unless" order on 11 October 2013. A list was eventually served on 5 November 2013, which referred to witness statements and accompanying voluminous exhibits. HMRC indicated that they were not prepared to copy all of the exhibits. No response was received.

45. Lifeline's skeleton argument was due on 24 February 2014. It was not received and an application for another "unless" order was made on 28 February 2014. This was also made in respect of the provision of the bundle of documents referred to in the List of Documents. The Upper Tribunal made an order requiring the filing of a skeleton argument by 3pm on 3 March 2014 and bundle of documents by 4pm on 4 March 2014. In default the appeal was to be dismissed.

46. Lifeline's skeleton argument was served 3 minutes before the expiry of the deadline and a bundle of documents was served on 4 March 2014. This comprised three documents listed in an entirely new List different from the List served on 5 November 2013.

47. HMRC emailed Lifeline on 4 March 2014 requesting that it provide its authorities bundle, as a joint index could not be agreed. Lifeline's skeleton argument, it will be remembered, referred to a considerable number of authorities. D&S responded that the authorities had been provided in another case so HMRC should get copies and were to email Lifeline if they could not find a case and it would be forwarded. This approach was not, Ms Goldring contends, realistic in the short time period within which HMRC had to provide their own skeleton argument in response. HMRC were therefore required to collate the relevant authorities.

48. On 4 March 2014, with the hearing imminent, HMRC sent a letter and on 5 March 2014 sent an email to Lifeline and to the Upper Tribunal indicating that the List of Documents received on 4 March 2014 was not complete, if Lifeline was still pursuing its original ground of appeal. The Upper Tribunal stated that it would deal with all aspects of the further conduct of the appeal on 10 March 2014.

49. Lifeline's position, as stated in the application dated 5 March 2014 to which I have already referred, was this: "As the appeal is limited purely to points of law the only documents that the Tribunal needs is written legal arguments, and related authorities, thus there are no further documents on which the Appellant relies" and "As the Appellant seeks to rely on points of law only it would seem to be misconceived to maintain that it needs to rely on any other documents." This approach contradicted that taken by Lifeline when it served the original List in November 2013 including witness statements and exhibits and other documents in relation to the appeal.

50. In contrast with what actually happened at the appeal hearing, Lifeline had previously confirmed to the Upper Tribunal some time in mid-February 2014 that it was continuing with the appeal on the Kittel contra-trading ground.

c. Attendance of Counsel for Lifeline at the appeal hearing

51. The appeal had been listed for final hearing since July 2013. At the group strike-out hearing on 29 January 2014, Mr Young stated, as recorded in the transcript, that he would be "doing Lifeline". On 24 February 2014, I refused an application dated 21 February 2014 to vacate the hearing. This application was based, at least in part, on the unavailability of Counsel.

52. On 4 March 2014, D&S sent an email stating that Counsel could not attend the hearing and asking if someone should attend to pass up papers.

53. In an email on 6 March 2014, Lifeline made a renewed application (dated 5 March 2014) to HMRC and the Upper Tribunal to adjourn the hearing after the refusal on 24 February 2014. Explanation was given as to the reasons why Mr. Young could not be present, namely that he was to appear in the Court of Appeal on that date in another case against HMRC. D&S stated that it was only on 21 February 2014 that they/Lifeline became aware that Mr. Young would not be available as there was a clash with a case in the Court of Appeal in which he was appearing, which was floating over 2 days and that "it was assumed that since Counsel had agreed to appear in the Strike Out hearing he would also be appearing in the substantive appeal".

54. Before dealing with the application, the Upper Tribunal required further information. In an email dated 5 March 2014, it required that any evidence on which Lifeline sought to rely in support of its application for an adjournment due to the non-attendance of Counsel must be sent by 2pm on 7 March 2014. It noted that the original application was unsupported by any evidence and sought explanation of how the double booking had occurred if the application for an adjournment was to be maintained.

55. On 5 March 2014, HMRC sought an order that a representative of Lifeline should attend the hearing and indicated that they would be applying for a wasted costs order. On the same day, the Upper Tribunal stated that it considered it inappropriate to order attendance but would find such attendance helpful. Indeed in light of expressed intention of HMRC to apply for wasted costs the Upper Tribunal indicated that it might be in Lifeline's interest for a representative to attend.

56. Some email correspondence ensued between D&S and HMRC about Mr Young's attendance. By 7 March 2014, it was apparent that the Court of Appeal case would not in fact be listed for 10 March. HMRC emailed D&S to that effect and sought clarification about whether Mr. Young would attend Lifeline's appeal hearing. Later that afternoon, D&S indicated that it had not been possible to contact Mr. Young and doubt was expressed that he would, in any case, be able to prepare due to lack of time. HMRC responded that they did not accept that Mr. Young could not attend due to "lack of time to prepare." They noted that Mr. Young was not new to this matter and encouraged his attendance if the application to vacate was based upon his unavailability. The response of D&S to that was that Mr. Young was not properly briefed and that he would not have seen the documents from HMRC, which had recently arrived with D&S (some 200 miles from Mr Young's chambers).

57. In fact, Mr Young did attend the hearing on 10 March 2014 and made submissions on behalf of Lifeline. I will have something to say later about the limited nature of those submissions and why Mr Young did not develop certain aspects of the appeal as set out in Lifeline's skeleton argument.

d. Background – the appeal in the First-tier Tribunal

58. HMRC's position is that their application for costs based on unreasonable conduct should also be considered in the context of the appeal in the First-tier Tribunal. Lifeline failed to attend the hearing of that appeal. It had previously incurred HMRC in additional costs by seeking and obtaining a 6 month adjournment of a previous listing which necessitated the replacement of counsel on behalf of HMRC.

59. Some of the unsatisfactory conduct of the proceedings in the First-tier Tribunal is recorded in the decision dismissing Lifeline's appeal. In particular, there was a further late application to adjourn the hearing in December 2011, which the tribunal refused. It is worth setting out [35] of that decision:

> "35. In accordance with rule 33 the Tribunal was satisfied that the appellant had been notified of the hearing and further having examined all the relevant facts considered it to be in the interests of justice to proceed with the hearing:
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> (i) The appellant originally applied for an interim payment in 2006 but failed to provide relevant information requested by HMRC.
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> (ii) The original hearing was set down for a date which suited the appellant's counsel but, with minimal notice, the director of the appellant requested a short adjournment and stated that he was 100% committed to dealing with the case.
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> (iii) The appellant was granted a six and a half month adjournment but left it until 25 November 2011 to state that its counsel was not available.
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> (iv) The appellant has been refused an interim payment and appears unlikely to have funds to apply for a judicial review of the decision and which in any event is unlikely to succeed.
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> (v) Despite being invited to attend the hearing himself without representation on the basis that the Tribunal would have ensured that he received a fair hearing and he would have had the chance to hear the evidence and give evidence himself, the director of the appellant did not appear and stayed away."

60. I note that these matters can be relied on by HMRC in relation to an application for costs against Lifeline (although there is no need to do so since a costs order will be made on ordinary principles without the need to rely on unreasonable conduct, as explained at paragraph 26 above). But these matters are, in my view, wholly irrelevant to D&S prior to the time when Lifeline first instructed them. I am not satisfied on the material which Ms Goldring was able to show me that D&S were even instructed by Lifeline at a time when any of the allegedly

unreasonable conduct in the F-tT took place. I reject reliance on this fourth head of complaint by HMRC.

Lifeline's and D&S's submissions

61. Mr Young made some succinct and helpful oral submissions. I need to consider those submissions together with the more extensive submissions made in his skeleton argument. In doing so, I make some observations and reach certain conclusions as I go along.

62. Mr Young, in his skeleton argument, begins by submitting that there was nothing unreasonable in bring the appeal. That is a point which is now conceded by HMRC: see paragraph 20 above. It is likewise conceded, in relation to another point made by Mr Young, that an award of costs in relation to unreasonable conduct in the present case is not to be made by way of a punitive sanction but is to be made in order to compensate HMRC for unnecessary costs which they have incurred. It is further conceded, as already mentioned, that HMRC cannot recover the costs attributable to their original application for costs which had been made under the wrong rule.

63. Mr Young contends that the Bill of Rights argument was not unmeritorious. I am bound to say that I see a very great deal of difficulty with it. But that is not the point. The point which HMRC make is that the argument was raised but then not pursued; HMRC incurred costs in preparing to meet it; and had the argument been dropped by, at latest, the time when Lifeline's skeleton argument for the appeal to the Upper Tribunal was served, unnecessary cost would have been avoided. As to that, Mr Young submits that, although it was dropped, this was not because Lifeline (or rather D&S and Mr Young who were conducting the appeal) thought it was unmeritorious. The reason it was dropped was a lack of funding.

64. That lack of funding, it is said, was also the reason for Lifeline's failure to attend the hearing before the First-tier Tribunal, funding which was lacking because HMRC "had retained [Lifeline's] tax credits which it need in order to "fund" its appeal. There was inequality of arms. The whole issue, however, was whether Lifeline was entitled to those tax credits; HMRC were not obliged to give effect to the credits pending the appeal and had refused to make an interim payment to Lifeline in accordance with their published guidance. I do not consider that there is anything in this point. It is, in any case, no excuse for subsequent unreasonable conduct if there was any.

65. Now, Mr Young points out in his skeleton argument that D&S are not a law firm. Mr Young says, and I am willing to accept for present purposes, that the firm does occasionally appear through Mr Smallwood in the F-tT in straightforward appeals in much the same way as HMRC is sometimes represented by legally unqualified officers. D&S have limited exposure, however, to the Upper Tribunal and will only act where they have the assistance of counsel. Mr Young provided that assistance, to some extent, in the present case, as appears below.

66. At this stage, I digress from Mr Young's submissions to consider when D& S and Mr Young were instructed. No evidence has been submitted on behalf of D&S about the timing or extent of their instructions from Lifeline or of any instructions by Lifeline or D&S to Mr Young. Professional privilege has not been waived in respect of the latter but Mr Young did tell me something of the history in the course of his submissions. Although I do not know when D&S were first instructed by Lifeline, it appears that its solicitors, Dass Solicitors, had ceased to act by 18 May 2011: see [5] of the decision of the F-tT. D&S had clearly become involved prior to 5 December 2011: on that date, Mr Smallwood wrote, as appears

from [16] of the F-tT Decision, on behalf of Lifeline to say that it was not possible to represent Lifeline in the absence of a release of funds by HMRC. They were not prepared, I infer, to act *pro bono*.

67. I note in passing that the F-tT considered carefully whether it should proceed with the hearing in the absence of Mr Haried, who had previously indicated his intention to represent Lifeline in person. The tribunal considered that Mr Haried was well aware of the hearing. On the first day of the hearing, the tribunal instructed HMRC to contact Mr Haried to invite him to attend. At [35] of their decision, the tribunal ruled that it would be in the interests of justice to proceed with the hearing, giving their reasons paragraphs numbered (i) to (v). The fifth reason was that, despite Mr Haried being invited to attend on the basis that the tribunal would have ensured that he received a fair hearing and would have had the chance to hear the evidence and give evidence himself, Lifeline did not appear and Mr Haried stayed away.

68. Although they did not appear on behalf of Lifeline at the hearing, D&S either continued to be involved with Lifeline or became re-engaged at a later date. Although it is not clear when D&S recommenced any active involvement or when they undertook functions in relation to the appeal to the Upper Tribunal, they must have been involved in the application for permission to appeal. I say this because Mr Young is recorded by Judge Herrington as being present at the hearing on 15 March 2013 when permission to appeal was granted. Mr Young's involvement with Lifeline arose through his relationship with D&S. It is inconceivable that if Mr Young was acting, D&S were not also acting.

69. Judge Herrington gave permission only in relation to the Kittel contra-trading ground. He did not need to consider any other ground because, as he recorded in

his short decision notice, Lifeline had amended its grounds of appeal to limit it to that ground.

70. Returning to Mr Young's submissions, he says in his skeleton argument that he had been persuaded to assist with the drafting of the grounds of appeal and agreed to do so *pro bono*. I do not know what those grounds included as originally drafted. He told me in his oral submissions that he met personally with Mr Haried – although the date of this meeting is entirely unclear to me – and it was agreed that Mr Young would act on an "appeal on a point of law". That, of course, reflected the jurisdiction of the Upper Tribunal, which is able to entertain an appeal only on a point of law. Mr Young did not inform me what point, or points, of law, if any, were discussed with Mr Haried and which Mr Young, with D&S, was authorised to pursue. In any case, the grounds of appeal had been limited to the Kittel contra-trading ground by Lifeline itself prior to the time of the hearing before Judge Herrington. Either Lifeline had given express instructions to limit the appeal in that way or Mr Young and D&S considered that they had authority to do so and that it was right to do so.

71. Although I do not know what other grounds of appeal were originally to be found in Lifeline's application for permission to appeal, I do know two things. The first is that the Bill or Rights point (but no other additional points) was raised at the group strike-out hearing (when Mr Young, it will be remembered, appeared on behalf of Lifeline). The second is that no application seeking to raise a new ground of appeal in reliance on the Bill of Rights was even flagged until shortly before the appeal hearing in March 2014. Further, when Mr Young mentioned the Bill of Rights at the group strike-out hearing, it is not clear what he was saying or with what authority. He may simply have been making an advocate's point to the

effect that he would be considering with his client raising a point which had occurred to him (and which he had run without success in other cases, as I understand it); or he was indicating that his client wished to raise this new point. He tells me that Mr Smallwood did discuss the point with Mr Haried, probably in January 2014, but there is no evidence about that.

72. There has been no suggestion from Mr Young that he, personally, has ever had any further discussion with Mr Haried (or any other director or employee of Lifeline) about the appeal other than the discussion (on an unknown date) which I have already mentioned. Nor has it been suggested on behalf of D&S that they had had such discussions other than as indicated in the last sentence of the preceding paragraph. Indeed, one reason that Mr Young gives for the difficulties faced by D&S in conducting the appeal is that D&S could not obtain instructions, Mr Haried having left the UK after the F-tT decision. It is realistic to conclude, as I do, that the decisions concerning what points to run were taken by Mr Young and D&S, albeit that the Bill of Rights point may have been discussed with Mr Haried in January 2014. I should add that, quite apart from the Bill of Rights point, there has never been even a hint that an application would be made to permit Lifeline to raise any other additional ground of appeal.

73. Mr Young submits that when the appeal hearing date approached, D&S faced this difficulty, namely that although they had secured Mr Young's services to draft the grounds of appeal *pro bono*, he was unavailable for the appeal as he was appearing in the Court of Appeal on another matter and could not accept instructions. D&S simply found it impossible to instruct an alternative counsel. The inability to instruct alternative counsel may have been, although here I speculate, because of a funding problem; certainly, I would readily accept that to

obtain further *pro bono* services from a different barrister at this stage (that is to say around 21 February 2014 when D&S became aware that Mr Young would not be available) would have been very difficult if not impossible.

74. How a situation arose where Mr Young had not been instructed and instead took his Court of Appeal brief is not entirely easy to understand. Since Mr Young would be continuing to provide his services *pro bono*, funding was not an issue so far as his attendance was concerned, and there was no reason not to instruct him well in advance. I should put a caveat on that. D&S and Mr Young might have thought that there were insufficient instructions from Lifeline to do so; or that, although the instructions were sufficient to instruct Mr Young, D&S themselves had not been put in funds and, not themselves being willing to act *pro bono* (which I accept they were not), Mr Young could not be expected to act without their (unavailable) support.

75. There is, however, no material to support that caveat. It has not been suggested – and I have been provided with no evidence to support such a suggestion – that D&S and Mr Young received any further instructions from Lifeline beyond those which they were given at the commencement of the appeal or what Mr Smallwood had been instructed in his conversion with Mr Haried in early January 2014. If it was the position that there were insufficient instructions and funds in the weeks before the appeal when Mr Young could have been instructed without a clash, then it is not easy to see how he could have told Judge Bishopp that he would be appearing on the Lifeline appeal (the date of which was then known to him). Further, there is nothing to suggest that anything changed so far as concerns funding in the period before the hearing to allow him to be instructed; and yet he actually did appear at the hearing with the support of D&S in attendance.

76. Mr Young's position is that he had been instructed in the Court of Appeal in the other matter. In the event, the case was not listed in the Court of Appeal but it was only on 7 March, three days before Lifeline's appeal was listed for hearing, that Mr Young was told that he would be free. By that time, it was too late for him to prepare fully for the hearing. He indicated that he was prepared to argue the Kittel contra-trading ground, with which he was very familiar from other cases in which he was involved, but he was not in a position to prepare arguments in relation to the Bill of Rights point. This may well be so and from Mr Young's professional perspective he appears to have acted entirely properly.

77. Mr Young submits that D&S were simply doing the best they could. Mr Young himself did not draft Lifeline's skeleton argument (although I note that it does not appear whether he was asked to do so and if so whether he refused because he was too busy or for some other reason). Instead, it was drafted by D&S based on material from skeleton arguments drafted by Mr Young in other cases in which he had been involved with D&S. This is not conduct, he says, which should be visited with an adverse costs order. There was in any case nothing wrong, he says, with the skeleton argument as drafted. Accordingly, if one were to look at the position on the day before the hearing, there would be no reason to make a third party costs order against D&S.

78. It is true, as he accepts, that, on the day, only the Kittel contra-trading ground was live and even then only in relation to the new aspect based on *Dixons* and *Maks Pen*. But this, Mr Young submits, was not because the other points raised in the skeleton were considered unmeritorious. Rather, it was because of his understandable unpreparedness for the hearing. Mr Smallwood had been intending to attend the hearing in order to invite the tribunal to read the

arguments, as contained in the skeleton argument, without making oral submissions. The tribunal might have rejected those arguments; but even assuming that it would have, the points were not so unmeritorious – even the Kittel contra-trading ground ignoring *Dixons* and *Maks Pen* was not so unmeritorious – as to warrant a third party costs order against D&S. This is not a case, Mr Young would say, where D&S (or indeed Mr Young himself) were running hopeless points in a situation where, to do so, would amount to unreasonable conduct. Indeed, I would add that it is not unreasonable in the required sense for advisers to run points in litigation which they consider have little prospect of success if the client insists that they should be run.

79. Mr Young deals in paragraph 17 of his skeleton argument with HMRC's complaint about Lifeline's failure to progress its own appeal and to comply with directions. D&S accept that this is a valid complaint against Lifeline. However, D&S themselves were not to blame. They were in a dilemma. Mr Young states (although this is not in evidence, but I am willing to accept for present purposes) that Mr Haried's wife had died of cancer during the appeal process (although he does not say when). Mr Haried had become depressed and reclusive and D&S were unable to make contact with him, it being thought that he had returned to India. D&S were not, he says, to be blamed for the absence of Mr Haried or an inability to take instructions.

Discussion

80. It is important, in my view, to take into account the extent to which D&S were acting on instructions and the extent to which they were making decisions and taking actions in the absence of instructions. Although Mr Young tells me that Mr Smallwood discussed the Bill of Rights point with Mr Haried in early January

2014, there is no suggestion that there were any other communications after than discussion.

81. I can well understand the difficulties facing an adviser in the position of Mr Smallwood who has received instructions to pursue an appeal but who then finds himself not put in funds and unable to contact the human representative of his client. It would be unsurprising in those circumstances if the adviser were to terminate his retainer, leaving the client to look after itself.

82. On the other hand, the adviser might consider that he had sufficient instructions to pursue the appeal without further communication, hoping that he would, at the end of the day, be paid. But if he takes that course, he must ensure that he does not act in a way which is unreasonable. If he does so, he exposes himself, in my view, to the risk of an adverse costs order on the basis of unreasonable conduct.

83. In this context, it is important to appreciate that not all conduct by a litigant which leads to an adverse costs order against him – even an indemnity costs order – means that he has been guilty of unreasonable conduct. A litigant, such as a taxpayer appealing to the Upper Tribunal, may decide at a late stage of his case that one or more of the points which he had been running should be dropped. The cost of the unnecessary work which his opponent, HMRC is the example, has had to carry out would be likely to result in an adverse costs order, perhaps even on the indemnity basis. But it does not follow that the litigant or his advisers have been unreasonable in the sense required for an order is to be made on the basis of unreasonable conduct.

84. Equally, it does not follow that, because a litigant has been unreasonable, so too has his adviser. A failure to observe directions made by a court or tribunal in the course of litigation may be visited with costs sanctions without the failure

necessarily amounting to unreasonable conduct on the part of the adviser. Even if the litigant himself has behaved unreasonably, for instance by failing to give instructions, or by giving unreasonable instructions, so that directions are not complied with, it does not follow that the adviser himself has acted unreasonably – indeed, it is not easy to see how he could take steps to comply with directions without instructions although his proper course might then be to terminate his retainer.

85. It is considerations such as those which I have mentioned in the preceding paragraphs which provide some support for Mr Young's submissions that D&S were simply doing the best they could in difficult circumstances not of their own making and that they did not, therefore, act unreasonably.

86. I do not consider that D&S can escape responsibility that easily. On the facts of the present case, I consider that D&S must take responsibility for the manner in which the appeal was conducted from, at latest, the date of the group strike-out application, 29 January 2014. Mr Young's own submission is that Mr Haried was absent and that D&S were unable to take instructions (and, I might add, was no doubt not put in funds). It may be that D&S had instructions to pursue an appeal based on the Bill of Rights as well as the Kittel contra-trading ground. But that does not excuse D&S from acting reasonably in the pursuit of a successful outcome overall for their client. I consider that D&S, having chosen to continue to pursue the appeal on behalf of their clients (knowing that they were not able to communicate with Mr Haried and that they were not in funds), are to be held responsible for the conduct of the appeal after, at latest, 29 January 2014 if that conduct was objectively unreasonable, I do not consider that they can shelter behind the lack of instructions or lack of funding.

87. It might be said that my reasoning ought also to lead to the conclusion that D&S should also be held responsible for at least some of HRMC's costs incurred before that date, in particular in relation to the failure to comply with directions and the need for HMRC to obtain an "unless" order in late 2013. I do not consider that that it is correct to apply my reasoning in that way. It would be difficult, I consider, to conclude that the conduct of Lifeline and D&S even taken together had, by the end of 2013, crossed the line from conduct warranting an adverse costs order against the litigating party (*ie* Lifeline) into unreasonable conduct. The fact that there has been unreasonable conduct after that (as I conclude below that there has been) does not mean that the conduct of the appeal as a whole has been unreasonable from beginning to end. And although there does not have to be a direct causal link between the costs incurred and the unreasonable conduct, the award must at least broadly reflect the effect of the conduct in question: see paragraph 13 above. I do not consider that it was until a later stage that D&S should have focused carefully on how the appeal was to be extended (*eg* by seeking to add new grounds of appeal) or to be limited (*eg* by accepting that the Kittel contra-trading ground would fail subject to the argument arising out of *Dixons* and *Maks Pen*).

88. In my judgment, D&S's conduct in February and March 2014 was not satisfactory. It is not that it is merely open to criticism but crossed the line into unreasonable conduct. The central features are these:

    a. Permission to appeal was granted on a single ground, the Kittel contra-trading ground, other potential grounds of appeal having been abandoned.

b. In November 2013, a long list of documents was prepared on behalf of Lifeline which it was said were necessary for the appeal, that is to say on the Kittel contract-trading ground.

c. On 29 January 2104, Mr Young indicated at the group strike-out hearing that Lifeline would be running an argument based on the Bill of Rights. Judge Bishopp pointed out that Lifeline did not have permission to run this argument.

d. Mr Young indicated at that hearing that he would be representing Lifeline at the appeal.

e. D&S did not instruct Mr Young who subsequently became unavailable.

f. Some time during February 2014, D&S indicated to the Upper Tribunal that Lifeline would be pursuing its appeal on the Kittel contra-trading point.

g. D&S took no steps to apply to extend the grounds of appeal until 3 March 2014 when an application was lodged to include the Bill of Rights point

h. On the same day, Lifeline's skeleton argument was lodged. It related not only to the Kittel contra-trading ground, but also to the Bill of Rights point and a number of other arguments.

i. A further List was filed comprising only three documents. HMRC pointed out that if the Kittel contra-trading ground was being pursued, the documents in the previous list were required too. Lifeline's attitude appears from paragraph 48 above.

j. D&S failed to provide a bundle of authorities, as to which see paragraph 49 above.

k. On 5 March 2014, D&S made the application on behalf of Lifeline referred to at paragraph 35 above. It is not easy to see how the contents of that application were consistent with Lifeline running any ground of appeal other than the Kittel contra-trading ground.

l. HMRC had to prepare for the hearing on the footing that all potential grounds of appeal might be run. The application for permission to extend the grounds of appeal had not been formally abandoned (whatever the position might seem to be under the 5 March application).

m. At the hearing, the application to extend the grounds of appeal to include the Bill of Rights point was not pursued. The Kittel contra-trading ground was conceded in the sense that it was accepted that the Upper Tribunal was bound by authority to reject it, with the issue being, therefore, for the Court of Appeal, which would soon be hearing Fonecomp's appeal. That was subject to a new point arising out of *Dixons* and *Maks Pen*, but that was a short self-contained point.

89. The result of this chain of events is undoubtedly that HMRC were put to some unnecessary work and expense. It should not have been necessary to apply for "unless" orders in February 2014. The need for more than one such order indicates that there was unreasonable conduct on Lifeline's side and it is D&S who are responsible for that. Similarly it was unreasonable of D&S not to comply with the direction to produce an authorities bundle. Their conduct in relation to the List of documents is hard to understand given that the original list came from them and was said to be relevant to the Kittel contra-trading ground.

90. However, the single largest item of what HMRC say is wasted expenditure relates to the skeleton argument which HMRC had to prepare in order to meet the

arguments raised in Lifeline's skeleton argument. In the event, it turned out that most of it became irrelevant, with only the new points arising out of *Dixons* and *Maks Pen* being argued. I agree with Ms Goldring that D&S's conduct concerning the fluctuating nature of Lifeline's case is open to criticism. Thus:

a. Although an intention to run the Bill of Rights point was indicated at the hearing of the group strike-out application (and must have been decided upon in the discussion earlier in January between D&S and Mr Haried), no application was made until 3 March. The point could not be dealt with, in the light of the later application, until the hearing and was then abandoned.

b. The intention to run all available points was apparent from the skeleton argument (served at the very last moment of a deadline under an "unless" order, an order obtained the result of a failure to serve in accordance with the original directions). And yet two days later, 5 March, an application was made for an adjournment (which, with respect, was unlikely to succeed and was not, in any case, pursued) alternatively for the appeal to be dismissed but with Lifeline being able to pursue an appeal on the Kittel contra-trading ground. The application for this alternative order was not pursued either, since Mr Young sought a reference to the CJEU arising out of *Dixons* and *Maks Pen*.

c. HMRC prepared for the hearing, as they had to do, on the basis that all issues were live, either by way of appeal or by way of an application to extend the grounds of appeal. At the hearing, the only point pursued was, as I have said, the one arising out of *Dixons* and *Maks Pen*.

91. On the face of it, I consider that this conduct, cumulatively, amounts to unreasonable conduct. Subject to one aspect, which I consider in the next

paragraph of this decision, this is simply not a proper way in which to conduct litigation in the Tribunal. It is conduct for which D&S are responsible. It is, in my judgment, no excuse, on the particular facts of the present case, that D&S were not able to communicate with Mr Haried or obtain instructions from Lifeline nor is it an excuse that they were not in funds. D&S should have decided what points were and were not going to be taken well in advance of the events, and changing positions taken, in early March. Had they acted reasonably, a significant part of the costs incurred from some time in January (29 January at the latest), would not have been incurred.

92. The question then is whether the difficulties which D&S faced in instructing counsel provide any excuse. Mr Young submits, as I have said, that the Bill of Rights point was not without merit; the reason it was not pursued was because he had not had the opportunity to prepare it. Had he not appeared, Mr Smallwood had been intending to invite the tribunal to treat the skeleton argument as Lifeline's case. It was better that the Upper Tribunal should have the assistance of Mr Young on the issues which he could deal with (that is to say, the Kittel contra-trading ground) than have no argument from counsel at all.

93. There are a number of difficulties with that argument. First, it does not deal with the failure to ensure that Mr Young would attend by briefing him earlier. Secondly, even the Kittel contra-trading ground, was substantially conceded with only a discrete element being argued. Thirdly, it would have been possible for Mr Young to invite Judge Sadler and me to treat the skeleton argument as Lifeline's case just as, he says, Mr Smallwood had been going to do. We were not invited to take this course: instead, the Bill of Rights point was not pursued.

94. In my judgment, there was clearly unreasonable conduct on the part of Lifeline and its legal team taken as a whole. I do not consider that the difficulties arising out of Mr Young's attendance and in instructing him provide an excuse for that unreasonable conduct. It is not suggested that Mr Young is in any way to blame for the position in which D&S found themselves. And given my earlier conclusions that D&S must take responsibility for the conduct of the appeal, it follows that they are to be held responsible for any unreasonable conduct after an appropriate cut-off date, at latest 29 January 2014: in essence, the unreasonable conduct can be laid at their door.

95. HMRC do not seek their entire costs of the appeal from D&S. There are different elements of that which they do seek. The major element relates to the cost of preparation of HMRC's skeleton argument and attendance at the hearing. The question here is what work HMRC would have needed to do if D&S had acted reasonably in the conduct of the appeal since the appropriate cut-off date. First of all, it should not have been necessary for HMRC to incur any costs in addressing the Bill of Rights point or any other arguments which were not part and parcel of the Kittel contra-trading ground. Secondly, it should not have been necessary for HMRC to have responded in their skeleton argument in detail to the Kittel contra-trading ground in the way in which they did. However, D&S could not be expected to ignore that ground altogether and simply concede it without going into the point to some extent. Judge Sadler and I held that the arguments based on *Dixons* and *Maks Pen* failed, but that is not to say that they were wholly unmeritorious, let alone to say to raise and argue them was unreasonable: quite the contrary, it was perfectly reasonable to raise them. In order to understand those

arguments, there had to be an understanding of the Kittel contra-trading ground in the first place in order to understand the context.

96. Of course, a reasonable understanding of the issues could be expected of the tribunal without the need for the lengthy exegesis that is found in Lifeline's skeleton. The way in which the Kittel contra-trading ground was dealt with in Lifeline's skeleton argument went beyond what was necessary: it was not simply to put the new points in context but was, in essence, an attempt to run the whole argument again. But some explanation was appropriate and HMRC would have had to consider that and to respond to it if they thought it necessary. I do not, therefore, consider that the whole of the costs of preparation of HMRC's skeleton argument and of the hearing can be said to have been incurred as a result of the unreasonable conduct of D&S.

97. HMRC's position on the quantum of the claim, and certain observations of my own, are set out in paragraphs 23 to 27 above. HMRC arrive at a figure equal to 50% of the costs incurred in the two months leading up to the hearing in March 2014. HMRC therefore adopt a very broad approach in order to arrive at a result which they say is fair and proportionate. It will be apparent that this does not precisely reflect what I consider to be the correct approach as discussed at length in this decision. My approach is that, in principle, HMRC should be entitled to the costs of the unnecessary work carried out after a cut-off date some time in January 2014. But it cannot be said that the whole cost of preparing the skeleton argument was unnecessary or that an attendance at the appeal hearing was unnecessary.

98. In relation to that, it is a matter of judgment with no science behind it to assess the appropriate date (after 31 December 2013 but on or before 29 January 2014) from

which D&S's conduct is fairly to be categorized as unreasonable. Further given the difficulties which D&S were acting under, albeit not providing an excuse, I think it correct to err in favour of D&S when exercising my discretion since, in my view, the onus is on HMRC to establish not only the fact of unreasonable conduct but also its extent. I therefore adopt 29 January 2014 as the appropriate cut-off date.

99. I do not have a precise breakdown of the costs incurred by HMRC after 29 January 2014. The figures which I have relate to the period of 2 months before the hearing date. However, all of the relevant fees of counsel were incurred after 29 January 2014 and it is clear that a significant part of the solicitors' costs were incurred after that date too, in particular the costs of the particular item of unreasonable conduct which resulted in the need for HMRC to obtain an "unless" order in February. I think it highly unlikely that the figure claimed by HMRC (50% of the costs incurred in the two months before the hearing) exceed their full costs incurred after 29 January after providing for a reduction (necessarily a somewhat unscientific reduction) to reflect (i) the fact that some work would have had to be done by HMRC in any case and (ii) the difficulties which D&S were acting under. As to the second of those, although, as I have said, those difficulties do not provide an excuse, they are a factor which I can take into account in assessing the culpability of D&S and therefore in judging the way in which I should exercise my discretion under section 29 and the Rules.

100. I therefore propose to assess the costs payable by D&S in the sum of £6,968 appearing in paragraph 27 above. I consider that the level of fees and costs charged for the work done was proportionate and reasonable and reject D&S's submission that they are too high.

Disposition

101. D&S are ordered to pay to HMRC the sum of £6,968 by way of costs within 8 days of the date of the release of this decision. I will also make an order to that Lifeline pay to HMRC their costs of the appeal to the Upper Tribunal. In respect of the period before 10 January 2014 and the period after the date of the hearing on 10 March 2014, these costs are to be assessed on the standard basis if not agreed. In respect of the period from 10 January 2014 to 10 March 2014, the costs are summarily assessed in the sum of £13,937.

102. HMRC cannot, of course, make double recovery under the orders I am making but, subject to that, they are to be entitled to recover from D&S even if Lifeline actually pays some of the costs which it is liable to pay. In other words, HMRC are entitled to recover £6,968 from D&S regardless of whether any payments are made by Lifeline to HMRC, unless (an unlikely event) Lifeline reduces the amount which it owes below £6,968 before recovery has been made by HMRC from D&S. As between Lifeline and D&S, my current thinking is that the costs should be borne by Lifeline and that D&S are entitled to be exonerated by Lifeline. However, I have not heard any argument about that point. I did not raise it at the hearing and clearly Mr Young, acting for both of Lifeline and D&S, would not have been in a position to deal with it. It may be wholly academic since Lifeline may not have assets to meet the order against it. The way in which I propose to deal with this aspect is to include, in my order, a direction to the effect that D&S is to be entitled to be exonerated, but giving Lifeline liberty to apply to vary that direction, such application to be made within 56 days of the date of the release of this decision.

Mr Justice Warren

Release Date; 8 March 2016