[2019] UKFTT 341 (TC)

# TC07169

*COSTS APPLICATION – whether HMRC behaved unreasonably in defending appeal – no save in serving irrelevant witness statement – application allowed in part*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/05726**

**BETWEEN**

**WILSONS SOLICITORS LLP** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**With the consent of both parties, and with the benefit of their written representations, decided on the papers.**

**A Sutcliffe QC, instructed by DAC Beachcroft LLP, for the Appellant**

**HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. On 24 February 2017, HMRC issued the appellant partnership with a Notice under paragraph 1 of Schedule 23 to the Finance Act 2011 ('Sch 23'). The notice notified the appellant of its right of appeal, and the partnership appealed. HMRC's review decision upheld the notice and so the appellant partnership appealed to this Tribunal. The appeal was heard on 24-25 September 2018 and by decision dated 22 October 2018, I allowed the appeal.

2. On 16 November 2018, the appellant made a timely application for its costs in this matter.

3. The appellant applied for the matter to be determined on the papers. The tribunal wrote to the parties giving both parties the chance to object within 14 days to a paper determination but no objection was received. I have therefore proceeded to determine the costs application on the basis of the written representations provided by the parties.

### BACKGROUND TO APPEAL

4. Sch 23 allowed HMRC to require a relevant data-holder to provide relevant data. The notice given to Wilsons Solicitors LLP defined the partnership as the 'relevant data-holder' and defined the 'relevant data' as (in summary) the data as being the records kept by the appellant under regulation 19 of the money laundering regulations.

5. To succeed in its appeal, Wilsons had to show that it was either not a relevant data-holder or that it did not hold relevant data. In the event, it succeeded on both points.

### THE LAW

6. The Rules of this Tribunal provide that the Tribunal may only make an order for costs in certain circumstances. The only circumstance which is suggested to be relevant in this case is in Rule 10(1)(b) which provides for the power to make an order for costs:

> if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings

7. When addressing the question of what conduct is unreasonable, the guidance given by the Upper Tribunal in *Catana* was that acting 'unreasonably in bringing, defending or conducting the proceedings' captured behaviour which where:

> an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.

8. In *Distinctive Care Ltd* [2018] UKUT 155 (TCC), the Upper Tribunal endorsed what it had said in *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) ("MORI") at [22] and [23] on the meaning of unreasonable behaviour, which it summarised as:

> [44]….
>
> (1) the threshold implied by the words "acted unreasonably" is lower than the threshold of acting "wholly unreasonably" which had previously applied in relation to proceedings before the Special Commissioners;
>
> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
>
> (3) actions include omissions;

> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
>
> (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
>
> (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
>
> (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
>
> (8) the power to award costs under Rule 10 should not become a "backdoor method of costs shifting".
>
> [45.] …. questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

9. In *MORI* the Upper Tribunal had also said of acting 'unreasonably':

> [49] It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. ….

10. I agree with HMRC that it is for the applicant (in this case, Wilsons, the appellant) to satisfy the Tribunal that HMRC's behaviour was unreasonable; it is not for HMRC to demonstrate that they acted reasonably.

11. Both parties referred to what Judge Bishopp said in *Heathclass Ltd* (2011), where he set out five criteria. On analysis, it seems to me that the 1st and second criteria are really the same. What I think he was saying in essence was:

> (1) Awards of costs for unreasonable behaviour should not be given too readily: otherwise such awards would become a back-door method of creating an open costs regime in cases where there is no such regime and appellants might be deterred from pursuing appeals;
>
> (2) Awards of costs for unreasonable behaviour should not be made too readily when a party withdraws an appeal before hearing else a party would be discouraged from so withdrawing;
>
> (3) On the other hand, the bar must not be set too high as it is right that awards of costs for unreasonable behaviour should be made in some cases, such as where a party has pursued an appeal simply in order to defer the payment of the tax, or where HMRC have unreasonably resisted an obviously meritorious appeal;
>
> (4) The Tribunal should take account of the nature of the case when considering whether it is appropriate to make an award of costs. In that case the judge thought it appropriate to award costs to HMRC as the appellant had pursued an appeal when lacking evidence to substantiate a vital part of its case.

12. While this was only an FTT case, neither party suggested that what the Judge said was wrong. However, I do not really consider it necessary to refer to the case as it did not really

say any more than was later said in the above Upper Tribunal cases. And those are the principles which I will seek to apply in this application.

**GROUNDS OF APPLICATION**

13. The appellant's application for costs was on the basis that HMRC had acted unreasonably. The unreasonable behaviour was said to comprise the following:

(1) It was clear from my decision that HMRC's case was (said the applicant) hopeless from the outset. HMRC's reliance on §17 of Sch 23 was said to be 'manifestly misconceived' since (the appellant said) it was clear that the appellant was not a relevant holder because it did not maintain a register as required by §17;

(2) It was equally clear from my decision that HMRC's case that the appellant held relevant data under Reg 15 of the Relevant Data Regulations 2012 was (said the applicant) a fundamentally erroneous construction;

(3) Therefore, said the applicant, HMRC should have conceded the appeal as soon as the appellant lodged its notice of appeal;

(4) As HMRC's position was previously untested and a novel interpretation of powers, the applicant said HMRC ought to have pursued the possibility of obtaining a declaration of the extent of its powers rather than issuing notices to solicitors, obliging them to defend them at great cost;

(5) HMRC had put it to extra and unnecessary expense by fielding unnecessary evidence and by failing to comply timeously with Tribunal directions.

14. I will deal with the grounds in turn.

## Unreasonable to defend proceedings

15. I have explained above that the appellant's main ground was that it was unreasonable for HMRC to defend the appeal. HMRC's case is that the position they took on the meaning of 'register' and 'relevant data' was not manifestly misconceived or unreasonable: HMRC had consulted external counsel and the point was novel. The appellant's was not an 'unbeatable argument'.

### *Relevant data-holder*

16. HMRC alleged that the appellant was a data-holder under ¶17 of Sch 23 the title of which was 'Licences, approvals etc' and which only applied to persons

> by whom licences or approvals are issued or a register is maintained

where 'register' was defined as including

> (b) any record or list that any other person is required or permitted to maintain by or under an enactment.

17. HMRC's case was that Wilsons fell into (b) as maintaining records required by the Money Laundering Regulations 2007/2157 ('MLR') and in particular ¶19 of the MLR which required a person affected by the regulations to keep records. Both parties were agreed that Wilsons was required to keep records under the MLR.

18. As I understood it, HMRC's case was that, whether or not keeping the records required by the MLR would ordinarily be the keeping of a register, §17 of Sch 23 FA 11 had defined register as including 'any record'. They relied on the Interpretation Act which said the singular included the plural unless a contrary intention appealed so that the obligation to keep 'records' was, said HMRC an obligation to keep a register. That made, said HMRC, Wilsons a relevant data-holder and the MLR records relevant data.

19. I rejected that for a number of reasons but the most important were given at [48], [56]-[58] and [60]. In summary, it was 'obvious' there was a contrary intention in reading a singular as a plural where the plural was part of the definition of a word in the singular; I also accepted the appellant's counsel's point that HMRC's definition should be rejected as led to redundancy of language in the legislation and in particular made the word 'register' redundant; and that HMRC's interpretation meant that the tail-piece of one of many sub-paragraphs would come to encompass many of the other sub-categories such that it clearly could not have been intended else it would not have been left as the tail-piece.

20. Reading my decision, I think it is right to say that I had little difficulty in disposing of HMRC's case. It would be fair to say, I think, that while a fairly superficial reading of §17 did support HMRC's interpretation, it was not difficult for me to decide that HMRC's reading was wrong.

***Was relevant data held?***

21. As I have said, even if I had been satisfied that the appellant was a relevant data-holder, I had to be satisfied that the MLR records held by the appellant were 'relevant data'. But the legislation only entitled HMRC to the name and address of a person entered onto a register; particulars of the entry on the register and information relating to an application to be entered on the register.

22. It was not easy to see solicitor's clients as entered onto a register or to see any aspects of a solicitor's client files as being entries on a register. My conclusion was:

> [90]…HMRC's interpretation requires violation to be done to the wording and meaning of ¶15 of the Regulations …. HMRC's interpretation involves a most unnatural reading of ¶15 of the Relevant Data Regulations.
>
> [91] I do not think that such an unnatural interpretation can be given to ¶15. Therefore, even if I had been satisfied that Wilsons was a relevant data-holder in relation to its clients because of its MLR obligations, I would not be satisfied that Wilsons held any relevant data as defined in the Regulations. The notice would therefore have to be discharged on this ground too.

23. In conclusion, it is clear that I had little difficulty in deciding the point of legal construction in favour of the appellant. But was it a case where it should have been sufficiently obvious to HMRC that they would lose such that it was unreasonable to defend the proceedings?

**Conclusion**

24. I note that HMRC did not seek to appeal my decision. I do not consider that relevant. A decision by the losing party to accept the FTT determination without an appeal to the Upper Tribunal is not an admission that bringing or defending an appeal was unreasonable.

25. The issue in the appeal was, so far as I am aware, a wholly new point. There was no binding authority. To decide the case, I had to resort to general principles of statutory interpretation as there was no relevant authority binding or otherwise. The question is whether the answer at which I arrived was, objectively, so obviously the correct answer that HMRC had acted unreasonably in not conceding the appeal at the outset.

26. My conclusion is that HMRC's legal arguments in this case fell just short of being unreasonable. I have not found this question easy to decide in this particular case, as I think HMRC's case was weak, but I have concluded that, while my decision was on the basis of statutory interpretation, I do not think it was objectively unarguable that, due to the apparently very wide statutory definition of 'register' as including records a person was obliged to keep by any enactment, that 'register' captured MLR records which a solicitor was bound by Act of

Parliament to keep. And while I am conscious that HMRC also had to show that the records held by the appellant were 'relevant data', and that I dismissed this part of HMRC's case very shortly on the basis it involved an unnatural reading of the legislation, nevertheless I do not think it actually unreasonable for HMRC to have taken the view that, had they been able to persuade the Tribunal that a person who kept MLR records was a relevant data holder, then the MLR records were relevant data.

27. Lastly, I agree with HMRC that the appellant was wrong to read [94] of the judgment as saying anything about whether HMRC's case should have been seen as unreasonable or hopeless. I said:

> [94] HMRC asked for the notice to be varied if I found it to be incorrect: but I have found it to be wholly incorrect for the above reasons and incapable of being varied. It is simply invalid.

28. This was not a statement that the case was unarguable but a statement that the notice could not be remedied by variation. It could not be remedied by variation because my interpretation of the statute meant that the appellant was not a relevant data-holder (in respect of MLR data) and therefore could not be a recipient of a notice of the kind which HMRC had served, however varied. I was saying nothing about the quality of HMRC's case that the appellant was a relevant data-holder.

**Unreasonable not to apply for declaration**

29. As I have said it was also the appellant's case that HMRC was unreasonable to proceed in the manner in which they did. It was the appellant's position that HMRC's case that a firm of solicitors was a data-holder because of its MLR obligations was weak, even if not unreasonable, and that in such circumstances it was unreasonable not to have applied in advance for a 'declaration' which I take to mean Tribunal approval of the notice, rather than issuing the notice and forcing the appellant to defend it. It took this view because HMRC's interpretation of Sch 23 FA was novel and HMRC (by their own admission) were clearly undertaking a 'test' to see if issuing the notice would yield information by issuing notices to 10 firms of solicitors, including the appellant.

30. While the appellant does not refer to the part of the legislation it had in mind, I have proceeded on the assumption that they were referring to paragraph 5 of Sch 23. That provision mirrors the information notice provisions in Sch 36 FA 2008 in that HMRC have an alternative route to gathering information. That is the power to apply to the Tribunal for advance approval of a notice, rather than issuing the notice without approval.

31. I agree that HMRC can apply for pre-approval. They could so by making the application for approval either 'ex parte' or 'inter partes' (see ¶5(3)). If ex parte but on notice to the relevant data-holder, the data-holder would (probably) be limited to making representations to HMRC (see ¶5(4(c)). This would have saved Wilsons the costs of a hearing, but not the cost of counsel's advice and written representations: and it would have been at the expense of its ability to participate in an inter partes hearing and at the expense of its right of appeal.

32. While in 'run-of-the-mill' Sch 36 third party information notice applications, there are normally good reasons for HMRC to apply for the hearing to be ex parte (such as the need to keep the current status of a tax investigation secret from the object of it), in the case of the sort of notice HMRC issued in this case, I can see no grounds for HMRC shutting off the appellant from making oral representations in opposition to approval of the notice. Therefore, I cannot conclude that HMRC acted unreasonably in failing to making an *ex parte* application under ¶5. On the contrary, I think it would have been unreasonable to so do.

33. That leaves only an inter-partes application under ¶5. And had HMRC proceeded in this manner, it is difficult to see how such an application would have saved Wilsons any money at all. This is because a hearing would still have taken place and it seems likely the appellant would have wanted the same legal advice and representation as it received in the appeal hearing.

34. In conclusion, I do not follow how it can say it was put to additional costs because HMRC did not initiate the pre-approval route. I think it's case on this may reflect an incomplete understanding of the inter-parties route for Tribunal pre-approval.

35. However, while the appellant does not say this it may be that it thought that, had HMRC made an inter partes application to the Tribunal in respect of all 10 firms at the same time, the Tribunal may have joined the hearings, the names of the objectors been made known to each other, and the costs of objecting to the approval could have been shared. But, bearing in mind that the evidence, recorded at §30 of my original decision, was that 8 firms chose to comply (albeit 1 gave a nil return) and the other firm objected on the grounds it was onerous, which was not a ground pursued by the appellant, I cannot conclude that the appellant would have obtained any financial assistance in objecting to the application from the other recipient firms had HMRC proceeded in this fashion.

36. So even if it could be said to be unreasonable not to have proceeded in this fashion, I would not be satisfied doing so would have saved the appellant any of its costs.

37. And in any event, I see no reason why HMRC should have sought the Tribunal's prior approval. By proceeding in the manner in which HMRC did, the appellant had a clear right to appeal. My conclusion is that HMRC did not act unreasonably by issuing the notices rather than seeking prior Tribunal approval.

**Unreasonable witness evidence?**

38. The appellant originally served two witness statements (from a Mr Parker and a Mr Patch) about the manner in which the firm collected and retained MLR information. Evidence should have been exchanged simultaneously but in the event, HMRC only served the statement of its witness, Ms Akhurst, many weeks after the appellant served Mr Parker's and Mr Patch's statements. The appellant's position was that Ms Akhurst statement was served late, was irrelevant, and forced them to serve evidence in response from a Mr Fullerlove that they would not otherwise have needed to serve.

39. In particular, Ms Akhurst's evidence was about HMRC's decision to use notices of the kind in issue in the appeal in order to find information about taxpayers' avoidance/evasion of tax through the use of off-shore tax structures. The statement referred to 'enablers of tax avoidance' and, as the notice was issued to Wilsons, might be read as suggesting that Wilsons was considered by HMRC to be an enabler of tax avoidance. The appellant also objected to Ms Akhurst's statement that she considered Wilsons were seeking special treatment (in contrast to the other 9 recipients, 8 of whom had complied). Wilsons also considered that the statement contained a suggestion that Wilsons had not complied with the Law Society's anti-money laundering practice note.

40. Counsel for the appellant felt obliged to cross examine her in respect of her statement on these matters. In her cross-examination, Ms Akhurst made it clear that she made no such allegations. Ms Anderson (counsel for HMRC) also made it clear that HMRC were not asking the Tribunal to drew adverse inferences against Wilsons (see [34]).

41. However, I agree with the appellant that, taking into account the way Ms Akhurst's statement was framed, and taking into account the importance to it of its reputation, it was reasonable of the appellant to serve Mr Fullerlove's witness statement in response to it. This

remains the position even though in the hearing I deemed his evidence irrelevant because HMRC expressly stated that they were making no such allegations. Until HMRC offered that clarification, it was quite reasonable for the appellant to rely on Mr Fullerlove's evidence.

42. So the appellant reasonably incurred costs in order to counter Ms Akhurst's statement; but the next question is whether it was unreasonable for HMRC to have served Ms Akhurst's statement in the first place.

43. In my decision, I concluded (see [28]) that Ms Akhurst's evidence was not really relevant to the issues which I had to decide. While it is the law (¶3(2) of sch 23) that a notice cannot be issued unless a relevant officer has reason to believe that the information sought 'could have a bearing' on chargeable periods, the question of whether the notice was issued for a proper purpose is not a permitted ground of appeal. Moreover, the appellant had not suggested that the notice in this appeal was issued for an improper purpose.

44. Curiously, it seems that Ms Akhurst's evidence may have been relevant to a pre-approval application under ¶5 Sch 23 (see [30] above) where the Tribunal would have to be satisfied that the notice was to be issued for a proper purpose, but in an appeal hearing against a notice issued without pre-approval the Tribunal is not expressly required to be satisfied that the notice is issued for a proper purpose. Nevertheless, I can understand why HMRC may have thought that they ought to satisfy the Tribunal that the notice was issued for a proper purpose.

45. Therefore, a short statement which covered nothing but HMRC's explanation for why they were seeking the information would have been unobjectionable and would not have required a response, but the statement was not so limited. It contained opinion evidence, which had to be ignored.

46. It was also served 7 weeks late but I accept that the appellant still had sufficient warning of it to serve evidence in response.

47. My conclusion is that HMRC should have taken a great deal more care to ensure that the witness statement was appropriate to the case that they were putting; they did not need to serve any evidence but certainly should not have served evidence that apparently contained allegations which were not a part of the case that they were putting. By doing so they forced the appellant to incur costs in responding and I consider that unreasonable.

**Unreasonable to breach directions?**

48. The appellant separately complained that HMRC breached the Tribunal's directions. Apart from the late service of Ms Akhurst's statement, the skeleton argument was served one day late.

49. While the late service of the witness statement appears to be to be unreasonable and unexplained, I am not satisfied that the appellant was put to additional costs because of its late service. Mr Fullerlove's evidence would have been responsive even had Ms Akhurst's evidence been served on time, as the directions were for simultaneous exchange.

50. And so far as the late skeleton was concerned, this was notified to the appellant in advance and the appellant had no objection: I do not consider that HMRC acted unreasonably in this nor that the appellant was put to additional costs because of it.

**CONCLUSION ON COSTS APPLICATION**

51. For the reasons given above, I find that HMRC acted unreasonably in serving Ms Akhurst's statement in the form it was in, and therefore the appellant should have its costs of serving Mr Fullerlove's statement in response.

52. However, while this was a borderline case, I concluded that overall HMRC's decision to defend the appeal should not be classed as unreasonable. For that reason, I otherwise refuse the appellant's application for costs

53. I sympathise with the appellant's position. It was one of 10 firms served with the notice. The firms were apparently randomly selected guinea pigs. In effect, 8 out of the 10 firms complied with the notice (albeit one by giving a nil return). Only 2 of the firms objected and one objected successfully and without incurring the costs of a hearing on the basis that the notice was too onerous. Only the appellant took a principled stand that the keeping of MLR records did not render a legal firm liable to a Sch 23 notice as the keeper of a register. I say the stand was principled because legal firms owe their clients a duty of confidentiality: the notice should only have been complied with if it was lawful. Wilsons acted quite properly by testing whether the notice was lawful: had they lost the appeal, they would have had the comfort of knowing that they were complying with their lawful obligations in providing the records to HMRC.

54. The cost to them of their principled stand is over £90,000. I presume complying with the notice would have been much cheaper, although it follows from my decision that I would have considered them wrong to do so. By objecting to the legality of the notice, they have obtained no financial benefit while at the same time they were never anything more than a third party holder of information about other taxpayers. The appeal raised an important issue which was the extent to which (if any) HMRC could require firms to produce their MLR records, which the appellant's stand meant was properly aired and determined in their favour.

55. However, while these grounds may be seen as good grounds on which to award the appellant its costs of defending the appeal, the jurisdiction of the tribunal is only to award costs where the other party has behaved unreasonably. I have concluded, albeit I considered it a borderline case, that nevertheless HMRC were just on the right side of the border and there was sufficient merit in their case such that it was not unreasonable to defend the appeal. The appellant should just have the costs associated with the preparation and service of Mr Fullerlove's evidence.

**THE COSTS SCHEDULE**

56. The application was accompanied by a properly itemised costs schedule.

57. HMRC did not take issue with the quantum claimed by the appellant (£93,185.30) other than to say should only pay to extent actually caused costs by unreasonable behaviour. Their position was that Mr Parker's and Mr Patch's statements were unnecessary to the issues in the appeal. In particular, their evidence was about how the appellant held the MLR information on its clients' files and would only have been relevant had the appellant defended the appeal, which it did not, on the grounds the notice was onerous. This view reflects what I said at [25] of my decision.

58. However, as I have found that the appellant should not be awarded its costs apart from those with respect to Mr Fullerlove's statement, this aspect of HMRC's defence to the costs application is not necessary. However, had it been, I would have agreed that the evidence of these two witnesses was unnecessary and so the costs of it should not be borne by HMRC in any event.

**DISPOSITION OF APPLICATION**

59. The application is REFUSED save that I order HMRC to pay the appellant the costs, assessed on a standard basis, of (a) consideration of Ms Akhurst's witness statement and (b) the preparation and service of Mr Fullerlove's evidence in response. If the parties are unable the amount, they must revert to the Tribunal for summary assessment.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

60. 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 MOSDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 30 MAY 2019**