Neutral Citation Number: [2015] EWCA Civ 747

Case No: C1/2014/2009

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMIN COURT
Mrs Justice Thirlwall
CO/1486/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2015

Before :

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
LORD JUSTICE FLOYD

- -

Between :

The Queen on the application of Veolia ES Landfill Limited and Another	**1st Respondent**
Viridor Waste Management Limited and Others	**2nd Respondent**
FCC Environment UK Limited and Another	**3rd Respondent**
Alpha Resource Management Limited	**4th Respondent**
SITA UK Limited and Others	**5th Respondent**
- and -	
Her Majesty's Commissioners for Revenue and Customs	**Appellant**

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- -

Ms Melanie Hall QC and Mr Brendan McGurk (instructed by **HM Revenue and Customs**) for the **Appellant**
Mr Sam Grodzinski QC (instructed by **Simmons and Simmons Llp**) for the **First Respondent**
Mr Francis Fitzpatrick QC (instructed by **Ashfords Llp**) for the **Second Respondent**
Ms Philippa Whipple QC (instructed by **Pricewaterhouse Coopers Legal Llp**) for the **Third**

and Fifth Respondent
The **Fourth Respondent** did not appear and was not represented

Hearing dates: Thursday 4 June

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Approved Judgment

LADY JUSTICE ARDEN :

ISSUE: WHETHER STAY SHOULD BE REFUSED WHERE PARTIES PURSUING TWO SEPARATE REMEDIES AND THERE MAY BE A RISK OF INCONSISTENT FINDINGS

1. The short point on this appeal is whether there should be a stay of judicial review proceedings ("JR proceedings"), designed to establish whether the respondents had a legitimate expectation of being entitled to a repayment of tax, while proceedings to determine whether they were ever liable for the tax in the first place are heard and determined. If both proceed at the same time, there may be different findings of fact. The JR proceedings may also be unnecessary if there is in fact no liability to tax and the respondents have a statutory right to repayment in those circumstances to all the tax wrongly paid. There are also considerations of cost and delay and the use of scarce court resources for what might turn out to be a valueless duplication of effort. However, there is guidance in *R (o/a Davies) v IRC; R(o/a Gaines-Cooper) v IRC* [2011] 1 WLR 2625, where an issue arose as to whether the taxpayer was entitled to rely on a guidance issued by HMRC, and there were again both judicial review proceedings and also an appeal against liability on foot. Lord Wilson held that this court had correctly determined that the appeal should be stayed to allow the judicial review proceedings to run their course first.

2. In this case, on 7 July 2014, Thirlwall J granted the respondent taxpayers permission to bring judicial review proceedings against the appellants ("HMRC") (which expression includes their predecessors, the Commissioners of Customs and Excise) for alleged abusive conduct in breach of the respondents' legitimate expectations arising out of negotiations for repayments of overpaid landfill tax, but she refused to stay those proceedings while the respondents' appeals against assessments for the same landfill tax were finally resolved. Her decision to refuse a stay is challenged by HMRC on this appeal. The parties are not complaining about the risk of additional costs: HMRC's main concern seems to be about the diversion of its resources away from the important task for it and the justice system of determining whether there was a liability to tax. That question arises in this and many other cases. The respondents' priority on the other hand is to have the JR proceedings tried first as they are likely to take a much shorter time to resolve than the tax appeals process, particularly if all avenues of appeal are pursued.

3. In my judgment, there is no doubt that, although the respondents seek effectively the same relief in the two sets of proceedings, they have two separate claims: (1) their appeals to the FTT and (2) their judicial review claims. There is no question of preventing them from pursuing either or both remedies though there may come a time when they are bound to elect between remedies. They can choose which set of proceedings will be their priority. In my judgment, there have to be strong reasons for restricting their right to pursue both claims. In this particular case, it would be a strong reason to restrict their right if there were likely to be a significant duplication of fact in the proceedings which might lead to inconsistent findings. On that basis the crucial question on this appeal is whether the judge's order will lead to the

Administrative Court having to make findings of fact on matters which will have to be determined in the tax appeals if the judge's order stands. In general, the same issues of fact ought not to be decided by different tribunals in disputes between the same parties not only because it wastes time and costs but because it is contrary to the interests of justice: it undermines the parties' confidence in the justice system's ability to produce a fair result and may lead to a continuation rather than a resolution of their disputes. There are cases (I am thinking particularly of disputes which have to be litigated in different national jurisdictions) where the risk cannot be avoided but the present case does not fall into that category.

SUMMARY OF OVERALL CONCLUSION

4. In my judgment, for the reasons given below and having considered the helpful submissions of all parties, due to developments in HMRC's case in related tax appeals leading to last minute but incomplete changes in HMRC's case on this appeal, this court is not in a position to determine that the judge's refusal to stay the JR proceedings was wrong because it would lead to a significant risk of inconsistent findings in the JR proceedings and tax appeals. Accordingly the appeal must be dismissed.

HOW THE ALLEGED LEGITIMATE EXPECTATION AROSE

5. The respondents are landfill site operators. Under section 40 of the Finance Act 1996, they are bound to pay landfill tax on waste material used in filling landfill sites, but that tax is payable only if the waste material is "discarded". In *Waste Recycling Group v HMRC* [2009] STC 200 ("WRG"), this court (Sir Andrew Moritt, Arden and Smith LJJ) held that the word "discard" should be given its normal meaning so that (in summary) it did not include material either not disposed of or not disposed of with the intention of discarding the material. On that basis it did not include the retention and use of waste material brought to the landfill site, which the landfill site operator reused, in that case, as a daily cover of the tip to protect it against vermin and the escape of odours, and as hardcore for roads on the landfill site. HMRC decided not to seek permission to appeal from this decision. Instead it chose to issue guidance for landfill site operators, Revenue & Customs Brief 58/08 ("Brief 58/08"). This stated that HMRC would, applying *WRG*, grant relief from landfill tax in specified circumstances. The material passages from Brief 58/08 read as follows:-

> 2. On 22 July 2008 the Court ruled in favour of Waste Recycling Group Limited in their action relating to landfill tax liability. The Court found that where material received on a landfill site is put to a use on the site (for example, for the daily coverage of sites required under environmental regulation, and construction of on-site haul roads), it is not taxable, as there is not, at the relevant time, a disposal with the intention of discarding the material.
>
> 3. We accepted the Court's decision and did not seek leave to appeal to the House of Lords.
>
> **Description of use of material**

> 4. Notwithstanding any possible future changes to landfill tax legislation that the Government might decide to introduce, the judgment means that materials put to use on a landfill site are not taxable. Illustrative non-taxable uses of material include:
>
> **Cell engineering**
>
> - Mineral material (including clay) used as part of an artificially established (geological) barrier on the bottom, sides or top (cap) of a landfill. Materials used to protect from damage any geosynthetic product used for landfill containment on the base, sides or top of the landfill.
>
> - Drainage material at the base and up the sides of the site used to collect leachate and allow its transport to a low point for collection/ extraction.
>
> - Material used beneath the landfill cap and up the sides of the site to allow landfill gas to accumulate for extraction. Material used as a preferential drainage layer above the cap to encourage surface water run off.
>
> - Mineral material (including clay) used to protect the cap and provide a restoration layer for planting.

6. As regards the present disputes with HMRC, I take the facts concerning the first respondent ("Veolia") only. Veolia made a claim for repayment of landfill tax which it considered it had overpaid by letter dated 26 February 2010. This was acknowledged by Richard Hart, a higher officer employed by HMRC on 9 March 2010. Veolia sent a reminder on 29 June 2010. On 22 September 2010, Mr Hart wrote with a long list of various issues which he wished to discuss at a meeting. Substantial correspondence ensued. Ultimately, on 1 February 2013, HMRC accepted that Veolia had overpaid landfill tax in periods up to October 2009 as it had incorrectly declared landfill tax on material placed against the base and sidewall drainage layer or liner of the disposal area to prevent damage to that layer or liner. HMRC stated that it was in a position to agree the quantum of the claim. It then went on to discuss the applicable time periods, unjust enrichment and interest.

7. The respondents say that HMRC investigated the matter very thoroughly. There is, however, a dispute as to whether HMRC were aware of the true engineering nature of the fluff (soft waste used, or claimed to be used, in cell engineering on landfill sites). Over the course of the following year it appears that HMRC came to the conclusion that the relief granted by Brief 58/08 was too wide. On 23 January 2014, HMRC issued fresh guidance, Revenue & Customs Brief 02/14 ("Brief 02/14"). In material part this states as follows:-

> On 22 July 2008, the Court of Appeal ruled in favour of WRG in their action relating to landfill tax. The Court found that

where material received on a landfill site is used on the site for the daily coverage of sites required under environmental regulation and construction of onsite haul roads, it is not taxable as it was not, at the relevant time being disposed with the intention of discarding it."

HMRC initially interpreted the judgment as meaning any materials put to use on a landfill site were not taxable. It published Revenue & Customs Brief 58/08 in December 2008 inviting claims for repayment of tax in accordance with this view.

Revenue & Customs Brief 15/12 and 18/12 published in May and June 2012 respectively, provided further clarification of the circumstances in which HMRC would consider claims for repayment of tax. In both briefs it was confirmed that material referred to by some as the "reverse or top fluff layer" constituted careful placement of soft waste which is (and always has been) liable to landfill tax. This is because the waste material is disposed of with the intention of discarding and the disposal does not constitute a use of that material.

HMRC's decision to treat this so called "reverse or top fluff" as material liable for landfill tax has been challenged by some landfill site operators who have appealed HMRC's decision to the First-tier Tax Tribunal. A hearing is now pending.

In preparation for such appeal, HMRC has reviewed its approach to claims received relating to the *WRG* judgment. The decision to undertake a review was also influenced by the increasing number of claims from some landfill operators who have cited this judgment to challenge the boundaries of landfill tax legislation.

HMRC's review considered a wide range of information on claims that had been made following *WRG* and also reviewed HMRC's previous decisions to pay claims in relation to material referred to as "base and side fluff". As a result of the review HMRC is announcing changes in how those claims will be handled.

3. Outcome of HMRC's review of claims for repayment of tax following the *WRG* case

The review concluded the following:

All fluff claims:

- The principle of "use" applies only to the specific circumstances in the *WRG* case.

- All types of fluff (whether side, base or reverse top) are, and always have been, taxable under primary legislation as it is waste permanently discarded to landfill.

- The *WRG* case does not provide a precedent that waste "used" within a landfill site is not taxable.

- HMRC has found no evidence to suggest that the fluff layers fulfil any engineering purpose or are a regulatory requirement.

- There is no difference between the various types of fluff in physical composition. They are all simply carefully placed and well managed waste.

Side and base fluff claims only

- HMRC will make no further payment for such claims.

- HMRC will not seek to reclaim any payments it has previously made.

8. Consistently with Brief 02/14, HMRC rejected the claims of Veolia whose quantum they had previously accepted. Veolia responded by starting JR proceedings, asserting a breach of its legitimate expectation that its claims would be paid. It was joined by the other respondents which also have (in whole or part) unpaid repayment claims and also assert breach of legitimate expectations, namely Viridor Waste Management Limited, FCC Environment (UK) Limited, Alpha Resource Management Limited and Sita UK Limited. It is for all these claims that Thirlwall J gave permission to bring judicial review proceedings.

9. HMRC responded by seeking a stay of the judicial review proceedings pending the resolution of the respondents' tax liability. By this time, the respondents had appealed against assessments raised on them for the tax in question, as had a number of other landfill site operators. At the time of the hearing before this court, that number had grown to 90. All these proceedings ("the tax appeals") were pending in the First-tier Tribunal ("FTT"). An appeal on one related issue has been determined in favour of HMRC. The taxpayer has appealed and this court is shortly due to hear its appeal. Subject to that, the tax appeals are all at an early stage and are likely to take years finally to determine.

10. In support of its application for a stay, HMRC argued that the proper place to determine whether landfill tax was payable was in the FTT. That is common ground. The JR proceedings would be heard in the Administrative Court in the usual way. HMRC went on to argue before the judge that, if the FTT found that landfill tax was correctly levied, it would be *ultra vires* HMRC for it to represent that it would repay such tax. Furthermore, HMRC submitted, if the FTT held that the tax was not properly payable, there would be no need for judicial review proceedings, which should await the outcome in the FTT.

JUDGE'S REASONS FOR REFUSING A STAY OF THE JR PROCEEDINGS

11. As explained above, the judge ruled against HMRC. She held that the stay would merely cause delay and that the judicial review proceedings could proceed on the basis of an assumption that HMRC were right in law. Accordingly, a preamble ("the Preamble") to the order of the judge states as follows:

> "…And whereas these claims for judicial review will proceed on the basis that Defendants' current interpretation of the relevant statutory provisions relating to landfill tax (insofar as it differs from that set out in the Defendants' business brief 58/08) [is] correct."

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12. HMRC then applied for and obtained permission to appeal to this court. In their skeleton argument they repeated their submissions that Brief 58/08 was *ultra vires* HMRC if the respondents were liable to pay the landfill tax. The judicial review proceedings have been stayed pending the determination of this appeal.

HMRC'S LOGISTICAL DIFFICULTIES AND LATE CHANGE OF CASE

13. Shortly before this appeal came on for hearing, HMRC applied for permission to amend its grounds of appeal and to rely on a new witness statement from Mr Morris Graham, an assistant director of HMRC. We heard the appeal having read these documents *de bene esse* with a view to ruling on all matters in our judgments.

14. In the draft amended grounds of appeal HMRC radically changed their case. They no longer contend that it was *ultra vires* for them to issue Brief 58/08. On the strength of *Rootkin v Kent County Council* [1981] 1 WLR 1186, Miss Melanie Hall QC, puts forward a completely different *ultra vires* point ("the *Rootkin* point") which has little to do with the question of a stay. She submits that it would have been *ultra vires* for HMRC to continue to make repayments of landfill tax, having discovered that their view of the legal basis for such repayment was mistaken. Ms Hall submits that HMRC had a mistaken view of the law when it agreed to make repayments to the respondents. It follows, she submits, that HMRC were justified in stating in Brief 02/14 that no further repayments would be made.

15. The witness statement of Mr Graham carefully explains two matters: (1) a "logistical" point and (2) the reasons for HMRC's sudden change of case. His evidence on these points may be summarised as follows:

    i) *Logistical point*: HMRC are almost overwhelmed by the number and variety of claims for repayment being made by the landfill site operators. The respondents are not responsible for this: rather this is a case of *qui s'excuse s'accuse*. While I appreciate the courtesy of an explanation for what has been a chaotic presentation by a public body of the issues on this appeal to this court, these difficulties cannot possibly constitute the strong reasons which I have already indicated in paragraph 3 above must be shown to restrict the respondents from pursuing their cause of action. The rule of law requires no less.

    ii) *Reason for change of case:*

a) There have been developments in the FTT proceedings since the date of the judge's order. HMRC are now faced with a significant number of challenges to its refusal to repay landfill tax.

b) Until recently HMRC processed claims on the basis that base fluff was part of cell engineering, but HMRC now realise that that is not correct. They have had expert advice to support this since 1 May. Essentially HMRC are advised that base fluff is not engineered and that its depth is random.

c) HMRC have now pleaded this in its statement of case in the two lead appeals before the FTT. These lead appeals do not include the respondents' appeals which are stayed pending the determination of the lead appeals. HMRC's statement of case alleges that the classification of waste as fluff is substantially driven by the landfill site operators' desire to avoid paying tax ("the new Cell Engineering Allegation").

d) Mr Graham states that HMRC no longer accept that fluff is part of cell engineering for the purposes of Brief 58/08.

e) Moreover HMRC now take the view that the respondents have sought artificially to create the impression of "use" for the purposes of the *WRG* decision.

f) HMRC do not contend that base fluff as opposed to top fluff was an expression concocted to support repayment claims, but they do claim that the engineering properties of base fluff have been overstated.

g) HMRC contend that the respondents must have been aware that fluff was not engineered. Accordingly HMRC are not satisfied that the respondents put all their cards on the table in their negotiations with HMRC.

h) One reason for HMRC's change of view on fluff repayment claims was the increase in number of top fluff claims being made on the back of base and side fluff claims which HMRC had accepted.

16. The reference to HMRC not being satisfied that the respondents put all their cards on the table is significant in the context of the JR proceedings because it indicates that HMRC may wish to argue in those proceedings that the "cards on the table" principle applies and that the respondents could not rely on what might otherwise be a legitimate expectation because they failed to disclose all material matters themselves: see *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1989] STC 873 at 892 (per Bingham LJ: "…it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling..."). There are other principles of legitimate expectation, but it is not appropriate to go into them on this interim appeal.

17. This court is not concerned on this appeal to decide the merits of any of the allegations made by any of the parties and it is therefore not to be taken as expressing

any view on the correctness or otherwise of the new Cell Engineering Allegation. The respondents all deny any bad faith or tax avoidance on their part. They contend that the allegations are new but Ms Hall submits that HMRC's amended statement of case in the FTT had effectively made the new Cell Engineering Allegation.

18. After the hearing before us, Mr Brendan McGurk, junior counsel for HMRC, unilaterally sent the court extracts from HMRC's statement of case in the two lead cases. We are told that Mr McGurk did this simply so that the court could see the relevant timeline. We are grateful for that explanation. It might have been preferable if he had consulted the court and the other parties first since this step merely added to the respondents' legitimate complaints that HMRC's late changes of case jeopardised their ability to respond effectively to their appeal. For my own part I do not consider that this further information added anything: HMRC had already made it clear that it considered that "top" or "reverse fluff" was random and not part of cell engineering.

PARTIES' ARGUMENTS FOR AND AGAINST A STAY: MY ASSESSMENT

19. Ms Hall submits that this court should require the respondents to use the tax appeals route first before turning to judicial review, since the FTT is the specialist tribunal appointed by Parliament to deal with disputes as to liability to tax and it is clearly established that, where there is an alternative remedy, the court will only exercise its discretion to grant leave to bring judicial review proceedings in exceptional circumstances: see *R(o/a Willford) v Financial Services Authority* [2013] EWCA Civ 677 at [36]. Indeed Ms Hall went so far as to call this case the high-water mark of the authorities in her favour on this application. She also cited *R(o/a Great Yarmouth Company Ltd) v Maritime Management Organisation* [2013] EWHC 3052 (Admin) but this did not add materially on the question whether the tax appeals route provided a remedy which had to be exhausted first before judicial review proceedings were pursued.

20. Ms Hall submits that HMRC are now facing a considerable number of claims by landfill site operators who wish to rely on the *WRG* case to say that they are entitled to relief. She submits that the width of the relief being claimed by numerous landfill site operators is now threatening to undermine the integrity of the landfill tax. Landfill site operators are in effect claiming that the requirement for "use" of material can extend as far as the whole of the material put into the landfill site where that site is ultimately landscaped and dedicated for recreational purposes. She further explains that no transitional period or saving was allowed when Brief 58/08 was effectively withdrawn because landfill site operators were using the claim for base fluff that they made under that Brief to support much wider claims for reverse fluff relief. She submits that HMRC have a duty to administer the tax fairly as between different cohorts of taxpayers. That is not an exclusive statement of its duties, but, contrary to a submission which Mr Grodzinski was minded to make, the duties of HMRC in this situation are not limited for the purposes of these proceedings to the taxpayers who are the respondents.

21. Counsel for the respondents skilfully addressed the very different case now put forward on this appeal. A number of submissions that they intended to make in answer to the grounds of appeal as originally filed have ceased to be relevant.

22. Mr Sam Grodzinski QC, for the first respondent, Veolia, submits that the judge's order rejecting a stay was a matter of case management and that HMRC are fully protected by the Preamble. On his submission, the Preamble represents HMRC's best case. Mr Grodzinski went on to propose that the Preamble should be expanded to read "And whereas these claims for judicial review will proceed on the basis that the Claimants' appeals in the FTT will be dismissed because fluff materials which form the subject of the present appeal are taxable under the Finance Act 1996." However, Ms Hall demonstrated that, so far as HMRC were concerned, this form of wording conferred no greater benefit than the existing Preamble and it might lead to further uncertainty. Without intending any discourtesy to Mr Grodzinski and those of the respondents who assisted in the preparation of this revised draft, I propose to say no more about it.

23. Mr Grodzinski submits that there is no overlap between the facts which the FTT has to find and those which the Administrative Court will have to find. For example, the Administrative Court will have to consider whether the representation was sufficiently clear and precise to give rise to a legitimate expectation. By contrast the FTT will not be concerned with a number of issues that arise in the Administrative Court, in particular the legitimate expectation, the meaning of Brief 58/08 (which on authority should be interpreted according to its meaning to the type of taxpayer to whom it is addressed) and subsequent dealings between HMRC and the respondents, unfairness and abuse of power. Moreover, it is common ground that the FTT cannot in fact determine any of these issues.

24. Ms Philippa Whipple QC, for the third and fifth respondents, focused on the changes to the relief sought on this appeal brought about by the changes sought to be made by HMRC. She submits that, as HMRC have changed their case and sought to adduce fresh evidence at the very last minute, there has not been sufficient time as yet for the respondents to identify whether there is any overlap. She submits that the appropriate course is to dismiss the appeal and leave matters to be dealt with by the Administrative Court in due course if a proper application is made.

25. Both Mr Grodzinski and Ms Whipple submit that this court should not accept HMRC's last minute change of case. They say that HMRC could have advanced its new case many months ago. In any event the question whether the same technical evidential analysis should apply to base fluff and reverse fluff is a matter for the FTT and that question had on their submission nothing to do with their public law claims.

26. Ms Hall submits that the question whether it would be fair or *intra vires* for HMRC to meet the claims for fluff in the light of the technical evidence which they now have with regard to cell engineering cannot be resolved without addressing the technical evidence. HMRC does not allege fraud or tax evasion. However, as pleaded in the statement of case against Veolia HMRC's case is that its position "may change as new facts continue to emerge."

27. Mr Francis Fitzpatrick, for the second respondent, explained that his position on the stay was one of neutrality.

28. I now turn to the reasons for my conclusion, already summarised above. HMRC's last minute change of approach on this appeal has inevitably created potential difficulties for the respondents. They have complied with the court's request to serve

submissions in answer to the new case put forward by HMRC but I accept Ms Whipple's submission that they had not had a proper opportunity to consider its implications. The respondents are, of course, very keen that the stay pending appeal on the JR proceedings should be lifted and they hope to receive early repayment of tax by that route. Indeed they agreed to a shortened time estimate for this appeal in order to get an earlier date.

29. I accept Ms Hall's submission that the FTT is a specialist system for determining tax liabilities. In my judgment, however, that is not determinative of whether there should be a stay in this case since the respondents are seeking to advance claims which cannot be advanced in the FTT. Ms Hall said that *Willford* was the highpoint in the authorities in support of her case, but it has little relevance in my judgment to the case where the alternative remedy which it is said that the claimant must pursue is a profoundly different claim from the judicial review claim which they seek to advance. Moreover, the fact is that the judge gave permission for the respondents to bring the JR proceedings. It would not, therefore, be a proper use of a stay application to seek a stay as a means of undermining the court's grant of permission to bring JR proceedings.

30. The first question I must decide is whether to accede to HMRC's applications for the admission of fresh evidence on this appeal and for permission to amend their grounds of appeal. It is clear that both applications are made extremely late in the day, which is a factor which militates against acceding to those applications.

31. I take the application for fresh evidence first. The considerations which generally apply to the admission of fresh evidence on appeal are those set out in *Ladd v Marshall* [1954] 1 WLR 1489. They are that (i) the evidence could not have been obtained with reasonable diligence for use at the trial (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (iii) the evidence must be credible but need not be incontrovertible. The third consideration is clearly satisfied in this case. There is, however, an issue as to evidence of the expert: while the evidence in Mr Graham's witness statement in general relates to events after the hearing before the judge, including instructing the expert, no reason is given as to why the expert evidence could not have been obtained before that hearing.

32. On the other hand, we are dealing with an interim appeal and the practice of this court can be more flexible in relation to evidence sought to be admitted on an appeal against an interim order: see per Floyd LJ in *Warner Lambert v Actavis* [2015] EWCA Civ 556 at [155]. Moreover, the court has now heard submissions on this evidence and the parties have made reasonably full submissions on it. In all the circumstances, and in the light of the conclusion that I have in anticipation reached on the basis of it, I would admit the new witness statement of Mr Graham in evidence on appeal.

33. So far as application for permission to amend the grounds of appeal is concerned, I would also grant that application. The new grounds seek to raise new points of law which it is convenient to decide at the same time as the other points. There are also certain points of law being withdrawn. In all the circumstances the respondents are not prejudiced by this course.

34. However, having heard the arguments propounded by all the parties, I would reject HMRC's appeal. My principal reason for this conclusion is that HMRC have not at this stage made it clear what precisely their case will be in the JR proceedings in answer to the respondents' claims and in particular how wide their case will go into technical issues connected with fluff. In those circumstances the court cannot be clear as to the amount of any overlap of fact (if any). It is clearly possible that there will now be some overlap because, for instance, of the reliance which HMRC now place on the "cards on the table" principle.

35. HMRC contend that they could not draft their answer because the JR proceedings are stayed. That is not a good point for at least three reasons: first, the JR proceedings were stayed because HMRC persuaded the court to stay them and so it is unattractive for HMRC to rely on the stay; second, HMRC could have sought a variation of the stay to allow them to file a defence; and, third, HMRC could in any event have provided the court and the parties with a draft of its proposed answer in sufficient time before the hearing that the parties could have made well-informed submissions about any overlap and the court could then determine and evaluate the extent of that overlap. The responsibility for not applying to vary the stay or not producing a draft defence must lie with HMRC and HMRC alone. I have already explained that in my judgment the lack of resources available to HMRC cannot justify their failure to get their case in order in time for this appeal to be an effective hearing.

36. For these reasons I would dismiss this appeal. Needless to say, HMRC are now making some very serious allegations in the tax appeals brought by these respondents and other landfill site operators. I do not doubt that the position is complex. HMRC's new case has the potential to lead to an increase in the areas of factual dispute. I do not, therefore, exclude the possibility that on a properly prepared application HMRC will be able to argue in the Administrative Court that there is a significant risk of inconsistent factual findings by the FTT. Such an application would be a matter for the Administrative Court but it is obvious that any such application would now have to be made in short order and at a suitable period in advance of trial.

Lady Justice Black

37. I agree.

Lord Justice Floyd

38. I also agree.