TC03699

Appeal number: TC/2012/8196, 8198 and 6406

COSTS – application for wasted costs order against representative - appeals struck out under unless order – finding that representative unreasonably and negligently failed to check identity of persons instructing it – wasted costs order made against representative

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOME OFFICE **Applicant**

- and -

ALTION LTD **Respondent to application**

In the matters of

WOJCIECH FILIPEK and ESTON GmbH

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 21 February 2014 with further submissions on 4 April 2014 and 9 April 2014

Mr R Jones, Counsel, instructed by the Home Office, for the applicant

Mr O Powell, Counsel, instructed by Altion Law Limited, for the respondent to the application.

DECISION

1. The Home Office applies for its costs in the two appeals to be paid by the representative of the appellants in those appeals. The respondent to this application is Altion Limited, which was the representative which purported to act on behalf of the appellants named in, and was itself the representative, named in, the three notices of appeal which commenced the proceedings in this Tribunal which led to the Home Office's costs application.

2. In this application, Altion Ltd is itself represented by Altion Law Limited, regulated by the Law Society and of which Ms Rebecca Hudson (a solicitor) is the head of Legal Practice and Mr Anthony Galvin is the Head of Finance and Administration. Mr Anthony Galvin provided a witness statement. He gave the history of Altion Ltd and Altion Law Limited, none of which appears relevant to this application.

The facts

3. Mr Richard Galvin is a director of Altion Limited and the witness for the respondent in this appeal.

4. Wojciech Filipek: On 15 June 2012 Rebecca Hudson, then of Altion Ltd, lodged a notice of appeal purportedly on behalf of Wojciech Filipek against a review decision of UKBA made by Mr G Crouch upholding a decision of another officer of the UKBA refusing to restore to Mr Filipek a lorry load of mixed beer and cider seized on 19 October 2011 on the basis of non-payment of duty alleged to be due of about £21,000.

5. The Tribunal issued an unless order against Wojciech Filipek on 22 November 2012 stating that in view of the fact that a letter from the Tribunal sent to the appellant's address was returned by the postal authorities marked 'addresse insuffisante" (sic), the appellant had until 15 December 2012 to notify the Tribunal that it intended to pursue its appeal. No reply was received.

6. The appeal was therefore struck out on 3 January 2013 on the grounds of non compliance with the unless order and also on the grounds that the Tribunal had no means of communicating with the appellant and no way of knowing whether it intended to proceed with the appeal.

7. Eston GmbH: On 22 August 2012 Rebecca Hudson of Altion Ltd lodged two appeals purportedly on behalf of Eston GmbH. The first was against a review decision of UKBA dated 22 July 2012 made by Mr Harris upholding a decision of another officer of UKBA refusing to restore to Eston GmbH two loads of beer (with alleged combined value of unpaid excise duty of approximately £50,000). The second was against a review decision of UKBA dated 25 July 2012 upholding a decision of another officer of UKBA refusing to restore to Eston GmbH two loads of beer (with alleged value of unpaid excise duty of approximately £47,000).

8. An unless order was issued on 22 November 2012 because the appellant had failed to respond to letters sent to their address seeking authority for their named representative (Altion Ltd) to act on their behalf. The Unless Order required the appellant to notify the Tribunal that it intended to pursue its appeals. Nothing further was heard and the appeals were automatically struck out on 8 December 2012.

Reliability of Mr R Galvin's evidence

9. In its application for costs against Altion Ltd, the Home Office sought to rely on findings of fact made in an FTT decision *Reddrock Ltd* [2012] UKFTT 46 (TC) in which Mr R Galvin was found to be an unreliable witness (§§15-32). These findings were not challenged in the Upper Tribunal [2014] UKUT 61 (TCC) at §17 by the appellant in that appeal . Mr Jones says this showed Mr R Galvin had been found to manufacture documents to try and support a claim.

10. However, I exclude the Tribunal's findings of fact in the *Reddrock* case from my mind. Findings of fact in one Tribunal are not in any way binding on another Tribunal.

11. However, in this appeal, at a number of points in cross examination, it was put to Mr Galvin he was lying, which he denied. Taking into account the inconsistencies in his evidence in this case discussed below, I find that his evidence was not truthful and not reliable.

The claimed meetings

12. In his first witness statement, Mr Richard Galvin said that Altion Ltd has experience of representing persons with excise duty disputes with HMRC and UKBA, often involving seizure of the goods. He said that when contacted by a potential new client he always arranged a meeting with them.

13. Mr Galvin said that he met a Ms Agheszka representing Wojciech Filipek on 29 September 2011 and a Ms Shameem from Eston GmbH on 21 February 2012. He was unable to produce notes from those claimed meetings although he did produce photocopies of documents he said were handed over at the meeting with Ms Agheszka. These included a photocard for Ms Agheszka which he said appeared to match the person who handed it to him. He said that when he met her he checked Ms Shameem's ID card and company documents but did not take a copy. His explanation of why he was able to produce them to the Tribunal is at §25.

14. Apart from Mr Galvin's evidence, the only independent evidence these meetings had taken place were entries in Mr Galvin's diaries on the appropriate days. However, I do not accept that the entries in the diaries do evidence any meetings. There are a number of reasons for this. Firstly, no location is recorded. Further, the photocopied page for 29 September 2011 (the day of the alleged meeting re Filipek) had been photocopied without the timings but it was clear that (had the Filipek entry been marked against the time of the meeting) it would have been fairly late in the afternoon rather than at the claimed 9.30am. Not only that, but there were a great

many more entries before the claimed 9.30am meeting with Filipek than after. And so far as Eston was concerned, the diary entry showed two different times, albeit consecutive, for the two appeals, whereas clearly only a single meeting would have been needed or was claimed to have happened. Further, the entry for Filipek was identical in form to the adjacent one for Glenfinnan (the haulier) yet no meeting was even claimed to have taken place for Glenfinnan.

15. Further, the emails to and from the client both before and after the claimed meetings took place did not refer to the meetings and indeed read as if there had been no meeting. For instance, one email which was timed after a claimed meeting commenced 'dear sirs'; an email from Mr Galvin timed at 6 hours after the claimed meeting with Ms Agheszka commenced 'Further to our telephone conversation…" Mr Galvin's explanation of these discrepancies was that he would use the 'copy & paste' function to create the email from the text of a similar email to another client and fail to personalise it. I do not accept that as the right explanation for the discrepancy, as, even if Mr Galvin did use 'copy & paste", he had nevertheless taken the trouble to personalise the letter in a number of other respects so it would be odd if he had failed to change the greeting and incorporate a reference to the meeting which on his case happened the same day.

16. There is also the finding of fact below that the person claiming to represent Eston was not representing Eston: so it is extremely unlikely Mr Galvin actually met Ms Shameem who was the director of Eston.

17. Mr Galvin's claimed choice of meeting place doesn't make sense either. He claimed to regularly meet clients at service stations for the purpose of verification. Yet he agreed he knew that service stations have no facility for him to copy documents.

18. Therefore, I do not accept that these meetings took place and it therefore follows that I found Mr Galvin's evidence that they had taken place unreliable. The effect is that I treat with caution any evidence given by him. It also means I find that he was prepared to represent clients without meeting them and without satisfying himself that the persons giving him instructions were actually the persons identified on the ID cards.

19. I accept the Home Office's point that, at least in the case of Wojciech Filipek, even had the meetings taken place, Mr Galvin would not have been much the wiser as there was nothing in the documents which connected Ms Aghneszka to Wojciech Filipek. But this is irrelevant as I find that the meetings did not take place.

The identification documents

20. For Filipek, the only copy documents Mr Galvin produced to the Home Office and the Tribunal were photocopies of some sort of ID card or licence for Ms Agheszka and some official documents in Polish. He had no translation of the documents although he claimed that at the time he would have run them through a Google translation service.

21. Taking into account the unsatisfactory and unreliable nature of his other evidence and the fact that he had not made any notes about what these documents meant, I do not accept this evidence. He could not explain to the Tribunal what these documents were. I find he accepted them without understanding them.

22. So far as Filipek was concerned, there was nothing in the documents which appeared to connect Ms Agheszka to the business or company called Wojciech Filipek. I find that Mr Galvin was therefore prepared to accept instructions on behalf of businesses without checking that the instructions actually emanated from someone entitled to give instructions on behalf of the named business.

23. Mr Galvin in oral evidence (but not in his witness statement) said he had telephoned the number on Wojciech Filipek's headed notepaper but not kept a record of this call. Bearing in mind the unsatisfactory and unreliable nature of his evidence, I do not accept that this is reliable evidence.

24. Mr Galvin, as mentioned, the day before the hearing, produced copies of an ID document for Ms Shameem and some untranslated German documents about the company. Unlike the Filipek documents, these documents did link Ms Shameem's name to Eston GmbH as she was shown to be the director.

25. Mr Galvin's original witness statement claimed he had seen these at the service station meeting but had not taken copies. He said he asked Ms Shameem to forward copies to him but she had not done so. His second witness statement, dated the day before the hearing, said he had discovered the documents two nights before the hearing, mis-filed in an unrelated client file (the one mentioned at §48) when he was researching information for this hearing, so Ms Shameem must have forwarded the documents to him although he was unable to produce a record of her doing so. It was put to him he was lying. Bearing in mind the inconsistencies in his story, I am unable to accept his evidence as to how and when he came to possess these copy documents. Nevertheless, they clearly did come into his possession at some point before the hearing but I am not satisfied that he had them when he agreed to act or when the Notice of Appeal was filed. I do not accept that he saw them at a service station meeting as no such meeting took place. Nor is there any reliable evidence Altion's client 'Ms Shameem' ever forwarded them to him. I find that he was content to agree to act for Eston GmbH without a meeting and without sight of any documents linking the person giving him instructions to his supposed client.

Reliance on third party due diligence

26. At the hearing, in evidence, it was Mr Galvin's case that he was not obliged to carry out any more due diligence on his clients than he had carried out because he had relied on due diligence carried out by third parties and such reliance was entirely reasonable.

27. So far as Filipek was concerned Mr Galvin said he relied on an undated letter purportedly from Wojciech Filipek asking MT Manut to confirm to 'my legal team' (referring to Altion) that Wojciech Filipek owned the goods. So this document was

clearly dated after Altion had agreed to act and therefore could not have been part of Mr Galvin's decision to accept 'Wojciech Filipek' as a client. Mr Galvin also said he had spoken to a contact at MT Manut and the UK receiving warehouse to confirm due diligence had been carried out, but he produced no note of any such conversations let alone a copy of any due diligence carried out by a third party.

28. He also claimed in oral evidence that so far as Eston GmbH was concerned he was happy to act on behalf of any company which had an account with MT Manut, as MT Manut would have carried out due diligence and issued the CMR. Similarly he also said he had spoken to a contact at MT Manut and the UK receiving warehouse.

29. In the hearing Mr Galvin claimed that his reliance on third party due diligence was 'absolutely huge' and 'as good as it gets' yet this cannot be reliable evidence because if such reliance had formed such a large part of his decision to take on Wojciech Filipek or Eston as clients, it would have been mentioned in his first witness statement where he describes the steps he took to verify his clients. It wasn't mentioned. His explanation for this was that it was so 'automatic' he didn't think to mention it in his witness statement. I consider this evidence as unreliable as his evidence about the meetings.

30. So I find as a fact that Altion Ltd did not rely on due diligence by MT Manut or the receiving warehouse. In any event, he did not claim even to have seen MT Manut's or anyone else's due diligence: his claim was merely that being a heavily regulated industry, a licensed excise warehouse would have undertaken very careful due diligence of all their clients, including Wojciech Filipek and Eston. I have absolutely no evidence of MT Manut's or the receiving warehouses' status as a matter of law let alone any evidence that MT Manut or the receiving warehouses did undertake any due diligence whatsoever of their clients. If Altion Ltd had relied on Wojciech Filipek's and Eston's status as MT Manut's client as satisfactory due diligence, I would find such reliance to be unreasonable. But as I have said, I do not consider that Altion Ltd did rely on third party due diligence.

Discrepancies in communications

31. There were a number of discrepencies between addresses, email addresses and spellings in the communications from the person or persons actually instructing Altion Ltd and the names and addresses of the purported clients. I discuss these below at §§37, 41 & 44. Mr Galvin's case was that he did not notice the spelling errors and discrepancies.

32. I consider the mistakes were fairly glaring and the failure to spot them or react to them indicates Mr Galvin was careless.

Other checks?

33. Mr Galvin agreed that he had not carried out any internet searches on Filipek or Eston. If he had carried out such a search on Filipek, I find it would not have revealed any more information that the Home Office were able to discover as reported below at

§35. A search of Eston's website would have shown it did not claim to trade in alcohol.

34. I consider that had he done these checks he would have known that neither company claimed to trade in alcohol and he should have been on notice that he needed to make further enquiries into the bona fides of the instructions given to him.

Was Wojciech Filipek Altion's client?

35. Mr Graham Crouch's evidence for the Home Office was that he had searched the internet for businesses using the name Wojciech Filipek. He found a taxi company in Warsaw and a restaurant but neither at the given address. There were also individuals with that name but not at that address.

36. Mr Crouch was not called as a witness but I accept this evidence as the appellant did not challenge it: in particular the appellant produced no other evidence of the existence of Wojciech Filipek, other than those documents in Polish referred to above, which (as we cannot read them) evidence nothing.

37. Further, while the company's name in its logo was correctly spelt (but difficult to read), the emails to Altion Ltd purportedly from Ms Agheszka purportedly on behalf of Wojciech Filipek contained misspellings of the company's name. Even more suspiciously, the email address comprised the company's name misspelt. While spelling errors are common, one would not expect an employee to misspell their employer's name, still less would one expect the employer to allocate their employee an email address with the company name misspelt.

38. Mr Galvin maintains that his client was Wojciech Filipek and explains away their failure to continue to give him any instructions and in particular their failure to respond to the Tribunal's letters on the basis of losing interest due to Altion's fees that would be incurred to take the matter to Tribunal.

39. I find, on the contrary, that whoever instructed Altion Ltd and wanted the restoration of the goods forfeited by the Home Office, it was not Wojciech Filipek. There was no evidence that a person or company with such a name had any trade in alcohol or any trade outside Poland, and the person who instructed Altion (from the misspellings) clearly did not actually represent any Wojciech Filipek.

Was Eston GmbH Altion Ltd's client?

40. The documents referred to at §25 comprised a copy Indian passport for a lady named 'Shameem' with no other name. She appears to be the same person as named in the company papers as the Company director as the address and date of birth is the same. The other papers (which appear to be on official German government business) are in German and only clearly state the name and address of the company (in Frankfurt).

41. Mr David Harris, a UKBA officer, gave evidence. He was the officer who made the review decision which had been under appeal purportedly by Eston GmbH. He provided a copy of the letter of authority purportedly supplied by Eston GmbH to Altion Ltd authorising the latter to act on their behalf. The address given on this headed notepaper was for "Prankfort am Main". Needless to say, the address for Eston GmbH is in Frankfurt am Main (it contained other mistakes such as "Germany" instead of "Deutschland" and 'Landstrasse' instead of 'Landstraβe'). He looked up the company's website on the internet and found that the company advertised itself a distributor of consumer electronics, computer peripherals and digital products. It made no reference to being an exporter of beer.

42. Mr Harris wrote to Eston GmbH on 23 July at their Frankfurt address asking them to confirm that they had instructed Altion Ltd to act on their behalf. He didn't get a reply so he then telephoned. He was told on the phone that they did not deal in alcohol and had nothing to do with Altion Ltd.

43. This evidence was not challenged and I accept it. Had Eston GmbH really been Altion's client, Altion ought to have been able to prove this yet all they could produce was a few emails purportedly from 'Shameem' and from a 'gmail' address.

44. The 'eston.germany@googlemail.com' account used by 'Shameem' was unlikely to be a genuine email address as the email addresses used by the company on its webpage all used its webaccount for email and were therefore in the format '…@estongmbh.de". It would make no sense for employees to be allocated a googlemail account when the company had its own personalised webaccount.

45. In conclusion, while I cannot read the untranslated documents, Eston GmbH has every appearance of being a genuine company with a Ms Shameen as its director and a trade in electronic goods. However, whoever corresponded with Altion Ltd and UKBA claiming to be 'Ms Shameem' and acting on behalf of Eston Gmbh, I find was not Ms Shameem and was not acting on behalf of Eston GmbH. That can be the only explanation for the above discrepancies.

46. But does it make sense for someone to hi-jack the name of another trader as appears to have happened with Wojciech Filipek and Eston GmbH? Unfortunately, it seems that it does. For instance, the 'real' client might have chosen to smuggle into the UK alcoholic goods without using their real name in order to divert suspicion on multiple runs, using instead copies of genuine ID documents for unconnected EU businesses. Having nevertheless had the goods forfeited despite this evasion, the 'real' client then might chose to pursue a case for restoration, obviously still using the assumed name and hi-jacked ID documents. It seems likely that that is what has happened in both cases here and may explain why the 'real' client no longer pursued restoration when UKBA started to investigate ownership of the goods and identity of the appellant.

Pattern of behaviour

47. It was a part of the Home Office's case that Altion Ltd repeatedly acted for persons hijacking other persons' names and/or failing to respond to letters sent to their addresses. Some 18 other appeals had been struck out in 2013 where Altion Ltd had claimed to be the representative of some 8 appellants.

48. In the case of these purported appellants, four appeals relating to restoration of alcoholic goods (TC/2012/2459, 9960, 1025,and 6321) were struck out (with the named appellant's consent) on 4 December 2012 on the basis that the named appellant had notified the Tribunal that it was not and had never been engaged in the trade in alcoholic goods, had no interest in the lodged appeals, and had not instructed Altion Ltd to act as its representative.

49. The rest of the appeals were struck out as the appellants did not respond to unless orders requiring them to state that they intended to pursue the appeals; the unless orders were issued because the appellants did not respond to letters from the Tribunal sent to their addresses.

50. I accept that the dates of the above strike outs were all after the events at issue in this application and therefore the Home Office cannot say that these events put Altion Ltd on notice at the time the appeals at issue were lodged. And even if they do reveal a pattern of conduct, I consider that is not relevant to the question of whether Altion behaved unreasonably in these two cases under consideration in this hearing.

51. However, what is relevant is that on 18 February 2012 (3 days before the contact with Eston) Altion Ltd received a letter from UKBA in respect of a different client in which the writer questions the legitimacy of Altion's client. Mr Galvin accepted he was aware of the contents of the letter but just said he checked each client. I find that he ought reasonably to have been aware from this letter that his checks were at least potentially inadequate, yet Altion Ltd carried on regardless.

The law

52. The power of the FTT to make an award of costs is limited to the circumstances set out in Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 ('the Rules').

53. It provides as follows:

> "**10 orders for costs**
>
> The Tribunal may only make an order in respect of costs…-
>
> (a) under Section 29(4) of the 2007 Act (wasted costs);
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending, or conducting the proceedings
>
> (c) [not relevant]

54. The Home Office applied for its costs in the two appeals under both Rule 10(1)(a) and (b) and at the hearing Mr Powell accepted that the application could be made under either subsection, although maintaining (of course) that his client's conduct was not such as to justify a costs order.

55. After the hearing, I became concerned about whether, if the Home Office could make out its primary case that Altion Ltd's client(s) used hijacked names, a costs order could actually be made under Rule 10(a) or (b). I asked for submissions on this point and the following §§62-80 is based upon my view of the law having read those submissions.

56. Mr Powell used this as an opportunity to make further submissions (§§14-17) on points raised in the hearing, even though this was outside the scope of the invitation. Procedurally, they do not require a response. I note, however, that Mr Powell no longer accepts a Tribunal can make a wasted costs order. This is because (he says) Rule 10 and s 29 TCEA set up a never-ending circle of references to each other (see the very last part of s29(4) cited in the below paragraph). I reject this submission which relies on a non-literal reading of s 29(4) and clearly goes against Parliament's intent to confer the right to award wasted costs on this Tribunal.

Wasted costs orders

57. The Tribunals Courts and Enforcement Act 2007 gives the FTT power to make an order for wasted costs. It provides at s 29(4) as follows:

> "In any proceedings mention in subsection (1), the relevant Tribunal may –
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

58. The next subsection defines wasted costs as follows:

> 29(5)
>
> Any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay."

59. In this application, I am concerned with s 29(4)(b) as the Home Office, having in effect succeeded in the appeals as the appeals were struck out, is making an

application for payment of its costs. Its application is under s 29(5)(a) as it alleges Altion Limited's behaviour in bringing and conducting the appeals was unreasonable and/or negligent.

60. However, for Altion Limited's behaviour to be relevant to costs under s 29(5), Altion Ltd must have been the 'legal or other representative' of the appellants. Similarly, for costs under Rule 10(b) the Tribunal would have to be satisfied that 'a party or their representative has acted unreasonably in bringing, defending, or conducting the proceedings' and it is the Home Office's case that Altion was the appellant's representative and it acted unreasonably.

61. For the Home Office to succeed, it must therefore first show that Altion was a 'representative' in proceedings in this Tribunal. But its primary case is that Altion didn't properly check that it was acting for named appellants and was in fact taking instructions from person or persons unknown who had merely hi-jacked the names of Wojciech Filipek and Eston GmbH. So it is necessarily the Home Office's case that Altion was *not* representing Wojciech Filipek and Eston GmbH.

What is a 'representative'?

62. The definition of 'representative' so far as an application under Rule 10(1)(a) for wasted costs is concerned refers back to the 2007 Act and its definition of 'representative', while Rule 10(1)(b) (unreasonable behaviour) relies on the meaning of 'representative' within the Rules.

63. <u>The 2007 Act:</u> Under Rule 10(1)(a) and s 29(4)(b) of the 2007 Act the Tribunal can only make an order for wasted costs against 'the legal or other representative'. There is no suggestion that Altion Ltd was a legal representative. Was it a 'representative' within the meaning of the 2007 Act? Section 29(6) provides (very similarly to the Rules):

> "In this section 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf."

64. There is no definition within the 2007 Act of 'party to proceedings' or of a person exercising a right of audience. However, s 29(2) says that the right of the Tribunal to order costs under (1) (which includes by virtue of (4) the discretion to make an order for wasted costs) has 'effect subject to Tribunal Procedure Rules'.

65. So it seems to me that the answer to the question of who is a 'party' in the FTT for both Rule 10(1)(a) (wasted costs) and Rule 10(1)(b)(unreasonable behaviour) comes down to the provisions in the Rules.

66. <u>The Rules:</u> There is no actual definition of 'representative' in the Rules, but Rule 11 provides a definition of a 'legal representative, and provides:

> '(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.'

67. The definition of a 'legal representative' is contained in subparagraph (7) which provides that a legal representative is an authorised person under the Legal Services Act 2007. The question for this appeal is whether Altion Limited was a 'representative'.

68. Meaning of party to proceedings: To be a representative, Rule 11(1) makes it clear that Altion Ltd must have been appointed by a 'party' to proceedings in this Tribunal. The definition of a 'party' is contained in Rule 1(3) which provides:

> "'party' means a person who is (or was that the time that the Tribunal disposed of the proceedings) an appellant or respondent in proceedings before the Tribunal."

69. The Home Office's case is that the person or persons who instructed Altion Ltd and who presumably had some interest in the goods the subject of the appeal had 'hijacked' the name of unconnected, legitimate traders. It is a necessary implication of the Home Office's primary case that the goods the subject of the appeal were imported into the UK under these 'hijacked' names, and that therefore Altion's real client or clients brought and maintained the appeals using these 'hijacked' names and are a person or persons unknown to the Tribunal.

70. In passing, it is an obvious inference that if the Home Office had reason to suspect that the names given to them as the names of the owners of the goods were hijacked names, then the application for restoration of the goods was (virtually) bound to fail as the smuggling is by far the most likely reason for using hijacked names.

71. I have found that Altion's clients in both these appeals were not who they purported to be but were using hi-jacked names. So was Altion Ltd a 'representative' of an appellant in proceedings before this Tribunal bearing in mind I have found that Altion Ltd was not appointed by either Eston GmbH or Wojciech Filipek to act on their behalf?

72. Were Altion's true (unknown) client or clients an appellant to proceedings before this Tribunal? If they were not, it seems that I would not have the jurisdiction to make an order for costs under Rule 10(1)(a) or (b) against Altion Ltd. An appellant is defined in Rule 1(3):

> "appellant means –
>
> (a) the person who starts proceedings (whether by bringing or notifying an appeal, making an originating application, by a reference, or otherwise);
>
> (b) [not relevant]
>
> (c) a person substituted as an appellant under Rule 9 (substitution and addition of parties)

73. On the face of it, whoever the client or clients of Altion Ltd were, they were the persons who commenced the proceedings. It or they were the persons who had applied to the Home Office for restoration of the goods (albeit under a false name),

and it was on their instructions that Altion Ltd filed the Notice of Appeal against the Home Office's refusal to restore the goods. However, Rule 20 provides:

> "**20 Starting appeal proceedings**
>
> (1) Where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal within any time limit imposed by that enactment.
>
> (2) The notice of appeal must include –
>
> (a) the name and address of the appellant;
>
> (b) the name and address of the appellant's representative (if any);
>
> (c) an address where documents for the appellant may be sent or delivered;
>
> (d) ….."

74. Rule 20(4) provides that if an appellant does not provide its Notice of Appeal within the time limit, the Tribunal 'must not admit' the notice of appeal unless the Tribunal grants an extension of time. But while Rule 20(4) states the effect of non-compliance with Rule 20(1), nowhere in the Rules is there a statement of what is the effect of non-compliance with Rule 20(2). So what is the effect if the appellant files a Notice of Appeal which does not (correctly) state his name and address?

75. Firstly, it is clear that even where the rules are breached, the Tribunal is seized of 'proceedings' even if there is no valid Notice of Appeal. For instance, where Rule 20(1) is breached, there are proceedings before the Tribunal even though the Notice of Appeal is not admitted. Those proceedings will (normally) be an application to admit the appeal out of time. Indeed throughout the rule a distinction is drawn between 'proceedings' and the 'appeal'. See for an example Rule 20(5). Therefore, a person who files an invalid Notice of Appeal is an *appellant to proceedings* in this Tribunal even though they may not be an appellant to an appeal. This is made clear by Rule 7(1) which provides:

> "An irregularity resulting from a failure to comply with any requirement in these Rules,…does not of itself render void the proceedings or any steps taken in proceedings."

In conclusion, if a person files a Notice of Appeal which fails to contain a correct statement of his name and address, the filing is not void, and he does by so doing commence proceedings as an appellant in this Tribunal. While it may be that the appeal could be struck out for non-compliance, nevertheless that person is, until any such strike-out, an appellant in proceedings. They are therefore (under the definition in Rule 1(3)) a 'party' even after the appeal is struck out.

76. Secondly, in any event, the Tribunal can waive any requirement of the Rules. Rule 7 goes on to provide:

> "(2) If a party has failed to comply with a requirement in these Rules, ….the Tribunal may take such action as it considers just, which may include –
>
> (a) waiving the requirement;
>
> (b) [not relevant]

In other words, this Tribunal has the power to waive the requirement for the appellant to provide its name and address.

77. Mr Powell suggests that because the Home Office's application for costs was made under Rule 10, I am precluded from considering any other Rule in this application. What he appears to mean is that I am precluded from waiving a failure to comply with the Rules under Rule 7(2)(a) because the Home Office did not make an application to that effect and is (he says) out of time to do so and/or because if I did so I would be extending my jurisdiction to make an award of costs and going beyond the boundaries of Rule 10.

78. I do not agree. The Tribunal can exercise its power under Rule 7 irrespective of any application being made to that effect. And I stay within my powers under Rule 10 if I make an award of costs against a party, albeit that that party may have become a party because of an exercise of my discretion under Rule 7.

79. The power is of course discretionary. Nevertheless, were the facts that Altion Ltd's client did not provide its true name and address and Altion Ltd behaved unreasonably in acting on their client's behalf in these proceedings, and I was minded to make an order for costs against Altion Ltd, I would make an order under Rule 7(2) were it necessary to do so to give myself the power to make the award of costs. It would be just to do so because otherwise Altion Ltd would escape on a liability for costs for the very reason it would be made liable: it lodged appeals without checking the bona fides of those instructing it. It would allow it to escape liability *because* of its unreasonable behaviour. That is not just and I would make such a ruling were one necessary.

80. But this is all superfluous, because, as I have said, Rule 7(1) means that, although I have found Altion Ltd's client or clients did use a hijacked name, its client's or clients' lodgement of the Notices of Appeal was not void despite the breach of the rules. They were therefore an appellant to proceedings in this Tribunal even though the appeals were not properly lodged and despite the fact that the Tribunal cannot identify the appellant or appellants. Altion's client(s) was therefore a party to proceedings in this Tribunal and I would have the power to make an award of costs under Rule 10(1)(a) or (b) against Altion Ltd as its or their representative.

Wasted costs v unreasonable behaviour costs

81. I queried whether an order for unreasonable behaviour under Rule 10(1)(b) could be made against a third party. The Home Office maintains that it can because s 29(2) TCEA enables the Tribunal to make a costs award against any person and the Rules do not impose a restriction either: Rule 10(5) refers to the paying person.

82. I accept that the Home Office is right on this but it makes no practical difference to their application: I am able to make a order for wasted costs on the basis of unreasonable behaviour under Rule 10(1)(a) as well as make an order for costs against a representative for unreasonable behaviour under Rule 10(1)(b).

The test for wasted costs

83. I have set out the test for wasted costs above but repeat it here for ease of reference. S 29(5) TCEA provides wasted costs are

> "Any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay."

84. The Home Office's position is that it was unreasonable for Altion Ltd to institute proceedings in the tax tribunal on behalf of its clients and that all the subsequent costs incurred by the Home Office in defending the proceedings were wasted and should be paid by Altion Ltd.

85. Mr Powell referred me to CPR 53.4 by way of analogy which incorporated the Court of Appeal's three stage test for wasted costs as set out in *Re a Barrister (wasted costs order)* (no 1 of 1991) [1992] 3 All ER 429 where Macpherson J said at page 435h:

> "A three stage test or approach is recommended when a wasted costs order is contemplated.
>
> (i) has there been an improper, unreasonable or negligent act or omission?
>
> (ii) As a result have any costs been incurred by a party?
>
> (iii) If the answers to (i) and (ii) are yes, should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific amount is involved?"

86. The Home Office alleges Altion Ltd acting by Mr Galvin acted unreasonably and negligently in bringing appeals in the name of Eston GmbH and Wojciech Filipek without properly ascertaining that its instructions came from those persons. They do not allege improper conduct on behalf of Altion Ltd.

87. Mr Powell also relied on Cooke on Costs 2013 at pages 633/4 for definitions of 'unreasonable' and 'negligent':

> " 'unreasonable' includes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and

> it made no difference that the conduct was the product of excessive zeal and not improper motive"
>
> 'negligent' does not mean conduct which is actionable as breach of the legal representative's duty to his own client. There is of course no duty of care to the other party. Negligence should be understood in an un-technical way to denote failure to act with the competence reasonably expected of ordinary members of the profession."

88. It was his case that conduct was not unreasonable unless it was vexatious or designed to harass. I do not agree with him and note that his reading of Cooke's is wrong as it merely says unreasonable 'includes' such behaviour. Unreasonable is not limited in the manner he suggests. It includes any unreasonable conduct.

89. It was also Mr Powell's case that it will be hard for an applicant to make out 'unreasonable' or 'negligent' behaviour as the bar is high: McPherson J referred to the ability to order wasted costs against a representative in *Re a barrister* as 'draconian' (page 435e-f).

90. I also note that in the case of *Ridehalgh v Horsefield* [1994] Ch 205 the Court of Appeal explained that in so far as 'negligent' was concerned:

> "[the Court wished] firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: 'advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do': an error 'such as no reasonably well-informed and competent member of that profession could have made'."

Verification of client's identity

91. The Home Office maintain that any representative, legal or otherwise, has a duty to verify the identify of a client especially when seeking a repayment of money (or return of goods) from the Government on behalf of that client.

92. Mr Powell's position was that his client had taken all reasonable steps and its behaviour was not negligent nor unreasonable. He did not suggest that Altion Ltd was not obliged to check the identity of its client.

93. I agree with the Home Office. Where a representative, legal or otherwise, files proceedings on behalf of its client, it has a duty to the Tribunal and the respondent to check that the person it represents is who they claim to be. No competent representative would agree to represent someone unless they had first taken reasonable steps to satisfy him/herself that their client was who they represented themselves to be, particularly in an area where a reasonably experienced or competent person would know that there was a risk of smuggling.

Operating in risk area

94. The Home Office say Altion Ltd acting by Mr R Galvin knew or should have known that there was a real risk of smuggling and that it should have been extra careful to check the identify of its client.

95. Mr Galvin points out that there are never any findings of smuggling in letters written by the Home Office and this may well be true. The question is always whether the Home Office's decision not to restore the goods was reasonable: the Home Office does not have to prove that smuggling actually took place.

96. However, it was or should have been clear to Mr Galvin, who admits that he represents many clients in these sorts of appeals in this Tribunal, that allegations of smuggling are made. He should have been careful.

97. Further, as I have mentioned at §51, before his dealings with 'Eston' he had received a letter from UKBA which mentioned the writer's reasons for suspicions that another of Altion's clients was not a legitimate business. Mr Galvin (on behalf of Altion Ltd) should have been on notice that he needed to check his clients' bona fides before lodging proceedings on their behalf.

Foreign clients

98. The Home Office also claimed that Mr Galvin should have been particularly careful as his clients (purported to be) foreign companies who (on his case) he only met at service stations.

99. I do not see that these allegations add anything. Appellants challenging restoration decisions may very likely be foreign companies and there is nothing suspicious in that at all. The meetings I have found did not take place so their purported location is irrelevant.

Other matters

100. The Home Office consider that the other appeals involving Altion as representative mentioned at §§47-49 are relevant. But since the first strike out was in 4 December 2012, as a matter of timing I do not see how the Home Office can sustain a case on this.

101. Mr Jones also maintained that various companies with which Mr Galvin was personally involved had been involved in sales or transport of excise goods. Mr Galvin denied this and the Home Office failed to show otherwise, so I exclude this allegation from my mind.

102. Mr Jones suggested that Mr Galvin should have been suspicious of accepting instructions from a person with just one name, "Ms Shameem", whose copy passport shows she had no surname. Mr Galvin denied that this was suspicious bearing in mind that the lady's address was in Asia, and I accept that: the Home Office have not tried to or succeeded in making out that Eston GmbH was not a genuine company.

The documents show that 'Ms Shameem' with no surname was its director. I have no reason to think that Eston GmbH and its director were anything other than legitimate: they were not, however, Altion Ltd's client.

Conclusion

103. The reality is that Altion Ltd acting by its director Mr Galvin did nothing to check the identity of its clients in these two cases. No meetings took place so all instructions and contact took place by email and telephone. Mr Galvin had no real interest in the identity of his clients as although he obtained some documents for Wojciech, he could not read them and I do not accept his evidence that he used a Google translation service to help him understand them. He acted for Eston when he filed the appeal without having any documents at all so he was unable to verify its identity nor that it owned the goods. He had nothing that tied in the person who actually gave him instructions with the companies they purported to represent. He conducted no internet searches on his named clients and failed to notice the spelling discrepancies in the documents and the oddities about the email addresses used, which, in view of the number of the nature and mistakes made, was very careless. He did this despite being well aware that the Home Office's concerns in restoration cases are that the goods are being smuggled.

104. I have found that at the time he did not in fact rely on any due diligence carried out by other parties. Even if he had, I would have found such reliance to be unreasonable as no copies of it were provided to him and he would have needed in any event to check that the person who gave him instructions really was representing the client he purported to represent.

105. I consider that this is both negligent in the sense described by the Court of Appeal and unreasonable behaviour. While Mr Galvin is not a member of a profession, he chooses to make it his business to act as an adviser to appellants in this Tribunal. While the same standard of conduct might not be expected of Altion Ltd as would be expected of a solicitor or barrister, it would be unreasonable for any representative qualified or not to fail to make any checks at all of its client's identity, particularly in restoration cases where there is a risk of smuggling has taken place

106. In conclusion I consider that Altion Ltd acted unreasonably and negligently in filing and pursuing appeals purportedly on behalf of Eston GmbH and Wojciech Filipek without undertaking any checks that the person(s) instructing it genuinely represented those companies, particularly bearing in mind Mr Galvin should have been on notice that there was at least a risk that the importer of the goods was smuggling.

Causation – test (ii)

107. So I find that Altion behaved both unreasonably and negligently and that the direct result of that was to put the Home Office to expense that they would not otherwise have incurred in defending proceedings. I say this because had Altion carried out proper checks, as the Home Office later did, they would have discovered

that the person(s) instructing it did not act for the person they claimed to represent, and (I must presume) in these circumstances Altion should have refused to represent them and the Notices of Appeal would not have been filed.

Discretion – part (iii) of test

108. The award of costs is in my discretion.

109. Mr Powell submitted that if (as I have found) Altion's clients were not representing the named appellants, then Altion Ltd was as much duped as the Home Office and it would be disproportionate of the Tribunal to make an award of costs in this case. I do not understand this submission. If Altion was as much duped as the Home Office, that was because of its own failure to check who was giving it instructions. There were many things Mr Galvin could have done to protect the company from 'hi-jack' clients, such as meeting them in person and checking properly that they had authority to act, insisting on translated documents, checking the internet, querying the odd email addresses and so on. He did not do this. Moreover, the Home Office is out of pocket having defended proceedings which should not have been lodged: there was no evidence or claim that Altion Ltd was out of pocket. For all I know, its clients paid its fees.

110. On the contrary, I consider that Altion Ltd behaved quite unreasonably and negligently at the time in lodging the appeals without undertaking any checks of its client's legitimacy and then Mr Galvin attempted to cover this up by giving untruthful evidence in this Tribunal. I chose to exercise my discretion to award against Altion Ltd and in favour of the Home Office the costs of defending proceedings from the moment it was notified of the appeal up to and including the costs of this application.

111. The Order is made exercising my discretion under both Rule 10(1)(a) and (b).

Amount of costs

112. The Home office claims costs of £3,430 as set out in schedule which was filed with the costs application but this did not include the costs of this application, which they also seek. The parties were agreed that the Home Office should provide a more detailed breakdown, including a breakdown of the costs for this application, and I only be asked to make a decision in principle.

113. I therefore direct that the Home Office provide such a breakdown to Altion Ltd within 28 days.

114. If the parties are unable to agree the amount of the costs award, they are at liberty to revert to the Tribunal for a determination. I make no determination on whether the basis of the award should be standard or indemnity as I was not addressed on this and therefore the parties must agree it or revert to the Tribunal.

Footnote

115. I note that a few days after the hearing Altion Law Limited copied to the Tribunal a letter that they had written to the Home Office complaining that they had had little warning of some of the documents relied on by the Home Office and put to the respondent's witness in the hearing. The Home Office replied the next day stating their position that the respondent had had sufficient time to deal with the documentation. No application has been made to the Tribunal in respect of this matter and I make no further comment on it.

116. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2014