TC03854

Appeal number: LON/2008/01734

PROCEDURE – application for further and better particulars – application dismissed – indemnity costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRIMAX TRADING INTERNATIONAL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 18 July 2014

Mr S Russell-Flint QC, instructed by Smith and Williamson LLP, for the Appellant

Mr H Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In 2008 HMRC denied the appellant recovery of input tax in the sum of over £13 million claimed in the four accounting periods March-June 2006 on the grounds that (HMRC alleges) the appellant knew or ought to have known that the transactions to which the input tax related were connected to fraud. The appellant appealed that decision to this Tribunal.

2. In the interim since the appeal was lodged the proceedings have progressed. A great many witness statements have been exchanged. Directions have been given. In January 2013 the parties were able to agree directions to take this appeal to substantive hearing and the listed pre-trial review was vacated.

3. Apart from the normal directions necessary to ready the appeal for hearing, the first direction agreed in January 2013 was for the appellant to provide on 15 April 2013 a list of issues in dispute, so familiar in MTIC cases, and designed to identify whether 'connection to fraud' was in dispute or whether it was only knowledge or means of knowledge that was in dispute.

4. In April 2013, the parties agreed an extension to the time of compliance to June 2013. However, on 17 May 2013 the appellant wrote to HMRC stating that they were unable to comply with the direction to provide the list of matters in dispute without first receiving a reply to an enclosed request for further and better particulars of HMRC's case.

5. HMRC, it appears with the agreement of the appellant, used this application as an opportunity to review its files on the appeal and this review led HMRC to file a number of updates or corrections to various witness statements. A substantive response to the application was provided following this exercise and about four months after it was made. The response was to refuse the application. The appellant then filed the application with the Tribunal and that application is what came on for hearing before me, about 10 months after it was made.

The application for further and better particulars

6. I summarise the questions asked in the application as follows:

> (1) Identity of those persons alleged to have participated in or had knowledge or means of knowledge of the alleged fraud, including an explanation of how it was alleged that monies were extracted from HMRC;

The appellant sought a direction (described as the 'bona fide' direction) that I direct that 'any party' must be presumed to be bona fide unless HMRC had pleaded fraud against them. I note that by the word 'party' it was clear that the appellant meant any *person* mentioned in the appeal: this follows from what Mr Russell-Flint said to support the application, and because the only *parties* were

the appellant and HMRC and HMRC had already pleaded knowledge of fraud against the appellant.

(2) 'due diligence' question: asking HMRC to identify what HMRC alleges the appellant ought to have done to discover the fraud;

(3) a request for a schedule of the evidence on which HMRC relied to prove tax loss in every deal chain, including a schedule of inferences which HMRC would ask the Tribunal to draw where direct documentary or witness evidence of a loss was lacking.

(4) A request for a similar schedule outlining the allegation of 'connection' to the tax loss.

7. The appellant also asked for other directions:

(1) HMRC to delete from their statement of case and all witness statements all allegations of fraud or means of knowledge against anyone if inconsistent with or not supported by their evidence;

(2) All statements of opinion in HMRC's witnesses' statements to be deleted;

(3) Mr Stone's statement to be excluded;

(4) No further evidence to be admitted without leave of tribunal.

8. The appellant did not at the hearing before me appear to consider its own application satisfactory, as its starting point, set out at §51 of Mr Russell-Flint's skeleton, was to ask for answers to some 30 questions, which were not the same questions as the ten or so listed in its application. After taking instructions, Mr Russell-Flint indicated he only intended to pursue those of the 30 new questions where were in essence the same as made in the original application. I ruled that the appellant was restricted to pursuing its application as filed. The reason for this was that it is essential where further and better particulars are pursued that the party seeking an answer be precise about the questions asked; new questions notified to HMRC only 4 days before the hearing were notified too late.

The identity of fraudsters and the bona fide direction

9. The items at (1) were interlinked and unable to be split. The appellant accepted HMRC had pleaded that the (alleged) defaulting companies had defaulted fraudulently and that HMRC had pleaded that the appellant had known of the fraud. Mr Russell-Flint's explanation of the reasons why the appellant sought (1) above was (in summary) that it though HMRC must plead (with reasons and evidence) whether *anyone else* knew of the fraud and that unless HMRC had pleaded that someone else had known of the fraud, that person must be presumed by the Tribunal hearing the case to be bona fide.

10. Do HMRC need to identify which of the many named persons in the chains of transactions they suspect of fraud? HMRC do not allege a case of conspiracy. They do not need to as *Kittel* does not require a conspiracy to be proved. HMRC do not even seek to identify the fraudsters (other than the inevitable allegation that the

defaulting companies and contra-traders were a party to the fraud) and *Kittel* does not require them to identify any of the fraudsters.

11. In so far as the alleged defaulters and contra-traders were concerned, Mr Russell-Flint appeared to accept that they were identified and reasons given for the allegation of fraud against them. His concern was with other non-parties to the appeal, and in particular with the appellant's immediate suppliers and customers. It is not pleaded that they were fraudulent but it is pleaded that their transactions (similarly to the appellant's) were organised for the purpose of fraud.

12. Mr Russell-Flint was not able to offer any authority for his proposition that a court or tribunal must presume a person not pleaded to be fraudulent is necessarily bona fide. He relied on various cases, but none were authority for this quite novel proposition. *Towler v Wills* [2010] EWHC 1209 (Comms) was relied on for the general proposition that:

> "[18] The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him.…time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a mater which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies….
>
> [19] It is not fair and just that the Defendant cannot be sure of the case he has to meet…."

13. Similarly, but in a case where fraud was alleged *Gamatronic (UK) Ltd and another v Hamilton and others* [2013] EWHC 3287 (QB) , Smith J said:

> "[26]….statements of case should be concise and avoid excessive details and particulars. That is so, but they must still be sufficient accurately (sic) to identify the issues for the court as well as the parties. For this reason I reject any suggestion that a pleading is sufficient if the other parties can discern what lies behind it: partiees should not have to dig behind what is pleaded to detect what is alleged (particularly where dishonesty or comparable impropriety is alleged)….."

14. *Locke v Stuart* [2011] EWHC 399 (QB) was relied on to support the application for the 'bona fide' direction. What the Judge actually said was:

> "I consider it to be inappropriate for trial bundles to contain the names and personal details of people with the suggestion that they have been guilty of fraud unless there are proper grounds evidentially for that assertion."

15. That was (in almost all ways) a quite different case from this one. The second defendant's case was that the first defendant, the claimant and lots of other persons were involved in a conspiracy to defraud insurance companies by making claims for accidents that were staged or didn't even happen. All the judge said was that fraud should not be alleged against non-parties unless there are proper grounds for making

such allegations. This is scarcely surprising as is well-known that allegations of fraud must not be made without a proper basis.

16. The appellant also relied on what Judge Wallace said in *Blue Sphere* [2008] UKVAT 20694 at §30:

> "It is a long established principle of English law that any allegation of fraud must be clearly pleaded with particulars. This applies to civil as well as to criminal proceedings. It applies to tax appeals as much as to any other litigation. An appellant against whom fraud is alleged is entitled to know clearly what case he has to meet."

Judge Wallace was here clearly confining his comments to the pleading of fraud against an appellant, which was the issue in front of him. There is nothing here that could be authority for the proposition that a tribunal must assume that someone against whom fraud was not pleaded must be bona fide.

17. It is pleaded that the suppliers and customers' transactions were organised by someone for the purpose of fraud, but the state of mind of the appellant's suppliers and customers is not pleaded. HMRC do not state whether they consider that the customers and suppliers knew of the fraud, merely ought to have known of the fraud, or were quite innocent (neither knowing nor having means of knowledge of the fraud). They leave it open.

18. By asking for the 'bona fide' direction the appellant is saying that HMRC cannot do this.

19. I consider that the respondents are entitled to leave as an open question the state of mind of the other parties to the transactions in the disputed transaction chains. While it is true that allegations of actual knowledge of a fraud should not be made against persons who are not parties to the appeal without there being evidence to support it, that is very far from saying that where no specific allegations are made the Tribunal must assume bona fides. It is obvious that a court or tribunal could not do justice if it had to assume where no allegation of fraud was made against a person who was not a party, then that person was entirely honest and innocent.

20. The suppliers and customers are not parties to the hearing and the appellant is not entitled to have them presumed innocent just because no allegations are made against them. If the appellant considers that the state of mind of its suppliers and customers is relevant to its case, then the appellant must put it in issue. If it is its case that its suppliers and customers were innocent, without knowledge or means of knowledge of the fraud, then the appellant should have served evidence to that effect and then must prove its case on this. (If the appellant chooses to introduce new evidence now, it will of course need to apply for leave for it to be admitted).

21. Mr Russell-Flint also intimated that the purpose of the request for further and better particulars at (1) was that it would be wrong for HMRC 'out of the blue' at the substantive hearing to put to the appellant's witness that, for instance, his immediate supplier was knowingly involved in the fraud and that the witness knew it.

22. While HMRC cannot be compelled to accept that the appellant's immediate suppliers and customers were bona fides, it is not part of HMRC's pleaded case that they were parties to the fraud. Therefore, the Tribunal hearing the case might consider that the hypothetical cross-examination question suggested by Mr Russell-Flint in the previous paragraph goes beyond HMRC's pleaded case. But I consider that in so far the request for further and better particulars was to prevent HMRC raising a case that they had not (yet) sought to raise, the request was inappropriate. If in cross examination HMRC started to go beyond their pleaded case then an objection should be taken at the time: a request for further and better particulars should not be used as a method to circumscribe cross examination questions that HMRC had given no indication that they intended to ask.

1B The extraction of funds question

23. Mr Russell-Cooke was not really able to explain what particulars were requested here. HMRC do not allege that the fraudsters paid the appellant to participate in the fraud, or that the appellant 'extracted' funds, other than the allegation that the appellant received a mark-up on the goods it bought and sold that should have put it on notice of the fraud (pleading 27.12). HMRC plead that the turnover (£21,000,000 in one month alone) was 'contrary to normal commercial logic' (pleadings 27.17 and 27.18).

24. I consider that it is clear to the appellant that HMRC's case was that the deals were very profitable to the appellant and that this is one of the reasons HMRC allege that the appellant knew or should have known of the (alleged) connection to fraud. Further and better particulars of this were not required as no other method of 'extraction' was alleged.

The due diligence question

25. The request for further and better particulars on due diligence was also difficult to understand. Mr Russell-Flint said that the appellant needed to know what it was that HMRC said that the appellant should have done differently. He accepted that this was only relevant to the allegation of 'means of knowledge': if the appellant *knew* of the connection to fraud then it is obvious that it ought not to have entered into the transaction.

26. I find that HMRC had pleaded a number of matters they said the appellant should have done differently: they pleaded, for example, that the appellant had failed to carry out credit checks, obtain credit references, or meet its trade partners, that it did not inspect the goods and that it traded without written contracts.

27. Mr Russell-Flint said that the appellant was 'completely unenlightened' on what was pleaded against it. I found this submission very difficult to understand. The level of pleading seemed to me to be clearly sufficiently detailed for the appellant to understand what it was that HMRC thought would have given it means of knowledge of the fraud.

28. While I accept that pleadings must be sufficiently detailed as outlined at §§12 and 13 above, in this case the request for further and better particulars on due diligence strays beyond what is necessary and what Lord Justice Saville said in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd and others* (1994) WL 1062346 is relevant:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the Court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played ….."

The Schedules

29. Mr Russell-Flint accepted at the hearing that the appellant was not pursuing its request for schedules (application (3) at §6) relating to the tax loss as it had already these. It did not dispute HMRC's assertion that HMRC had served (before the request for further and better particulars) in respect of every transaction a deal sheet showing every transaction which HMRC considered comprised the deal chain and of which they had information, and that every deal sheet was supported by the underlying invoices or other evidence of the transaction.

30. The appellant maintained the request for particulars about 'connection' noted at (4) of §6. Mr Russell-Flint was not really able to explain this request to me. The deal sheets necessary evidenced what HMRC alleged to be the 'connection' as they traced the goods purchased by the appellant back through an (alleged) chain of transactions to an (alleged) default.

31. He said it should be made clear, but wasn't from where the evidence of the claimed transaction chains came. HMRC's case was that all the deal packs (comprising the deal sheets and underlying documentation) were exhibits to the 'broker' officer's witness statements, so the broker officer was the source.

32. Mr Russell-Flint accepted this but queried from where that officer had obtained the information. Therefore, I find that the actual request for further and better particulars in so far as it related to schedules related to schedules already served. In the hearing the request for the schedules morphed into a criticism of the reliability of the broker officer's sources of information. And I accept Mr Watkinson's point, that if the appellant wants to make submissions at the hearing that HMRC's internal databases (from which the broker officer obtained the information) are unreliable then that allegation should have been made earlier.

33. In conclusion I find that there was nothing in the request for schedules. The appellant has the schedules. If it wishes to make an issue in the case of the reliability

of the information on HMRC's databases, which was the source of the information in the schedules, then this request for particulars entirely failed to make that clear.

The deletion of allegations direction

34. The request noted at (1) of §7 was a for a direction that was also difficult to understand. The appellant did not identify any allegation which they said was unsupported by evidence. While I accept that allegations of fraud should not be made without a proper basis (see §14), if the appellant wanted allegations deleted on the basis, it must identify precisely the allegation to which it objects. It did not.

35. Bizarrely, a further direction was requested which was that HMRC to apply to the Tribunal to make the amendments to its statement of case which the appellant was demanding. This needs no comment as I have refused the 'deletion of allegations' direction.

The statements of opinion direction

36. Again, while at (2) of §7 the appellant asked for statements of opinion to be deleted, it did not identify any statements of opinion to which it took objection. Mr Russell-Flint's view was that it was for HMRC to identify the statements of opinion given by its witnesses of fact.

37. He is wrong. It was the appellant's application. The appellant needed to satisfy me it was justified. Yet it did not draw my attention to a single statement of opinion by a witness of fact so I was not satisfied that the direction sought was justified.

38. Back in August 2013, HMRC had offered to compromise this issue by suggesting the parties agreed a direction that there was no need to cross examine a witness of fact on his opinion. This was not accepted by the appellant.

39. While witnesses of fact should not give opinion evidence, it seems unnecessary to pore endlessly over witness statements to delete opinions, as a Tribunal would not place any weight on a factual witnesses' opinion as evidence of the truth of it. It is true that where a witness statement of a non-expert comprises largely opinion, then it might be right to exclude it to discourage the service of documents containing largely irrelevant material. However, as I was shown no statements of opinion at all, I am not satisfied it is right to delete any of them.

40. While the compromise offered by HMRC might have been ineptly worded, its clear intention was that the appellant's concerns ought to allayed by a direction that statements of opinion by witnesses of fact would not be evidence of the correctness of that opinion. This was clearly a satisfactory compromise in the situation where the appellant had not troubled to identify any particular offending statements of opinion and I made a direction to that effect.

Mr Stone's statement

41. So far as application (3) of §7 was concerned, HMRC offered a compromise in Mr Watkinson's skeleton. They gave to the appellant a list of paragraph numbers from Mr Stone's statement on which they would rely and indicated that they would not rely on the rest of the statement. The appellant accepted this compromise at the outset of the hearing and I did not need to consider it.

No further evidence without leave

42. The application at §7 (4) was uncontroversial in that both parties accepted they needed leave of the Tribunal to introduce further evidence.

Conclusion

43. At the hearing I dismissed the appellant's application for the reasons stated save that I made the agreed direction respecting Mr Stone's evidence. I also made the direction that there should be no further evidence without leave and regarding opinion evidence of factual witnesses. I went on to make directions to ready the case for hearing including directing that the appellant must file its list of issues within two months or be at risk of being struck out.

Costs

44. HMRC then applied for its costs on the indemnity basis. Both parties were agreed that the old costs regime (from the 1986 Tribunal Rules) applied to this appeal.

45. The appellant considered that the appropriate costs order was to order costs to be in the cause on the basis that a pre-trial review needed to take place in any event and I had made case management directions as well as decide the application.

Costs in the cause?

46. I did not accept that costs should be in the cause rather than follow the outcome of the application. The purpose of the hearing was to resolve the application. While I had made case management directions, these replaced those agreed between the parties in early 2013 which had been adequate to take the case to hearing. The need for replacement case management directions arose because of the appellant's application and its failure to provide its list of issues.

47. Further, in an open costs regime, costs would normally follow the outcome of applications because otherwise parties would not be encouraged to restrict their applications to reasonable matters and to agree what could be agreed before the hearing.

48. Therefore, costs should follow the outcome of the application and not be costs in the cause. The appellant was substantially unsuccessful: it succeeded in part on only two of the more minor matters and on terms earlier offered by HMRC. The

appellant should bear HMRC's costs of the hearing as they were occasioned by its unsuccessful application.

Indemnity costs?

49. The parties were agreed on that an indemnity costs award was appropriate if the appellant had acted unreasonably in making its application. The appellant did not accept that it had acted unreasonably.

50. I considered that the appellant had been unreasonable to tie its failure to provide the list of issues to the request for further and better particulars. They two matters were not obviously related. For instance, whether HMRC identified the alleged fraudsters had no obvious relevance to the appellant notifying HMRC whether they accepted the deal chains were as alleged and whether there was fraudulent tax loss in the chains; the application for schedules of evidence on tax loss had no relevance either as HMRC had served their schedules of their evidence of tax loss. To the extent the appellant did not accept the provenance of that evidence, that would affect the reply they gave to the list of issues, but the request for further and better particulars did not advance the matter.

51. However, the request for further and better particulars was a stand alone application and the question was whether the appellant had acted unreasonably in making that request, rather than whether it was unreasonable to have used the application as the explanation for the failure to provide the list of issues.

52. I have commented that the appellant's counsel was not always able to explain the request to me. The request for schedules that had already been provided was particularly difficult to understand.

53. Moreover, the appellant's attempts to justify its application were largely on the basis that they wished to forestall HMRC putting something that wasn't pleaded to the appellant's witnesses. As I said, that is not something that is properly the subject of a request for further and better particulars, but for an objection at the hearing if HMRC sought to do such a thing.

54. Moreover, the appellant's stated position was that it did not understand HMRC's case. Yet its application was made over four years after service of the statement of case and after it had earlier agreed directions to take the case all the way to hearing. I was unable to accept that the reason for the request for further and better particulars was that the appellant did not understand HMRC's case.

55. Lastly, in so far as the application sought the 'bona fide' direction it did so without any authority that that was a proper direction for a tribunal to make and when it seems obvious that such a direction would not be in accordance with justice or case law. It was an attempt to tie HMRC to a case that HMRC did not seek to make, wrapped up as a request for further and better particulars of a case which the appellant which had been adequately pleaded.

56. I accept that in two relatively minor matters the appellant succeeded in some part: it wanted all statements of opinion from any witness of fact excluded and Mr Stone's entire statement excluded. In effect HMRC agreed to partly exclude Mr Stone's statement and I made a direction that amounted to implementing HMRC's suggested compromise on opinion evidence by factual witnesses.

57. Despite this partial success, I still consider the appellant's overall behaviour unreasonable. So far as this partial success was concerned, it would have been reasonable to agree to HMRC's compromise suggested in August 2013 (and which could have covered Mr Stone's statement too) in the circumstances that the appellant itself did not seek to identify any particular offending statements of opinion; it was unreasonable to persist in seeking a direction from a Tribunal of non-specific exclusion when the appellant was not prepared to identify the offending parts of the statements.

58. For these reasons I considered that the application amounted to unreasonable conduct by the appellant. The appellant did not need and was not really seeking further and better particulars; the purpose behind much of the application was difficult to ascertain. Why seek schedules it already had and why seek to anticipate HMRC raising questions in cross examination there was no reason to suppose would ever be asked (as not part of its pleaded case)? Its application for the 'bona fide' direction presumably had the purpose of getting the Tribunal to rule by default on the bona fides of third parties, but was quite obviously a hopeless application. If the appellant wished to put the bona fides of its suppliers and customers in issue then it should have raised such a case and filed the evidence. The application for a direction by default was without merit.

59. I also consider that the appellant pursued its application unreasonably in substituting 30 new questions four days before the hearing.

60. The appellant's unreasonable behaviour has in effect stayed the case for about 12 months and due to both parties' counsels' unavailability the case will not now be heard until 2016 when the original hearing window was 2014.

61. I ordered that the appellant pay HMRC's costs of the hearing on the indemnity basis.

62. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 31 July 2014