[2013] UKUT 049 (TCC)

Appeal number FTC/04/2013

Appeal by HMRC of decision of FTT to vacate hearing. Appeal allowed.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

PURPLE TELECOM LIMITED

Respondent

TRIBUNAL: The Hon Mrs Justice Proudman DBE
Sitting in public at the Rolls Building London EC4A 1NL

Mr Mark Cunningham QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Ian Bridge, instructed by Dass, solicitors, for the Respondent

DECISION

1. This is an appeal against a decision by Judge Greg Sinfield in the First tier tribunal of the Tax Chamber ("the FTT") to adjourn the hearing of a substantive appeal, an appeal brought by Purple Telecom Limited ("Purple Telecom") against decisions of HMRC to deny it recovery of input tax on the ground of allegations of Missing Trader Intra Community fraud. Purple Telecom, through its sole director, Mr Nils Wager, denies that it knew (or indeed should have known) that any of the transactions were connected with the fraudulent evasion of Value Added Tax. That substantive appeal was listed to commence on 4 February 2013 in the FTT before Judge Sinfield lasting some four weeks.

2. The matter is urgent: this appeal has been expedited and the listing of the February hearing has been retained in the FTT's diary with a view to the main hearing going ahead if HMRC's appeal succeeds against the decision to vacate the trial. Mr Bridge for Purple Telecom says that if the appeal succeeds it will be inappropriate for Judge Sinfield to hear the trial. I say nothing about that as it seems to me it is a matter for him in the circumstances whether to recuse himself.

3. HMRC's appeal is brought on five grounds. The FTT gave permission on two of those grounds and the hearing today is of that appeal plus the hearing for permission on the other grounds followed, if successful, by the hearing of the appeal as a whole. The first two grounds are based on the premise that the FTT made wrong findings of fact; the second two are based on a wrong exercise of discretion.

4. Purple Telecom applied on 18 December 2012 for vacation of the hearing on the ground that Mr Wager was undergoing psychiatric treatment and was medically unable to give instructions, to prepare for the trial and to attend the trial and give evidence. The application was supported by a letter dated 13 December 2012 from Mr Wager's psychiatrist Dr Bakshi, stating that Mr Wager was experiencing low mood, generalised anxiety and panic attacks and was not able to concentrate and instruct solicitors at present "at least for the next few months". "His symptoms are interfering with his cognition and concentration. He will be disadvantaged if he was cross-examined in his present mental state."

5. The first hearing of the application was on 19 December 2012. The Judge directed that an independent consultant psychiatrist should be jointly instructed to examine Mr Wager and prepare a single joint expert's report as to his ability to give instructions and give evidence. Mr Wager made himself available that same afternoon, the joint expert completed his report on 23

December and provided it to the parties and the FTT on 4 January 2013. At the adjourned hearing the FTT considered Dr Wise's report and heard submissions from counsel on both sides. As a result, the FTT vacated the hearing.

6. Judge Sinfield's reasons bear reading in their entirety. However, I quote the following passages:

> "It is, of course, true that there will inevitably be great inconvenience and some wasted costs if the hearing of the appeal currently listed to commence on 4 February is vacated at this late stage [Mr Cunningham QC for HMRC pointed out, as is the case, that it was unlikely that the appeal would be re-listed until some time in 2014] but, as explained below, I consider that such considerations are outweighed in this case by others derived from the overriding objective in…the …rules…
>
> While it is clear that there are some inconsistencies between Mr Wager's scores on the forced choice memory tests and his ability to manage his affairs, it was agreed by both Dr Bakshi and Dr Wise that there was some impairment and that this could affect Mr Wager's performance in relation to the appeal hearing…
>
> …The letter from Dr Bakshi and the report by Dr Wise lead me to conclude that…there is real doubt that Mr Wager would be able to give instructions to his advisers and fully participate in the appeal proceedings without further medication and treatment. I am also aware from the earlier hearing that, to date, Mr Wager's solicitors have experienced difficulties in obtaining instructions from him in relation to the appeal because of Mr Wager's condition. Even assuming that a higher dose of citalopram were to be prescribed [a solution suggested by Dr Wise], it is not clear that Mr Wager would be sufficiently restored to health in order to give adequate instructions to his advisers in advance of the hearing.
>
> I consider that Dr Bakshi's letter and Dr Wise's report show that Mr Wager's mental state is such that there is a real risk that he would be unfairly disadvantaged if the hearing of the appeal proceeded on 4 February 2013. Both Dr Bakshi and Dr Wise suggest that Mr Wager's condition can be improved by medication and treatment. Dr Bakshi suggests that this process would require a few months and that is not contradicted by Dr Wise. It seems to me that the only fair and just course is to vacate the hearing to allow time for Mr Wager to recover so

> that he can participate fully in the appeal proceedings when they are re-listed."

7. The right to appeal is on a point of law only: see s. 11 (2) of the Tribunal Courts and Enforcement Act 2007. Section 12 of that Act sets out what the Upper Tribunal may do if it finds an error on a point of law. It "may (but need not), set aside the decision of the first tier tribunal" and, if it does, "must either remit the case to the first tier tribunal with its directions for reconsideration or remake the decision."

8. This case therefore brings into play the considerations set out by the House of Lords in *Edwards v. Bairstow* [1956] AC 14, as explained by the Court of Appeal in *Georgiou v. Customs & Excise Commissioners* [1996] STC 463. In *Edwards,* Lord Radcliffe said at 36,

> "…it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

9. In *Georgiou* (at 476), Evans LJ, with whom the other members of the Court of appeal agreed, said,

> "The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding it made? In other words was the finding one which the tribunal was entitled to make? Clearly if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

10. This is not a case in which the first tier tribunal heard oral evidence and therefore I am in the same position as Judge Sinfield as far as evaluation is concerned. However I emphasise that the mere fact that I might have reached a different decision form him myself is insufficient. I have to find something perverse in the decision, such that no reasonable tribunal properly directed could have reached it.

11. I must also bear in mind that this a case-management decision and the discretion of the tribunal has a wide ambit. As Mr Bridge says, Judge Sinfield gave careful consideration to the question of whether he should adjourn the

hearing and concluded that he should. He was the appointed trial judge and reached this conclusion within a few weeks of the trial date.

12. In *Goldman Sachs International and Ors v. HMRC* [2009] UKUT 290, Mr Justice Norris in the Upper Tribunal said,

> "…I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues."

13. He then cites, not as establishing any novel proposition but as containing a convenient statement, the following passage from the judgment of Lord Justice Lawrence Collins in *Walbrook Trustee v. Fattal & Others* [2008] EWCA Civ 427:

> "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

14. Norris J commented, "I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system." The principle was reiterated by Arnold J in *Megantic Services Ltd v. HMRC* [2011] WL 1589.

15. Norris J went on to say,

> "…the decision of the judge of the first tier tribunal is to be accorded respect. That judge was a judge appointed for his specialist knowledge; that judge was one who daily deals with cases of the type under appeal and who, in making an assessment, can draw upon a depth of practical experience in the conduct of such cases."

16. The issue is therefore whether, as Mr Cunningham QC for HMRC submits, the evidence was contrary to the findings of Judge Sinfield such that no person acting judicially could have come to the determination under appeal, or whether, as Mr Bridge for Purple Telecom submits, the decision is not so plainly wrong that it can be regarded as outside the generous ambit of discretion given to the FTT in case management matters.

17. The first ground of appeal is that the tribunal held that the implication of paragraph 55 of Dr Wise's report was that, without a higher dose of citalopram (and until it had effect), it was Dr Wise's view that Mr Wager would not be able to perform adequately at the hearing. It is said that such a holding was unsupported by the opinion of Dr Wise that:

(a) Mr Wager understood the purpose of the action and of the hearing

(b) Mr Wager understands the purpose of counsel and can advise on the evidence presented;

(c) Mr Wager was able to use and weigh information in reaching a decision and to communicate that decision;

(d) Mr Wager has the ability to give instructions in relation to the hearing;

(e) Whilst Mr Wager may have difficulty giving evidence at the level he would like, on the balance of probabilities it is unsafe to attribute a substantial level of impairment to a mood disorder;

(f) Factors that would mitigate any impairment due to increased levels of arousal arising from a mood disorder, would be the option for short breaks during the day, at intervals of not more than 2 hours.

18. The second ground of appeal was similar, namely that having regard to those conclusions, it was wrong and perverse of the FTT to hold that there was real doubt that Mr Wager would be able to give instructions and fully participate in the appeal proceedings without further medication and treatment. In particular, Judge Sinfield held in paragraph 10 that there was real doubt that Mr Wager was capable of giving instructions and this was directly contraverted by Dr Wise's unqualified finding that he had that ability.

19. Permission to appeal was given on these two grounds on the basis that Judge Sinfield accepted that "it is arguable that I erred in relying on some parts of the body of the report in preference to the statements in the summary."

20. Permission on the other three grounds of appeal (relating to the exercise of discretion) was refused. The third ground was that the tribunal gave insufficient weight to various matters, inter alia as to the timing of Purple Telecom's application in determining the fair and just course. Judge Sinfield says that he did weigh these matters in the balance.

21. The fourth ground was that he failed to give sufficient weight to concerns raised in Dr Wise's report about some of Mr Wager's responses and test scores. Judge Sinfield said about this:

> "Although there were concerns about Mr Wager's responses and test scores, there was no dispute that he was suffering from depression and anxiety and I do not accept that I made any error in not dealing with the concerns expressed in greater detail or giving them greater weight."

22. The fifth ground is that there was no evidence to support the finding that Mr Wager's solicitors had experienced difficulties in obtaining instructions, a matter which weighed with the FTT in holding that there was real doubt that Mr Wager could give instructions. Judge Sinfield says that the finding was based on the solicitor's statement which was not contradicted.

23. It seems to me that as a preliminary matter it is important to look at Dr Wise's report as a whole before coming to the exercise of whether the appeal should be allowed or permission given. First, there is no doubt that Dr Wise agreed with Dr Bakshi that Mr Wager was suffering from depression. Paragraph 43 (read together with the earlier part of the report headed "Mental state on examination" is important. Dr Wise says:

> "From Mr Wager's description and Dr Bakshi he described symptoms consistent with a moderate Depressive Disorder. The BDI-II and BAI (explained earlier) would suggest that it was at the upper end of that range, if not severe, at least from the anxiety perspective."

24. However, Dr Wise qualifies that conclusion (again reading in conjunction with the earlier part of the report) under the heading "Unusual Results" in paragraphs 44-47 of his report, saying that the scores on many of his tests were so bad that they were worse than those obtained by people suffering from dementia or mental retardation and were inconsistent with his ability to travel, attend an appointment in central London, benefit from traditional psychological therapies, instruct solicitors or manage his property and affairs. It is plain (as Dr Wise makes several references to them) that these inconsistencies weighed heavily with him in his analysis. He concludes about this (paragraph 52) "…it is difficult to comment what the objective level of

impairment is; although I hold the opinion that it is not at the level of impairment described by Mr Wager." He says there are two possible conclusions that a court could draw. First, "Factitious Disorder" which I take to mean genuine but (in lay terms) psychosomatic symptoms. This is not something that Dr Bakshi mentioned and there is no estimate of when such symptoms might improve over time while the proceedings were still hanging over Mr Wager's head. Secondly, feigning or malingering. Again I read paragraph 54 together with paragraphs 37 and paragraph 5.3 of the summary.

25. Paragraph 55 goes on to say,

> "Whatever the level of impairment is, were he to take the citalopram consistently and at a higher dose, I would expect that on the balance of probabilities he would be better able to perform than is described by Dr Bakshi in the letter."

26. As Mr Bridge points out, better than what? Better than nothing since Dr Bakshi says that Mr Wager cannot perform at all. Also it is for Dr Bakshi to prescribe the higher dose and her views about the advisability of this are not known.

Was Judge Sinfield wrong?

27. The first question is whether the judge made a mistake about Mr Wager's capacity to give instructions and to give evidence.

28. Mr Bridge says he did not. Paragraph 10 of his decision refer to "the letter from Dr Bakshi" as well as "the report by Dr Wise" as a basis for his conclusion that there is "real doubt that Mr Wager would be able to give instructions to his advisers and fully participate in the appeal proceedings without further medication and treatment." It also refers to the difficulties Mr Wager's solicitors said they had in obtaining instructions.

29. Mr Bridge referred to Dr Wise's report paragraph 43 and 52, describing an objective level of impairment.

30. It seems to me that Mr Bridge's submissions elevate Dr Bakshi's letter to a position it does not have. Dr Wise's firm and unqualified conclusion was that

Mr Wager could give instructions relating to the hearing. Paragraph 10 of the FTT's decision gives the clear impression, in reality clearly says, that the "real doubt" was obtained from Dr Wise's report as well as the letter from Dr Bakshi. If Judge Sinfield was disagreeing with Dr Wise and preferred Dr Bakshi's evidence, in circumstances where she was his doctor, gave a short report and the FTT had commissioned an independent report, it was incumbent upon Judge Sinfield to have said so in terms. It is plain that Dr Wise disagrees with Dr Bakshi's assessment but there is no hint of this in the reasons for the decision.

31. I come to the conclusion that the FTT did make a mistake about that and that the evidence was contrary to the finding.

32. Secondly, I turn to the question of whether Mr Wager was fit to give evidence. Mr Bridge referred to paragraph 51 of Dr Wise's report, which said that it may be "possible" for Mr Wager to give evidence.

33. I observe that Dr Wise was specifically asked two, and only two, questions, first, whether Mr Wager was fit to give instructions and secondly, whether he was fit to give evidence. He is an experienced and well-qualified expert and he stated that he understood his duties. If he believed that Mr Wager was not fit to give evidence, or even that there was a serious question-mark over his fitness to do so, he would have said so. There was opportunity for him to make such a comment in the summary of conclusions in his report. Instead, he says in those conclusions (having given his opinion that Mr Wager understood the purpose of the action and the hearing, that he understood the purpose of counsel and could advise on the evidence presented and that he could use and weigh information in reaching a decision and communicate that decision) he said at paragraphs 7 and 8 of his summary:

> "7. Dr Wise holds the opinion that whilst Mr Wager may have difficulty giving evidence at the level he would like, it is unsafe to attribute a substantial level of impairment to a mood disorder."

Although there is at first blush an ambiguity in the words of this paragraph, it is difficult to reach any other conclusion in context than that there is, on the balance of probabilities, no substantial level of impairment.

> "8. Factors that would mitigate any impairment due to increased levels of arousal arising from a mood disorder, would be the option for short breaks during the day, at intervals of not more than two hours."

34. What he is saying here is that "any impairment" can be mitigated by frequent breaks in his evidence and the "slow and patient approach" advocated earlier (in paragraph 51) of the report.

35. Thus the appeal should succeed on this ground, but there is a separate question of how the discretion should be exercised. I will return to this question.

36. HMRC's secondary case is that Judge Sinfield exercised his discretion impeachably, in other words, relying on grounds 3-5 of the grounds of appeal. Mr Cunningham and Mr Westwood in their skeleton argument repeatedly referred to "minimal" impairment of Mr Wager's mental faculties. That seems to me to downplay the impairment too much. As Judge Sinfield found, the two psychiatrists both found that there is "some impairment". Unlike Dr Bakshi, Dr Wise said it was impossible to tell how much, principally because of his suspicions of malingering, save that he concluded that it was not at the level of impairment described by Mr Wager, which must mean that he concluded that it was not as great as Mr Wager's own assessment.

37. I find for HMRC in relation to grounds 1 and 2 of the appeal. As these are important findings it necessarily follows that the FTT could not have exercised its discretion correctly. If however I were wrong about grounds 1 and 2, I would not give permission under grounds 3, 4 and 5 for the reasons given by Judge Sinfield in paragraphs 5 to 7 of his decision refusing permission to appeal. Of course, in evaluating grounds 1 and 2 I have, as I have said, considered Dr Wise's report as a whole, which takes into account the matters specified in ground 4 (a)-(f).

38. By virtue of s. 12 of the 2007 Act I could therefore either remit the matter back to the FTT for reconsideration or decide how to exercise the discretion whether or not to vacate the hearing myself. The parties do not appear to want me to do the former; apart from anything else, time does not allow me to refer the matter back for a rehearing and I do not propose to do so.

39. In exercising the discretion afresh I weigh the following factors in the balance.

40. First, in favour of a postponement. There is the fact that Mr Wager is unarguably suffering from a form of depressive disorder which results in "some" impairment of his mental faculties. The overriding objective (on which the FTT expressly relied) demands fairness above all. Mr Bridge pressed upon me the inequality of arms between Purple Telecom on the one hand and HMRC on the other. He also pressed on me the very great importance of Mr Wager's reputation and credibility, both of which he said could not adequately be dealt with at an immediate trial. He explained that

Judge Sinfield would have had firmly in mind, as I should also, the difficulties faced by a person accused of participation in an MTIC fraud. It was, he said, only natural that Mr Wager should exhibit symptoms of his depressive disorder when bombarded with 7 fresh ring binders of evidence at the eleventh hour.

41. At all events, I take into account the fact that Mr Wager may be disadvantaged by having a hearing now and that (to quote Dr Wise) "it is …difficult to determine how much impairment of concentration or other cognitive function is present." Dr Wise leaves it to the tribunal to decide whether or not Mr Wager is genuinely ill: see paragraphs 50-54 of his report. One has to "weigh up [his] ability to process information in an aroused state".

42. Mr Bridge alleged that although this appeal was brought by his client as long ago as 2007 HMRC was guilty of delays along the way and only began to prepare for trial some months after the date for the hearing was notified by the FTT in April 2012. Some of the teeth were drawn from the late service of documents by the fact that the further evidence was served with the consent of the FTT by an order dated 19 November 2012, which gave Purple Telecom 14 days in which to object to it, and it did not do so.

43. Set against Purple Telecom's submissions there is Dr Wise's clear finding that Mr Wager can give instructions. He has had solicitors acting for him throughout who could be expected to take points as to his inability to give instructions. Secondly, (as Dr Bakshi appears to agree) although Mr Wager does suffer from a moderate depressive disorder it is not a severe one.

44. Thirdly, and importantly, there is the fact that there is no guarantee that (to quote Dr Wise) Mr Wager "would be able to perform as well as he would wish", if the hearing were to be postponed for a year. Even Dr Bakshi says that "His long term prognosis is good. However he is not able to concentrate and instruct his solicitors at present, <u>at least for the next few months</u>. During this period I will review his mental state and treatment. [my emphasis]" Thus there is no proper indication as to time other than a "long term prognosis", whatever that may mean. Understandably, Dr Bakshi does not commit herself to any date in deciding when Mr Wager may be fit to give evidence. On the contrary, she says she will monitor the position.

45. I also take into account the fact that the appeal relates to transactions which took place as long ago as March and April 2006 so that a fresh hearing will be more than 8 years after the date of the transactions. While it is true that much of the evidence will be gleaned from deal logs and other written documentation, time must be an important factor and this appeal cannot go on for ever.

46. Mr Cunningham submitted that Purple Telecom has always failed to engage with the proceedings, acting only reactively not proactively. In the last 12 months HMRC have written long letters about trial preparations which have been ignored or answered on the basis that instructions were being taken. The very first indication of any mental health problems with Mr Wager was on 13 December 2012, shortly before Purple Telecom made its application to vacate the trial date and in response to HMRC's own application for a Case Management Conference to break the deadlock. I note for the record that there is no evidence before me of the reasons for the delay between 2008 and 2012.

47. Lastly, Judge Sinfield found that vacating the trial date would cause what he described as "great inconvenience" and "some wasted costs".

48. Weighing all these factors in mind, I propose to exercise my discretion in favour of not vacating the trial date.

49. The inference to be drawn from Dr Wise's report is, as I have said, that appropriately managed, Mr Wager can give evidence, even if he is not found to be malingering. Doubtless, so far as possible, the FTT will accommodate Mr Wager's needs with the "slow and patient approach" advocated in paragraph 51 of Dr Wise's report and frequent breaks in his evidence as advocated in his conclusions.

50. I would add only one more matter. I do not know what has happened since the order of the FTT. I emphasise that I do not preclude any fresh application to vacate the trial date because of recent events.

51. I would only add that this written statement of my decision has, as requested by Mr Bridge, been prepared as a matter of urgency from my notes of the judgment I gave at the oral hearing on 22 January 2013.

TRIBUNAL JUDGE: The Hon Mrs Justice Proudman DBE

RELEASE DATE: 24 January 2013