UPPER TRIBUNAL **Case number: FTC/64/2010**
TAX AND CHANCERY CHAMBER

BLADA LIMITED (in liquidation) **Appellant**

-and-

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

Tribunal Judge: Colin Bishopp

Sitting in London on 30 and 31 July 2013

After hearing Mr Hywel Jenkins, counsel, for the appellant and Mr Mark Cunningham QC and Mr Jamie Sharma, counsel, for the respondents

It is directed as follows:

1. The appellant shall, by not later than 31 October 2013, provide security for the respondents' costs in the sum of £175,000, in such manner as the parties may agree and in default of agreement as may be determined by the tribunal;
2. In default this appeal shall be dismissed;
3. The parties have liberty to apply.

Colin Bishopp
Upper Tribunal Judge

Release date: 28 August 2013

REASONS FOR DIRECTION

1. The directions I have made follow from the application of the respondents, HMRC, for security for their costs. The precise nature of the relief sought, although not specified in the application itself but nevertheless made clear to the appellant and to the tribunal in advance, was that I should, first, direct the appellant, Blada Limited ("Blada"), to pay into the tribunal the costs payable by Blada to HMRC consequent upon the direction to that effect made by the First-tier Tribunal following the determination of Blada's unsuccessful appeal to that tribunal, or to secure the payment of those costs in some other way; and, second, direct Blada to provide security for HMRC's costs of the appeal to this Chamber.

2. The first question to be resolved is whether the Upper Tribunal, and specifically this Chamber, has the jurisdiction to make such a direction. I do not know of, and the parties did not identify, any other appeal to this Chamber in which such a direction has been sought, still less granted, and in those circumstances the question is novel. Mr Hywel Jenkins, counsel for Blada before me, did not contend that the jurisdiction was absent but, in view of the novelty of the question, I think it appropriate that I explore the argument advanced by Mr Mark Cunningham QC, leading Mr Jamie Sharma, for HMRC that the power to make a direction for security is available.

3. Before 1 April 2009, when this Chamber of the Upper Tribunal and the Tax Chamber of the First-tier Tribunal came into existence, an appeal from a decision of HMRC in relation to VAT (as in this case) was made to the VAT and Duties Tribunal, from whose decisions an appeal lay to the High Court. There does not seem to be any room for doubt that the power to make a direction for security in the context of an appeal from the VAT and Duties Tribunal resided in the High Court. In *Calltel Telecom Ltd v Revenue and Customs Commissioners* [2008] STC 3246 counsel for the taxpayer described such an application as "unprecedented" (and I am aware from my own experience that directions for security were at the least very rare) and "misconceived", but despite those arguments Briggs J found that the High Court had the requisite jurisdiction, and went on to exercise it. It was also accepted, without contrary argument, by Lewison J in *Megtian v HMRC* [2009] EWHC 3500 (Ch) (in which *Calltel* was cited, although not on this point) that the High Court had the power to order security in an appeal from the VAT and Duties Tribunal.

4. The starting point for a consideration of the extent of this Chamber's jurisdiction is s 29 of the Tribunals, Courts and Enforcement Act 2007, which (so far as presently material) provides that:

> "(1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
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> (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.
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> (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. The Tribunal Procedure Rules which apply to the Upper Tribunal are the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Rule 10 deals with orders for costs, and makes provision for a variety of circumstances, many of which are of no relevance to this case. The material parts of the rule, as it is currently in force, are as follows:

"(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—

…

(a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal …

(4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative …

(6) An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings …

(7) The Upper Tribunal may not make an order for costs or expenses against a person (the 'paying person') without first—

(a) giving that person an opportunity to make representations …."

6. It is plain from those provisions that the powers of this tribunal in the context of an appeal from the Tax Chamber, albeit there are some procedural requirements to be observed, are very wide, and it is at the least arguable that they are wide enough to include the power to make an order for security, even though such a power is not specifically conferred. But, said Mr Cunningham, if there is a doubt it is readily resolved by s 25 of the 2007 Act:

"(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal—

(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and

(b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.

(2) The matters are—

(a) the attendance and examination of witnesses,

(b) the production and inspection of documents, and

(c) all other matters incidental to the Upper Tribunal's functions.

(3) Subsection (1) shall not be taken—

(a) to limit any power to make Tribunal Procedure Rules;

(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."

7. Thus, said Mr Cunningham, this tribunal has the same powers as the High Court in relation to, as sub-s (2)(c) puts it, "all other matters incidental to the Upper Tribunal's functions", which must include the making of an order relevant to the future conduct of an appeal such as an order for security, unless Tribunal Procedure Rules expressly provide otherwise—which they do not.

8. I am satisfied that Mr Cunningham is right, and that this tribunal does have the power to make the orders he seeks. It is pertinent that, s 29 of the 2007 Act notwithstanding, the Tribunals Procedure Committee, charged with the responsibility of drafting the rules in use in the tribunals, has adopted the policy that (leaving aside wasted costs orders, which are not relevant here) orders for costs are the exception rather than the rule, and perusal of the entirety of rule 10 shows that it reflects that policy. Indeed, in some jurisdictions there is no power at all to award costs. But, as rule 10(1) shows, appeals from the Tax Chamber to this Chamber have been selected as one of a limited range of exceptional classes of case in which sub-ss 29(1) and (2) of the 2007 Act apply without restriction by Tribunal Procedure Rules. Moreover, had Parliament intended to restrict the scope of this Chamber's jurisdiction in respect of costs to something less than that exercised by the High Court it could easily have done so by, for example, adopting a similar approach to that of ss 15(2) and 18 of the 2007 Act, which impose restrictions on the Upper Tribunal's power of judicial review. In those circumstances it seems to me that my jurisdiction in respect of this application is exactly the same as that of the High Court, and is correspondingly to be exercised in the same way.

9. Mr Cunningham estimated the respondents' costs before the First-tier Tribunal at about £250,000. That sum is not agreed, and the respondents have not proceeded to assessment because, he said, they are fearful that by doing so they will merely incur further irrecoverable costs. He sought, in relation to the costs of this appeal, security for only £25,000—not because that will cover all of the costs, but because the respondents are willing for present purposes to limit themselves to that sum. Mr Jenkins' position was that the amounts are immaterial; the appellant cannot pay more than a nominal sum, and any direction I might make which requires the payment of a substantial sum could not be met by the appellant and would have the result of stifling the appeal.

10. I had the unchallenged statement of Mr Stephen Monroe-Birt, an HMRC officer who had investigated the appellant's financial position, and what follows on that topic is derived from his statement. At the time of the hearing before the First-tier Tribunal—September 2009—the appellant was effectively dormant, having declared no sales turnover in its VAT returns since November 2006. Its last accounts filed at Companies House, made up to 31 October 2009, showed large values for debtors and creditors, and shareholders' funds of £503,899, but the only readily realisable asset the accounts disclosed consisted of cash at bank and in hand of £60. The remaining assets were identified as deferred tax (a loss available to be offset against future profits if earned) of £363,993 and "other debtors" of £2,837,478; no further detail of those debtors is given, but it seems to me likely that the greater part of the total consists of the input tax of £2,260,981 which the

respondents have refused to pay, that refusal being the subject of the unsuccessful appeal to the First-tier Tribunal. The assets were offset by trade creditors of £196,220 and "other creditors", also unspecified, of £2,516,204.

11. The parent company of the appellant is shown by the accounts as Nandita Holdings Ltd ("Nandita"), a company incorporated in the British Virgin Islands. Mr Monroe-Birt's statement goes on to record that Nandita is in turn wholly owned by The Bristol Trust, of which the beneficiaries are the former sole director of the appellant, Mr Simon Bliss, and his immediate family. There was, and it appears still is, a debenture in favour of Nandita providing for a fixed charge over certain of the appellant's assets, and a floating charge over the remainder. There were also two further debentures, in favour of trade creditors.

12. A winding up order was made in respect of the appellant in March 2012, on a creditor's petition. I had the witness statement of the liquidator, Mr Martin Armstrong. He was unable to attend the hearing, and his place was taken by a member of his staff, Mr Iftikar Rahman, who had assisted him in the liquidation and was familiar with its detail. The important points to merge from their evidence are these:

- no assets at all (even the cash at bank and in hand) have been realised in the liquidation nor (with the possible exception of the disputed input tax) are any likely to be realised;
- secured creditors (the debenture holders) have claims of about £2.4 million and unsecured creditors of about £1.36 million;
- Mr Armstrong accepted appointment as liquidator on a contingency fee basis (that is, his fees will be paid if and only if the appeal is successful and the respondents are required to repay the input tax); and
- Mr Armstrong is not funding, and will not fund, the appeal.

13. Mr Armstrong's statement says nothing about the appeal, save to mention that it is the only possible way in which any money might be recovered in the liquidation. Mr Rahman at first asserted that it was the liquidator who gave instructions to counsel and the tax advisers who are representing the appellant about its conduct, but later during his cross-examination accepted that the liquidator had not been made aware of several matters, and that he had relied on Mr Bliss to communicate with its representatives, and provide them with information as necessary. He accepted, ultimately, that Mr Bliss was "pulling the strings", and that the liquidator had no agreements of his own with counsel or the tax advisers representing the appellant about the amount or the payment of their fees. Mr Bliss, in his oral evidence, denied that he was "pulling the strings" but in my view there is no other possible conclusion to be drawn. It is quite clear to me from the evidence I heard and saw that the liquidator is made aware of developments only when necessary, that he has no real input into the prosecution of the appeal, and that although the appeal is nominally being pursued in the name of the company, effective control of its conduct lies with Mr Bliss (I accept with Mr Armstrong's blessing) and it is he who gives instructions to the tax advisers and counsel.

14. There can be no doubt from the evidence available to me that the appellant has no resources at all, and that position will change only if it is successful in this appeal. As I do not have great familiarity with insolvency law I invited counsel to address me on whether, in such circumstances, a liquidator who pursues, or allows another to pursue, unsuccessful litigation in the name of the company would expose himself to the risk of a costs order which could be enforced against him personally. They agree that there is jurisdiction to make such an order in appropriate circumstances but that, before such circumstances may properly be found, some element of impropriety on the part of the liquidator must be shown: see the judgment of the Court of Appeal in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418, [1997] 1 WLR 1613. Although Mr Cunningham took care to reserve the respondents' position on the point, I shall deal with the application before me on the footing that no such order will be made. I should add for clarity that I do not, thereby, seek to tie the hands of the tribunal which ultimately determines the appeal; I adopt this course in order to decide whether it is appropriate to make an order for security without regard to a contingency of that kind.

15. The appeal is being funded, as his own evidence makes clear and is in any event undisputed, by Mr Bliss, members of his family and several of the appellant's creditors. That was also the position, at least in general terms, in May 2011, when the respondents' application was first listed to be heard, before Judge Wallace, although it seems that at that time alternative means of funding were being sought. Judge Wallace adjourned the application and directed that the appellant should provide a witness statement of Mr Bliss "in support of the assertion that a requirement to provide security in excess of £25,000 or to pay such a sum into the Tribunal would stifle the appeal". I shall return to the claim of stifling shortly; I need to observe at this point that is seems to me that Judge Wallace may have misunderstood the appellant's position, which at that time was that it would be able to pay £25,000, but only if it received payment from the respondents of further input tax claims, one of which claims had not at that time even been made.

16. Mr Bliss has, now, served in all four statements. The first, dated 24 May 2011, deals with the appellant's financial position, and is consistent with what I have already set out. It is, however, worth mentioning that it emerges from the statement that the bulk of the further input tax repayment which the appellant has claimed is made up of the VAT on the fees charged by its former solicitors (as they now are) for its representation before the First-tier Tribunal. As the fees and VAT have not been paid to the solicitors (who, I was told, had agreed a contingency fee arrangement and do not expect payment unless and until this appeal succeeds) the respondents have refused to pay the claim, pointing to s 26A of the Value Added Tax Act 1994. The remainder has been set against an admitted outstanding corporation tax liability, part of which remains unpaid. Thus, as this source of money is not available, the appellant can pay nothing.

17. Since Mr Bliss is evidently somewhat aggrieved by what he perceives to be the unfair conduct of the respondents in refusing to pay the input tax incurred on the solicitors' fees I interpose that in my view their conduct is not merely fair but inevitable. Section 26A does not provide that the respondents may withhold payment, implying a discretion, but that the taxable person is not entitled to

payment. I do not see how the respondents could lawfully have acted otherwise than as they have done. I should record that Mr Jenkins, quite properly, did not argue the contrary.

18. Mr Bliss's statements record that the appellant had previously been financed by loans from Nandita, which themselves were funded by loans secured on his and his parents' homes. He produced a large volume of documentation designed to show that he personally has very limited funds and, indeed, is in considerable debt. Mr Cunningham complained, in my view with justification, that it had taken Mr Bliss more than two years to produce the evidence which Judge Wallace directed should be produced within three weeks, and even now it was incomplete since it was directed only to the appellant's and Mr Bliss's inability to provide security. The fourth of Mr Bliss's statements was served on the day before this hearing, and as I have said Mr Bliss additionally gave oral evidence, by telephone from his home which is now in Australia. However, Mr Cunningham did not oppose the admission of the evidence, and I have considered it. I do not think it necessary to go into detail; it is sufficient to record that I am satisfied that Mr Bliss has extremely limited access to funds of his own, and if it were his assets alone which were in issue I would accept that it would be impossible to provide any security beyond the nominal.

19. In Mr Bliss's fourth statement he mentions that the tax advisers now representing the appellant have agreed to do so on a contingency ("no win, no fee") basis, but that Mr Jenkins' fee for this hearing, which he has not agreed should be the subject of a contingency fee arrangement, has been paid by Mrs Bliss, by means of a credit card—and presumably she will pay off the amount owed over time. Mr Jenkins explained that he is not instructed to represent the appellant in the appeal itself, and it is unclear at present whether or not counsel engaged to appear at the appeal (assuming counsel is instructed at all) will require advance payment or be content to accept contingency fees. The appellant's position in the context of this application is that advance payment will be required.

20. The arrangements by which the payment of counsel's fees and any other expense of pursuing the appeal which has to be met in advance are to be funded are set out in the final paragraph of Mr Bliss's most recent statement:

> "In terms of funding on-going litigation in relation to counsels fees, I have secured a verbal agreement with the major creditors to jointly fund the appeal in the Upper Tribunal. They include Lisa Southall, Ian Southall, VLSI International Holdings, Folder Limited, Phil Randle, my parents and brothers. No detail has been agreed, but all have an interest in a successful appeal."

21. Mrs Southall and VLSI International Holdings are the two trade creditors in whose favour the appellant had provided debentures; as the First-tier Tribunal's decision shows, VLSI was at least partially funding the appellant's trade. Ian Southall, as I understand the evidence, is Mrs Southall's husband. Folder Ltd and Mr Randle are, Mr Bliss said, unsecured trade creditors. His parents and brothers, he said, were willing to provide some help, as was his wife. As he did not know how much would be required in all to finance the appellant's costs he had not reached any detailed agreement with these backers. He also accepted that he had

provided no evidence of their means, but maintained that £25,000 would be "a lot of money for them".

22. The rules governing the making by the High Court of an order for security for costs (which, as I am exercising the same jurisdiction must necessarily govern any order I make) are to be found in Part 25 of the Civil Procedure Rules 1998. Rule 25.12 provides that:

> "(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.
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> …
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> (2) An application for security for costs must be supported by written evidence.
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> (3) Where the court makes an order for security for costs, it will—
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> (a) determine the amount of security; and
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> (b) direct—
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> (i) the manner in which; and
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> (ii) the time within which
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> the security must be given."

23. The conditions which must be satisfied before an order may be made are set out in rule 25.13. So far as relevant here, that rule provides:

> "(1) The court may make an order for security for costs under rule 25.12 if—
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> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
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> (b)
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> (i) one or more of the conditions in paragraph (2) applies, or
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> (ii) an enactment permits the court to require security for costs.
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> (2) The conditions are—
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> …
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> (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
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> …
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> (f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so.…"

24. Rule 25.14 provides that the court may make an order for security against a person who "has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings". I was not asked, and do not propose, to exercise that jurisdiction,

nor to explore further rule 25.13(2)(f), which I have included only for completeness. I should add that rule 25.15 makes it clear that an appellant and a respondent to an appeal are in the same position in this respect as the claimant and defendant, respectively, to a claim.

25. It is plain from what I have already said that the condition in rule 25.13(2)(c) is met, and Mr Jenkins did not argue otherwise; his case was that it was rule 25.13(1)(a) which prevented my making an order for security since I could not properly be satisfied that it was "just to make such an order". I will return to his submissions later.

26. For the respondents, Mr Cunningham argued that there was little to differentiate this case from *Calltel*, in which Briggs J dealt with an application for security against two associated companies, jointly pursuing an appeal, which were accepted to be insolvent. It was claimed on their behalf that their insolvency was attributable to HMRC's refusal to pay the input tax credit which was the subject of the appeal. That is not quite this case since, even if the input tax credit claimed here were paid, the appellant would be balance sheet insolvent. However, I take into account the fact that the major creditor is its own holding company and, if the debt due to it were left out of account and the disputed input tax were paid it would, I think, be solvent. At [13] Briggs J said this:

> "I deal first with the submission that an order for security would stifle this appeal. Plainly if the court were to conclude that an order for security would stifle this appeal that would be a very powerful factor against making an order by way of security, *a fortiori* in a case where the appeal is brought in the relevant sense as of right rather than with the court's permission. None the less the burden is on the appellants to show that it is probable that an order would stifle the appeal, as indeed Mr Cordara [counsel for Calltel] accepts. It is well settled that mere insolvency of a corporate appellant or a corporate claimant does not prove that an order would stifle the relevant appeal or the relevant claim. Otherwise, in any case where an applicant for security demonstrated that the insolvency test was satisfied in relation to the party against whom security was sought, a stifling test would *prima facie* be satisfied. It has been made clear in a number of cases that the court must first consider whether the company has backers or supporters who have both the resources and the motivation to provide the security. I have in mind in that context the current edition of 7(1) Halsbury's Laws (4th edn) (2004 reissue), para 514 and *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 at 540 in which Peter Gibson LJ said:
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> > '… the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation …'
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> That was a case about security in proceedings at first instance but the principle is equally applicable to security sought upon an appeal from an appellant and, indeed although a pre-CPR case, it has been approved subsequently for example in *Hammond Suddard Solicitors v Agrichem*

International Holdings Ltd [2001] EWCA Civ 2065, [2001] All ER (D) 258 (Dec), to which I shall refer in due course. In this respect the appellants proffer no evidence before me even though Mr Cordara correctly acknowledges that the burden is on them. They rely merely upon the Revenue's case that they are insolvent, but the Revenue's evidence establishes, in my judgment, firstly that the appeal to the tribunal was funded at very large expense and the proper inference is that the solicitors who conducted that appeal were paid. Secondly, that the appellants were neither trading nor going concerns at that time, from which the inference is that those costs were funded from outside sources. Thirdly, that this appeal is being similarly lavishly funded. I was shown a 185-page skeleton argument recently lodged on behalf of the appellants in pursuit of these appeals and there were dragged into court six boxes of lever arch files which it is proposed are to be deployed at the hearing of the appeal. It is no criticism of the appellants but they have also retained leading tax counsel and a new firm of solicitors to prosecute the appeal. Fourthly, the evidence shows that apart from the appellants' creditors, one of which is of course a contingent creditor (ie the Revenue), Mr Gohir is the sole stakeholder as the only shareholder and director in the appellant companies and would therefore be the main beneficiary of the £18.5 million prize that would be derived from a successful outcome to the appeal. He has also, as I have indicated, an added incentive of his own, namely as Mr Cordara rightly put it, to clear his name by reversing the finding of the tribunal that he masterminded a serious fraud on the Revenue."

27. It is true that, here, there is no evidence that the appeal is being funded "lavishly", or that the solicitors who represented the appellant before the First-tier Tribunal have been paid, but one should not overlook the fact that those now willing, on Mr Bliss's evidence, to fund the continuation of the appeal are those who stand to benefit from its success. Mr Cunningham also pointed me to what Briggs J said at [14]:

> "…neither the appellants nor Mr Gohir have taken the opportunity to challenge with any evidence the powerful inference that Mr Gohir has both the means and the motive to provide the necessary security if necessary as the price of being able to pursue this appeal. Accordingly, it seems to me that no case is made out or even begun to be made out that an order for security in the present case would stifle the appeal."

28. Although it could not be said that there is powerful evidence in this case that the backers *can* provide security, it nevertheless remains the case that there is no evidence that they cannot. At [23] Briggs J added:

> "(1) [An order for security] will not stifle the appeal. (2) Since I infer that Mr Gohir can afford to put the appellants in funds to provide the security, no injustice arises from the fact that their impecuniosity arises from the Revenue's refusal of the tax credit claimed. (3) It is clear that if no order is made but the Revenue win this appeal, the companies will not be able to pay the costs and it seems to me most unlikely that Mr Gohir will then pay them voluntarily by way of paying them on the companies' behalf. (4) The costs of a ten day appeal, since that is the estimate of the appeal, are likely to be substantial. (5) It is simply not just that by not having to provide security the companies and Mr Gohir can prosecute this appeal in circumstances where

> they incur no practical exposure to the Revenue's costs if they lose. Accordingly I propose to make the order for security sought on the first of the Revenue's two applications."

29. I should deal, parenthetically, with two differences between *Calltel* and this case. First, in the former (which was an appeal from the VAT and Duties Tribunal to the High Court) an appeal lay as of right, as Briggs J mentioned, whereas now permission to appeal is required and has been given (as it happens by me). Second, Mr Gohir had been found to be dishonest and had an interest in clearing his name, but no such finding has been made against Mr Bliss. Mr Jenkins did not argue the point strongly, but nevertheless placed some reliance on those differences.

30. I do not think anything of substance turns on them. The threshold for the grant of permission to appeal from the First-tier Tribunal to this Chamber is low: an applicant has to do no more than show he has an arguable case. It is plain from what Briggs J said in *Calltel* that he did not regard the presence or absence of prospects of success as an important factor when, as he put it, "the court simply does not know what are or are not the prospects of success." That is equally the position in this case. Second, I am not altogether clear what conclusion should be drawn from the reasons why a backer chooses to support an appellant. Mr Gohir had an interest in restoring his reputation and in recovering the large amount of input tax at stake in that case. Mr Bliss may or not wish to restore his reputation; although he was not said to be dishonest in the same way as Mr Gohir, the First-tier Tribunal made several adverse comments about his conduct. And like Mr Gohir, he and several of the other backers or prospective backers have, on Mr Bliss's own evidence, a financial interest in the outcome of the appeal and will benefit if it succeeds.

31. The position in this case, said Mr Cunningham, was also similar to that in *Contract Facilities Ltd v Estate of Rees (deceased)* [2003] EWCA Civ 1105 (cited by Briggs J in *Calltel*) in which Waller LJ described the desire of the person funding the company's appeal to be permitted to do so without his being at risk of costs if the company lost as "a heads he wins and a tails they lose basis". That, said Mr Cunningham, is exactly this case: if the appellant were to win the appeal, Mr Bliss would expect it to recover not only the input tax but the costs both of the appeal before the First-tier Tribunal and of this appeal while if this application were refused he, and his fellow backers, would remain immune from any risk that they would be required to pay HMRC's costs if the appellant lost.

32. Mr Jenkins' argument, in summary, was that it cannot be just to make an order for security, an order with which the appellant and its proposed backers are unable to comply, since the effect of doing so would be to stifle the appeal. He accepted that the burden lies on the appellant to show that this would be the result of an order for security, and that the court or tribunal is required to look not only at the resources of the company but also those of its directors, shareholders or other backers, as Peter Gibson LJ said in *Keary Developments Ltd v Tarmac Construction Ltd*.

33. But this is not a case, like *Hammond Suddard Solicitors v Agrichem* or *Calltel*, in which there is evidence of ample resources which the backer is attempting to shelter. Briggs J recognised in *Calltel* that the position would be

different in the absence of such evidence: see the second sentence of [13], set out above. Mr Jenkins also pointed to the observation (to which Briggs J referred in *Calltel*) of Bowen LJ in *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 485 that

> "Suppose the plaintiff in that case had been right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action. To have required security for costs on the ground of an insolvency which (if the plaintiff was right) the defendant had wrongly caused, might have been a denial of justice."

34. In a similar vein, in *Keary Developments Ltd v Tarmac Construction Ltd* Peter Gibson LJ made the point that

> "The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity."

35. The evidence, said Mr Jenkins, showed that Mr Bliss had encountered the greatest difficulty in assembling sufficient money to make it possible for the appeal to proceed at all. Requiring the appellant in addition to provide security for the respondents' costs would inevitably lead to the stifling of the appeal if, as was plainly the case, it would be unable to comply with such an order. It was true that if the appeal failed the appellant would be unable to pay the respondents' costs, both before the First-tier Tribunal and before this tribunal, and the backers, even if they had the means, could not be compelled to do so, but it would be manifestly unfair to deprive the appellant of its access to justice because of its impecuniosity, the more so if that impecuniosity was attributable to the refusal by HMRC to meet the claim which is the subject of the litigation between the parties.

36. I agree that in the context of a dispute, as this is, between taxpayer and state one should be cautious about the making of an order for security when the taxpayer's insolvency may, if only in part, be attributable to its treatment by the state, and when the making of an order might be seen, even if not oppressive, as a means of stifling a claim. Some comfort may be drawn from the fact, as I have already mentioned, that this is the first and, so far, the only occasion on which HMRC have applied for such an order in the more than four years of this Chamber's existence. One can but hope that such applications will continue to be made sparingly. But, important though those considerations are, it does not seem to me that there can be any basis on which applications for security if made by HMRC should be routinely refused; the general body of taxpayers is entitled to some protection from the pursuit of an appeal on the "heads I win and tails you lose" basis criticised by Waller LJ in *Contract Facilities*, and in an appropriate case it is in my judgment right to make such an order.

37. The difficulty which faces the appellant in this case, as it seems to me, is that it has not discharged the burden of showing that the appeal would be stifled if I were to direct that it provide security. I accept, as I have already said, that the appellant has no resources of its own and that Mr Bliss is impecunious, but I have no information at all about the resources of the other backers, or proposed

backers, and their ability to provide security beyond Mr Bliss's unsubstantiated assertions that it has been difficult to secure their support and that £25,000 would be "a lot of money for them". This is not a case in which the appellant, or Mr Bliss, has had very little time to produce the evidence to support the proposition that security cannot be provided. More than two years have gone by since Judge Wallace first adjourned the application, yet I have no evidence at all on the availability of funding beyond Mr Bliss's four statements.

38. I respectfully agree with the proposition that where true impecuniosity is shown the court or tribunal, in any case and not merely those in which state is a party, should be slow to adopt a course which may shut out a litigant with an arguable case from justice. But mere assertion, which is all I have, that that will be the result of an order for security is not enough; if it were, it would be simplicity itself for a litigant to conduct his case on a "heads I win and tails you lose" basis. If backers wish to secure the benefit of successful litigation it is, in my view, incumbent on them to accept the risk of an adverse costs order if the litigation is unsuccessful, or to demonstrate that it would be unjust to make an order which might have that effect. Save for Mr Bliss, they have made no attempt to do so.

39. For those reasons I have concluded that the appellant has not discharged the burden of showing that an order for security would stifle the appeal. Since it is plain that, absent such an order, HMRC will have no prospect of recovering their costs not only of this appeal but also before the First-tier Tribunal, if they succeed, it is in my judgment just to make an order.

40. As I have said, Mr Cunningham put HMRC's costs of the appeal before the First-tier Tribunal at about £250,000 and sought an additional £25,000 for the costs of this appeal. For the reasons I have given Mr Jenkins did not address me on amounts. The figure of £250,000 (in fact a little less) is merely the amount HMRC claim, which may of course be reduced on assessment. The £25,000, on the other hand, represents rather less than HMRC say they have already spent, and allows nothing additional for the future, but I am not asked to order more. The amounts on which I have decided are £150,000 in respect of the First-tier Tribunal appeal, which I regard as the minimum sum which HMRC could reasonably hope to recover on assessment, plus the £25,000 I have mentioned. I have only Mr Cunningham's word for it that HMRC have spent that sum, but it is plainly not an excessive amount.

41. I do not propose to direct that the appellant must pay any sum, but shall instead direct that it provide security. If, however, the simplest means of doing so is to make a payment, then it may adopt that course. I mention for the avoidance of doubt that the tribunal does not have the facility to hold funds. The parties should endeavour to agree on the means by which security is to be provided, and revert to me if they are unable to do so. I am mindful that the amount of the security directed is substantial and I have decided to allow the appellant a little more than two months to provide it. But I make the provision of security a condition on the non-satisfaction of which the appeal cannot proceed, and if the appellant fails to provide it as I have directed the appeal will be dismissed, without further direction.

Colin Bishopp
Upper Tribunal Judge

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