Neutral Citation Number: [2021] EWCA Civ 561

Case No: C1/2020/0241

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Upper Tribunal Judge Elizabeth Cooke
CO/2278/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2021

Before:

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE ROSE
and
LORD JUSTICE POPPLEWELL

- -

Between:

THE QUEEN (on the application of M SPORT LIMITED)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Robert Venables QC and Ross Birkbeck (instructed by **Griffin Law**) for the **Appellant**
Jack Holborn (instructed by **HMRC' Solicitor's Office and Legal Services**) for the **Respondent**

Hearing date: 10 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on: 16 April 2021 at 10:30am

Lord Justice David Richards:

1. M.Sport Limited appeals against the refusal of Upper Tribunal Judge Elizabeth Cooke, sitting as a judge of the High Court, to award it the costs of an application for judicial review against a decision of the Commissioners for HM Revenue and Customs (HMRC). As appears below, the application did not proceed to a hearing because, shortly after service of the proceedings, HMRC withdrew the notices which were to be the subject of the judicial review challenge.

2. I will first outline the events leading up to, and following, the issue of the proceedings.

3. On 6 March 2019, HMRC issued to the appellant a follower notice and an accelerated payment notice (the notices) under part 4 of the Finance Act 2014 (FA 2014). In the very broadest of terms, these notices may be issued where a taxpayer has appealed against HMRC's refusal of relief said to arise under a tax avoidance scheme and, in proceedings involving another taxpayer, a judicial ruling has been given which, HMRC considers, is adverse to the first taxpayer's case. Section 204(6) lays down time limits in which a follower notice must be given.

4. Provision is made in the case of both types of notice for the taxpayer to make representations to HMRC, by section 207 in the case of follower notices and section 222 in the case of accelerated payment notices. The grounds on which representations may be made are limited to those specified in the sections respectively. Both sections provide that HMRC "must consider any representations" and, having considered them, "must" determine whether to confirm, amend or withdraw the notice in question.

5. On 29 April 2019, the appellant made written representations pursuant to sections 207 and 222 in respect of the notices, arguing that they should be withdrawn on grounds that fell within those specified in the sections. One of the grounds was that the notices had not been issued within the permitted time limits. The appellant stated in the representations that, if the notices were not withdrawn, it would bring judicial review proceedings to challenge them.

6. On Friday 17 May 2019, the appellant wrote a 19-page pre-action protocol letter, setting out eight grounds under FA 2014 and a further six grounds under the Human Rights Act 1998.

7. The letter proposed that HMRC should reply by 31 May 2019. HMRC replied by email on 31 May 2019, stating that they would not be able to reply that day but stating that they would provide a full response by close of business on 5 June 2019. The appellant did not reply to this email.

8. Very shortly after 5pm on 5 June 2019, HMRC sent its response. As regards the grounds relating to issues under FA 2014, HMRC stated that the proposed claim was premature. The appellant had made its written representations on 29 April 2019 and HMRC expected to respond to them by the end of June. HMRC stated that the "proper course is for the Claimant to await HMRC's response to its statutory representations and only then to issue a judicial review claim if it considers it has grounds for doing so". Reference was made to the decision of Green J in *R (Archer) v HMRC* [2018]

EWHC 695 (Admin), [2018] 1 WLR 3095 (*Archer*). HMRC added that the appellant was not required to take corrective action in respect of the follower notice or to make any payment pursuant to the accelerated payment notice until it had received HMRC's response to its written submissions.

9. By contrast, as regards the grounds advanced by the appellant under the Human Rights Act, HMRC's letter dated 5 June 2019 provided a full response.

10. The appellant did not reply to this letter but, on 18 June 2019, it served its judicial review claim, which had been issued on 5 June 2019. It set out all the grounds, under both FA 2014 and the Human Rights Act, which had been set out in its pre-action letter. It sought (i) an order quashing the notices, (ii) a declaration that the giving of each notice was a breach of the appellant's Convention rights, and (iii) a declaration that it would be unlawful for HMRC to take any steps to enforce the notices.

11. On 1 July 2019, HMRC responded to the appellant's representations made on 29 April 2019. HMRC accepted that the follower notice was not given within the time limit laid down by section 204(6) FA 2014 and informed the appellant that, on that basis, HMRC had determined to withdraw both notices. They repeated that the judicial review proceedings had been issued prematurely and sought costs of £1,500.

12. The appellant's position was that, as HMRC had withdrawn the notices, they should pay its costs of the proceedings, which it later stated to be £129,902 at this point.

13. Unable to agree the issue of costs, the parties agreed to submit it to the court for decision. On 23 October 2019, a consent order was made providing that the claim was withdrawn and setting out a timetable for sequential submissions on costs from HMRC and from the appellants, with the opportunity for reply submissions from HMRC. The first round of submissions by HMRC were required to be served "within 28 days of service of this order". Paragraph 3 of the order stated: "If the Defendants do not file submissions under clause 2, the Defendants will pay the Claimant's costs of the claim on the indemnity basis, to be the subject of detailed assessment if not agreed".

14. These provisions are material because, in its submissions, the appellant asserted that HMRC's submissions were not served in time, and that therefore the appellant became entitled to its costs on the indemnity basis. In its reply submissions, HMRC stated that the order was not received by them until 5 or 6 November 2019, so that its submissions were served in time.

15. HMRC submitted that there should be no order as to costs. The appellant should have waited for HMRC's response to the appellant's representations under sections 207 and 222 FA 2014 and the proceedings were issued prematurely. Further, the claim succeeded only in part. The notices were withdrawn because they were served out of time, not for any of the reasons advanced under the Human Rights Act. As that part-success would have been achieved without issuing proceedings, the case fell within the second category of case identified by Lord Neuberger MR in *R(M) v Croydon London Borough Council* [2012] EWCA Civ 595, [2012] 1 WLR 2607 at [60].

16. The appellant submitted that it should be awarded its costs because (i) HMRC failed to comply with the consent order as regards the service of HMRC's submissions; (ii)

the proceedings fell within the first category of case in *R(M) v Croydon*, as the appellant had obtained the real substance of its claim by the withdrawal of the notices; (iii) HMRC failed to comply with the pre-action protocol; it had an adequate opportunity to respond to the appellant's representations and its pre-action letter before the claim was issued; (iv) the appellant could not include its Human Rights challenge within its representations under FA 2014; (v) in the light of other first instance authority, it acted reasonably in issuing the claim before receiving HMRC's response to its representations, notwithstanding Green J's decision in *Archer*.

17. On 22 January 2020, the judge decided to make no order as to costs. On the face of the order, under the heading "Observations", the judge gave her reasons as follows:

> "Although the notices that were the subject of the proceedings have now been withdrawn, it appears that the judicial review proceedings were premature and that the Claimant should have waited for a response to its statutory representations of 29 April 2019. In the light of the Defendant's letter of 1 July 2019 it appears that the response to those representations was likely to have been withdrawal of the notices.
>
> I make no order, therefore, for costs in favour of the Claimant. Equally I make no order in favour of the Defendant in the light of the delay in its response to the letter before claim. Had a substantive response been made, or at least a response reminding the Claimant of the need to wait for a response to representations, within 14 days of the letter before claim then it may well be that proceedings would not have been commenced."

18. This appeal is brought, with permission granted by Lewison LJ, on three grounds. First, the order is procedurally unfair because the judge failed to give reasons, in particular she failed to address the submissions made as regards *Archer* and the conflicting first instance authority. Second, the judge should have found that HMRC were liable under the terms of the consent order to pay the appellant's costs on the indemnity basis. Third, even if ground (2) is wrong, (i) HMRC were the unsuccessful party and the judge was wrong to depart from the normal order, in accordance with *R(M) v Croydon*, that they should pay the appellant's costs, and (ii) HMRC failed to abide by the pre-action protocol and should accordingly be ordered to pay the appellant's costs on the indemnity basis.

19. I will consider the first ground, that the judge failed to give adequate reasons, after I have considered the other grounds.

20. There is, in my judgment, nothing in ground (2). Mr Venables QC, appearing for the appellants, accepted that the burden of establishing that HMRC's submissions had not been served in time lay on the appellants. The court sent the order by first-class post to the parties, and it was therefore deemed to be served on the second day after posting: CPR 6.26. HMRC were not out of time with their submissions unless the order was served on or before 29 October 2019. If therefore the court posted the order by 27 October 2019, HMRC were out of time. The order was date-stamped 24 October 2019 by the court. Mr Venables submitted that, in view of that date, the order

would on the balance of probabilities have been posted by the court on or before 27 October 2019. The date of receipt stamped by HMRC on the envelope produced by them did not establish the contrary.

21. In my judgment, the best evidence of service of the order is the date stamped by HMRC's post room on the envelope containing the order. That is evidence of receipt by post on 5 or 6 November, as opposed to speculation that the court posted the order within three days after 24 October 2019. In my view, HMRC were right in the stance they took on this in their reply submissions before the judge below, and I would reject this ground of appeal.

22. The substance of the appeal arises under the third ground of appeal.

23. At the heart of this ground lies HMRC's submission that the issue of the claim was premature, and that the appellant should have waited until HMRC responded to the appellant's representations. The right to make written representations, and the obligation of HMRC to consider them and to respond to them by confirming notices or withdrawing or amending them, are laid down by FA 2014. The decision taken by HMRC in response to representations is therefore susceptible to judicial review.

24. In *Archer*, this court affirmed the decision of Green J at first instance and held that this statutory procedure provided an alternative remedy which should normally be pursued before the issue of judicial review proceedings: see [2019] EWCA Civ 1021, [2019] 1 WLR 6355. The taxpayer in that case had issued a judicial review claim as regards an accelerated payment notice. Some three weeks later, she made representations under section 222, following which HMRC withdrew the notice. The master rejected the taxpayer's application for her costs of the proceedings and made no order as to costs. Her appeal was dismissed by Green J and by this court.

25. In his judgment, with which Floyd LJ and Flaux LJ agreed, Henderson LJ said at [87] that the legislation must be construed as a whole and, so construed, the right to make representations, and HMRC's obligation to consider them and to decide whether to confirm a notice, was "an integral part of the primary legislative scheme". At [89], he said that "it seems clear to me that Parliament must have intended taxpayers to take advantage of the machinery in section 222 in all cases where it was available, before having resort to judicial review proceedings". This was in part because no appeal procedure was provided against accelerated payment notices, and Parliament must have appreciated that a challenge could only be by judicial review, so that the machinery for representations provided a relatively cheap and simple way of challenging a notice without, or at least before, issuing proceedings. Henderson LJ concluded at [90] that "it seems to me all but self-evident that section 222, read in its context, was intended by Parliament to provide the primary recourse for a taxpayer dissatisfied with an APN, which should normally be exhausted before judicial review proceedings are set in motion".

26. This is precisely the ground on which the judge in the present case refused to make an order for costs in the appellant's favour.

27. This provides a solid basis for saying that the judge made no error of law but applied the right principle and came to a result which was entirely in accordance with that principle.

28. Nonetheless, it is right to say that, while a court exercising its discretion as to costs must in a case similar to *Archer* have regard to the principle established by it, there may be facts or circumstances which justify a different outcome. Mr Venables submitted that the judge was wrong to apply it in the present case, for two reasons.

29. The first reason was that in *Archer* the grounds for judicial review were restricted to grounds that fell within the categories that could, under section 222, be the subject of representations. In the present case, the grounds for the appellant's claim included challenges under the Human Rights Act, which could not be included in representations under FA 2014. Given the three-month time limit for commencing judicial review proceedings, the appellant had to issue its claim on or very soon after 5 June 2019.

30. In my judgment, this submission is not well-founded. If a taxpayer raises, or is entitled to raise, objections which fall within the categories specified in sections 207 and 222, HMRC's response to the representations, which they are obliged to give, will supersede their earlier decision and will in effect be their final decision. It will be a decision that the taxpayer is entitled to challenge on any relevant grounds. Those grounds will not be restricted to grounds specified in sections 207 and 222 but may include, for example, a challenge under the Human Rights Act.

31. Mr Venables submitted that this was not the effect of *Archer*. He submitted that this court proceeded on the basis that, if HMRC had not responded to representations by the date when the time limit for the issue of proceedings challenging the original notice would expire, the parties could agree an extension of time or could proceed in the safe knowledge that the court would extend time. Mr Venables correctly pointed out that the parties could not by agreement extend time (see CPR 54.5(2)) and no taxpayer could proceed on the basis that it was certain to obtain an extension from the court.

32. In support of his submission that this court in *Archer* proceeded on the basis that it was the issue of the original notice from which time would run and that there would be an extension of time by agreement or later order of the court, Mr Venables referred to the judgment of Henderson LJ at [92].

33. At [92], Henderson LJ referred to a submission that the three-month time limit left the taxpayer no realistic option except to issue a claim within that time. Henderson LJ rejected this submission, saying:

> "I am equally unimpressed by the argument that the strict three month time limit for judicial review leaves the taxpayer with no realistic option except to begin judicial review proceedings within three months of the date of the APN, even if representations are also made under section 222. The authorities show that, although the time limit in CPR 54.5(1) is indeed strict, it is not applied unthinkingly, and in a suitable context the courts are willing to adopt a flexible and pragmatic approach, as exemplified in cases such as *Burkett* [2002] 1 WLR 1593. Where Parliament has provided a potential alternative remedy, such as that in section 222, the court will if necessary ensure that the taxpayer is not prejudiced by taking

> advantage of it. So, for example, in a case where the taxpayer has in good faith made representations under section 222, and HMRC's response is not notified to the taxpayer until more than three months from the date of the APN, I would expect the court to proceed on the basis that time does not begin to run for judicial review purposes until the date of the notification. In practical terms, the sensible course would normally be for the taxpayer, when making his representations, to seek HMRC's agreement that time for judicial review purposes should not begin to run until the section 222 procedure has been completed. Absent exceptional circumstances, I cannot imagine that HMRC would refuse such a request, and if they did so without justification, I would expect any subsequent objection to judicial review on the grounds of delay to receive short shrift from the court. As the guidance in *Cowl* [2002] 1 WLR 803 emphasises, both sides are under a duty to act responsibly and to take all reasonable steps to ensure that judicial review proceedings are not prematurely pursued while other forms of dispute resolution are in progress."

34. While Henderson LJ refers there to the practical solution of an agreement by HMRC that "time for judicial review purposes should not begin to run until the section 222 procedure has been completed", he nowhere suggests that this would take effect as an extension of the three-month time limit from the original notice. This would not be consistent with the general proposition expressed at [93] that judicial review proceedings "should be held in reserve as a true remedy of last resort, to be deployed (if at all) only when the section 222 procedure has left the taxpayer still dissatisfied, and even then the focus of the challenge should be on the APN as it stands at the end of the process rather than as it was originally issued (unless of course it has simply been upheld without variation)". Even if the original decision has simply been upheld without variation, the final decision is nonetheless the one upholding the notice, and that decision can be the subject of a challenge by judicial review.

35. Read in context, the passages in [92] on which Mr Venables particularly relied were not referring to an agreed extension of time. Henderson LJ said that he would expect the court to proceed on the basis that time does not begin to run until the date of notification of the decision in response to the representations. The "sensible course" to which he referred was not an agreement by HMRC for an extension of time from the original decision but an acknowledgement that time would run from the date of their decision after consideration of the representations.

36. Accordingly, I reject Mr Venables' submission that this case can be distinguished from *Archer* because the appellant's grounds for judicial review included challenges under the Human Rights Act.

37. The second reason for distinguishing *Archer* advanced by Mr Venables was that Mrs Archer had failed to make representations before the issue of judicial review proceedings and did not do so until about three weeks later and that she had failed to comply with the pre-action protocol, whereas in the present case it was HMRC, not the appellant, who were in breach of the protocol.

38. While it is true that Mrs Archer did not make representations until after she issued her claim, so making it even clearer that she had acted prematurely, this is not a material difference. The critical point is that judicial review proceedings should not be commenced until after the statutory procedure under section 222 has been completed by HMRC's response to the taxpayer's representations.

39. As regards compliance with the pre-action protocol, the appellant complains that HMRC did not reply to its pre-action letter until after the date proposed by the appellant, 31 May 2019, and even when they did reply, on 5 June 2019, they responded only to the Human Rights grounds and not to the grounds under FA 2014.

40. These criticisms are misplaced. The protocol requires a potential claimant to send a pre-action letter in good time before making a claim. The notices were issued on 6 March 2019, but the pre-action letter was not sent until 17 May 2019, raising not only the grounds under FA 2014 already covered in its statutory representations but also new grounds under the Human Rights Act. Given the heavy involvement of the appellant's legal advisers during this period, I am not satisfied that it can be said that the appellant sent its pre-action letter in good time and, in any event, HMRC cannot be criticised for not replying substantively before 5 June 2019. On 31 May 2019, HMRC informed the appellant's solicitors that they could not reply that day but would do so on 5 June 2019. The appellant did not reply but issued its claim on 5 June 2019. Its reason for not waiting was, it appears, that in error it believed that the three-month time limit from the issue of the notices on 6 March 2019 expired that day. As for the contents of HMRC's reply, it fully addressed the Human Rights issues but stated that the issues under the FA 2014 would be answered in their response to the appellant's statutory representations, which in my view was an appropriate course to adopt.

41. It was further submitted for the appellant that the judge failed to apply the principles or guidance established by this court in *R(M) v Croydon* concerning the costs of judicial review proceedings which are settled or become unnecessary as a result of action by the public authority, without a substantive hearing of the merits. At [60], Lord Neuberger MR said:

> "Thus in Administrative Court cases just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims."

42. As regards cases in the second category, Lord Neuberger said at [62] that "where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs". In cases in the first category, the applicant would normally be awarded its costs.

43. The appellant contended that the present case fell in the first category. Its purpose in bringing the proceedings was to secure the withdrawal of the notices, which it achieved. As against that, it may be said that the notices were withdrawn on the narrow point about their service outside the statutory time limit and without reference to or acceptance of the Human Rights grounds, which Mr Venables told us were intended to be "a full frontal attack on the follower notice system which, if accepted, would render the system a dead letter".

44. It is unnecessary to resolve this point because, even if the appellant were correct as regards the categorisation of its claim for the purposes of *R(M) v Croydon*, it does not affect the result in this case, where the proceedings were brought prematurely and would have been unnecessary if the appellant had waited for HMRC's response to its representations. In most cases, and certainly in this case, it is a factor which pre-empts any consideration of the applicant's degree of success.

45. Finally, the appellant submits that it acted reasonably in issuing its claim form. This would not in principle justify an order for costs against HMRC. While acting unreasonably may deprive a successful party of its costs, a party that wrongly issues proceedings will not usually become entitled to its costs because it behaved reasonably.

46. The appellant relies for this submission on what it says was, when it issued its claim, a conflict of High Court authority on whether a taxpayer should wait for HMRC's response to its representations under the FA 2014. Green J held in *Archer*, in a judgment given in March 2018, that a taxpayer should wait, and the Court of Appeal affirmed the decision on 18 June 2019. Mr Venables submitted that this conflicted with the decision of Dove J in *R (Cockayne) v HMRC* (10 November 2016) [2016] Lexis Citation 706, a decision dismissing an application for permission to bring judicial review. In that case, Dove J held that the claim was issued out of time.

47. There are at least three reasons why reliance on the decision in *Cockayne* does not assist the appellant. First, the facts were significantly different from those in *Archer* or the present case. The relevant notice was issued by HMRC in November 2014. The taxpayer made representations under section 222 in February 2015, to which HMRC responded in June 2015, upholding the notice. The taxpayer made further representations in 2015 and early 2016, and in May 2016 she issued the claim seeking to challenge by way of judicial review what was said to be a "failure" by HMRC to exercise its discretionary power under section 227(1) to withdraw or amend the notice in response to those further representations. Dove J held that such a "failure" was not a decision which was susceptible to judicial review. It may be contrasted with the obligation of HMRC under section 222 to consider representations and to determine whether to confirm, amend or withdraw the notice, which HMRC had done in June 2015. Dove J further stated that in reality the decision under challenge was the original issue of the notice in November 2014 or, "if one were to take a more pragmatic approach and say that that in truth that decision was not crystallised until the provision inviting representations under section 222 of the 2014 Act had been exhausted", and on either basis the challenge was way out of time.

48. Second, nothing said by Dove J could be said to create a conflict with Green J's decision. Even if there were any conflict, which I do not accept, Green J's decision was reached on a substantive application for judicial review after full argument.

Third, of course, Green J's decision had been upheld on appeal by the time the judge in the present case ruled on the question of costs. In passing, I will note that we were told by Mr Holborn, appearing for HMRC, that *Cockayne* was cited to Green J and to this court.

49. There is nothing arising from the judgment in *Cockayne*, and any possible conflict with *Archer*, which could justify an order for costs in the appellant's favour.

50. For these reasons, I conclude that there is no substance in any of the grounds advanced by the appellant against the merits of the judge's decision to make no order as to costs.

51. As permission to appeal was given on all grounds, I should comment on the first ground, that the judge had failed to give reasons.

52. As earlier mentioned, there was no oral argument on the question of costs, but the judge received sequential written submissions from HMRC, the appellant and HMRC in reply. In their reply submissions, HMRC gave succinct responses to each of the arguments advanced at some length by the appellant. They also produced the evidence to show that they had not been late in the service of their submissions, so that the appellant had not become entitled to costs under the terms of the consent order.

53. The appellant argued that, because of the brevity of the judge's reasons, it was left in the dark about the judge's approach to important parts of its case. I would not accept this. Read, as it should be, in the context of HMRC's reply submission, the obvious inference from the judge's decision is that she accepted HMRC's arguments in rebuttal of the appellant's arguments.

54. It is highly unfortunate that the appellant did not include the reply submissions in the bundle submitted to this court with its application for permission to appeal. If it had been, I am not confident that permission to appeal would have been given.

55. Nothing that this court says should encourage lengthy decisions on costs, particularly following a refusal of permission for judicial review. It might in the present case have been better for the judge to make brief reference to the appellant's submissions and the reasons for rejecting them, which at least in part could have been done by reference to HMRC's reply submissions.

56. For all these reasons, I would dismiss the appeal.

Lady Justice Rose:

57. I agree.

Lord Justice Popplewell:

58. I also agree.