



Neutral Citation: [2024] UKFTT 00320 (TC)

Case Number: TC09137

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

On the papers
Appeal reference: TC/2018/05250

Appeal against wasted costs award, Rule 10(1)(a) and Rule 10(1)(b). No award could have been made under either Rule. Appeal allowed.

Heard on: 15 October 2023
Judgment date: 10 April 2024

Before

TRIBUNAL JUDGE GETHING

Between

Metropolitan International Schools Limited

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Reynolds Porter Chamberlain

For the Respondents: Mr Simon Bracegirdle litigator of HM Revenue and Customs'
Solicitor's Office

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. At a hearing in October 2021 to consider the issue of information notices under Schedule 36 Finance Act 2008, I considered an application made during the hearing for an award of costs made by the Appellant in relation to the cost of a witness summons. The Appellants had objected to the inclusion of certain paragraphs in a witness statement of Ms Powell an officer of HMRC concerning conversations with a partner at Grant Thornton who refused to attend the Tribunal voluntarily. At the eleventh hour the Appellants sought the permission of the Tribunal to either exclude from the consideration of the Tribunal those paragraphs of Ms Powell's witness statement or issue a witness summons requiring the attendance of the Grant Thornton partner.

2. In my decision I did not exclude from consideration of the Tribunal the paragraphs of Officer Powell's witness statement as it was not necessary. I made the decision on the basis of other information made available to the Tribunal during the course of examination of an officer of HMRC. I made an award of costs in favour of the Appellant because I considered that had HMRC disclosed those other grounds for issuing information notices MIS would not have had to incur the expenses.

3. HMRC appealed against the decision to award costs on the basis they had not had sufficient notice of the issue and had not made representation on the issue during the hearing. On 29 September 2022 I set aside that element of the decision and invited the parties to produce representations. I received those representations in 2022 but personal circumstances have prevented me from dealing with the issue before now.

The Key Facts

4. On 18 February 2020 HMRC served a witness statement of the case officer Ms Powell. Ms Powell is not a lawyer or a member of any professional body.

5. On 30 March 2020 the date for the hearing was set for 19 October 2021.

6. On 17 September 2021 MIS informed HMRC they would like Mr Pedley of Grant Thornton to attend the hearing to refute statements made by Ms Powell at paras 8-40 of her witness statement. Those paragraphs are under a heading, "*Difficulties experienced in progressing the enquiry*".

7. On 24 September 2021 Grant Thornton advised MIS that Mr Pedley would not attend without a witness summons.

8. On 1 October MIS informed HMRC that they considered paragraphs 31 and 34-36 and exhibits entitled first and second attendance which are contemporaneous notes made by Ms Powell of conversations between her and Mr Pedley of Grant Thornton a former adviser to MIS to be irrelevant to the issues under consideration. And if HMRC did not remove the paragraphs they would apply to the Tribunal to summon Mr Pedley as a witness to dispute Ms Powell's evidence.

9. On 6 October HMRC informed MIS that Ms Powell's witness statement would not be amended.

10. On 11 October MIS lodged a witness summons application with the Tribunal.

11. On 13 October MIS informed HMRC that the witness summons would allow Ms Powell's evidence to be challenged and also requested paras 8 to 40 of Ms Powell's witness statement under the heading "*Difficulties experienced in progressing the enquiry*", should be excluded. They contain a summary of the exchanges between MIS, and/or its advisers and Ms

Powell pertaining to her requests for information and documents made by Ms Powell to check MIS's tax position.

12. On 13 and 14 October MIS and Grant Thornton entered into correspondence with the Tribunal.

13. On Wednesday 14 October the Tribunal issued the witness summons to Mr Pedley requiring his attendance and indicating that MIS would meet his fees but did not agree to exclude the paragraphs and exhibits from the evidence.

14. On Thursday 15 October 2021 MIS asked HMRC to agree that paragraphs 7-40 of Ms Powell's witness statement were irrelevant. HMRC did not reply.

15. The hearing took place on Tuesday 19 October 2021.

The legislation and case law

The Tribunals Courts and Enforcement Act 2007, section 29 reads as follows:

“29 Costs or expenses

(1) The costs of and incidental to-

(a) all proceedings in the First-tier Tribunal; and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place...”

(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 the Tribunal Procedure Rules.

(4) In any proceedings mentioned in sub-section (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 the Tribunal Procedure Rules

(5) “In sub-section (4) “wasted costs” means 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 representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that other party to pay.

The discretion afforded to the Tribunal is subject to Rule 10 of the Tribunal Rules:

“10(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;”

6. The Upper Tribunal in *Market & Opinion Research International Ltd v Revenue and Customs Commissioners* [2015] UKUT 0012 (TCC)(“**MORI**”) held that consideration of whether a party has acted unreasonably for the purposes of Rule 10(1)(b) of the Tribunal Rules is a value judgment which depends on the particular facts and circumstances of the case.

The Upper Tribunal decision in MORI was endorsed by the Upper Tribunal in *Distinctive Care Ltd v HMRC* [2018] UKUT 155 (TCC) at [44] to [45] (“*Distinctive Care*”), which has in turn been upheld by the Court of Appeal in *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010. The *Distinctive Care* principles are:

- a) 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;
- b) it is possible for a single piece of conduct to amount to unreasonable conduct;
- c) actions include omissions;
- d) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
- e) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
- f) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the Tribunal) rather than the quality of the original decision;
- g) the fact that an argument fails before the Tribunal 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;
- h) the power to award costs under Rule 10 should not become a “*backdoor method of costs shifting*”.
- i) questions of reasonableness should be assessed by reference to the facts and circumstances at the time/(s) of the acts.

HMRC’s Representations

16. In essence HMRC consider that the Tribunal erred in law in making the award of costs under section 29 Tribunal Courts and Enforcement Act 2007 (TECA) which permits awards of costs at the discretion of the Tribunal but considers the Tribunal failed to take into account the detailed requirements of Rule 10 of the Tribunal Rules and the terms of section 29.

17. Specifically HMRC say that:

(1) the Tribunal may not make an award of wasted costs against a case officer who is neither a legal or other representative (with a duty to the Tribunal) within the meaning of section 29(5) as confirmed by the Court of Appeal in *Ridehalgh v Horsfield* [1994] Ch 205 which was adopted by Judge Baily in *Paul Owen v KA Shun Lo and others* 2022 UKFTT 121 (TC) . Ms Powell is not such a legal representative and a wasted costs order may not be made against Ms Powell under section 29.

(2) That leaves only Tribunal rule 10 (1)(b) i.e. whether Ms Powell acted unreasonably bringing defending or conducting the proceedings.

18. In relation to unreasonable behaviour HMRC say:

(1) MIS had had Ms Powell’s witness statement 19 months before raising the issue of its content.

(2) MIS had apparently accepted Ms Powell’s witness statement before taking the first step to ask Mr Pedley to attend as a witness.

(3) MIS first raised the issue of paragraphs 31, 34-36 and the first and second exhibits being irrelevant to the appeal on 1 October 2021. Paras 31 and 34-36 refer to Ms Powell’s

recollections of calls with Mr Pedley which are recorded in notes made near the time of the conversations.

(4) It was not until 13 October 2021 that MIS raised their demand to have paragraphs 8-40 excluded. Paras 8-40 record Ms Powell's view of the conduct of HMRC's enquiry which HMRC say can only assist the Tribunal. Such background information is commonly found in witness statements of this kind. Ms Powell is entitled to tell her side of the story to the Tribunal.

(5) HMRC say it is for the Tribunal not a party to determine what is relevant.

(6) HMRC say MIS's position is illogical and inconsistent. They say the paragraphs are irrelevant but yet insist on summoning a witness to challenge the statements.

(7) HMRC say it is not in the interests of justice, nor in accordance with rule 2(c) of the Tribunal Rules for a witness to be constrained when drafting a witness statement for fear what they may write is seems as unacceptable by the other party.

(8) Even though the Tribunal favoured Mr Pedley's view of what he is likely to have said or meant, the Tribunal did not exclude from the bundle Paras 8 to 40 nor the exhibits to the witness statement. Mr Pedley had no recollection of what he had said only a statement of what he would have said.

(9) The Tribunal found there were reasonable grounds for issuing the notices which grounds were not in the witness statement of Ms Powell but which were adduced in cross examination and examination by the panel. It is not unreasonable for evidence to be given in cross examination and questioning by the panel. Mr Pedley could not assist the Tribunal in relation to this crucial evidence. Further Mr Pedley's evidence had no bearing on that evidence. MIS considered paragraphs 4-40 irrelevant.

(10) MIS sought to restrict evidence to be given by Ms Powell. MIS did not seek more information or evidence from Ms Powell.

(11) MIS's application was to challenge the accuracy of Ms Powell's recollections of telephone calls not to question the reasons for issuing the information notices.

(12) MIS applied for the witness summons 8 days before the hearing date although they had Ms Powell's witness statement for 19 months beforehand and had had 7 months' notice of the hearing date. Two days after the application was made Mr Pedley asked for more time to consider his position. That request was denied, and the summons was issued

(13) HMRC had not been invited to comment on the application to summon Mr Pedley.

(14) HMRC's duty to show the documents are reasonably required is a duty to the Tribunal. The documents must be reasonably required but HMRC has no duty to demonstrate that to the Appellant. The substantive decision paras [8] to [20] confirm that.

(15) HMRC say that as the substantive decision confirmed that a number of items were reasonably required HMRC had satisfied that requirement and had not acted unreasonably.

(16) HMRC request the Tribunal to:

(a) Find HMRC did not act unreasonably in defending the notice and conducting proceedings.

(b) Find that MIS's demands to withdraw parts of Ms Powell's witness statement were unreasonable.

(17) At the date of HMRC's representations no note of costs had been provided by MISL and HMRC had asked that a schedule of costs be provided. The Tribunal now has the schedule of costs.

The Appellant's Representations

19. MIS makes two requests:

- (1) an order for wasted costs under Rule 10(1)(a) of the Tribunal Rules and, in the alternative,
- (2) an order for costs under Rule 10(1)(b) based upon HMRC's unreasonable conduct.

20. MIS say the Tribunal has discretion to make an award in relation to **wasted costs** pursuant to Rule 10 of the Tribunal Rules. The Tribunal should reinstate the original order for costs for the reasons given under Para [2] of the Tribunal's original decision.

21. MIS says the restrictions on the Tribunal's authority to make a wasted costs order under Rule 10(1)(a) are satisfied. HMRC's Solicitors Office is the representative of HMRC and it behaved unreasonably in omitting to provide, prior to the hearing of the Appeal, the objective grounds for the issue of the notices. They say at [23] of their Representations on Costs, "*But for the unreasonable omission of the objective reasons for issuing information notices, it would not have been necessary for the Appellant to incur the costs it did in making the Application.*"

22. MIS provided a schedule of costs. MIS ask for a direction for HMRC to pay the costs in the schedule as such a direction would be consistent with the overriding objective set out in Rule 2 of the Tribunal Rules.

23. In the alternative MIS ask for a direction that HMRC pay the costs under Rule 10(1)(b) of the Tribunal Rules as, "*a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.*"

24. The failure to provide the objective reasons for issuing the notices was the unreasonable behaviour. That behaviour led MIS to incur the costs. MIS point to the case of *Gardiner v HMRC* [2015] UKFTT 115 (TC) where the Tribunal awarded the taxpayer his costs where HMRC's unreasonable behaviour comprised its failure to provide evidence of the taxpayer's negligence.

Discussion

25. As HMRC point out, and as is clear from my para [11] of my substantive decision, HMRC's duty to demonstrate that it has reasonable grounds to issue a notice, is a duty it owes only to the Tribunal and not to MIS.

26. I erred in law in inferring at paragraph [2] of my substantive decision that HMRC had a duty to explain to MIS that the information requested in the notices was reasonably required and consequently that MIS was justified in applying for a witness summons to require Mr Pedley to attend the hearing to contest some statements in Ms Powell's witness statements.

27. I accept HMRC's submission that paragraphs 4-40 of Ms Powell's witness statement contained background information to the issue of the notices and it was not unreasonable for HMRC to include that information in Ms Powell's witness statement.

28. As there was no duty on HMRC to explain the reasons for the issue of the notices to MIS and it was reasonable for the background information to be included in Ms Powell's witness statement:

(1) No award for wasted costs could be made under Tribunal Rule 10(1)(a) as there had been no “*improper, unreasonable or negligent act or omission*” on the part of HMRC’s Solicitor’s Office or any officer of it.

(2) No award may be made under Tribunal Rule 10(1)(b) against HMRC because as there was no duty to inform MIS of the reasons for the issue of the notices, failure to provide the reasons cannot be regarded as unreasonable conduct in the “*bringing, defending or conducting the proceedings*”.

29. I make no further order as to costs.

HMRC noted in its application that at the date of their submissions in 2022 MIS had not complied with the notices, and no date for compliance had been included in the amended notices attached to my substantive decision. I am unaware of the current status of compliance. Should it be necessary I correct the omission in my substantive decision. I require all the outstanding information and documents to be provided to HMRC by 1 May 2024.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

**JUDGE HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 10th APRIL 2024