Neutral Citation Number: [2019] EWCA Civ 1301

Case No: A3/2018/1841

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
REVENUE LIST
The Hon Mr Justice Roth

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/7/2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE SIMON
and
LORD JUSTICE DAVID RICHARDS

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Between:

Jazztel Plc (as Test Claimant for GLO issues 9A and 9B)	**Appellant**
and	
The Commissioners for Her Majesty's Revenue and Customs	**Respondents**

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Sam Grodzinski QC and **Michael Jones** (instructed by **PricewaterhouseCoopers LLP**) for the Appellant

Rupert Baldry QC (instructed by **the General Counsel and Solicitors for HMRC**) for the Respondents

Hearing date: 9 July 2019

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Approved Judgment

Lord Justice Simon:

1. This appeal raises the question of the ambit of s.234 of the Finance Act 2013, in circumstances where a Group Litigation Order ('GLO') has been made, the lead claimant has succeeded in a judgment at first instance and other claimants in the GLO ('the Affected Claimants') wish to advance their claims for the recovery of tax paid on the basis of the judgment. It is common ground that s.234 inhibits such claims: the issue is on what basis and to what extent?

Background

2. This case is part of stamp duty litigation which has been ongoing for a number of years. The CJEU ruled that the imposition of stamp duty and/or stamp duty reserve tax ('SDRT'), at the higher rate of 1.5%, rather than the usual rate of 0.5%, on the issue or (in certain circumstances) transfer of shares into a clearance service or to a depositary receipts issuer, was unlawful under EU law, *HSBC Holdings plc v. Revenue & Customs Commissioners* (Case C-569/07) [2010] STC 58 ('*HSBC Holdings No.1*') and *HSBC Holdings plc v. Revenue & Customs Commissioners* (2012) 81 TC 663 ('*HSBC Holdings No.2*'). Following this a large number of claims were brought against the respondents ('HMRC') for recovery of duty that had been paid.

3. On 21 October 2010, the Stamp Taxes GLO was made to manage the claims pursuant to CPR 19.11-13 and Practice Direction 19B.

4. By an order of 26 November 2014, the GLO was amended so as to identify three issues: issues 9A, 9B, and 10. Issue 9A related to a limitation defence in relation to claims where the stamp duty was paid (i) before 8 September 2003, and (ii) more than six years before the claim was issued. Issue 9B related to a limitation defence in relation to claims where the stamp duty was paid (i) on or after 8 September 2003, and (ii) more than six years before the claim was issued. Issue 10 was whether HMRC was entitled to raise a change of position defence in answer to claims in restitution for the recovery of stamp duty levied in breach of EU law. The order also selected the appellant ('Jazztel') as the test claimant for those issues.

5. Following a trial in January 2017, Marcus Smith J delivered a judgment on the issues: [2017] EWHC 677 (Ch); [2017] 1 WLR 3869. On issue 9A, he held that HMRC could not rely on section 320 of the Finance Act 2004 as a defence to repayment of tax paid before 8 September 2003 and more than six years before the claim was issued. On issue 9B, he held that HMRC could rely on section 320 as a defence to repayment of tax paid on or after 8 September 2003 and more than six years before the claim was issued. On issue 10, he made various findings of fact but made no determination of law, reserving final judgment on the issue, and noting that HMRC accepted that the question of law had been determined in Jazztel's favour in *Test Claimants in the FII Group Litigation v HMRC* [2016] EWCA Civ 1180 ('*FII CA No.2*') in which permission to appeal was pending in the Supreme Court.

6. Marcus Smith J found that various amounts of SDRT in issue had been paid by or on behalf of Jazztel, and that it had made those payments in the mistaken belief that the statutory provisions were lawful. He therefore concluded, in the light of the terms of the Stamp Taxes GLO, that Jazztel was entitled to recover such duty paid before 8

September 2003, subject to a condition that it would repay the monies should HMRC ultimately establish a change of position defence in the Supreme Court.

7. An order dated 25 April 2017 gave effect to this judgment. HMRC was ordered to repay to Jazztel the duty that had been paid before 8 September 2003. The order provided that, in the event (i) the Supreme Court gave permission in *FII CA (No.2)*, and (ii) it allowed the appeal on terms that HMRC could rely on in support of its change of position defence in Jazztel's case, and (iii) the validity of that defence was either agreed by Jazztel or upheld at a future hearing, Jazztel would be required to repay the sums in question.

8. Following the making of the order, both sides applied for permission to appeal to the Court of Appeal: Jazztel in relation to issue 9B and HMRC in relation to Issues 9A and 10. On 31 July 2017, Marcus Smith J ordered that the question of permission to appeal and cross-appeal should be stayed pending the decision of the Supreme Court on HMRC's application for permission to appeal on change of position in the *FII* proceedings. Following the decision of the Supreme Court in *Prudential v. HMRC* [2018] UKSC 39, (delivered after the decision which is being appealed before us) HMRC decided not to pursue any appeal against Marcus Smith J's decision on issue 10; and it was in the light of this development that the parties renewed their applications for permission to appeal. Marcus Smith J granted permission to appeal on 18 March 2019 to HMRC in relation to issue 9A, and to Jazztel in relation to issue 9B. These limitation issues are therefore currently subject to appeal, although a hearing date for the hearing of the appeals has yet to be fixed.

The application

9. In the meantime, on 18 April 2018, Jazztel applied on behalf of the Affected Claimants for an order that any GLO claimant should be entitled to payment by HMRC of the principal amounts of SDRT claimed together with interest, subject to proof of particular matters and subject to certain conditions upon which the sums would be repayable (broadly those conditions which applied to Jazztel). The draft order was expressed as follows:

> Subject to an Affected Claimant being entitled to restitution from HMRC of the SDRT it has claimed in the proceedings to which the GLO relates, an Affected Claimant shall be entitled on request to payment by HMRC of the principal amount of SDRT claimed and simple interest thereon, on the same terms as those agreed between HMRC and Jazztel plc following the trial of the Test Claim and recorded in paragraphs 4 and 5 of the Order of Marcus Smith J dated 25 April 2017…

10. HMRC resisted the application relying on the provisions of s.234 of the Finance Act 2013, which so far as material is in the following terms:

> Interim remedies
>
> 234. Restrictions on interim payments in proceedings relating to taxation matters

> (1) This section applies to an application for an interim remedy (however described), made in any court proceedings relating to a taxation matter, if the application is founded (wholly or in part) on a point of law which has yet to be finally determined in the proceedings.
>
> (2) Any power of a court to grant an interim remedy (however described) requiring the Commissioners for Her Majesty's Revenue and Customs, or an officer of Revenue and Customs, to pay any sum to any claimant (however described) in the proceedings is restricted as follows.
>
> (3) The court may grant the interim remedy only if it is shown to the satisfaction of the court –
>
> > (a) that, taking account of all sources of funding (including borrowing) reasonably likely to be available to fund the proceedings, the payment of the sum is necessary to enable the proceedings to continue, or
> >
> > (b) that the circumstances of the claimant are exceptional and such that the granting of the remedy is necessary in the interests of justice.
>
> …
>
> (9) For the purposes of this section, proceedings on appeal are to be treated as part of the original proceedings from which the appeal lies.

11. Jazztel argued in response that s.234 did not apply to the proposed order and, that if it did apply, the Affected Claimants were entitled to an interim remedy under s.234(3)(b), on the basis that the circumstances were exceptional and the granting of the remedy was necessary in the interests of justice.

12. The issues before the judge hearing the application, Roth J, were therefore, first, whether the order sought by Jazztel on behalf of the Affected Claimants was an interim remedy, and second, if so, whether Jazztel could rely on the exception in s.234(3)(b).

13. In a judgment given on 17 July 2018, [2018] EWHC 1830 (Ch), Roth J held (in summary) that the order sought by Jazztel was clearly an interim remedy that fell within the scope of s.234. There had been no trial of the issues that arose in relation to the Affected Claimants, and the argument that they would be able to obtain summary judgment was unpersuasive since summary judgment would be inappropriate in the circumstances, see S*ix Continents Ltd v. Revenue Commissioners* [2015] EWHC 2844 (Ch). The grant of permission to appeal to the Court of Appeal on the substantive limitation issues indicated that there was a real prospect of success, which was effectively the same test as for the refusal of summary judgment. Section 234(9) was also relevant since proceedings for which a permission to appeal was pending could not be in a different position from proceedings where permission had been granted.

14. As to the argument based on s.234(3)(b), he held that although the remedy was necessary in the interests of justice so as to prevent the Affected Claimants being in a less favourable position than the test claimant, there were no relevant exceptional circumstances. The mere fact of being in a GLO relating to a taxation claim could not be regarded as exceptional and nor would be the delay experienced by the Affected Claimants in recovering their money.

The arguments on the appeal

15. Mr Grodzinski QC submitted first that, contrary to the views of Roth J, the order that Jazztel sought was not an interim remedy within the scope of s.234. He pointed out that Marcus Smith J had observed, in the context of the relief sought, that he did not view it as being in the nature of an interim payment, more 'a contingent final order'. The effect of granting the application would be that the Affected Claimants would be put in the same position as Jazztel, subject to proof of the only outstanding factual issues: first that they had made the payment of the SDRT to HMRC, and second, that they had done so under a misapprehension that they were liable to make the payment. They would be subject to the same condition as Jazztel: namely, that the payments would be reversed should HMRC ultimately succeed in the Court of Appeal. He argued that what the Affected Claimants were seeking was a final order subject to a condition subsequent, or alternatively the appropriate case management of their claims in accordance with the overriding objective. He contrasted this relief with interim or contingent relief: for example, an interim payment, which would be subject to repayment if the case were resolved against the payee at trial.

16. He submitted that this approach is consistent with the GLO regime as identified by Lord Woolf in *Boake Allen Ltd v. Revenue and Customs Commissioners* [2007] UKHL 25, [2007] 1 WLR 1386 at [31]:

> All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group. This means that irrespective of the number of individuals in the group each procedural step in the actions need only to be taken once. This is of benefit not only to members of the group, but also those against whom proceedings are brought.

17. His argument was that HMRC's approach frustrated these beneficial objectives; and that there was no sensible basis for distinguishing between Jazztel and the Affected Claimants, which were 12 other companies in the same position, but which had happened not to be chosen as the lead claimant.

18. CPR Part 19.12 (1) (a) provides that:

> (1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –

> (a) that judgment or order is binding on the parties to all the other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise…

The effect of this provision is clear: the judgment is binding as far as it goes on all parties to a GLO.

19. Mr Grodzinski submitted that the effect of CPR r.19.12(1) was that the issue that was subject to appeal has been determined in favour of the GLO claimants. There was therefore neither the need nor the scope for summary judgment for the Affected Claimants. The position was materially different to the situation in *Six Continents Ltd v. HMRC* (see above) to which Roth J referred, because the claimant in that case was not a party to a GLO, did not therefore have the benefit of CPR r.19.12 and had to apply for summary judgment in respect of the points in issue.

20. So far as ground two was concerned, he submitted that the circumstances of the Affected Claimants were properly characterised as exceptional. Their claims had been on foot for many years; they had no choice whether to become parties to the GLO; there was no obvious means by which they could detach themselves from the group litigation and pursue their own claims individually, since any application to lift the general stay would be firmly resisted by HMRC; and the designated test claim has been resolved in such a way that their own claims would succeed by reasons of CPR Part 19.12.

21. Mr Baldry QC submitted in response that Jazztel's application was for an interim remedy falling within s.234(1) which did not satisfy any of the conditions in section 234(3). It was an application for relief founded, at least in part, on 'a point of law which has yet to be finally determined in the proceedings.' The effect of the GLO was that the judgment was binding on the Affected Claimants, but this did not entitle them to apply for judgment on the same terms as the test claimant, until such times as the GLO issues on which their claim rested were finally decided.

22. He argued that Roth J had been right to hold that the application was for a form of interim remedy and that as such it fell within the scope of s.234. Claims included in a GLO did not, by reason of that fact, lose their identity as separate claims subject to the usual requirements of the CPR. The Affected Claimants had not applied for summary judgment, nor had they had a trial of their claims. Due to the stay which governs the GLO, their claims have not progressed beyond the issue of a claim form. Roth J was correct to hold that HMRC's approach was neither technical nor formalistic. As he noted, if the stay were lifted the Affected Claimants would not be in a position to apply for summary judgment, see *Six Continents Ltd v. Revenue Commissioners* (above).

23. In relation to ground 2, he submitted that the Affected Claimants' circumstances fell within the purpose and scope of the restriction on interim relief introduced by s.234; and there was nothing exceptional in their circumstances such as to justify the invocation of s.234(3)(b).

Discussion and conclusion

24. In cases relating to taxation Section 234 imposes a restriction on applications for interim remedies 'however described' if founded even in part on a point of law. The use of the phrase 'however described' focuses attention on the substance of an application and not simply how it is framed. I would accept that the present application is not seeking an order that is essentially discretionary. It is however seeking an order that is provisional. In contrast to its own position, Jazztel is not in a position to seek a final order on behalf of the Affected Claimants. It is using its own position as lead claimant within the GLO to seek orders on behalf of the Affected Claimants outside the GLO, applying for a provisional judgment before the claims have proceeded to trial.

25. Mr Grodzinski accepts that there are factual and legal issues that will have to be resolved. The two factual issues are the extent to which payments of SDRT were made by the individual Affected Claimants and whether they were made mistakenly. The legal issues are those for which permission to appeal has been granted, and to that extent the application is for a remedy founded on a legal issue that has yet to be decided.

26. Furthermore, the outstanding limitation issues make the Affected Claimants claims inappropriate for summary judgment, for reasons explained by Henderson J (as then he was) in the *Six Continents case* (above). Six Continents had issued an application for an interim payment, and then for summary judgment in the light of favourable judgments in the Supreme Court and the CJEU (see [16] and [17]). Henderson J refused to grant summary judgment because there were substantive issues between the parties which turned to a significant extent on questions of law which were either already under appeal, or sufficiently similar to questions under appeal, that their ultimate resolution was likely to be heavily influenced by the outcome of the appeals, see [35]. However, in the circumstances he went on to order interim payments. In the present case there are plainly serious issues to be decided on appeal; and s.234 (whatever else its effect) plainly precludes the ordering of an interim payment.

27. There is the additional difficulty, that it would require the stay of proceedings in the GLO to be lifted. No such application has been made; and I can see objections to the grant of the application if it were simply a step in a process that s.234 is designed to prevent.

28. As Roth J noted, s.234(9) is relevant, since it specifically provides that proceedings on appeal are to be treated as part of the original proceedings.

29. Accordingly, I would reject ground one. Jazztel's application is in substance an application for an interim remedy to which the restrictions in s.234(3) apply; and it is to the consideration of the reservation in that subsection to which I now turn.

30. The Court could grant an interim payment under s.234(3)(b) if Jazztel could show that in the case of a particular Affected Claimant the granting of the remedy was necessary in the interests of justice. The reference to the circumstances of a claimant being 'exceptional' does not provide a test in itself; but it indicates that it will be an unusual case where the interests of justice necessitate ordering an interim remedy or payment. The exceptional case is more likely to be recognised than easily described.

31. No evidence has been filed addressing the circumstances of any particular Affected Claimant; and the mere fact that a claimant is subject to a GLO relating to a taxation claim cannot be regarded as exceptional. The delay in recovering the payment of duty is the consequence of treating proceedings as not being final until an appeal has been resolved, as specified by s. 234(9). The normal basis for compensating for the loss of the use of money is an award of interest. In my view the circumstances of the Affected Claimant have not been shown to be either exceptional or such as to require interim relief as a matter of necessity in the interests of justice.

32. For these reasons I would dismiss the appeal.

Lord Justice David Richards:

33. I agree.

Lord Justice Floyd:

34. I also agree.