Adjourning a hearing (rule 5(3)(h))

In *MHA*, a social security case, the Upper Tribunal held that, when considering whether or not an adjournment should be granted, "the starting point is the reason for the application". In that case, the reason was for additional evidence to be adduced. Therefore, the tribunal was required to consider how useful the additional evidence would be, bearing in mind:

- the evidence already before the tribunal;
- the evidence likely to be obtained if the proceedings were adjourned;
- how long the adjournment would need to be; and
- whether the tribunal could use its expertise to compensate for the lack of additional evidence.

The Upper Tribunal continued by stating that adjournments should not be granted if they are merely a tactical manoeuvre designed to put off the day when, in a tax case, tax would need to be paid.

The Upper Tribunal also considered the potential impact of the adjournment sought on the tribunal system, but commented that the system as a whole is unlikely to be of great significance in most cases and it would be an exceptional case in which an adjournment would be refused solely on account of the needs of the system as a whole. The author suggests that this might be more of an issue if a lead case had been selected and a great number of cases were dependent on its outcome. An adjournment in the lead case to accommodate a new but relatively minor matter might well be considered inappropriate. Conversely, if the new matter affected a large number of the cases that were dependent on the lead case, that fact might itself tip the balance in favour of an adjournment.

In *Wright*, it was noted that an adjournment on medical grounds would normally be given. However, where there was a risk that medical grounds would lead to an indefinite adjournment, the public interest in the finality of litigation would at some point prevail. In another case, *Westminster*, the Upper Tribunal noted that the First-tier was "initially inclined to conclude in favour of an adjournment [but it was] the nature of the medical evidence and the uncertainty as

to when, if at all, [the individual] would be able to participate that ultimately tipped the balance in the other direction".

In *Mattu*, a case which started in the Upper Tribunal, the Upper Tribunal refused to grant an adjournment on the basis of an unsubstantiated self-diagnosis and self-admission into a hospital. The tribunal noted that, were the case to proceed in the taxpayer's absence, HMRC would withdraw an allegation of dishonesty (which implicitly would have merited the taxpayer's presence). Furthermore, the tribunal made it clear that the case was primarily one of law rather than fact and that it would take a flexible approach to the timing of proceedings so as to allow the taxpayer to give evidence.

Cases: *MHA v Secretary of State for Work and Pensions* [2009] UKUT 211 (AAC); *Wright (No. 2) v HMRC* [2013] UKUT 481 (TCC); *Westminster Trading Ltd v HMRC* [2017] UKUT 23 (TCC); *HMRC v Mattu* [2021] UKUT 245 (TCC)

Staying (or, in Scotland, sisting) proceedings (rule 5(3)(j))

One principle of justice is the avoidance or minimisation of a delay before a matter is considered by a tribunal. Indeed, in *DEFRA v Downs*, Sullivan LJ considered a stay to be the exception rather than the rule: reasons supporting a stay would be "normally some form of irremediable harm if no stay is granted". However, there will conversely be cases in which the interests of justice point towards matters being put on hold. For example, it would not be an appropriate use of the tribunal's or the parties' resources for a case to be heard if the matter might subsequently prove to be academic.

This might be (as in *Davies*) because the taxpayer has commenced parallel proceedings in another court or tribunal which, if successful, would obviate the need for the tribunal hearing. Alternatively, the matter might involve a question of law that is already the subject of another appeal in relation to another taxpayer: in such a case, it would often make sense for the tribunal and the parties to see how that other case progresses before deciding the matter in hand.

Thus, in *Teletape*, the tribunal, following the Court of Session in *RBS Deutschland*, said that a stay would be appropriate if a tribunal or Court "considered that a decision in another Court would be of material assistance in resolving the issues before [it] and that it was expedient to do so". The tribunal also acknowledged that cases can

sometimes be stayed for years on this basis. However, if a long stay is proposed, the applicant would need to show that the outcome in the other case is likely to render unnecessary a hearing in the stayed case. The tribunal also noted that the key question is the administration of justice and not merely the various parties' views on whether or not any delay is prejudicial to their case.

In *Ticketmaster*, the Upper Tribunal noted that "the dual considerations of material assistance and expediency, identified in *RBS*, are simply a rewrapping of the overriding objective". Accordingly, it considered that a tribunal should give due weight to the questions of material expediency and expediency, "but, ultimately, the tribunal must ensure that the case is dealt with fairly and justly". *Ticketmaster* was not a case in the Tax Chamber. However, in *Barclays*, the tribunal had no hesitation in adopting the *Ticketmaster* approach. The author considers the tribunal to have been entirely correct in taking that view.

The earlier *RBS* approach was followed in *Pinewood* where, despite a clear difference in facts, the tribunal considered that another appeal on the same question of law which was being heard in the Upper Tribunal could mean that it was appropriate for the case to be stayed. Similarly, in *Gandalf*, the tribunal held:

> "Different factual scenarios are not in themselves a reason to refuse the stay. [The tribunal] must consider the questions of interpretation referred [to the other court] and the likelihood [that the court] … would uncover issues of legal principle which will materially assist in the resolution of the issues in the appeals before the Tribunal."

Nevertheless, in *Waverton*, it was recognised that there is still a difference between cases involving merely similar legal issues and those where there are also factual distinctions between the two cases.

As noted in *Degorce*, "the question is not whether the determination of another court might provide assistance, but whether it will provide assistance". In refusing an application for a stay, the tribunal was also conscious of the benefits in not delaying the hearing of oral evidence from witnesses.

In *Gardner-Shaw*, the considered that the net effect of *DEFRA* was no different from that in *RBS*. The tribunal went on to consider the balancing exercise, noting that a continued stay could have had a detrimental effect on the taxpayers' continued ability to trade.

In *Global*, the tribunal considered that criminal proceedings elsewhere should take precedence over the appeal in the tribunal as there was a risk of prejudice in the criminal proceedings in respect of findings of fact that the tribunal might make. A different conclusion, however, was reached in *Aabsolute Bond*.

Similarly, in *Dong*, a stay was requested pending the resolution of criminal proceedings. The tribunal did not consider that the existence of those proceedings was determinative, given that the criminal court and/or the tribunal could take measures to prevent the criminal proceedings being prejudiced. However, because the two sets of proceedings were otherwise likely to be heard at the same time, a provisional stay was directed so as to ensure that the parties could properly prepare for both.

In *Badzyan*, the tribunal accepted that a stay was appropriate to allow a related appeal to progress. But HMRC's request that the stay be indefinite was rejected. It directed a six-month stay so as to allow the situation to be reviewed.

In *Peries*, the tribunal considered that parallel proceedings in the High Court were not sufficient to give rise to a stay in the tribunal. The distinction was that, in theory at least, the High Court proceedings would not make the tribunal appeal academic.

The tribunal also considered in *Peries* that the shortage of funds was not in itself a reason to stay proceedings in the tribunal as parties are not required to instruct lawyers. It is arguable that this might depend on the circumstances of the particular case, especially if a taxpayer's impecuniosity is reasonably likely to be short-lived. However, a tribunal will always ensure that unrepresented taxpayers are given a fair hearing, so there would have to be a good reason to show why a stay is appropriate in other cases.

In *Dollar*, the tribunal was faced with a number of unattractive options. It was unwilling to stand down witnesses who were ready to give evidence at a full appeal hearing taking place a week after the application hearing and it was also unwilling to duck the stay

application and leave it for the tribunal due to hear the full appeal. On the other hand, there was one aspect of the appeal which was already due to be heard by the Upper Tribunal (following a transfer under rule 28), and the First-tier was not willing to risk a duplication of effort if the matter were to be decided by the First-tier in the meantime. Balancing these concerns, the FTT directed that the hearing proceed as originally planned, with all evidence heard at that time, but stayed all matters of law relating to the issue that will be considered by the Upper Tribunal in that other case.

Cases: *Global Active Holdings (in the appeal of Global Active Technologies (dissolved) v HMRC)* (2006) VDT 19715; *HMRC v RBS Deutschland Holdings GmbH* [2006] CSIH 10; *DEFRA v Downs* [2009] EWCA Civ 257; *Peries v HMRC* [2011] UKFTT 674 (TC); *R(oao Davies and another) v HMRC* [2011] UKSC 47; *Daryanani and Others t/a Teletape v HMRC* [2012] UKFTT 319 (TC); *Pinewood Studios Ltd v HMRC* [2012] UKFTT 370 (TC); *Gandalf IT Ltd v HMRC* [2012] UKFTT 573 (TC); *Aabsolute Bond Ltd v HMRC* [2012] UKFTT 603 (TC); *Gui Hui Dong v NCA* [2016] UKFTT 116 (TC); *Degorce v HMRC* [2016] UKFTT 429 (TC); *Badzyan v HMRC* [2017] UKFTT 439 (TC); *Waverton Property LLP v HMRC* [2017] UKFTT 853 (TC); *Gardner-Shaw UK Ltd v HMRC* [2018] UKFTT 313 (TC); *Ticketmaster UK Ltd v The Information Commissioner* [2021] UKFTT 83 (GRC); *Barclays Services Ltd v HMRC* [2021] UKFTT 151 (TC); *Dollar Financial UK Ltd v HMRC* [2021] UKFTT 218 (TC)