

Introduction

*BPP Holdings Ltd and others v HMRC (BPP Holdings Ltd)*¹ marks a useful contribution by the Supreme Court (SC) on tribunal procedure. The underlying dispute related to VAT, but the substantive issues were not relevant here. The key question for the SC in this case was whether an order issued by the tax chamber of the First-tier Tribunal (FTT) debarring HMRC from defending an appeal was an order the FTT was entitled to make. This central question provided the SC with the opportunity to generate further guidance on a number of related matters and to provide clarity as to whether HMRC can benefit from preferential treatment in comparison to other parties in tax proceedings before the FTT. The issues the case-note discusses are the following:

- (i) the SC's guidance on how tribunals should go about importing procedural standards from the civil courts system, namely that any standards should be imported with nuance, taking into account the differences between a tax tribunal and the ordinary court system;
- (ii) its unequivocal refusal to endorse an approach that would allow for the preferential treatment of HMRC or other public bodies and state agencies appearing before tribunals;
- (iii) its critique of the existing sanctions system for litigants who do not comply with time limits and cause delays that may prejudice the other parties to the dispute;
- (iv) the appropriate standard of review to be applied when attempting to determine whether the impugned decision was one that the decision-maker was entitled to make.²

Facts

Following a corporate rearrangement, BPP Holdings Ltd (BPP), a company providing education and books to students, was divided into a separate companies. One of the new companies (UC) took over the duties of providing education, while another (LM) was responsible for the supply of books. Of these two new entities, it was accepted that UC made standard-rated supplies for VAT purposes, but BPP took the view that the LM's supplies were zero-rated and did not account for VAT on its supplies. In response, HMRC issued VAT assessments on LM, arguing that BPP's approach was flawed, or alternatively, that the rearrangement constituted an abuse. BPP appealed this assessment to the FTT. HMRC served its statement of case with a 14-day delay, while additionally failing to clearly set out the facts on which it would rely to support its contention that VAT was owed. In light of this, BPP requested further information and an order was made by the FTT directing HMRC to reply within a specific timeframe. The order was accompanied by a stern warning, informing HMRC that failure to comply may result in an order barring it from taking further part in the proceedings. While HMRC responded within the set time

*Teaching Fellow in Public Law and Human Rights, University of Edinburgh

¹ *BPP Holdings Ltd and others v HMRC* [2017] UKSC 55.

² The standard was set out by Lord Greene in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, requires the reviewing judge to assess whether the decision-maker's determination was "so unreasonable that no reasonable authority could ever have come to it".

limit, the BPP applied for a debaring order against HMRC, on the basis that the responses provided did not in fact sufficiently address each of the questions posed in BPP's request for information. Judge Mosedale in the FTT accepted that the responses provided by HMRC were wholly inadequate and the debaring order was granted.³ This decision was subsequently appealed by HMRC to the Upper Tribunal which allowed the appeal.⁴ The Court of Appeal then restored the debaring order⁵ and the case was finally appealed by HMRC to the SC. The single judgement was given by Lord Neuberger, with whom the remaining justices agreed.

1. The contribution of Civil Procedure to the procedure before Tribunals

An initial issue raised in the judgment under examination relates to the appropriate approach tax tribunals must take when determining the applicable sanction for a party that fails to comply with procedural directions.

In reaching her conclusion to bar HMRC from future proceedings, Judge Mosedale in the FTT⁶ had relied on guidance provided in *Mitchell v News Group Newspapers Ltd (Mitchell)*.⁷ Non-compliance with such orders was traditionally excused in instances where the prejudice caused to the other parties by the non-compliance could be remedied, for instance, through payment of costs. However, following reforms to the Court Procedure Rules (CPRs),⁸ the Court of Appeal in *Mitchell* held that a stricter approach should be taken against a party that failed to comply with procedural rules, even if the sanction was "harsh".⁹ It was not sympathetic to claims by the appellant's solicitors that their failure to lodge a costs budget in the appropriate timeframe was attributable to work-related pressures and should be excused.¹⁰ CPRs, however, do not

³ *BPP Holdings Ltd and others v HMRC (BPP Holdings Ltd (FTT))* [2014] UKFTT 644(TC).

⁴ *HMRC v BPP Holdings Ltd and others* [2015] UKUT 496 TCC; [2015] STC 415.

⁵ *BPP Holdings Ltd and others v HMRC (BPP Holdings Ltd (CA))* [2016] EWCA Civ 121. Rather oddly, although Lord Neuberger appears to distance the SC from the CA's judgment by saying that although it agreed with its conclusion, it "should not be taken as approving all its reasoning" (*BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [9]) there is no point at which the CA's reasoning is specifically criticised by the SC.

⁶ *BPP Holdings Ltd (FTT)*, above fn. 3, [2014] UKFTT 644(TC).

⁷ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795. In *Mitchell*, the Court of Appeal was assessing how strictly it should "enforce compliance with rules, practice directions and orders in the light of the changes made to CPR r 3.9". See C. Brockman, 'The Jackson Reforms and the Mitchell Decision' available at <http://www.guildhallchambers.co.uk/uploadedFiles/RelieffromSanction-CB.pdf> [Accessed 19 October 2017].

⁸ These changes to the CPRs were brought under the 'Jackson Reforms' that recommended tougher sanctions for non-compliance. See Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, 2010). See also, Jack R. Williams, "Well, that's a relief (from sanctions)!" - Time to pause and take stock of CPR r.3.9 developments within a general theory of case management' (2014) 33 *Civil Justice Quarterly* 394-411; Andrew Higgins, 'CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don't make for good case management' (2014) 33 *Civil Justice Quarterly* 379-393; Lord Justice Richards, 'The Mitchell/Denton line of cases: securing compliance with rules and court orders' (2015) 34 *Civil Justice Quarterly* 249-253.

⁹ *Mitchell*, above fn. 7, [2013] EWCA Civ 1537 at [59].

¹⁰ *Mitchell*, above fn. 7, [2013] EWCA Civ 1537 at [81]. The Court of Appeal was particularly dismissive to this claim as it stressed that "Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to

apply to tribunals which have their own procedural regulations.¹¹ While there are some significant similarities between the respective rules of procedure, there were also “clear differences in the words”¹² used. Therefore, the question for the SC in *BPP Holdings Ltd* was whether Judge Mosedale was correct in taking *Mitchell* into account. More specifically, was there any persuasive value that could be assigned to case-law relating to rules of procedure in civil litigation when assessing the appropriate sanction for breaching tribunal orders in the context of a tax dispute?

In his analysis, Lord Neuberger endorses the view that when examining issues of procedure, tribunals may rely on standards developed by the courts.¹³ Tribunals “should generally follow a similar approach”¹⁴ to the ordinary court system where sanctions are concerned. This reliance, however, must be exercised with caution and is not all-encompassing. Thus, in *BPP Holdings Ltd*, Lord Neuberger highlights two important matters that tribunals should take into account when seeking guidance on procedure from the ordinary court system.

Firstly, Lord Neuberger notes that the jurisdiction of some tribunals extends to the whole of the UK and therefore, they should strive to apply any rules in a uniform manner across the UK.¹⁵ Consequently, tribunal judges, when seeking guidance from civil procedure standards, should be wary of focusing solely on the procedural jurisprudence developed in the English and Welsh courts. Approaches in Northern Ireland and Scotland should also be taken into account.¹⁶

Secondly, Lord Neuberger identifies the limitations of relying on case-law relating to sanctions for failure to comply with time-limits under the CPRs. While weight must be given to the courts’ approach, the differences between civil courts and tax tribunals must also be given due consideration before any standards are imported to the tribunal system. Ultimately, the courts’ approach to CPRs and sanctions should not be imported *directly* to tax tribunals. Lord Neuberger agreed with the Court of Appeal’s finding in that the approach followed by Judge Mosedale in the FTT was indeed characterised by nuance, and due regard was given to the differences between tax tribunals and the ordinary court system. Therefore, her reliance on *Mitchell* was appropriate and did not constitute a reason to allow HMRC’s appeal.

This approach of the SC seeks to clarify the relationship between tribunal and court procedure. The SC recognises that inevitably, tribunal judges will draw inspiration from civil court procedure. This, for Lord Neuberger, is a wholly appropriate means to develop tribunal procedures, but decisions of the courts should be treated only as giving guidance by analogy. Tribunals must therefore remain aware of their distinct status in the broader justice system. It is questionable whether the SC’s approach here provides sufficient

comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner”.

¹¹ Tribunals Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Particularly relevant to the case was Rule 8.

¹²Per Justice Moore-Bick in the Court of Appeal: *BPP Holdings Ltd (CA)* above fn. 5, [2016] EWCA Civ 121 at [17].

¹³ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [23].

¹⁴ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [26].

¹⁵ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [23].

¹⁶ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [23].

guidance to Tribunal judges in this regard. The SC seems reluctant to provide a more thorough account of what a ‘nuanced’ approach would consist and it does not identify the procedural rules which should not be directly imported to the tribunal system. It appears that the SC is happy to allow the tribunal system itself to carry out this exercise, as long as the approach followed stays within the parameters the SC sets with this judgment, namely that the standards should not be imported directly, and due regard should be given to the whole of the UK.

2. Can state agencies benefit from special treatment before tribunals?

A key characteristic of tribunals is that they adopt a more informal and flexible approach to the delivery of justice than courts.¹⁷ This led HMRC to argue that debarring them was a particularly draconian measure which contravened the public interest. First it was argued that the public interest dictated payment of tax. As it was very likely that were the debarring order allowed to stand, the VAT would not be recovered, the order unnecessarily prevented HMRC from discharging its public duty¹⁸ and was a sanction that was particularly disproportionate. HMRC’s second argument was that as this was an important test case for HMRC,¹⁹ debarring it was a sanction that would have repercussions far beyond this specific case, as it could result in a decision on the VAT status of a supply that would be “erroneous and accordingly contrary to the public interest” which would have an impact on other disputes awaiting this decision.²⁰

Lord Neuberger’s response was that these arguments relating to the public interest could not be accepted as adequate or satisfactory. As he stressed, rather than providing further leeway to HMRC on the basis that it is a state agency carrying out an important public function, courts and tribunals should instead “expect higher standards from public bodies than from private bodies or individuals”²¹ when assessing whether a party in a dispute should be sanctioned for a failure to follow tribunal orders. While Lord Neuberger seems to acknowledge a legitimate public interest in the collection of VAT, there was an at least equal, if not more compelling interest in securing the fairness of proceedings between the two parties. This meant that allowing for preferential treatment of HMRC in tax proceedings would be an unacceptable outcome. In fact, he went further, and noted that there were no sufficiently convincing reasons put forward by HMRC to justify why a different approach should be adopted between the ordinary court system and tribunals where litigation process is concerned.²² Therefore, the informality associated with Tribunals does not, per the SC, allow for departures from procedural rules that would seriously disadvantage the other parties.

The importance of this case as a test case was also rejected as a relevant factor worthy of consideration. The SC recounted the FTT’s approach on the matter.²³ Judge Mosedale in the FTT had argued here that any legal authority that would potentially be attached to the final decision for BPP would be undermined by the fact that the case would be heard

¹⁷ “[T]ribunals are quicker, cheaper, more informal and more expert than the Courts” See M. Elliott and R. Thomas, *Public Law* 3rd edn (Oxford: Oxford University Press, 2017) 687.

¹⁸ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [30].

¹⁹ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [19].

²⁰ This argument was presented by the HMRC in the CA: *BPP Holdings Ltd (CA)*, above fn. 5, [2016] EWCA Civ 121 at [28] point f.

²¹ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [30].

²² *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [30].

²³ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [19].

unopposed.²⁴ Additionally, the SC noted, that the fact that the appeal would be heard unopposed thereby increasing, the chances of BPP's success in the proceedings, was not a matter worthy of weighty consideration, "save in exceptional circumstances".²⁵ Thus, the key consideration for the tribunal judge to take into account was the interest in protecting the inviolability of tribunal orders, especially in light of the fact that no explanation was provided to justify HMRC's dilatoriness. If tribunal orders could easily be ignored with impunity by the parties, especially state authorities, individuals challenging state agency decisions before a tribunal would be left without any meaningful remedy for any prejudice they suffered. This would in turn compromise the effectiveness of tribunals as mechanisms to challenge and complain against public authorities.

For these reasons, this is a particularly welcome aspect of the SC's judgment. Placing HMRC in a position of dominance could easily have led to, or even encouraged, abusive practices and obstructionism. This would have consequently placed any party appealing a determination of HMRC in a position of significant disadvantage in the course of the proceedings before the tax chamber. The SC, while not mentioning this point explicitly, demonstrates sensitivity in upholding key values associated with good administration and administrative justice more broadly. If a tribunal was consistently lenient in favour of a state agency, on basis that the agency should fulfil its public duty without obstruction, the legitimacy of the tribunal appeals system would be undermined.²⁶ The strict application of the rules to HMRC should be useful in future cases, especially where an appellant with limited means is faced with undue delay by HMRC. As Lord Neuberger correctly asserts, "a dangerous precedent"²⁷ would have been set if an alternative approach had been adopted by the FTT.

3. The severity of the sanction the FTT imposed on HMRC

In light of the public interest in favour of allowing HMRC to participate in the appeal that was discussed in the previous section, the SC also took the opportunity to comment on the existing sanctions regime available to tribunal judges. It had been agreed by both parties that the measure taken against HMRC was particularly draconian.²⁸

Lord Neuberger also acknowledged that a debaring order was a particularly strict sanction given the circumstances of the case. Nevertheless, this was the only available sanction to the tribunal judge. This placed her in the unenviable position of either having to provide no remedy to BPP, which meant that HMRC "would have got away with it",²⁹ or to make the debaring order which would potentially, as demonstrated above, have ramifications beyond the facts of the specific case. In light of this, Lord Neuberger argued that additional sanctioning powers ought to be granted to tribunals,³⁰ replacing the

²⁴ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [19].

²⁵ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [32].

²⁶ Furthermore, this would cast doubt over the judicial independence and impartiality of to the tribunal system. Securing structural independence of the Tribunal system was a key impetus behind the merger of the HM Courts and Tribunals Service. See Elliot and Thomas, above fn.18, 633.

²⁷ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [30].

²⁸ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [35].

²⁹ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [35].

³⁰ "There may be force in the notion that the tribunal rules should provide for the possibility of more nuanced sanctions, such as a fine or even the imposition of some procedural advantage": *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [35].

existing binary options, or either no sanction or debaring HMRC, both of which were deemed to be “unpalatable.”³¹ This plea to create a more nuanced sanctions regime was immediately mitigated, however. Lord Neuberger recognised the complications associated with formulating an effective and proportionate system of sanctions and thus clarified that the point was mentioned with “diffidence.”³² Nevertheless, *BPP Holdings Ltd* serves to illustrate the dilemma facing tribunal judges who want to uphold the fairness of the overall proceedings whilst also serving the public interest. It is hoped that Lord Neuberger’s obiter statements on the matter can become the impetus for a broader reconsideration of the available relevant sanctions that a tribunal judge can impose to a party causing undue delay to proceedings.

4. Was the debaring order a determination the FTT was entitled to make? The limits of judicial review of Tribunal decisions.

The SC, in determining whether a debaring order was a sanction the FTT was entitled to impose, sought to examine the relevance of the considerations taken into account by the FTT judge and, conversely, whether any relevant considerations were ignored. The FTT, in reaching its conclusion had carefully assessed the prejudice to BPP caused by the delay, namely the fact that BPP would not have adequate time to properly prepare their case or to address the points raised by HMRC. This was compounded by “the absence of any explanation or excuse for the failure, coupled with the existence of other failures by HMRC to comply with directions.”³³

The SC, once again, endorsed the FTT’s approach in this regard. HMRC, by disputing the relevance of the reasons taken into account and by arguing that relevant considerations were not taken into account (the public interest in collecting VAT, the public duty of HMRC to collect it), asserted that no reasonable authority applying its powers would have granted the order. In rejecting this claim, the SC reiterated the limits of its supervisory powers. The SC (and the appellate judge more broadly), does not engage in a thorough examination of the merits of the determination under review, nor does it substitute its own opinion for that of the original decision-maker. The power has been conferred to the FTT to make this determination, and whether the SC, or another judge examining the case, would have reached the same conclusion given the available facts, is irrelevant. A mere disagreement as to the outcome of the case does not suffice for the SC set it aside on the grounds that it was unreasonable. A determination, per Lord Neuberger, must be “unjustifiable”³⁴ for the SC to quash it. The impugned debaring order could not “cross that high hurdle”³⁵ given the circumstances of this case and therefore, was allowed to stand.

While the debaring order was, in Lord Neuberger’s view, not “beyond the limit of permissible harshness”³⁶ it was “not far from that limit.”³⁷ The borderline nature of this case, however, is attributed more to the lack of a nuanced sanction system than to the

³¹ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [35].

³² “Experience suggests that such ideas, while attractive in theory, can often be difficult to formulate or to apply satisfactorily in practice, so I mention the point with some diffidence”. *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [35].

³³ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [54].

³⁴ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [33].

³⁵ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [33].

³⁶ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [34].

³⁷ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [34].

unreasonableness of Judge Mosedale's order. The threshold of unreasonableness thus remains one that is particularly difficult to reach, a hurdle that will be overcome in particularly limited and extreme circumstances. The SC thus demonstrates no willingness to lower this threshold in this case.

Conclusion

BPP Holdings Ltd provided an opportunity to the SC to clarify a host of significant issues relating to the appropriate procedure in the tribunal system. Lord Neuberger's judgment is noteworthy, firstly, for affirming the importance of fairness in tribunal proceedings, especially where one party to the dispute is a public authority. The purported public interest in the collection of VAT payments and the interest in allowing HMRC to carry out its public duty cannot override, in the SC's estimation, the need to ensure that public bodies live up to the expected standards in the conduct of litigation. The SC also encourages tribunals to rely on the court system to draw analogies that may be useful for the implementation of the tribunal's own rules of procedure on the condition that any influence from the ordinary court system is nuanced. *BPP* also serves to illustrate the shortcomings of the current sanctions system available to Tribunal judges. It remains to be seen whether Lord Neuberger's concerns will become a source of motivation for changes to the current regime. Finally, the judgment confirms that a decision-maker's determination will not be set aside as unreasonable, unless the outcome is manifestly without justification. Ultimately, Lord Neuberger asserts that even in this case, where an arguably severe sanction was imposed, the determination was not "on the wrong side of the line"³⁸ of reasonableness.

Dimitrios Kagiarios*

³⁸ *BPP Holdings Ltd*, above fn.1, [2017] UKSC 55 at [34].

*Teaching Fellow in Public Law and Human Rights, University of Edinburgh