[2019] UKFTT 0746 (TC)

TC07503

PROCEDURE – Appellant's application for costs – Complex category appeal – Appellant opted out of cost shifting regime – Whether respondents acted "unreasonably" in conduct of proceedings – No – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/01219

BETWEEN

LONDON LUTON HOTEL BPRA PROPERTY FUND LLP **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 3 December 2019

Jonathan Bremner QC, instructed buy DWF Law LLP, for the Appellant

Jonathan Davey QC and Nicholas Macklam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 28 March 2019 the Tribunal issued the decision in this appeal with neutral citation [2019] UKFTT 212 (TC) (the "Decision"). This allowed, in part, the appeal of London Luton BPRA Property Fund LLP (the "LLP") against a decision of HM Revenue and Customs ("HMRC") to reduce the LLP's business premises renovation allowances ("BPRA") claim of £12,478,210 by £5,255,761. The LLP had claimed BPRA in respect of sums paid, under the terms of a contract with a property developer, for the conversion of a flight training centre near London Luton Airport into a 124-bedroom hotel (the "Property"). As noted at [27] of the Decision, this was the first occasion on which the BPRA legislation contained in the Capital Allowances Act 2001 (as amended by the Finance Act 2005) had been considered by the Tribunal. Following its issue, both the LLP and HMRC sought and were granted permission to appeal against the Decision.

2. By an application dated 24 April 2019, which is opposed by HMRC, the LLP seeks its additional costs in the sum of £809,098.50 incurred as a result of what it contends was HMRC's unreasonable conduct of the proceedings.

3. Mr Jonathan Bremner QC appeared for the LLP. HMRC were represented by Mr Jonathan Davey QC and Mr Nicholas Macklam. Although carefully considered, in reaching my conclusions I have not found it necessary to refer to every argument that they advanced on behalf of the parties.

LAW

4. The power of the Tribunal to make an order for costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA"). This provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

5. As Rose, LJ (with whom Floyd and Lewison LJJ agreed) observed in *Distinctive Care Limited v HMRC* [2019] 4 All ER 111 at [7]:

> "The broad power to award costs conferred by s 29(1) [TCEA] is therefore expressed to be subject to the FTT Rules. Those Rules, by r 10, reflect the intention that the First-tier Tribunal is designed in general to be a 'no costs shifting' jurisdiction, not least because many appellants are not legally represented. Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal."

6. Insofar as it applies to the present case Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;…

> (c) If –
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer … has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs under this sub-paragraph; …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

7. In relation to having "acted unreasonably", the Upper Tribunal (Judge Berner and Judge Powell) in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) ("*MORI*") observed, at [15], that:

> "The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.

The Upper Tribunal in *MORI* went on to say, at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules."

8. What is clear, however, is that just because the Tribunal finds against a party, that party should be required to pay the costs of the other. If that were the case, as Judge Hellier said in *Wallis v HMRC* [2013] UKFTT 81 (TC) at [27], the specific provisions for Complex cases would "make no sense". The Upper Tribunal in *Hills v HMRC* [2017] STC agreed, saying at [67]:

> "Although it is generally the case that the mere rejection of an argument by a tribunal does not of itself mean that the party putting forward that argument has acted unreasonably, there are occasions when the maintenance of a particular case may be unreasonable. Although every case must be considered in its own context, I accept that one of those possible instances is where a party persists with a case in the face of an unbeatable argument that he is wrong. That was the view expressed by the First-tier Tribunal in *Leslie Wallis v Revenue and Customs Commissioners and another* [2013] UKFTT 081 (TC), at [27]; the tribunal there gave an example of persistence with a legal argument the same as one rejected by the Supreme Court, when that rejection has been brought to the party's attention. That was relied upon by the First-tier Tribunal in *Roden v Revenue and Customs Commissioners* [2013] UKFTT 523 (TCC) where the tribunal said, at [14], that a party would not be acting unreasonably when pursuing a case without merit unless he ought to have known that his case was without merit."

9. The effect of a successful application for permission to appeal by a party, such as the LLP and HMRC in the present case, in relation to the issue of costs and whether the conduct of one party was unreasonable was disputed by the parties. Mr Davey contends that it should be taken into account whereas Mr Bremner, says that it plays no part considering "unreasonable conduct" for Rule 10(1)(b) purposes. He relies on the comments of Judge Brannan in *Invicta*

Foods Ltd v HMRC [2014] UKFTT 456 (TC) who, having granted HMRC permission to appeal, said in relation to an application for costs:

> "38. … I have borne in mind the fact that an application for permission to appeal is a process in which the other party (i.e. the party that was successful in the initial appeal) plays no part. It is not entitled make submissions on the unsuccessful party's application for permission to appeal. An application for costs under rule 10(1)(b) is, however, an application in which both parties are engaged and in which both parties are entitled to put forward arguments to the tribunal, as has happened in this case. It seems to me, therefore, that I could not deal fairly and justly with the application for costs under rule 10(1)(b) if I allowed myself to be influenced by my decision in relation to the grant of permission to appeal which was part of a process in which the applicant in the issue relating to costs was unable to make representations.
>
> 39. In considering this application for costs, I have therefore confined myself to the merits of the submissions made by the parties in respect of this application for costs. I have not been influenced by the views I reached in relation to the application for permission to appeal. I recognise that this could, in an extreme case, lead to somewhat different conclusions being reached in relation to an application for permission to appeal and an application for costs under rule 10(1)(b). That is not the case in this instance, but if such incongruity has to be the price of fairness then so be it."

10. Additionally, as Judge Brannan cautioned in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91], rule 10(1)(b) of the Tribunal Procedure Rules should not become a "backdoor" method of costs shifting. As he said, at [91]:

> "The test is simply one of unreasonableness in all the circumstances of the case, but it would not be appropriate, in my view, to apply that test with a too-ready resort to the benefit of the hindsight. It is easy to be wise after the event."

DISCUSSION

11. Although its appeal was categorised as 'complex' the LLP opted out of the cost shifting regime in accordance with Rule 10(1)(c)(ii) of the Procedure Rules. Its application is therefore made under Rule 10(1)(b) and can only succeed if it is established that HMRC has "acted unreasonably" in defending or conducting the proceedings.

12. The LLP contends that HMRC acted unreasonably in the conduct of proceedings which resulted in it having to incur the cost of a hearing that took longer than it should have done because of what it says were a substantial number of irrelevant and unnecessary matters raised by HMRC, in particular that HMRC:

(1) pursued issues irrelevant to those before the Tribunal:

(2) spent time in both oral evidence and submissions in relation to agreed issues;

(3) pursued arguments that had no realistic prospect of success;

(4) belatedly sought substantial disclosure from third parties; and

(5) sought, at "the eleventh hour" to amend its statement of case.

13. It is necessary to consider each of these in further detail.

Pursuit of irrelevant issues

14. In essence this relates to what Mr Bremner contends was the reliance by HMRC on irrelevant expert evidence. He says that notwithstanding the position taken by the LLP in its Notice of Appeal HMRC adopted a very different approach in its statement of case. This included putting in issue the relevance and correctness of the valuation of the Property as a completed hotel by Edward Symons ("ES"), the market practice in relation to property

development and the reasonable cost of the physical renovation works. As a result, Mr Bremner says, the LLP was required to call its own expert evidence to counter that of the expert witnesses called by HMRC.

15. The experts called by the LLP were:

(1) David Harper FRICS, who provided two reports on valuation and costs (an application to admit a third report on day seven of the hearing was dismissed by the Tribunal) and who gave evidence for a full day (Day 9); and

(2) Douglas Smith MRICS, whose report addressed the "typical approaches" to development and development funding in the non-tax and tax driven market and whose evidence last almost half a day (Day 11).

16. HMRC relied on the expert reports of:

(1) Nicola Cochrane FRICS, FAAV of the Statutory Valuation Team at the Valuation Office Agency ("VOA") regarding the valuation of the Property as an hotel. Her evidence took a full day (Day 12);

(2) Anthony Williams MRICS of the District Valuer Services (part of the VOA) in relation to whether the development of the Property accorded with industry norms/market practice; and

(3) Paul Avo BSc, MRICS on the reasonableness of the costs in carrying out the physical works of renovation, conversion and incidental repair undertaken by the developer.

The evidence of Mr Williams and Mr Avo occupied almost a half day in total (Day 13).

17. The Tribunal, at [140] of the Decision, concluded that the ES valuation was "wholly independent" and preferred the evidence of Mr Harper to that of Ms Cochrane and accepted the criticism of Mr Gammie QC, counsel for the LLP:

> "…of Mrs Cochrane who, when cross examined, was unwilling, for perfectly understandable reasons of client confidentiality, to provide any detail, even in general terms, of her experience of undertaking valuations that could stand comparison with type of transaction with which we are concerned in this appeal. This can be contrasted with the experience of the LLP's valuation expert, Mr Harper (see paragraph 38(6), above) who was "overall" satisfied that the Edward Symmons report accurately reviewed the value of the hotel and who disagreed:
>
> > '… with the Revenue's statement that the valuation was inaccurate in that it constitutes or includes an overvaluation.'"

18. Additionally, other than record, at [42] and [43] in the Decision, that he had given evidence the Tribunal did not consider it was necessary to make any further reference to the evidence of Mr Williams. Similarly, although it is recorded, at [40(6)] that he gave evidence there is no subsequent reference to Mr Avo in the Decision.

19. Mr Bremner contends that, given the conclusions of the Tribunal, the time taken up at the hearing to cross examine these witness – their evidence in chief was contained in their respective statements/reports – was time wasted and that their evidence was irrelevant and that by adducing such evidence HMRC had acted unreasonably.

20. However, as Mr Davey says, the directions in relation to expert evidence had been agreed and endorsed by the Tribunal. These provided:

> "UPON a joint application by the Appellant and Respondents dated 17 March 2017

…

3. Expert evidence

a. Not later than 20 January 2017, the Appellant shall serve on the Respondents a document setting out:

i. whether the Appellant wishes to rely upon expert evidence; and

ii. if so, the expert area(s) in question.

b. Not later than 17 March 2017, the Respondents shall serve on the Appellant a document setting out:

i. whether they wish to rely upon expert evidence; and

iI. if so, the expert area(s) in question.

c. Not later than 31 March 2017, if either, or both, of the Parties do wish to rely on expert evidence, then the Parties shall endeavour to agree the areas.

d. Not later than 7 April 2017, in the event that the Parties are unable to agree the areas in question, the Parties are to make an application to the tribunal to call such evidence.

e. In the event that the Parties agree the areas in question then, no later than 28 July 2017, each party shall send or deliver to the other party a written report containing the evidence of each expert witness that it intends to call to give oral evidence at the hearing of the appeal, with exhibits thereto and each shall notify the Tribunal that it has done so. The written report of any such expert witness shall stand as the evidence in chief of that witness subject to such further questions as the Tribunal shall allow."

21. The scope of expert evidence was agreed by the parties and it was therefore not necessary for any application to the Tribunal to determine this matter in accordance with sub-paragraph d of the 'Expert Evidence' direction. Mr Davey relies on this in support of his argument that it was not unreasonable for HMRC to rely such evidence.

22. As the issues on which expert evidence was adduced were raised by HMRC in the statement of case, I do not consider that the agreement of the LLP to the inclusion of the evidence can have any bearing as to whether HMRC were unreasonable in the conduct of proceedings. Indeed, given the requirement under Rule 2 of the Procedure Rules for the parties to assist the Tribunal in implementing the overriding objective to deal with case fairly and justly, I would expect parties to agree to the inclusion of evidence that one party considered to be relevant irrespective of the other party's view.

23. However, if, as the LLP contends, the matters were irrelevant it would have been open for this to have been dealt with in submissions rather than adduce evidence of its own experts or spend the time it did cross examining those called by HMRC. Neither, if the evidence had been irrelevant, would it have been necessary to seek the admission of a further report by Mr Harper in response to the evidence of Ms Cochrane during the hearing and seek permission to appeal when the application was dismissed on the grounds that the evidence was, "relevant evidence necessary for the LLP to properly put its case."

24. As such, I do not accept the LLP's contention that it was unreasonable for HMRC to rely on the expert evidence it did in this case, especially as it was possible for such evidence to be completed within the allotted time in accordance with agreed timetable for the hearing.

Pursuit of agreed issues

25. Mr Bremner says that although it was not disputed that the LLP knew how the developer would apply the Development Sum and how the Capital Account and licence fee operated it did not prevent the lengthy cross examination by HMRC's counsel of Nicholas Lewis, a

Director of Downing Corporate Finance Limited the promoter of the LLP, on the first matter and "a very considerable time" of the cross examination of Mr Lewis, Michael Tracy, a director of and shareholder in the Cannock group of companies which included the developer of the Property and David Matthews, formerly of the Co-operative Bank (the "Co-op"), on the second matter.

26. Mr Lewis was cross examined for virtually two full days (Days 3 and 4), Mr Tracey a day and a half (Days 5 and 6) and Mr Matthews two thirds of a day (Days 6 and 7). This, Mr Bremner contends was unreasonable conduct by HMRC.

27. Mr Davey, however, does not accept that these issues, particularly in relation to the Capital Account and licence fee, were agreed. This he says is clear from HMRC's written argument for the hearing which, at [213], states:

> "The LLP's analysis is fundamentally flawed as it failed to take account of the possibility that the Co-op could withdraw the Capital Amount from the Capital Account under clause 3.5.3 of the Capital Account Deed. In that event, the Capital Amount would simply return to the Co-op would never be received by the Developer. It follows that at all times when the Capital Amount was deposited in the Capital Account, there was a material risk that it would simply be withdrawn by the Co-op and set off against the outstanding balance of the LLP's liability under the Co-op loan."

28. It is for the parties to determine in what way and how best to conduct litigation. Given that these issues were relevant to the issues before the Tribunal, that there were no objections to the line of questioning put to the witnesses or indeed the general area on which they were cross examined and that the evidence was concluded within the agreed timeframe, I do not consider that this amounts to unreasonable conduct on the part of HMRC.

Pursuit of arguments without realistic prospect of success

29. Before considering the correct approach to the issues the Tribunal, at [131], first considered two matters "which were the subject of much cross examination and submission during the hearing". It is in relation to the first of these, the relationships between the various parties to the transactions, particularly the LLP and the developer, that Mr Bremner says HMRC's conduct has been unreasonable. In particular that it pursued arguments that the LLP and the developer, Cannock, were not unconnected parties; that the Development Sum was not the product of negotiation; and that the ES valuation was not independent.

30. As is clear from [132] to [136] of the Decision, having heard submissions from both parties on these issues in closing, HMRC's contentions were firmly rejected by the Tribunal. However, as is clear from *Wallis v HMRC* and *Hills v HMRC*, this is not enough to find that the conduct of the unsuccessful party was unreasonable and order it to pay the costs of the successful party. To have been acting unreasonably, as is clear from *Roden v HMRC* [2013] UKFTT 81 (TC) which was cited with approval in by the Upper Tribunal in *Hills*, the unsuccessful party would not only have had pursue a case without merit but have known that it was doing so.

31. In the present case, notwithstanding the conclusions of the Tribunal, I am not satisfied that the arguments advanced by HMRC were without merit especially given the comments of Mr Gammie who, when opening for the LLP on Day 2 of the hearing, referred to HMRC's written argument saying:

> "So when the Revenue say at paragraph 174 of their skeleton argument, in the middle of paragraph 174, they say:
>
> > 'The LLP had no real opportunity to undertake any negotiation whether at arm's length or otherwise. The scheme was a fait accompli and the LLP had no real option but to accept the

> structure that had been created for it. There was no opportunity, for example, to use a different developer who would charge a reasonable amount.'
>
> Of course it didn't. Of course it didn't. It would be lunatic, it would be lunatic, if anything like that could possibly happen, because this is a project that -- this has been put together by Cannock [the developer] and the appellant [the LLP] is the funding vehicle through which equity investment is going to be made in the project that Cannock has put together. There's no slight possibility in any real commercial world that Cannock is just going to let the LLP go off and tout it around someone else, even assuming that they can find another developer who was as experienced in this particular field as Cannock and Downing [the promoter] in actually marketing these things."

32. However, even if the argument were without merit as the LLP contends I am not satisfied that HMRC knew that this was the case. As such I do not consider HMRC to have acted unreasonably in relation to these matters.

Belated third party disclosure

33. Although the substantive hearing had been listed to commence on 30 April 2018, HMRC made several disclosure applications including those against the following third parties:

(1) the Co-op on 7 November 2017;

(2) Richard Rawlinson (an investor in the LLP) on 21 December 2017;

(3) Stephen Lundy (an IFA who, as a consultant for Berkley Morgan Limited, recommended investment in the LLP to his clients) on 21 December 2017;

(4) Berkley Morgan Limited (in respect of documents not in the possession or control of Mr Lundy) on 30 January 2018; and

(5) Balfour Beatty PLC on 22 March 2018.

34. The LLP, although it was made a party to them, did not oppose the third party disclosure applications all of which were resolved by consent. The LLP did, however, express its concern at the timing of the applications and their proximity to the hearing which was listed to commence on 30 April 2018 as it was necessary for various procedural steps, eg relating to bundles and skeleton arguments, to be taken in good time for the hearing. The LLP contends that it was unreasonable of HMRC to seek disclosure from third parties at a time when the hearing had already been listed and there was insufficient time to review and evaluate the material obtained which would have enabled it to prevent duplication of documents and exclude material that was neither probative nor relevant.

35. It is also said that the additional documents obtained as a result of the disclosure applications added to the documents before the Tribunal which, as noted at [6] of the Decision, filled "some 55 lever arch files". As a result, Mr Bremner says, the LLP has been put to needless trouble and expense of having to review the disclosed material to properly prepare for the hearing and this has inevitably added to the costs of the litigation.

36. However, as Mr Macklam (for HMRC) says, the vast majority of the documents disclosed were already either in the possession of the LLP or provided in good time prior to the hearing. Additionally, to assist the LLP, HMRC prepared a list setting out the document in question, whether HMRC sought to rely on it and explaining why this was the case. HMRC also undertook a review of the Co-op documents on which it wished to rely and produced a list reducing the amount of material the bulk of which was provided to the LLP two or three weeks before the hearing.

37. Clearly much of the material obtained, especially from the Co-op was relevant. Indeed all of the documents referred to at [62] – [84 and [95] – [100] of the Decision were those obtained by HMRC as a result of this disclosure and had the disclosure applications not been the Tribunal would have been deprived of this probative material. While I accept that it was probably more inconvenient for the LLP to have to consider and review the documents disclosed nearer to the hearing than if they had been disclosed earlier, given that it would have been necessary for the LLP to have considered and reviewed this evidence whenever it had been provided I do consider that it was unreasonable for HMRC not to have made the applications sooner.

Belated application to amend statement of case

38. HMRC made an application to amend its statement of case on Thursday 26 April 2018 at 18:37, four days before the hearing was due to commence. The application, which occupied the first morning of the hearing was dismissed. Mr Bremner contends that it was unreasonable for HMRC to have made such a late application which, if successful, would have raised an additional argument without prior warning and, in any event disrupted the LLP's preparation for trial and resulted in additional costs for the LLP.

39. However, the question is not whether HMRC succeeded in its application or not, which would have been the position had the LLP not opted out of the costs shifting regime, but whether the application to amend the statement of case was without merit and HMRC knew that was the case (see *Wallis v HMRC*, *Hills v HMRC* and *Roden v HMRC*). Adopting such an approach I am unable to find that HMRC acted unreasonably in making the application.

DECISION

40. Having opted out of the Rule 10 costs shifting regime it would seem that the LLP having succeed in part in its appeal is now, by its allegations of unreasonable conduct on the part of HMRC, seeking to obtain its costs through the backdoor. However, given my conclusions above, that HMRC have not acted unreasonably, the LLP has failed to reach the necessary threshold as identified in *MORI.* As such, it is not necessary to consider the second stage, the exercise of the Tribunal's discretion, and the LLP's claim must fail.

41. Therefore, for the reasons above, the application is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 12 DECEMBER 2019