[2016] UKFTT 116 (TC)

TC04904

Appeal number: TC/2012/8190 and TC/2012/8191

PROCEDURE – whether FTT proceedings should be stayed pending criminal proceedings – no – directions issued

FIRST-TIER TRIBUNAL
TAX CHAMBER

GUI HUI DONG **Appellants**
-and-

HONG FANG

- and -

NATIONAL CRIME AGENCY **Respondent**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, the Strand, London on 19 February 2016

Mr C Marsh-Finch, counsel, instructed by Hogan Brown Solicitors, for Mr Dong and Ms Fang

Mr C Stone, counsel, instructed by the National Crime Agency

DECISION

1. The application is to stay the hearing of Ms Fang and Mr Dong's appeal against the NCA assessments. All parties have assumed that there is no question of Ms Fang's hearing proceeding independently of Mr Dong's, albeit that Ms Fang does not stand accused of any criminal offence. However, the overlap of the facts in the two cases means that I agree that they must be heard together, as I have previously directed. In any event, Ms Fang relies on Mr Dong's evidence in her appeal, so all the same points would arise in any event.

2. So in respect of the joined appeal hearing, I have to ask myself whether it should be stayed until at least after the hearing of the criminal case against Mr Dong on the basis of a real risk of prejudice to Mr Dong in the criminal proceedings. See §31 of *Mote* [2007] EWCA Civ 1324.

3. On the test for this I should say I did not find *Payton* [2006] EWCA Crim 1226 helpful other than for the general proposition (also §31) that it is important care is taken to ensure a fair trial of defendant is not prejudiced by anything arising in civil proceedings: their lordships were careful not to make specific rulings on a matter that was obiter and not properly argued. That case is also distinguishable at it concerned civil proceedings for forfeiture arising out of the exact same allegations as made in the criminal case, which is not the case here.

4. Mr Marsh-Finch also referred me to the Attorney General's guidance (*Asset recovery powers for prosecutors: guidance and background note 2009* published in 2012) and its statement that priority to be given to criminal proceedings. Quite apart from fact this guidance is neither aimed at this Tribunal nor binding on this Tribunal, there is nothing in it that is in any way inconsistent with the test – which is binding on this Tribunal and set out in *Mote* - that civil proceedings should only be stayed for a criminal case where there is real risk of prejudice to the defendant.

5. What real risk of prejudice has been suggested to arise here?

6. Firstly, it is said that Mr Dong will have to address in the FTT proceedings matters relevant in the criminal proceedings.

7. I find this is only true to a very limited extent. The FTT proceedings relate to assessments from April 2004 to April 2009 while the criminal charge relates to events after 1/9/10; moreover, the assessments relate to allegations that Mr Dong personally earned income which he did not declare. The assessments do not depend on whether that income was earned legally or illegally. The criminal case on the other hand is (in summary) that Mr Dong carried on money laundering through his company.

8. In fact, it is theoretically quite possible for Mr Dong to win one case and lose the other without there being any inconsistent findings of fact by either judicial body and quite irrespective of where the burden and standard of proof is.

9. But I accept that some overlap in facts is possible. For instance, it is possible that in the FTT proceedings, it may be put to him in cross examination that his business was dishonest and therefore his evidence is unreliable (because he is allegedly dishonest). Dishonesty is central to the allegations in the criminal case. There may be some other overlap. But in passing I note that I do not consider one of the areas of overlap the fact that NCA only has power to raise the tax assessments where it has suspicions of criminal conduct: as per s 317(1) Proceeds of Crime Act 2002. This is firstly because the NCA proving it had reasonable suspicions is very different to the NCA proving guilt and in any event the assessments have not so far been challenged on the basis the NCA was the wrong body to raise them.

10. It is not enough to show that there may be some factual areas of overlap, or that the appellant could be cross examined twice (once in the civil and once in the criminal courts) on the same matter. It must be shown it would prejudice the criminal trial and it could only do that if evidence arising in or findings from the civil case were used against the defendant by the prosecution or known to the jury. I do not see that it matters if it is merely known to the prosecution if they cannot use it in the trial.

11. And I ought to take into account both that the FTT and the Crown Court can limit any risk of prejudice to Mr Dong in his criminal trial. For this see *Akcine Bendrove Bankas Snoras (in bankruptcy) v Antonov and Baranauskas* [2013] EWHC 131 (Comm), in particular at §18 (ix).

12. And here the risk to Mr Dong if the civil case proceeds the criminal can be managed by the FTT by (1) holding the hearing in private (2) refusing to allow the proceedings to be recorded, or if it is not possible in the RCJ to do that, then to refuse permission for the recording to be released to transcribers and (3) to refuse to publish the decision until after the hearing of the first instance criminal case. That will prevent any prejudicial matter arising in the hearing or from the Tribunal's decision being known to the jury at the criminal trial.

13. Any such prejudicial matter may be known to the prosecution, of course, but the criminal court can prevent the use of it by the prosecution. It can, for instance, prevent cross examination on anything Mr Dong said in the Tribunal hearing. And certainly the Crown Court could exclude the FTT's findings so there should be no risk of the FTT's decision being used against Mr Dong; for instance, the criminal court judge could prevent, in the event Mr Dong loses the FTT case, the prosecution suggesting to the jury that Mr Dong is dishonest because the FTT found he did not declare his taxable income.

14. So there is nothing here which would justify a stay of the civil proceedings.

15. Mr Marsh-Finch pointed out that Mr Dong has a right of silence but, as pointed out by Mrs Justice Gloster in the *Snoras* case, this is not infringed as he can refuse to incriminate himself in FTT (§18(iv)-(viii). Practically, an exercise of this right may make it difficult for Mr Dong to succeed in the FTT, but there is nothing to stop him putting an exculpatory case forward if he has one. It seems to me that the real risk to him is if he says (or is accused of saying) something in the FTT which is inconsistent

with what he says in the criminal court. But as I have already said, this risk is done away with as long as the criminal court judge prevents the use by the prosecution of damaging testimony given by Mr Dong in the civil case.

16. Therefore, I do not think that this amounts to a real risk of prejudice in that the risk can be done away with by suitable directions in the criminal hearing.

17. However, what does concern me is Marsh-Finch's point that it would be oppressive for Mr Dong to be fighting both cases at the same time, especially when the criminal case is predicted to last 3 weeks long and the FTT hearing, although significantly shorter, may still take three or four days. Realistically, there is no possibility of the FTT setting down this case before May. The Tribunal will give a couple of weeks for parties to provide their listing information and then would normally give about two months for the preparation of bundles, their exchange, and the preparation of skeletons and their exchange. I also note, as mentioned below, that the Tribunal would want to give the appellants time to consider the disclosure in the criminal case as it may contain something helpful to their FTT case and that disclosure is not expected to take place until the end of March/start of April. So realistically, the hearing window for the FTT case would be May- September 2016 in any event. Mr Marsh-Finch has informed me, and Mr Stone has not suggested otherwise, that the criminal trial is expected to take place in July 2016, a date which is right in the middle of what would otherwise be the expected hearing window for this appeal.

18. It is obviously prejudicial if the FTT hearing took place during the criminal trial and it seems to me it is prejudicial if it takes place when Mr Dong should be preparing for his criminal trial. The only way to mitigate that risk is to move the hearing window of the civil case to later in the year (as it cannot be moved forwards): I recognise however that there is a risk that when the criminal case is actually set down it may not be in July and even if set down in July, it may for some reason or another be adjourned. It would be most unfortunate to delay the hearing of the FTT case only for the criminal case to be deferred as well.

Other reasons for a stay?

19. I considered whether I should grant a stay of the case for other reasons.

20. Mr Marsh-Finch intimated that the appellants hope to win proceedings currently under foot in the High Court to release sufficient of their frozen assets to pay for various legal matters including an expert to assist the appellants in the FTT case. But it is uncertain whether the appellants will succeed in this application and even if they do, as Mr Marsh-Finch recognised, they may not chose to use the resulting expert report.

21. As I have said Mr Dong also expects full disclosure in late March/early April in the criminal case of all the papers held by the prosecutor. Again it is not known whether the disclosure will contain anything helpful to the appellant's case in this Tribunal.

22. My view is that these are both uncertain matters which do not justify a stay of these two cases: firstly, the delay in the hearing over the frozen assets is down to the appellant. They could have made this application at any time and certainly at any time during the two years since my decision on postponement (see [2014] UKFTT 128 (TC)) from which (says Mr Marsh-Finch) the lacuna in Mr Dong's evidence and the need for an expert was apparent. Moreover, the hearing in the frozen assets application has been delayed due to the need for the appellant to serve evidence, and the new hearing in March may be jeopardised by the appellant's continuing failure to serve evidence. In apportioning blame, I do not think any failures of the appellant's previous representative are relevant as that was nothing to do with the NCA. Secondly, it is uncertain whether anything would result from the disclosed paperwork or an expert's report would assist the appellants in their case. Thirdly, bearing in mind that the FTT hearing at best could not take place before May, there is time, even if the case is not stayed, for the appellant to consider the disclosure (and expert's report, if any) and make any consequential applications to admit evidence.

23. In conclusion, these further matters do not justify a stay of the case either.

Reasons not to stay the case?

24. The assessments against Ms Fang is long outstanding and she has benefit of postponement of assessed tax and is at no risk of confiscation proceedings as there are no criminal charges against her. There is therefore real detriment to the NCA if her case is stayed as they are kept out of the money to which they claim entitlement.

25. There is far less detriment to the NCA so far as Mr Dong is concerned, and the assessments against him are much higher. Mr Dong does not have the benefit of postponement of the tax during the civil proceedings: while it is true that the NCA had been unable to proceed with enforcement of my decision on postponement (referred to above) during the pending appeal to the Upper Tribunal, that appeal was struck out in October 2015 and HMRC have now commenced enforcement proceedings against Mr Dong.

26. Mr Stone sought to persuade me that I should not consider this relevant because one of the grounds on which Mr Dong is challenging the enforcement proceedings is that the FTT proceedings are outstanding. However, while that may be so, it does not mean that that challenge will be successful. The High Court will apply the law and so far as s 55 TMA is concerned, Mr Dong has no right to postpone collection of the tax during the appeal against his assessments. There may be other grounds on which Mr Dong can resist enforcement on which I cannot comment, but the outstanding FTT appeal is not one of them.

27. So I do consider that there is little financial detriment to the NCA in so far as Mr Dong's appeal is stayed: nevertheless, there is a general public interest in cases not being unnecessarily delayed and evidence becoming stale, and these appeals date back to 2012 and the assessments to 2003-2009.

Conclusion

28. In summary, unnecessary delays are inimical to justice, and there is detriment to the NCA in a stay even if that detriment is mostly with respect to the smaller assessments in Ms Fang's case, so I should not stay the hearing of this appeal unless I am persuaded there is a good reason to do so and the criminal proceedings are not a good reason for a stay unless otherwise there is a real risk of prejudice to Mr Dong in the criminal proceedings.

29. It would in my view be clearly inappropriate to stay the civil case pending final resolution of the criminal case, as suggested by Mr Marsh-Finch, as that could take years and in any event the prejudice (if any) would arise in the criminal hearing and not in any criminal appeal. So I am only really considering whether to stay the civil case until after the verdict in the first instance criminal hearing.

30. And as I have said above, I see no reason why in general this civil case could not take place before the criminal hearing taking into account that it is concerned with different allegations in a different periods and, to the extent something is said by the appellants in the civil hearing detrimental to Mr Dong in his criminal trial, both the FTT and criminal court can effectively prevent jury knowing of it or the prosecution using it and so no stay is justified on these grounds. There is also time, even without a stay, for the appellants to apply to admit documents from the criminal disclosure and/or an expert report (assuming the appellants do not further delay the hearing of their application to release frozen funds, and if it succeeds).

31. However, because of concerns of a real risk of prejudice with the FTT case being listed too close to or even during the criminal case, I consider that while a stay is not justified, I cannot direct a hearing window which I would otherwise have directed of May-September 2016. So I direct that:

(1) Both parties shall provide their dates to avoid and time estimate by 11 March 2016 for a hearing in the period September-December 2016;

(2) If at any time from now either party discovers that the criminal trial is likely not to take place in July 2016, they should immediately inform each other and the Tribunal. And if that happens, the Tribunal will reconsider what is the appropriate hearing window and (if the criminal trial is put back) may bring forward the hearing of the civil appeals.

(3) If the hearing of the appeal in the FTT takes place before the verdict in the criminal trial, it will be in private;

(4) If the hearing of the appeal in the FTT takes place before the verdict in the criminal trial, either there will be no recording made of the hearing or the recording will not be released to anyone, including that it will not be released to transcribers; short hand writers will not be permitted to attend.

(5) The decision of the Tribunal in the substantive appeal will not be published until after the jury has reached its verdict in the first instance hearing of the criminal trial.

(6) Directions 5 to 10 of my directions dated 30 September 2015 will remain in force.

(7) The Tribunal will assume that a Chinese Mandarin interpreter will be required for the whole hearing unless informed otherwise by the appellant in advance.

In so far as the criminal trial is concerned, it is for the appellant's representatives to make such applications to the criminal court judge as they consider indicated in order to prevent any detrimental evidence from Mr Dong or findings (if any) in the civil case being used by the prosecution.

32. 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: 22 FEBRUARY 2016