[2018] UKFTT 313 (TC)

TC06543

Appeals numbers: 17/2919
17/2920, 17/2769, 17/2766, 17/2903
17/1700, 17/2923, 17/2532, 15/4298
17/3831, 17/2925, 17/1042, 17/4985

PROCEDURE– disputed application for stay – test to be applied – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARDNER-SHAW UK LIMITED **Appellants**
GARDNER-SHAW (LONDON) LTD
BEST PRICE RETAIL & WHOLESALE LTD
DRINKS 4 LESS (UK) LTD
CASA DI VINI LTD
NEMESIS TRANSPORT LTD
HARP WINES & SPIRITS LTD
HARE WINES LTD
DRINKS STOP CASH & CARRY LTD
CONTINENTAL CASH & CARRY LTD
DHILLONS BREWERY LTD
LONDON CASH AND CARRY LTD
MAGICSPELLBREWERY LTD

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 2 May 2018

Mr D Bedenham, Counsel, for the all the Appellants above listed except Continental Cash and Carry Ltd

Continental Cash and Carry Ltd was not represented and did not appear

Mr W Hays, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Continental Cash and Carry Ltd

1. HMRC applied for a continuation of the stay in all of the appeals the subject of this hearing; all of the appellants have objected to the application.

2. Continental Cash and Carry Ltd was not represented at the hearing and according to the Tribunal's records had no representative at the date of the hearing. The Tribunal's records indicated that the notice of hearing was sent to the appellant at its registered office. I was therefore satisfied that reasonable steps had been taken to notify the appellant of the hearing. I also considered that it was in the interests of justice for the hearing to take place in their absence as they had been notified of it but had chosen not to attend, and the issue of the stay needed to be resolved.

Background to application

3. The appellants' appeals (save that of Magicspellbrewery Ltd) all concern the new alcohol wholesalers registration scheme ('AWRS') which was established by s 54 Finance Act 2015 with effect from 1 January 2016. In brief, the effect of the new legislation was to require all wholesalers of duty paid alcohol to be approved by HMRC. All of the appellants made applications to HMRC under the new legislation to be approved as wholesalers of duty paid alcohol and all except Magicspellbrewery Ltd were refused. Magicspellbrewery's appeal concerned a refusal by HMRC to register under the relevant legislation as a Class A and Class B brewer.

4. All have appealed to this Tribunal HMRC's decision to refuse to register them under the applicable legislation. It is accepted that they all have a right of appeal and the Tribunal has supervisory jurisdiction conferred on it by s 16 Finance 1994. The appeals were lodged with this Tribunal at various times, but all between the dates of January and May 2017.

5. Directions in all the above appeals, and other AWRS appeals, were issued and all required HMRC to disclose:

> 'all documents which were considered by [HMRC's] officer when reaching the decision at issue'

6. HMRC applied for these directions to be varied in a number of AWRS appeals but its application was unsuccessful by decision of the FTT dated 15 May 2017. HMRC appealed the FTT's refusal to vary the disclosure direction, but the FTT's decision was upheld by the Upper Tribunal on 6 December 2017.

7. The appeals were all stayed pending the outcome of the Upper Tribunal decision. HMRC have now applied for a further stay pending the outcome of their application to the Court of Appeal for permission to appeal against the Upper Tribunal decision. The appellants opposed the application.

8. In the hearing I was informed that the Court of Appeal was likely to decide the application for permission to appeal between June and September this year. If permission is granted, it will be even longer before the outcome of HMRC's appeal against the FTT's disclosure decision is known.

What is the correct approach in law to an application for a stay?

9. Both parties were agreed that the FTT had the power to order a stay; they were not agreed over whether I should order the existing stay to continue.

10. The parties were not entirely agreed on the correct approach in law to an application for a stay. HMRC relied on what was said by the Court of Session in *RBS Deutschland GmbH* [2007] STC 814 where it was said that a court might stay proceedings against the wishes of a party

> 'if it considers that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it is expedient to do so.'

11. Mr Hays pointed out that this test had been relied on many times in the FTT and I was referred to, as examples, the cases of *Coast Telecom* [2012] UKFTT 307 (TC) and *Waverton Property LLP* [2017] UKFTT 0853 (TC) where both judges had pointed out that 'material assistance' did not require the pending decision to be *determinative* of the case in which the application for a stay was made.

12. The appellants, however, drew my attention to the Court of Appeal decision in *Defra v Downs* [2009] EWCA Civ 257, where Sullivan LJ said:

> [8] the approach to be adopted in respect of applications for a stay is clearly set out in the notes to CPR 52.7. A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
>
> [9] It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal…..

13. The appellant's position was that, to the extent that there was a difference in approach between them, *Defra v Downs* was to be preferred to *RBS Deutschland.*

14. However, while the dicta in the two cases is worded very differently, I find it difficult to see a material distinction between the different statements of the test.

Clearly, no stay should be ordered behind the decision in another appeal if it was not expected to be of material assistance in determining the appeal in question. But this is what I think that Court of Appeal meant by requiring there to be 'solid grounds' before a stay could be contemplated.

15. And whether an appeal should be stayed behind a decision in another appeal which is expected to be of material assistance clearly requires the Tribunal to conduct a balancing exercise between the parties. Once it is established that there is a pending decision likely to be of material assistance in the determination of the appeal before the tribunal, I do not think that either court ruled that there was some kind of presumption against or in favour of a stay: it is simply question of balancing the risks of injustice to each party. And that is what I take the Court of Session to have meant by the word 'expedient'.

Will the final determination of the interim decision in Hare Wines be of material assistance?

16. HMRC either has (or will) in all the appeals before this tribunal applied to set aside the disclosure order; the Tribunal must determine that application before the appeals can be determined. The outcome of the appeal against the interim decision in *Hare Wines* will be effectively determinative of the applications to set aside the disclosure orders; certainly it will be of material assistance in resolving them.

17. The question is therefore whether it is expedient to order the stay and that requires all the relevant circumstances of the case to be considered, and in particular the risk of injustice to each party if the stay is ordered or not ordered to continue.

Prejudice to the appellants if stay granted

18. Mr Hays' position was that all of the appellants were trading save three. The three exceptions were Drinks Stop which was in liquidation; Nemesis, which was not an established trader and therefore had no interim licence to trade; and London Cash and Carry which, although an established trader, had also been unable to secure a temporary licence to trade.

19. All the other appellants were established traders who had been able to obtain an interim licence to trade.

20. It was Mr Hays' position that, therefore, a stay was of no prejudice to the appellants (save two) because they were able to trade irrespective of the refusal of registration or (in the case of Drinks Stop) were in liquidation and not able to trade in any event.

21. Mr Bedenham accepted Mr Hays' was right about which appellants were continuing to trade but did not agree that a stay was therefore of no prejudice to them. He pointed out that the injunctions from which all bar three of the appellants benefited was of the type of the injunction made by the Court of Appeal in *R (oao ABC Ltd) v HMRC* [2018] 1 WLR 1205). The injunctive relief might therefore cease before the

substantive appeals were determined. This was because the Court of Appeal had ruled that HMRC had the power, where appropriate, to grant temporary licences to trade pending appeals against refusals of AWRS approvals. It remitted the cases back to HMRC to consider whether or not to exercise its power but in the meantime permitted the trader to continue to trade.

22. HMRC were challenging the Court of Appeal's ruling that they had power to grant interim relief to traders appealing against an AWRS refusal: if HMRC won their appeal in the Supreme Court (due to be heard July 2018), the temporary injunctions would cease to be of effect.

23. Mr Hays' reply was that, even if HMRC succeeded in their case in the Supreme Court, the appellants would still be able to apply for injunctive relief directly from the High Court, albeit not from HMRC. This followed because the Court of Appeal had held in *ABC Ltd* that, irrespective of whether the legislation gave HMRC power to grant a temporary licence, the inherent jurisdiction of the High Court permitted it (in an appropriate case) to order injunctive relief pending the outcome of an appeal. The Supreme Court had refused permission to appeal against that part of the Court of Appeal's decision and so it was final. It followed that the appellants might succeed in obtaining injunctive relief until the determination of these appeals.

24. My conclusion on this was that, as far as it could presently be known, it could not be said whether or not the injunctions from which all but 3 of the appellants benefited, and which permitted them to continue to trade, would continue until their appeals to this tribunal were finally determined. If the injunctions continued, as Mr Bedenham accepted, there was no prejudice to the appellant in the stay. If the injunctions did not continue, they would be potentially seriously prejudiced by a stay as there would be a real risk a stay might result in the appeals not being heard before the appellants lost the benefit of the injunction. Once they lost the benefit of the injunction, they would be unable to trade and at that point their right of appeal against HMRC's decision which preventing them trading might become nugatory.

25. So far as Drinks Stop was concerned, it was in liquidation and not trading. Its prejudice from the stay was much more minor: there was no doubt the possibility that the liquidation would be extended if the proceedings were made longer by the stay but otherwise there was little prejudice to them in the stay.

26. The prejudice to Nemesis and London C&C was very clear: they could not trade pending determination of their appeals and any stay prolonged determination of their appeals.

The prejudice to HMRC if the stay was refused

27. HMRC had accepted in the hearing before the Upper Tribunal, as they normally did in all cases, that they had a duty of candour in the Tribunal and in particular that, even if the Tribunal only ordered disclosure of documents on which each party relied, HMRC would disclose all relevant material held by them. Relevant material is

material which is likely to assist the appellant's case or undermine HMRC's defence to it.

28. The difference between the disclosure ordered by the FTT in this case of all material considered by the officer in reaching the disputed decision, and that which HMRC accepted that it would disclose in any event was only of *irrelevant* material, if 'irrelevant' was taken to mean material which would not assist the appellant's case and which would not undermine HMRC's defence to it.

29. So far as ordinary irrelevant material was concerned, it seemed to me that the only reason HMRC objected to the disclosure of it was because of costs. It was Mr Hays' position that being required to list all irrelevant material considered, however fleetingly, by the officer before he reached his decision the subject of the appeal, was a labour intensive exercise.

30. While I accept that, I am not convinced that it would be a very much more labour intensive exercise than would be required by a standard disclosure exercise of all relevant material: either exercise would require all documents on which the officer's decision was based to be listed; both exercises would also require disclosure of all documents which the officer considered and should have taken into account (but did not) in reaching his decision. The difference between the two is simply the additional *irrelevant* documents which were considered.

31. It seemed to me that the real issue for HMRC was with PII material. HMRC's view was that the PII material was strictly irrelevant material. While such material might well have been relied on by HMRC in reaching the decision at issue in the appeal, it would not be material which supported the appellant's case nor undermined HMRC's. On the contrary, it would be material which supported HMRC's case but on which they chose not to rely in the hearing because they did not wish to disclose it (presumably to avoid compromising the source of it). I agree with HMRC that if and to the extent the PII material merely supports HMRC's case, it would not normally be disclosable under a CPR standard disclosure order if HMRC did not seek to rely on it.

32. HMRC's reason for appealing the FTT's disclosure order and requesting the continuation of the stay pending their appeal was not, as I understood it, to prevent a situation of the cat being out of the bag and impossible to put back. The FTT's order did not require HMRC to disclose PII material to the extent a justified claim for PII was made. HMRC's request for the stay was, as I understood it, simply a matter of costs. The effect of the existing disclosure order was that HMRC would have to consider its file for each appellant, identify any PII material, follow costly internal procedures to check that the claim for PII was properly made, and then prepare an application for the claimed PII material to be withheld from disclosure.

33. Mr Bedenham's position was that his clients accepted they had no right to PII material. From that, I understood it to be his position that if any PII claim made by HMRC appeared well founded, he did not expect his clients to challenge it. It was not therefore the case that HMRC would necessarily also be put to the additional costs of defending a PII claim.

34. In conclusion, refusing the stay did not seem to involve irremediable damage to HMRC save in the matter of costs. HMRC was not in a position to recover its costs of the extra disclosure even if they ultimately succeed in their defence to these appeals: all the appeals are standard and the Tribunal will not have the power to make a costs award (save for unreasonable behaviour/wasted costs, neither of which exceptions would appear to apply here). Particularly in respect of the PII material, that the difference in cost to HMRC of the two disclosure exercises is likely to be a significant sum, but HMRC made no attempt to quantify it for me.

The balancing exercise

35. It seems to me that it is likely be some time before it is known whether the injunctions from which the appellants (bar 3) now benefit will last until their appeals are determined. If the Supreme Court upholds the Court of Appeal decision in *ABC*, HMRC will be called upon to reconsider the appellants' applications for interim licences to trade. Either HMRC will grant them or they will not; if they do not, the appellants will have to fall back on an application to the Administrative Court for injunctive relief under its inherent jurisdiction, which may, or may not, succeed. If the Supreme Court overturns the Court of Appeal decision, then the appellants will also in that circumstance have to fall back on such an application, which may or may not succeed.

36. Therefore, whether or not the Supreme Court upholds the Court of Appeal decision in *ABC*, there is a real possibility that the appellants will cease to be able to trade before their appeals in this tribunal are determined. Such an eventuality will indeed render their right of appeal nugatory and be of irremediable harm to them.

37. Refusing the stay will not necessarily prevent such an outcome but it should make it less likely. That is because the appeals can continue to be prepared for hearing without further delay.

38. Refusing the stay will only risk HMRC irremediable harm in so far as costs are concerned. It will be considerably more expensive for HMRC to comply with the FTT's disclosure order than simply to undertake standard disclosure.

39. In conclusion, assuming it is not possible or right for me to take a view on which party is more likely to win on the disclosure issue, I have to see it as equally likely either party could win.

40. But the potential consequences for the appellant of the stay being ordered are many magnitudes more severe than the potential consequences for HMRC of the stay being refused: the appellant is at risk of put out of business and being left with a nugatory right of appeal against the refusal decision of HMRC which they may be able to show was wrong, whereas HMRC would merely be obliged to undertake a significantly more expensive disclosure exercise than it might turn out they should have been directed to do.

41. But I also have to consider that the risk of irremediable harm to HMRC actually occurring is greater than the risk to the appellant. This is because (if the stay is refused but HMRC succeed in their appeal against the *Hare Wines* interim decision) the irremediable harm to HMRC in costs is certain to occur. If, on the contrary, the stay is ordered but HMRC lose the *Hare Wines* interim appeal, the irremediable harm to the appellants is not certain to occur because it is possible that some or all of them will obtain injunctions which will last until determination of their appeals.

42. A further consideration is that by refusing to extend the stay in these appeals, I risk making HMRC's application for permission to appeal the *Hare Wines* interim decision, and the subsequent appeal if permission is given, nugatory. Once HMRC have carried out the more costly disclosure exercise ordered by the FTT in these appeals, it would seem pointless for the appeal against that order to continue. I will have effectively anticipated the judgment of the Court of Appeal and (if they win) deprived HMRC of the benefit of it.

43. While I accept that that is so, it is also the position that (a) extending the stays in these appeals risks making the appellants' right to appeal against HMRC's refusal to authorise them to carry out the trade they wish to continue to carry on nugatory. One way or the other there is such a risk and I cannot avoid it. And (b) as I understand it, HMRC see a point of principle as being at stake, which potentially affects many more cases then the 13 before me, and did not suggest to me that they would discontinue their appeal against the interim decision in *Hare Wines* if I refused to continue the stay.

44. Nevertheless, taking all of the above considerations into account, it seems to me that the balance of justice is in favour of the appellants' appeals being able to proceed. The stay should be lifted in the case of the 10 appellants who currently benefit from an injunction.

45. Should my conclusion be different for the 3 appellants who do not currently trade as alcohol wholesalers?

46. It seems, on the contrary, that the risk of irremediable harm to Nemesis and London C&C is at least as great to the other appellants as they do not currently benefit from an injunction and it is not suggested that they will do so in the future. While I am aware Nemesis is a new entrant to the trade, it is still in the position that it cannot carry on the trade that it wishes to carry on unless and until it wins its appeal. A stay simply extends the inability of these two appellants to trade. The continuation of the stay should therefore be refused in the case of Nemesis and London Cash and Carry.

47. However, Drinks Stop is in liquidation and it seems to me that it is at no risk as it cannot trade whatever the outcome of its appeal. The stay should be continued in the case of Drinks Stop.

A short stay?

48. The decision of the Court of Appeal on HMRC's application for permission to appeal is expected shortly: would it be appropriate to consider a short extension of the stay until then?

49. I do not think so. If the Court of Appeal's decision favours HMRC, the short stay would be pointless unless it was extended until resolution of the appeal. And I have rejected a long stay above. If the Court of Appeal's decision was to refuse HMRC leave to appeal, then the short stay would be pointless as it would only have delayed the then inevitable exercise of HMRC carrying out the more expensive disclosure exercise, and put the appellants to increased delay pointlessly.

Direction

50. I lift the stays in the above appeals save for Drinks Stop. HMRC are directed to carry out the disclosure exercise in all the appeals except Drinks Stop as directed by the FTT on 15 May 2017. I had no representations on how long HMRC would need to comply with the Direction. I accept that there are some 12 appeals and the required disclosure exercise is extensive. Reasonable time should be allowed. HMRC has 14 days to make representations to the Tribunal (copied to the appellant) on how long they need. The appellant has 7 days to respond, and HMRC then 7 days to reply to the response. I will then decide the due date for compliance.

51. But for the avoidance of doubt HMRC must begin the disclosure exercise now: whatever time is allowed for disclosure, it will start to run from the date of issue of this decision.

52. 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: 20 JUNE 2018