Appeal number:TC/2011/05762

PROCEDURE – costs – complex case – appellant substituted for previous appellant – appeal later withdrawn – whether and to what extent there should be a direction for costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANK WARREN **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at the Royal Courts of Justice, London WC2A 2LL on 31 March 2017

Mr Jonathan Crystal of counsel instructed by IPS Law LLP appeared for the Appellant

Ms Rebecca Murray of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs appeared for the Respondents

DECISION

1. This is my decision on the Respondents' application for costs following withdrawal by the Appellant of his appeal on 17 June 2016. Mr Warren had been substituted as the Appellant in the appeal following my decision released on 25 October 2013 (see *MCashback Software 6 LLP v Commissioners for HM Revenue & Customs [2013] UKFTT 679 TC*) and a direction of the same date. Put briefly, Mr Warren was a member of MCashback Software 6 LLP ("the LLP"). The appeal was originally notified to the Tribunal by the LLP, but in the event the LLP did not pursue the appeal. Mr Warren therefore applied in May 2013 to continue the appeal in the name of the LLP or in his own name. The application was opposed by HMRC but for the reasons given in my decision I directed that Mr Warren should be substituted as the Appellant in place of the LLP pursuant to Tribunal Rule 9(1). For the purposes of this decision, where appropriate I shall refer to Mr Warren as the Appellant.

2. The appeal was originally notified to the Tribunal on 28 July 2011. On 10 September 2011 the tribunal acknowledged receipt of the appeal and informed the then parties that the appeal had been categorised as a complex case. For present purposes the significance of that categorisation is in relation to costs. Tribunal Rule 10(1)(c) provides as follows:

> " (1) The Tribunal may only make an order in respect of costs …
>
> …
>
> (c) if –
>
> (i) the proceedings have been allocated as a Complex case …; and
>
> (ii) the appellant (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case has been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph."

3. The LLP did not make any request to the tribunal pursuant to Tribunal Rule 10(1)(c)(ii) to exclude the proceedings from potential liability for costs. In other words, the LLP did not opt out of the costs sharing regime applicable to complex cases.

4. The circumstances leading to withdrawal of the appeal may be summarised as follows. Pursuant to a direction released on 25 October 2013 the Appellant served a statement of case on 22 January 2014 and on 16 October 2014 the Respondents served an amended statement of case. Thereafter the parties agreed directions which were released by the Tribunal on 6 January 2015. The directions included provision for witness statements and expert reports. The directions were subsequently amended on 28 May 2015.

5. In June 2015 the Appellant became aware that a partnership follower notice pursuant to section 204 and Schedule 31 Finance Act 2014 had been served on Mr Latham, the representative partner of the LLP. A copy of the follower notice had also been sent to the Appellant. I understand that the follower notice required corrective action, including withdrawal the present appeal by the Appellant. It was based on HMRC's opinion that the Supreme Court decision in *Tower MCashback LLP 1 v Commissioners for HM Revenue & Customs [2011] UKSC 19* ("the Judicial Ruling") was relevant to the arrangements of the LLP.

6. Pursuant to the directions, lists of documents were served and on 20 November 2015 a witness statement of the Appellant was served. The Appellant also applied for a witness summons in relation to Mr S Marsden, a designated member of the LLP and for the production of documents by the LLP.

7. In February 2016 the tribunal was copied into correspondence between the Appellant and the Respondents concerning the follower notice. The parties were given an opportunity to make representations as to the implications for the appeal of the follower notice. On 21 April 2016 the Respondents asked for a case management hearing to be listed. A hearing took place on 13 June 2016. During the course of that hearing Mr Crystal referred to the Appellant as facing a dilemma in relation to the appeal. In particular the Appellant faced the possibility of penalties if the appeal was not withdrawn. At the time of the case management hearing no decision had been taken by the Appellant as to whether he would withdraw the appeal. I was told at the hearing that Mr Marsden had agreed to attend as a witness voluntarily and that the Appellant had obtained the documents he had previously been seeking. The directions following the hearing made provision for the Appellant to serve a witness statement from Mr Marsden and also for service of an expert report.

8. In the event the Appellant withdrew the appeal on 17 June 2016, shortly after the case management hearing. The tribunal sent notice of that withdrawal to the parties pursuant to Tribunal Rule 17(2) on 14 July 2016.

9. On 3 August 2016, following withdrawal of the appeal the Respondents applied for their costs of the appeal pursuant to Tribunal Rule 10(1)(c), to be subject to a detailed assessment pursuant to Rule 10(6)(c) and Rule 10(7)(a). An indication was given that the Respondents' costs of the appeal were estimated to exceed £85,000. The application suggested that a summary assessment would not be appropriate and sought a direction that the requirement to provide a schedule of costs in Rule 10(3)(b) should be waived. The relevant provisions of Rule 10 are as follows:

> " 10 (3) A person making an application for an order under paragraph (1) must--
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends--

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

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first--

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by--

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply--

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;"

10. The Appellant objected to the Respondents' application to waive the requirement to serve a schedule of costs with the application on the basis that no sufficient reason had been given.

11. I considered the Respondents' application to waive the requirement to serve a schedule of costs on paper. Given the nature of the proceedings I was satisfied that this would not be a case where the tribunal would make a summary assessment of costs. The schedule therefore would serve no real purpose, other than to increase costs. In a direction released on 31 August 2016 I directed that the requirement for a schedule should be dispensed with. Jurisdiction to make such a direction is contained in Tribunal Rules 5 and/or 7(2)(a). Rule 5 provides that subject to any statutory provisions, the tribunal may regulate its own procedure and may give a direction in

relation to the conduct of proceedings, including a direction for extending time for compliance with any Rule. Rule 7(2)(a) provides as follows:

> " (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include –
>
> (a) waiving the requirement."

12. Against that background I can consider the submissions of Mr Crystal on behalf of the Appellant and of Ms Murray on behalf of the Respondents. Essentially, the Appellant objects to any direction requiring him to pay the costs of the appeal for the following reasons:

> (1) The Respondents failed to make an application for costs within the period of 28 days of being sent notice of withdrawal.
>
> (2) The Appellant has never had an opportunity to opt out of liability for costs and cannot therefore be liable for costs.
>
> (3) In any event, as a matter of discretion the tribunal should not make a direction for the Appellant to pay the Respondents' costs or the appeal.
>
> (4) In the event that a direction for costs is made, those costs should not include costs prior to the Appellant being added as a party on 15 November 2013.

13. I shall consider each of those objections in turn.

Is there a Valid Application for Costs?

14. Mr Crystal relied on Rule 10(3)(b) which provides that a person applying for costs "must" send or deliver with the application a schedule of costs in sufficient detail to allow the tribunal to undertake a summary assessment of costs if it decides to do so. He also pointed out that Rule 10(4)(b) provides that an application for costs may not be made later that 28 days after the date on which the tribunal sends out the notice of withdrawal.

15. In light of those requirements Mr Crystal submitted that no valid application for costs has been made. The application for costs was required to be made by the Respondents on or before 11 August 2016. The application purported to be made by the Respondents was made on 3 August 20116 but it contained no schedule of costs, therefore it was not a valid application. He acknowledged that the tribunal made a direction waiving the requirement to send or deliver a schedule of costs in a direction released on 31 August 2016, but that was after the date by which the application had to be made and it could not retrospectively validate an invalid application.

16. My direction waiving the requirement for a schedule of costs was consistent with the general approach taken in this tribunal, first described by Judge Poole in *Vardy Properties v Commissioners for HM Revenue & Customs [2013] UKFTT 96 (TC)* as follows:

" 18. … The Rules require that any party seeking an order for costs must send with its application "a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so". For the vast majority of cases dealt with by the Tribunal, this procedure is appropriate. However, where the amount of time and effort involved in drawing up the appropriate schedule may be large, it appears unfortunate that a party should be put to the time and effort of doing so before establishing an "in principle" entitlement to costs, especially if there are potential complications or disputes about the precise terms of any order (e.g. as to an allowable proportion, as to the basis of assessment or even as to the appropriateness of an order at all).

19. In this connection, I would point out that the Tribunal has a general power, under rule 7 of the Rules, to waive a requirement of the Rules if it considers it "just" to do so – but only after there has been a breach of the requirement. It also has a general power to extend time limits under Rule 5. There is also, of course, the overriding objective of fairness and justness contained in Rule 2.

20. Taking all those matters into consideration, it may be helpful for me to indicate that in the circumstances of this case, if HMRC had submitted a prompt costs application without the appropriate schedule attached (but including an application to dispense with the requirement for the schedule), I would have been prepared to waive the requirement to deliver the schedule of costs with the application. I would have given appropriate directions to enable the costs application to be determined "in principle" before requiring HMRC to deliver a detailed schedule of costs at a later date if the figures could not be agreed between the parties. For situations where the amounts of costs involved are large and complex, this seems to me to be a sensible step which is only likely to save potential wasted time and costs for all parties."

17. The Respondents' application for costs was consistent with the approach described in Vardy Properties, and I was satisfied that no schedule of costs was necessary. Indeed Mr Crystal accepted that if there is a direction for costs following this application then there should be a detailed assessment of those costs.

18. I suggested to Mr Crystal that this was a "technical objection" in the sense that it could be remedied one way or another without prejudice to the Appellant. Mr Crystal pointed to the fact that the requirement for a schedule or costs was mandatory, in that Tribunal Rule 10(3)(b) uses the word "must" in relation to the requirement to include a schedule of costs. I still regard it as a technical objection in circumstances where it is accepted that there will be no summary assessment of costs. The Tribunal plainly has jurisdiction to waive the requirement in an appropriate case. There is nothing to prevent the Tribunal from waiving the requirement at any stage and I remain satisfied that my direction released on 31 August 2016 was appropriate in circumstances where there was no real prejudice from the absence of a schedule of costs.

19. I note also that Tribunal Rule 7(1) provides that an irregularity resulting from a failure to comply with any requirement in the Rules does not of itself render void any step taken in the proceedings. I do not consider that failure to provide a schedule of costs within the time for making an application for costs renders the application invalid.

20. I am satisfied therefore that there is a valid application for costs.

The Significance of the Opt Out

21. The Appellant contends that in the unusual circumstances of this appeal he has never had an opportunity to opt out of the cost sharing regime for complex cases. In particular, he was not a party to the proceedings when they were categorised as complex and he was not sent a notice by the tribunal categorising the appeal as a complex case when he was substituted as the Appellant in place of the LLP.

22. Mr Warren was substituted as the Appellant pursuant to Tribunal Rule 9(1)(b). The substitution took effect on 15 November 2013. Rule 9(5) provides that if the tribunal gives a direction under Rule 9(1) then it "may give such consequential directions as it considers appropriate". At the hearing of Mr Warren's application which led to his substitution as the Appellant, there was broad agreement as to the directions I should give for the future conduct of the appeal. I was not asked to make any directions in relation to the categorisation of the appeal or to give Mr Warren an opportunity to opt out of the costs sharing regime.

23. The hearing which led to Mr Warren being substituted as the Appellant took place on 31 July 2013. My note of that hearing records that at the conclusion of the hearing Ms Murray referred to the appeal as being a complex case. Both Ms Murray and Mr Crystal stated that they were reserving their position on the costs of the application until they had received the written decision. I am satisfied therefore that Mr Warren's representatives were aware at that stage that the appeal had been categorised as complex. I am satisfied also that they were aware or had at least assumed that the LLP had not opted out of the costs sharing regime. Even if Mr Warren or his representatives were not aware of the costs position at that time, they ought to have been aware.

24. The Respondents contend that having been substituted as the Appellant and not having asked for any consequential direction in relation to costs, the Appellant assumed the litigation risk of a direction for costs in the event that the appeal was unsuccessful, including if the appeal was withdrawn.

25. Mr Crystal submitted that any litigation risk must be limited to the period after 15 November 2013 when the substitution of Mr Warren as the Appellant took effect. He submitted that I should waive the requirement for the Appellant to opt out of the costs regime, or alternatively as a matter of discretion I should extend the time for him to opt out.

26. Ms Murray submitted that it would be unjust and cause significant prejudice to HMRC if the Appellant was entitled to effectively opt out of the costs regime now that he has withdrawn the appeal. She relied on a description of the purpose of the opt out provision given by Warren J in *Commissioners for HM Revenue & Customs v Atlantic Electronics Ltd [2012] UKUT 45 (TCC)*. Mr Crystal did not question the rationale for the opt out provisions, in particular what was said at [7]:

" 7. The right to opt out under Rule 10 has to be exercised, as I have mentioned, within 28 days of the allocation of the case as a Complex case. There are, I think, two related reasons for that requirement. The first is to achieve certainty for both parties so that they know, at an early stage, which costs regime is to apply and can run their cases accordingly. The second is to prevent the taxpayer from waiting to see how his case progresses. To take the extreme case, if the taxpayer were entitled to wait until a decision had been given, he would obviously elect for a costs shifting regime if he had won and for a no costs shifting regime if he had lost. This would be effectively a one-way costs shifting which it was never the policy of the Tribunal Procedure Committee to produce. In a less extreme case, say half way through an appeal, the same consideration applies although it has less force; but the policy is that the taxpayer should not be able to wait and see how the wind blows but must make his election early on. The need to make an election within 28 days is well-known and causes no difficulties in practice."

27. It seems to me that the answer to the Appellant's objection in this regard lies in the fact that when the Tribunal gives a direction substituting a party, it may give such consequential directions as it considers appropriate. No consequential directions were sought or given in respect of costs. The appeal therefore remained a complex case in which the Appellant had not opted out of liability for costs. The Appellant had the opportunity at any time from 31 July 2013 onwards to apply for a consequential direction in relation to costs and/or to extend the time within which to opt out of liability for costs.

28. It is clearly desirable that there should be certainty in relation to costs at an early stage in the proceedings. It is undesirable that an appellant should be able to opt out of costs at a late stage. In the light of all the circumstances of the present appeal I am satisfied that the costs shifting regime applied to the appeal and the Appellant had an opportunity to opt out. He did not opt out and it is not appropriate to extend his time for doing so.

Discretion as to Costs

29. Mr Crystal submitted that in circumstances where the Appellant had never been given an opportunity to opt out of the costs regime, it would be unjust to make a direction that he pay the costs of the appeal. He submitted that it can be assumed that if the Appellant had been aware of that opportunity then he would have availed himself of it.

30. Mr Crystal also submitted that there was nothing in the conduct of the Appellant to justify a direction for costs against him. He suggested that directions for costs in complex cases were "exceptional" because appellants "invariably seek to exclude potential liability for costs".

31. I do not accept those submissions. The question of costs was raised at the hearing on 31 July 2013. The Appellant did have an opportunity to opt out of the costs sharing regime. It may be that the Appellant and his representatives did not address their minds to the question of costs following the written decision and the substitution taking effect. Even if that is the case, there is nothing in the conduct of the Appellant

to suggest that the Appellant would have opted out of the costs regime if he or his representatives had specifically considered the position. I cannot assume that the Appellant would have opted out of the costs shifting regime. Nor in my experience is it the case that appellants in complex cases invariably opt out of the costs regime.

32. Mr Crystal submitted that I should also take into account in exercising my discretion that the withdrawal came about the follower notice provisions in Finance Act 2014 were introduced. Those provisions came into force after commencement of the appeal and after Mr Warren was substituted as the Appellant. The corrective action required by the follower notice included withdrawal of the appeal and if the Appellant had not withdrawn the appeal then he could have become liable to penalties. It was reasonable for him to withdraw the appeal at that stage and he should not suffer a costs liability for doing so.

33. Ms Murray submitted that the follower notice provisions should not affect the Appellant's liability for costs. The Appellant could have chosen to pursue the appeal. He could also have made representations under those provisions to the effect that the Judicial Ruling was not relevant to the LLP. I am not aware what representations, if any were made or what response if any there was from HMRC.

34. I do not consider that the introduction of the 2014 legislation is a significant factor in the discretion as to costs, if it is relevant at all. The merits of the appeal were not affected by the 2014 legislation. Losing the appeal may have affected the Appellant's liability to penalties under section 208 Finance Act 2014. However the Appellant would have been able to appeal any penalty pursuant to section 214. One ground of appeal in section 214(3)(d) is that it was reasonable in all the circumstances for the Appellant not to take the corrective action. Hence, whilst the Appellant was exposed to a risk of penalties, if he acted reasonably he could justify not taking the corrective action and thus avoid the penalties. On that basis the risk to the Appellant in pursuing the appeal was the possibility of penalties if he was later found to have been unreasonable in pursuing the appeal.

35. In the course of litigation many things can happen which might alter the view a party takes as to the desirability of continuing the litigation. That does not mean that a party withdrawing an appeal should be able to avoid the cost consequences of doing so. In the present case the fact remains that if it was reasonable for the Appellant to pursue the appeal, whether or not the appeal was successful he would not be subject to penalties.

36. Against that background, I do not consider that there is any reason to depart from the usual approach in a complex case that costs should follow the event.

What if any Costs should be Recoverable?

37. The Appellant contends that costs in excess of £85,000 are "extraordinary" in the context of the present appeal. However that is not relevant to the question of whether there should be a direction for costs. The proper amount of costs recoverable

is a matter for assessment, which in the present case would be a detailed assessment. This is not a case where a summary assessment would be appropriate.

38. Mr Crystal submitted that if a direction for costs is made, then it should be limited to the period after Mr Warren was substituted as the appellant. In effect, that is the period after 15 November 2013. What happened before that date was nothing to do with the Appellant. I do not accept that submission. Where a person is substituted as a party, subject to any consequential directions made at the time that person should inherit the position of the previous party, including the position as to costs. Adopting any other approach would be unfair to the Respondents.

39. Mr Crystal also resisted a direction for costs in relation to the Appellant's application to continue the appeal in the name of the LLP or in his own name. Ms Murray submitted that there was no reason to exclude from any direction as to costs, the costs incurred by the Respondents in defending that application. She submitted that the application had failed and that the direction in fact made was for Mr Warren to be substituted as the Appellant. The costs of that application would normally follow the event and there was no good reason to make a direction excluding HMRC's costs in defending the application.

40. The question of costs in relation to that application was effectively reserved and I must now deal with it. I understand that pursuant to the Civil Procedure Rules, a court would normally make an order for the costs of such an application against the party seeking to be substituted. In the present case however the application was strenuously resisted, whether it related to the application to continue the proceedings in the name of the LLP, in Mr Warren's name or for his substitution as an Appellant. In those circumstances I consider that there should be no order as to the costs of that application. In other words, both parties should bear their own costs of the application, including the hearing on 31 July 2013.

41. Finally, I should record that the Appellant did not seek to rely on his financial means as a reason why no direction as to costs should be made. I shall proceed therefore on the basis that his means do not affect the manner in which I should exercise my discretion.

Conclusion

42. For the reasons given above I direct that the Appellant should pay the Respondents' costs of the appeal excluding their costs of defending the application heard on 31 July 2013. Those costs are to be the subject of a detailed assessment on the standard basis, if not agreed.

43. 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.

JONATHAN CANNAN

TRIBUNAL JUDGE
RELEASE DATE: 26 JUNE 2017