TC07725

COSTS - Rule 10 - Appellant and Respondent each applying for a costs order on the basis of alleged unreasonable conduct - Appellant supplying evidence shortly before the hearing - In considering this evidence, HMRC withdrew its opposition to the appeal - Was HMRC's conduct unreasonable - No - Was Appellant's conduct unreasonable? - No - Appellant's application for costs dismissed - HMRC's application for costs dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03788

BETWEEN

WAMMEE HOLDINGS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 20 January 2020

Andrew Young, Counsel, for the Appellant

Paul Marks, A litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is a strange case.

2. The first few steps were conventional: HMRC made a decision; that decision was appealed by the taxpayer; and the appeal was resisted by HMRC. But thereafter, the proceedings came to assume a less conventional form: the appellant filed additional evidence shortly before the appeal; HMRC decided to concede the appeal; the Appellant applied for its costs under Rule 10; and the Respondent Commissioners also applied for their costs under Rule 10.

3. Each party contends that the other acted unreasonably "in bringing, defending or conducting the proceedings" (Rule 10(1)(b)) albeit that each party points to different aspects of the other's conduct, and each party alleges that the unreasonableness of the other was manifest at different times.

4. In broad terms:

   (1) The Appellant says that HMRC should never have made the decision in the first place and/or should not have resisted the appeal;

   (2) HMRC says that the Appellant should have provided it sooner with the information which then put HMRC into the position where it could decide that the decision under challenge should be withdrawn and the appeal allowed.

5. Against that background, each party invited me to exercise my discretion in their favour in terms of costs. The Appellant's application was made on 12 June 2019. HMRC's application was made on 13 June 2019.

6. Having heard oral argument from both parties, supplementing lengthy and detailed skeleton arguments, as well as having considered a file of materials, and a file of authorities, I have decided to dismiss both applications, for the reasons set out more fully below.

7. Given that this appeal was assigned to proceed in the standard category, then the outcome, by way of the application of the default non-costs-shifting provisions of the Tribunal's Rules - is there is no order for costs. Both parties will bear their own costs of and incidental to the appeal, including their costs of and incidental to their respective costs applications.

BACKGROUND

8. These are the relevant facts:

   (1) The Appeal was brought by way of a Notice of Appeal dated 15 June 2018. It sought to challenge HMRC's decision to cancel the Appellant's VAT registration;

   (2) That decision was originally notified on 21 March 2018 (with effect from 1 December 2017). Thereafter, it was upheld (but varied) at departmental review on 18 May 2018. The variation was to amend the date of cancellation to 1 August 2013 (which was the Appellant's Effective Date of VAT Registration). The amended deregistration date was notified in a letter dated 23 May 2018;

   (3) On 31 May 2018, the Appellant asked HMRC to review the varied decision (treating it as a new decision) but HMRC refused to do so;

   (4) On 7 July 2018, the Tribunal assigned the appeal to the standard category (i.e, a non costs-shifting regime, except in certain limited circumstances);

(5) On 14 August 2018, HMRC issued its Statement of Case;

(6) On 28 August 2018, the Appellant asked for the dispute to be subject to HMRC's Alternative Dispute Resolution (ADR) procedure;

(7) On 20 September 2018, HMRC, through an official described as an ADR Mediator, refused that application, 'as your circumstances do not fit within the published criteria for acceptance. The reason I've taken this decision is that HMRC have already submitted their Statement of Case. As the case is already in Tribunal Directions (sic), the most appropriate way to resolve your dispute is to proceed to the Tribunal ..." (ellipsis in original);

(8) On 20 September 2018, the Tribunal released case management directions, with lists of documents to be provided by 26 October 2018, and witness statements by 23 November 2018. Neither party applied to vary or set aside those directions;

(9) On 26 October 2018 (i.e., on the last day) the Appellant provided its List of Documents;

(10) On 12 November 2018, HMRC provided a witness statement from Officer Bebbington, in support of its decision, together with an exhibit;

(11) On 23 November 2018 (i.e., on the last day) one of the Appellant's directors, Mr Conboy, provided a short witness statement, to which was attached a one page exhibit;

(12) The hearing of appeal was listed to take place on 22 May 2019;

(13) On 6 May 2019, the Appellant applied to file and serve an additional witness statement. That was the second witness statement of Mr Conboy. It is somewhat longer and more detailed than the first statement, and attaches a very lengthy (about 200 page) exhibit, contained in 16 numbered exhibits;

(14) On 8 May 2019, HMRC wrote and reserved their position as to the new witness statement and evidence, i.e., as to whether HMRC was going to object to its production to the Tribunal or not;

(15) At 3.24pm on 13 May 2019, Officer Bebbington, "having reviewed the new information the Directors have produced" told HMRC's Solicitor's office that she was satisfied that the Appellant had demonstrated "economic activity" and was therefore entitled to be VAT registered. She asked for "our case to be withdrawn";

(16) Very shortly thereafter, at 3.58pm, the Appellants served their Skeleton Argument (dated 9 May 2019) on HMRC. Paragraph 31 asserted that HMRC's "decision and approach" had been "wholly unreasonable", and intimated that the Appellant would make an application for costs;

(17) At 4.50pm that same day, Mr Marks (being the person at HMRC seized of the appeal) wrote to the Tribunal, copied to the Appellant's representatives, and said "following consideration of the new evidence, the Respondents accept that the appeal should be allowed and will not defend their decision. The Appellant's VAT number will be restored [...].";

(18) Mr Marks also wrote that HMRC refuted the claim that their conduct had been unreasonable, and said that they had been entitled to defend their decision "until the new evidence was received". They added: "The Respondents note their displeasure at this late evidence, which if it had been submitted either during the enquiry or with the notice of appeal would have led to the settling of this matter at a far earlier stage, rendering the Statement of Case, the production of a bundle, the witness statement, and preparation of

a Skeleton Argument by the Respondents wholly unnecessary." HMRC reserved its rights to apply for its costs;

(19) On 12 June 2019, the Appellant applied for its costs;

(20) On 13 June 2019, HMRC (cross) applied for their costs.

THE PARTIES' POSITIONS

9. The Appellant mounts a wide-ranging attack on various elements of HMRC's conduct, both before and during the appeal. It points to what it alleges to be "several discrete issues of unreasonable conduct which taken either individually or collectively demonstrate that the appeal was unreasonably defended and/or was unreasonably conducted".

10. These are:

(1) HMRC's knowledge (said to have been both actual and constructive) obtained during a criminal inquiry conducted into the Appellant's directors had led HMRC to conclude that there was no criminal case to answer "as, amongst other things, taxable supplies had been made," meaning (it is now contended) that HMRC could not reasonably assert that the Appellant was not a taxable person, and hence "a priori could not lawfully be deregistered." In short, it is said that resisting the appeal in those circumstances was unreasonable: the **'Criminal Inquiry Issue'** (my description);

(2) HMRC's review of the decision was tainted insofar as HMRC either withheld the details of the criminal investigation from the reviewing officer, *"or the review officer unreasonably chose to disregard that information and went on to unreasonably maintain the Commissioners' unlawful registration decision. Either way, such conduct is tortious - Three Rivers District Council and others v Governor and Company of the Bank of England (Nr 3) [2000] UKHL 33, as it would amount to misfeasance in public office*": the **'Misfeasance Issue"** (my description);

(3) HMRC unreasonably failed to take account of information provided to them by the Appellant, and chose, for tactical reasons, to "take the Appellant to the line before conceding the appeal": the "**Information Issue**" (my description)

(4) HMRC unreasonably refused ADR: the **"ADR Issue"** (my description).

11. HMRC's point underlying the Commissioners' application for costs is much narrower. It is that the Appellant unreasonably conducted the proceedings, insofar as it failed to file, until a relatively late stage, and shortly before the hearing, material evidence which was not previously notified "directly leading to the Respondents' decision to no longer defend the appeal."

DISCUSSION

12. Because the underlying appeal never went to a substantive hearing, but was resolved (except for the question of costs) administratively, assessment of whether conduct was unreasonable is therefore, to some extent, an exercise in conjecture, or 'what-iffery'.

13. There is no specific definition of unreasonable conduct in the Tribunal's Rules. That is unsurprising. In *Dammermann v Lanyon Bowdler LLP* [2017] EWCA 269, the Court of Appeal (Longmore and McFarlane LJJ) considered the similar provision which is applicable to civil trials on the small claims track where costs as between the parties may only be awarded when a party "has behaved unreasonably": see CPR 27.14(2)(g). There, the Court remarked: "We doubt if we can usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably" since all such cases must be highly fact-sensitive." I acknowledge that the Civil Procedure Rules are not the

Tribunal Rules, and the wording is not identical, but, in my view, the general guidance holds good. Costs cases, in the Tribunal as well as in the Court, are highly fact-sensitive.

14. In the Tribunal context, I must keep in mind the guidance of the Court of Appeal (Rose LJ, with whom Floyd and Lewison LJJ agreed) in *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010. There, HMRC had issued an information notice, which was subject to appeal. Shortly (a fortnight) thereafter, HMRC wrote to say that they had decided to withdraw the information notice, "following the recent receipt of legal advice", and the FTT formally allowed the taxpayer's appeal against the notice. Thereafter, the taxpayer applied for its costs under Rule 10(1)(b). The FTT (Judge Mosedale) dismissed that application, and the Upper Tribunal (Judge Sinfield CP and Judge Poole) and Court of Appeal agreed.

15. I do not consider that I should take account of anything which took place before 15 June 2018, i.e., the date on which the Notice of Appeal was issued. Rule 10 refers to "the proceedings". Until the Notice of Appeal was issued, there were no "proceedings" and hence nothing upon which Rule 10 can bite: see *Distinctive Care* at Para [19]. As such, I do not consider the matters set out in Paragraphs 5-11 of the Appellants' application for costs to be relevant.

16. I also bear in mind that I must always bear in mind first that my focus should be on the standard of handling the case rather than the quality of the original decision: *Distinctive Care* at Para [25].

17. Moreover, the jurisdiction to award costs is intended to be exercised in a straightforward and summary way and should not trigger a wide-ranging analysis of HMRC's conduct relating to the applicant's tax affairs: *ibid.*

The Criminal Inquiry Issue

18. Even if any matters, antedating the bringing of this appeal, were relevant, I am simply not in a position - here and now - and without having had the opportunity to hear or consider any evidence to make findings as to what was provided to HMRC at the visit on 6 December 2016, or what was said at Blackburn Police Station on 24 January 2018. The Appellant has not chosen to put before me anything substantive from the criminal investigation.

19. In my view, the Criminal Inquiry issue cannot be resolved by me in the context of this application, and that is sufficient to dispose of what I have described as the Criminal Inquiry Issue.

20. But, and even if the foregoing were wrong, nonetheless I do not think that it could safely be said that HMRC's decision to resist an appeal before the Tax Tribunal when it had previously decided not to pursue criminal proceedings inevitably connotes unreasonable conduct. The reasons are simple. The burden and standard of proof are both different in criminal proceedings from Tribunal proceedings. HMRC might have decided that it could not meet the criminal standard of proof in prospective criminal proceedings, but nonetheless decided to resist an appeal on the footing that the Appellant would fail to meet the civil standard of proof in the Tribunal. The two are not necessarily inconsistent.

The Misfeasance Issue

21. As to what I have referred to as the Misfeasance Issue, I am not in position to make any findings as to whether there was misfeasance in public office by any officer of HMRC. I have not heard any evidence. The allegation is an extremely serious one, but has not been put. Moreover, and even if there were evidence of that character, it is not a matter within this Tribunal's jurisdiction. Misfeasance in public office, as a tort, belongs to the civil courts - not to the Tax Chamber.

22. In any event, I note, albeit only in passing, that had the Appellant genuinely considered, at the time, that the making and/or maintenance of the decision either was irrational in a public law sense (e.g., it was inconsistent with the decision not to pursue a criminal inquiry) or was actuated by bad faith and/or otherwise tainted with impropriety, then it had avenues outside the Tax Chamber to broach those issues, but - as far as I am aware - did not do so.

The ADR Issue

23. I am going to deal with this issue out of sequence.

24. On 28 August 2018, the Appellant asked for the dispute to be subject to HMRC's Alternative Dispute Resolution (ADR) procedure. On 20 September 2018, HMRC, through an official described as an ADR Mediator, refused that application, 'as your circumstances do not fit within the published criteria for acceptance. The reason I've taken this decision is that HMRC have already submitted their Statement of Case. As the case is already in Tribunal Directions (sic), the most appropriate way to resolve your dispute is to proceed to the Tribunal ..." (ellipsis in original).

25. 'The published criteria for acceptance' were not placed before me.

26. In reality, I am being asked by the Appellant to rule that HMRC's refusal, at that time, was unreasonable conduct. That is to say, I am being asked to find that HMRC's reliance on its published criteria for acceptance, in this case (and even considering it in that narrow sense, and without looking at HMRC's ADR policy in general) was unreasonable conduct of a kind capable of sounding in an adverse costs order. There is simply insufficient material before me permit me to reach any such conclusion.

27. I was taken to the well-known guidance of the Court of Appeal (Maurice Kay, Beatson and Briggs LJJ) in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288. That was a case (unlike this one) where a party had declined to respond to an invitation to participate in ADR in any way (i.e, complete silence). Here, the point is whether HMRC's refusal to take part in ADR was unreasonable: see *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, with the principles set out at *PGF II SA* at Para [22].

28. One thing which I would have to consider is whether ADR would have enjoyed any reasonable prospect of success. When the invitation was extended, the best evidence of the evidence and material which the Appellant would put forward in any ADR can be taken from what it did subsequently put forward in its first witness statement. That was insufficient to change HMRC's mind. HMRC only changed its mind following the second witness statement. It is far from clear to me, even had HMRC responded differently to the ADR invitation, that the ADR had any reasonable prospect of success at that time.

29. The Appellant bears the burden on the ADR issue, and has failed to discharge that burden.

The Information Issue

30. The burden of proof lay on the Appellant to establish that HMRC's decision was wrong (i.e., that the Appellant had been correctly registered for VAT and was engaged in taxable activities).

31. The Tribunal's directions were in standard form, and, in relation to both documents and witness statements, the directions clearly set out what the Appellant was to do. The Appellant did not apply to vary or set aside those directions.

32. The first witness statement was not produced in a factual or legal vacuum. The Appellant knew what HMRC's position in relation to this appeal was. That position was clearly set out (at the very latest) in HMRC's Statement of Case. In particular, the Appellant knew that the key point of HMRC's case was its contention that "on the evidence put before them ... the

Appellant does not meet the fourth requirement stipulated by section 4 [of the VAT Act 1994]; in that the 'management charges' were not made in the course or furtherance of the business': see Paragraphs 23 and 28 of the Statement of Case. By the point of Mr Conboy's first witness statement, the Appellant had had the Statement of Case for about 3 months.

33. Against that background, Mr Conboy's first witness statement (23 November 2018), is, on the face of it, is strikingly inadequate, even if it to be read alongside what is said in the Notice of Appeal. Although it is not possible to say definitively whether that witness statement, even if supplemented by such oral evidence in chief as the Tribunal may have allowed, would have discharged the burden of proof on the Appellant, it nonetheless does seem to me that the Appellant, in putting in evidence of the kind and extent that it did, was running a real risk of falling short of discharging its burden of proof.

34. Mr Conboy succinctly asserts that "the Appellant's aim is, and always has been, to make a profit." In support of this assertion, and in purported demonstration of it, he exhibited a one-page spreadsheet "outlining the income and expenditure of the Appellant which demonstrates this fact." That spreadsheet sets out, from November 2013 to October 2018, a 'Summary' with 'Notional Tax' outputs and inputs, and 'Net of VAT' sales and costs. This does not appear to be a summary report generated by accounting software. Mr Conboy does not say anything as to how those figures have been arrived at. None of the underlying prime documents are exhibited, or even referred to. Mr Conboy says nothing of substance about any information already provided to HMRC and (in particular) how that information supported the Appellant's position and/or undermined HMRC's position. Mr Conboy is simply making a series of bare assertions, which are not supported by evidence.

35. This is not affected by Paragraph 15 of the Application for costs which asserts (again, without much particularity) "All of the business records, and detailed explanations as to the business operation had been made available to the Respondents prior to the appeal being lodged." There are three difficulties with this submission (besides the fact that it is a submission, and is not itself evidence).

36. Firstly, this is not a point which Mr Conboy makes in his first witness statement. There, he does not refer to any documents other than the spreadsheet. He does not even say that any information had already been provided to HMRC.

37. Secondly, this flows from a misunderstanding of the nature and effect of the Tribunal's directions. Those directions provide a framework and structure within which the parties must work in presenting their appeal to the Tribunal. The bringing of the appeal means that this is no longer a two-sided debate between HMRC and the taxpayer to which the Tribunal belatedly becomes an interlocutor. The Tribunal was not a party to their earlier discussions. It is not enough to say, in response to directions, 'HMRC have already had everything - they know what I have to say' because (i) the Tribunal has not had anything; and (ii) the Tribunal does not know, except in response to directions for the filing of witness statements and the provision of documents, what the parties are saying in the context of the appeal.

38. Thirdly, the underlying difficulty which the Appellant encounters here is the second witness statement. On the face of it, it comes from nowhere, a couple of weeks before the hearing, some time after the date for witness statements, and when the Appellant had already filed its evidence. Mr Conboy does not even say in his second witness statement what had led him to seek to file a second witness statement (nor does he seek any extension of time). But, as a matter of common sense, the natural inference can only be that someone on the Appellant's side had come to form the view that Mr Conboy's first witness statement was not adequate to do the Appellant's case justice (in an evidential sense, and bearing in mind where the burden

of proof lay) and that someone on the Appellant's side had decided to do something about it. That something was the second witness statement and the exhibit.

39. The second witness statement sets out new evidence (in the body of the witness statement itself) as well as exhibits a significant volume of evidence which the Appellant clearly came to regard should be placed before the Tribunal, but which had not been done in the first witness statement.

40. For the reasons already discussed, it is not enough to tell the Tribunal, as the Appellant seeks to do in this Application, 'all the things exhibited to the second witness statement had already been provided'.

41. The Appellant's List of Documents refers to 17 items, of which 15 are letters and emails described by date, sender and recipient, e.g. '4 January 2017 email from Respondents to Appellant'. During the hearing, I was told that each of those entries is intended to refer not only to the piece of correspondence itself, but also the attachments to it. I was not provided with anything to show me how what had been provided as attachments to letters married up with the List of Documents, so I cannot be satisfied that what I am told is correct. For example, the second witness statement exhibits various board minutes (MC11 to MC16) which I cannot see as referred to as annexed to any of the Appellant's letters. By way of further example, the same point can be made in relation to the long letter dated 25 June 2015 from Enterprise Ventures Ltd to the Appellant, setting out in detail the terms of a proposed investment.

42. It is my clear view that the Appellant was the sole architect of the situation it found itself in, shortly before the appeal, and when it decided to file a second witness statement. This was the Appellant's appeal to run. Decisions as to the best way in which to conduct its appeal lay entirely in the Appellant's hands. The Appellant cannot now argue that there was some element of unreasonable conduct by HMRC which caused the Appellant either (i) to file the first witness statement and exhibit in the form that it did, or (ii) to file the second witness statement and exhibit in the form that it did. In short, it was the Appellant's conduct which led to the appeal being conceded by HMRC shortly before the hearing. I am satisfied that HMRC's decision to cease resistance permits of reasonable explanation. That explanation is that the Appellant, in the context of this appeal (and regardless of anything which may or may not have been said or done before the appeal was brought) put forward new information and new documents which were considered by the officer.

43. HMRC's conduct in withdrawing the decision under appeal, when it did, was reasonable. I do not consider that HMRC were in a position to have taken the decision to withdraw sooner. I do not consider that HMRC's refusal to change their mind on receipt of the first witness statement can realistically be said to have been unreasonable on HMRC's part. On the basis of the first witness statement, the Appellant's prospects of success do not appear to have been especially promising. It is quite clear that the catalyst for the decision to withdraw was the second witness statement and the lengthy exhibit. I do not detect, from any of the materials which I have been shown, any element of 'tactics' or brinksmanship in the fact or timing of HMRC's decision no longer to resist the appeal. The case officer was consulted, she expressed her view to the litigator, and the litigator acted accordingly and promptly.

44. On the facts, I do not consider that HMRC can be said (i) to have continued to defend an appeal where HMRC knew that their position was hopeless, (ii) had unreasonably prolonged matters once they were in the Tribunal, or (iii) should have withdrawn their decision at an earlier stage: see *Distinctive Care* at [29]-[30] (citing, with approval, *Tarafdar (t/a Shah Indian Cuisine) v HMRC* [2014] UKUT 362 (Judges Berner and Powell)).

45. By the same token, and indeed for many of the same reasons, I cannot accede to HMRC's application either. It is just as unattractive as the Appellant's. This was on the standard track.

The Appellant advanced an appeal. The Appellant's evidence, as originally advanced, was not such as to persuade HMRC to change its mind. I do not consider that the fact that the Appellant chose to make a second witness statement, albeit late in the day, showed that the Appellant's conduct previously had been unreasonable. I simply do not see why it should.

46. It is true that the changes of position - of both parties - came at a late stage, but litigation is a dynamic process. Late developments do sometimes happen - they are an inherent risk of the process. But they are not such that they can generally be characterised as unreasonable conduct such as to sound in costs.

47. In my view, neither of the late developments in this case - the second witness statement, nor HMRC's response to it - can properly be said, on the facts, to be sufficiently unreasonable so as to justify the making of an adverse costs order against either party.

OUTCOME

48. The Appellant's application for costs is dismissed.

49. The Respondent's application for costs is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 22 MAY 2020