[2018] UKFTT 160 (TC)

TC06413

Appeal number: TC/2016/02491

Costs – assessment. Basis of assessment – loss of a chance of saving costs caused by an unreasonable refusal or neglect to engage – a permissible basis – yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK CANNON **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. IAN MENZIES-CONACHER.

Upon Receiving a written application for an award of costs to be made in favour of the Appellant further to the Decision of the Tribunal in the substantive appeal,

And Upon considering the Respondents written response thereto,

And Upon considering the Appellant's representations to the written response,

Und Upon considering rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009,

DECISION.

1. The appellant, Mr Cannon, who was the substantially successful party in contested proceedings before the Tribunal which took place on 23 and 24 October 2017 has, by his Leading Counsel, made an application for an award of costs pursuant to rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, on the basis that the respondents acted unreasonably not only during the hearing of the appeal, but also subsequent to the appeal being lodged with the Tribunal and prior to it coming on for hearing.

2. This appeal was heard within a regime where there is usually no costs shifting, with the result that neither party is usually on risk of costs being awarded against it unless an application can be founded on the basis that there has been unreasonable conduct on the part of the other party in bringing, defending or conducting the proceedings.

3. We gratefully adopt the formulation of the approach to be taken set out by Judge Brannan in Eastenders Cash and Carry plc v HMRC [2012] UKFTT 219 at [91].

4. The appellant puts his application on two separate and distinct bases:
    a. That the respondents acted unreasonably in rebuffing the appellant's proposal for meaningful settlement discussions subsequent to the appellant withdrawing his application dated 01 August 2016 for amended directions and disclosure, so that there would be no prejudice to the prospect of obtaining a global settlement between the appellant and the respondents. The respondents were represented at that hearing, on 9 January 2017, and were on notice that the application was withdrawn on that specific basis. The respondents do not dispute that the appellant's then counsel had proposed during a telephone discussion on 05 January 2017 that the allegation against the appellant that he had deliberately made an incorrect furnished holiday letting loss claim should be withdrawn on the basis that it had no realistic prospect of success and that a global settlement should be discussed. That was met with a telephone call from the respondents

(after 09 January 2017) to the effect that it was determined to pursue the allegation of deliberate conduct.

b. That during the course of the appeal hearing before us counsel for the respondents asserted, absent a proper basis for so alleging, that when the appellant gave evidence that he had obtained certain advice from his retained accountant, in respect of the furnished holiday letting loss claim, he was being dishonest. In other words, absent any evidence to demonstrate that oral advice of the type described by the appellant had not been given, the appellant's evidence that such advice had been given was challenged as being dishonest.

5. We must also keep in mind that an application for costs based upon unreasonable conduct can only succeed if there is a causal nexus between any identified unreasonable conduct and all, or an some part, of the costs claimed. In other words, the identified unreasonable conduct must have been causative either of all the costs incurred being incurred or, at the very least it must have been causative of costs being incurred over and above those which would otherwise have been incurred.

6. Insofar as the allegation that the appellant made a deliberately incorrect furnished holiday letting loss claim is concerned, we roundly rejected the case advanced by the respondents. That, of itself, cannot lead to an award of costs on the basis that at least some costs were incurred by reason of that case being pursued. The test that we apply must not be based upon hindsight, but, rather, upon (i) what was known to the respondents at the time when they chose not to engage in discussions/negotiations, per the invitation made by telephone on 05 January 2017 and (ii) upon what was known at the hearing when the allegation was put to the appellant that he was being dishonest when he said that his accountant had given him certain advice.

7. In normal civil litigation the refusal by one party to enter into settlement discussions or a refusal to engage in mediation, is one factor that a court can take into account when exercising its discretion concerning the award of costs. However, that does not obtain in this Tribunal where there is no discretion to exercise unless and until one party can establish that costs have been incurred over and above those which would otherwise have been incurred, by reason of identified unreasonable conduct. Nonetheless, argues

the appellant, such refusal is capable of being characterised as unreasonable conduct once the appeal has been lodged with the Tribunal. The ethos in civil litigation since the introduction of the CPR has very much focused upon parties co-operating with one another and with the Court/Tribunal and, wherever practicable, engaging in discussions and/or alternative dispute resolution which, even if it does not fully resolve a particular dispute, might serve to narrow issues and thus save hearing time which, in most cases, also leads to a reduction in costs. The higher courts have clearly signalled that those who decline to engage in that kind of process do so at risk of adverse costs consequences.

8. The respondent's refusal or failure to enter into meaningful discussions took place, notwithstanding that subsequent to the appellant being interviewed under caution in October 2013, the respondents had concluded (in July 2014) that there was insufficient evidence of dishonesty to warrant any criminal charges being laid. We appreciate that an argument can be made that given the different standards of proof involved in proving a criminal charge and raising an allegation of deliberate conduct in proceedings where the civil standard of proof applies, it is not necessary for the later decision to follow the earlier decision (not to prosecute). Nonetheless, in the context of such a decision we would have expected the respondents to apply anxious scrutiny to their case and particularly to consider whether it should still be pursued on the basis of an allegation of deliberate conduct. In the foregoing context, we consider that it was unreasonable for the respondents to decline to engage with the appellant (and his legal advisers) with a view to settlement of the matters then joined between the parties. The respondents might have rejected the arguments that would have been put to them had such discussions/negotiations taking place, but equally, had they listened to such arguments and representations with an open mind, the respondents might have been persuaded to change their stance. Given our conclusions as set out in our Decision in the substantive appeal, we have little doubt that this was driven by the respondents' myopic belief in the right of their own case. The respondents manifested a closed, or even a determined, mind, so far as the main issue in contention was concerned, notwithstanding that, as made plain in our substantive Decision, there were compelling reasons to conclude that the appellant's conduct had not been deliberate.

9. This feeds into the evidentially unsupported and opportunistic allegation that was put to the appellant during the hearing before us, to the effect that when he said that he had received certain advice from his accountant and tax adviser on the holiday letting loss issue, he was lying. Perhaps it was thought inevitable that this should be the stance taken by the respondents, because they recognised that if the appellant's evidence on that issue went unchallenged it was evidence that substantially (but maybe not fatally) undermined the case then being advanced by the respondents (to the effect that the appellant had made a deliberate error concerning the holiday letting loss claim).

10. The appellant's witness statement left the respondents in no doubt about his case and the evidence that he adduced to support it. The respondents knew that the appellant's evidence would be that he had received certain advice from his accountant and absent any evidence, even circumstantial evidence, pointing in a contrary direction, saw fit to instruct counsel to put that this was untruthful evidence. Professional standards demanded that before such an allegation was put there must be some evidential basis to justify such an allegation, which is especially serious when levelled against a professional person or indeed any person of good character.

11. Accordingly, we find ourselves in agreement with the submission made on behalf of the appellant that there was pre-hearing unreasonableness in the respondents' refusal (or its neglect) to enter into meaningful discussions. We are satisfied that this occurred because an entrenched position was being adopted which was deaf to any kind of explanations and/or arguments that could properly be advanced on the part of the appellant with a view to a different stance being taken.

12. We also find ourselves in agreement with the submissions made on behalf of the appellant to the effect that it was unreasonable to make an evidentially unsupported allegation of dishonesty against the appellant, which amounted to an allegation of perjury, when his evidence about the oral advice provided by his accountant was challenged in the uncompromising terms that we have described.

13. We then have to ask whether those two individual instances of unreasonable conduct have been causative of either the costs of the appeal being incurred or, at the very least, costs being incurred which are over and above those which would otherwise have been incurred.

14. So far as the evidentially unsupported allegation of perjury is concerned, that did not cause the appeal hearing time to extend beyond that which would otherwise have been necessary. In that sense, it was not causative of costs over and above those which would otherwise have been incurred, being incurred.

15. So far as the failure to engage in pre-hearing settlement discussions is concerned, we take a different view. Plainly, we cannot speculate about what the outcome of such discussions would have been but we can be certain that the failure to engage in them meant that there was the loss of the chance that the entire costs of the hearing before us could have been or might have been avoided altogether.

16. The question then arises whether a proportion of the appellant's costs can be awarded against the respondents on the basis that the loss of a chance of such costs being avoided is sufficiently causative (in the sense identified above) to allow a summarily assessed award to be made. By analogy with the rule in ordinary civil proceedings where damages can be assessed by reference to the value of the loss of a chance, for example, in a case where negligence is proved against a defendant, but that negligence has only resulted in the claimant suffering the loss of a chance that a particular outcome would have been achieved, we are satisfied that such an approach is legally permissible.

17. The far more difficult question arises in respect of the assessment of the loss of that chance. This is not simply a matter of looking at the respondents' approach to the litigation because, if that was so, it would mean that the respondents could argue for a very low assessment on the basis that their resistance to any kind of settlement was manifest and so an outcome to the discussions/negotiations which avoided the need for the costs of the hearing to be incurred, was most unlikely. Thus, in our judgement, an objective approach needs to be adopted with the Tribunal assessing the extent to which

there was a realistic chance of the discussions/negotiations resulting in a settlement that would have avoided the costs of the appeal hearing, by reference to the facts and disclosed evidence then in being. We say "then in being" so as to make it clear that there must be no element of hindsight brought to bear.

18. It follows that any such exercise cannot be undertaken on a scientific or precise basis. Any assessment necessarily involves the Tribunal making its best assessment of the prospects of a negotiated outcome, satisfactory to each party, being reached had such discussions/negotiations been entered into by the respondents after the appellant had invited the respondents to engage in same. Our assessment is that if the respondents had entered into such discussions/negotiations with an open mind and made an objective assessment of the then available evidence, there was (or should have been), at least a 50% chance that the appellant would have persuaded the respondents of the right of his position, which, we are satisfied, would have led to no hearing costs being incurred. When we say "the right of his position" we are referring to the appellant's desired outcome that the respondents should resile from the allegation that he had deliberately made an incorrect furnished holiday letting loss claim.

19. It follows that in our judgement, this appeal calls for an award of costs against the respondents as to 50% of the appeal costs incurred by the appellant since 1 May 2017. We choose that date because if the respondents had agreed to engage in meaningful discussions/negotiations that would have involved one or more meetings being convened after the hearing on 09 January 2017 and, perhaps a little generously, we consider that a period of four months (or thereabouts) would have been reasonable to facilitate any such meeting or meetings and for any compromise agreement to be reached.

20. The appellant has submitted a summary of its costs incurred, but some of those costs pre-date 01 May 2017. We have not been given sufficient information to allow us to establish which of those costs pre-date 01 May 2017 and those which post-date that date. Accordingly, our costs decision is that the respondents must pay to the appellant

50% of his litigation costs incurred after 01 May 2017, such costs to be assessed by the Tribunal if not agreed between the parties.

21. In the event of agreement not being reached :

    a. The appellant must serve upon the respondents and the Tribunal a detailed Schedule of Costs incurred and claimed, by 01 August 2018.
    b. The respondents must, by 30 August 2018, serve upon the appellant and the Tribunal its response to that Schedule of Costs, indicating those costs which are agreed and those which are in dispute (or partly in dispute) and, if in dispute, to what extent and why.
    c. Thereafter the appellant has 14 days from the date upon which the respondents serve their response to submit any written rejoinder to the respondents' response.
    d. Unless the parties or either of them request an oral costs hearing, the Tribunal will then determine the application on the basis of the written submissions.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 27 MARCH 2018