Costly business

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discusses the cost order options available in Upper Tribunal appeals.

An increasing number of appeals are made from First-tier Tribunal decisions to the Upper Tribunal (Tax and Chancery Chamber) so it is important to be aware of the differences between them in the rules and procedures relating to costs awards.

The most notable difference is that the process moves from a virtually cost-free environment to one where the successful litigant has an established right to their reasonable costs. In other words, in the Upper Tribunal, the appellant and the respondent have to assume the risk of a costs award being made against them – in addition to their own costs – should they lose the case.

The procedural rules relating to orders for costs in the Upper Tribunal are similar to those in the High Court. They are in the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), s 29 and the Tribunal Procedure (Upper Tribunal) Rules 2008. In brief, s 29 gives the tribunal a wide discretion to determine the question of costs and expenses of or incidental to the appeal. This discretion is subject to the more specific Upper Tribunal rules on costs.

Rule 10 provides that the Upper Tribunal may make an order for costs in cases transferred by or on an appeal from the First-tier Tribunal. Such an order may be made on an application by a party or on the tribunal's own volition. An application for costs may be made at any time in the proceedings. This may be at the time the appeal notice is lodged or after the appeal hearing has ended, but no later than one month after a decision notice is received. The paying side has the right to make representations regarding an application. If the paying side is an individual, the tribunal is compelled to consider both the their representations and their financial means.

In terms of the costs to be awarded under an order, the tribunal may determine the sum payable by summary assessment based on the information provided by the applicant, or by endorsing an amount agreed by the parties or by a detailed assessment by the senior courts costs office.

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In practice, the ideal outcome for an applicant is for the tribunal to assess the costs, even if it does not represent the entire amount claimed, rather than incur further expenses and fees trying to agree a figure or applying to the costs office.

If the tribunal makes an order for the detailed assessment of costs, it can also order that an amount be paid on account in anticipation of the costs assessment process. A successful appellant may consider seeking such an order to ensure they are awarded a significant part of their costs and do not suffer cash flow difficulties during the sometimes lengthy assessment process.

KEY POINTS

- Rules for costs for the Upper Tribunal are similar to those in the High Court.
- Protective costs orders can be granted in a few circumstances.
- Future costs may be capped but these are difficult to obtain.
- Conditions for a costs limiting order.
- Effect of the Upper Tribunal's decision in *Drummond*.

Different costs orders

By virtue of TCEA 2007, s 25 the Upper Tribunal has the same powers, rights, privileges and authority as the High Court in all matters incidental to its functions, including costs orders: see *Drummond v HMRC* [2016] UKUT 0221 (TCC) at para 23. That being the case, as well as the general orders for costs, which may be made at any time during appeal proceedings, the Upper Tribunal (much like the High Court) has discretion to award other less well-known costs orders.

In the High Court the rules relating to costs orders are contained in the Civil Procedure Rules. Although these do not apply directly to the Upper Tribunal, since its rules are drafted broadly and do not contain guidance as to their application in practice, direction may be taken from the relevant parts and from decisions that have applied or interpreted them.

Protective costs orders

The first type of order that may be awarded by the High Court is a protective costs order (PCO). This prospectively protects the applicant from an adverse costs decision if their appeal is unsuccessful. The power to award such orders does not derive from statute or from the procedural rules but instead resulted

from the comments made by Dyson J in *R v Lord Chancellor ex parte CPAG* [1999] 1 WLR 347.

The leading authority on PCOs is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 in which the Court of Appeal endorsed Dyson J's comments that the power to grant a PCO 'should be exercised only in the most exceptional circumstances'. It then proceeded to lay down guidance as to the considerations to be taken into account in exercising this power. In essence, the court or tribunal ought to be satisfied that:

- the issues raised are of general public importance;
- the public interest requires that those issues should be resolved;
- the applicant has no private interest in the outcome of the case;
- in light of the financial means of the applicant and the respondents and the amount of costs that are likely to be incurred, it is fair and just to make the order;
- if the order is not made the applicant will probably and reasonably give up his case;
- pro bono representation is likely to carry a greater weight in favour of a PCO; and
- it is up to the court in its discretion to decide whether it is just and fair to make an order.

In addition, all but one of the authorities that have dealt with PCO applications have agreed that one cannot be made in private litigation and that PCOs are ordinarily granted in judicial review proceedings at first instance.

Subsequent authorities have held that the *Corner House* governing principles should be treated as guidance with in-built flexibility in each case. It should be noted that the general public importance and public interest criteria are matters of evaluation for the judge. But if a case deals with an issue of statutory interpretation likely to affect the whole population it is likely to be of general public importance (*R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436).

The fact that an applicant may have a private interest in the case does not necessarily disqualify the applicant from a PCO (*R (Morgan and another v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107). This is significant since it is 'inevitable' that all tax appeals will have an element of self or private interest but this was held not to be by itself a reason to refuse a PCO in cases such as in *Drummond*.

Costs capping orders

A distinguishing feature between PCOs and costs capping orders (CCOs) is that the latter are governed by part 3.19 of the Civil Procedure Rules. A CCO, in essence, restricts the future costs or expenses that may be claimed by a party in proceedings. Such an order may be made at any stage and against all or any of the parties.

This is different from a PCO where the party likely to benefit from its protection is usually the appellant (taxpayer).

It should be noted that CCOs are distinct and independent from PCOs and that the costs-capping powers of the court do not apply to PCOs. Similarly, CCOs apply to future costs only, not additional liabilities such as an uplift in a conditional fee agreement entered into by a litigant and his legal team. A CCO may be made for the whole litigation or any separate/preliminary issues. There is a special procedure for making an application to a court or tribunal.

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Part 3.19(5) gives the court a power to make a CCO if these conditions are met:

- it is in the interests of justice to do so;
- there is a substantial risk that, without such an order, costs will be incurred disproportionately; and
- such a risk cannot be managed adequately by case management directions and detailed assessment of costs.

Part 3.19(6) outlines the circumstances that must be considered by the court in exercising its power to make a CCO:

- whether there is substantial imbalance of financial means between the parties;
- whether the costs of capping are likely to be proportionate to the overall costs;
- the stage the case has reached; and
- the costs incurred to date as well as future costs.

In practice, a CCO is likely to be more difficult to obtain than a PCO because it requires the applicant to explain cogently why disproportionate costs could not be controlled using other case management orders or by the detailed assessment of costs in the costs office.

Generally, the appeal judge or a costs judge would ensure that the amount claimed is reasonable and commensurate with the length of the proceedings and the complexity of the case. There is, therefore, a high hurdle to overcome to persuade a court that those inherent checks would be insufficient.

Costs limiting orders

The last of the three types of cost order that may be made by a court or by the Upper Tribunal is a costs limiting order (CLO). These came into effect in April 2013 and are established by part 52.9A of the Civil Procedure Rules. Part 52.9A was implemented by a recommendation in the *Review of Civil Litigation Costs: final report* in December 2009 (tinyurl.com/go6s5co).

The aim is to enable a court to grant an order excluding or limiting a party's costs exposure in appeals that come from a 'no costs' jurisdiction. The court must take into account several conditions and considerations before making such an order:

- The costs recoverable will be limited to the extent that the court specifies.
- The court must have regard to the means of both parties, all the circumstances of the case, and the need to facilitate access to justice.
- It may not be appropriate to make an order if the appeal raises an issue of principle or practice on which substantial sums may turn.
- An application must be made as soon as practicable (probably at the time permission to appeal is granted) and will normally be determined by the court without a hearing unless the court directs otherwise.

The need for the power to grant this type of order was highlighted by *Eweida v British Airways plc* [2009] EWCA Civ 1025. The appellant, who had brought a claim against her former employer in the Employment Tribunal (and subsequently in the Employment Appeal Tribunal), applied to the Court of Appeal for a PCO or CCO.

> ***"It had no power to issue a PCO in private litigation."***

The Court of Appeal dismissed the application on the basis that it had no power to issue a PCO in private litigation – Mrs Eweida also failed the private interest test. Further, a CCO would be inappropriate because, even if disproportionate costs were incurred by the respondent, the risk to the appellant could be controlled by a costs judge under detailed assessment.

Despite the issues in the case being of general importance and there being proper grounds of appeal, the court concluded that the rules, as they stood at the time, did not permit the making of an order in the form sought. Although the court agreed with the argument that the appellant should not be obliged to pay for the respondent's 'Rolls-Royce' legal service, its hands were tied.

The Court of Appeal's comments sparked a review of the costs rules and resulted in the introduction of CLOs. These give the court full discretion, if it is in the interest of justice, to exclude or limit costs recovery in appeals that pass from a no-costs or low-costs jurisdiction to a court where the 'costs follow the event' even if the appellant has a private interest in the litigation.

Upper Tribunal commentary

The Upper Tribunal in *Drummond* discussed in detail the three types of costs orders available to it. The appellant obtained permission to appeal against a decision by the First-tier Tribunal that he was not entitled to a VAT refund on the construction of a dwelling house because of a planning condition prohibiting the occupation of the property to a specific type of occupant. VATA 1994 treats such a planning condition as a bar to a 'building designed as a dwelling' because of restrictions on its separate use and disposal.

The taxpayer did not have legal representation and was assisted by a friend. Judge Sinfield pointed out that going to the Upper Tribunal would result in a shift in the costs regime, so the appellant decided to apply for a PCO. The application argued that the grounds for appeal were unique and that there was a specific public interest in hearing the appeal. HMRC, in an email, did not propose to make submissions in response to the application unless it was directed to do so. The Upper Tribunal, thinking that HMRC did not object, granted the PCO without giving reasons. After the order had been made, HMRC objected on the basis that:

- the tribunal did not have jurisdiction to do so; and
- the order should not have been made without representations from HMRC and without giving reasons.

Although HMRC dropped the first ground in its skeleton argument submitted before the hearing, the Upper Tribunal explained why it believed it had jurisdiction to grant cost orders. It held that TCEA 2007, s 25 and s 29 as well as rule 10 of the Upper Tribunal rules granted an unrestricted power to the tribunal in relation to costs. Judge Sinfield concluded that 'in the absence of any limitation, it follows that the Upper Tribunal has the same power as the High Court to determine by whom and to what extent costs are to be paid'.

After a discussion of the relevant rules of procedure and relevant authorities, the Upper Tribunal held that it had the power to grant PCOs, CCOs and CLOs in appropriate cases. It also held that, as a matter of principle, consistency and good administration, the *Corner House* principles as well as the Civil Procedure Rules should be applied to applications for costs in the Upper Tribunal. The judge clarified that, after considering the principles, it was a matter of discretion for the Upper Tribunal to decide whether a costs order was appropriate in the circumstances of each case. Judge Sinfield set aside the PCO originally granted and invited the taxpayer to resubmit his application, giving him and HMRC particular guidance as to the information that should be included.

Generally speaking, the party or parties subject to a costs order are at liberty to have it varied or set aside. There is, however, no guarantee that such an application would be successful unless there has been a material and substantial change of (financial) circumstances or any other compelling reason to warrant a variation.

In *Drummond,* the Upper Tribunal set aside its original PCO because it had been made on the basis of a fundamental misunderstanding of HMRC's position and not just because of the absence of reasons in the decision.

Points to note

Although protective costs orders are an exception to the norm both in appellate courts and in the Upper Tribunal, applications for protection against costs should always be considered and made in appropriate cases. Care should be taken to select the correct order, timing and procedure to be followed in making such an application.

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