Case No: BL-2010-000004

Neutral Citation Number: [2020] EWHC 1454 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 30 March 2020

Before:

THE HON. MR JUSTICE FANCOURT

Between:

BRITISH COMMUNICATIONS PLC

Claimant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Defendant

Mr Roderick Cordara QC appeared on behalf of the **Claimant**
Ms Eleni Mitrophanous QC appeared on behalf of the **Defendant**

Hearing date: 25 March 2020

Approved Judgment

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MR JUSTICE FANCOURT:

1. This is my judgment on a hearing that took place by way of telephone conference on 25 March 2020, with members of press listening in on the hearing and therefore deemed under the current protocol and practice direction for remote hearings to have been a public hearing, not a private hearing. Judgment will be recorded in accordance with that practice direction and the recording is available to be listened to by any member of the public or press in a public court in future, with the permission of the court.

2. On 1 April 2010 the Commissioners for Her Majesty's Revenue & Customs ("HMRC") issued a review decision letter confirming their refusal of British Telecommunications plc's ("BT's") claim for repayment of overpaid VAT.

3. On 29 April 2010 BT issued a statutory appeal to the First-tier Tribunal ("FTT") claiming repayment under the Bad Debt Relief Scheme that applied at the relevant time, and additionally under section 80 of the Value Added Tax Act 1994 and/or its predecessor. I refer to those FTT proceedings as "the Appeal".

4. On 30 June 2010 BT issued a claim in restitution in the Chancery Division of the High Court as a protective fall-back claim, in case it was held by the FTT that the statutory appeal was invalid. I will refer to that claim now as "the Claim".

5. On 28 July 2010 a consent order was made in the Claim. It was ordered that the Claim be stayed until 56 days after the determination of the VAT Appeal reference BC/2010/04071, or 30 days after final determination of any appeal from the First-tier Tribunal (Tax Chamber). Then directions were given for the service of Particulars of Claim, acknowledgment of service and a Defence after the lifting of the stay. The reason for the stay was that the Claim was unnecessary in the event that that the statutory appeal route was available to BT and succeeded. If section 80 applied to BT's case, that section provides an exclusive remedy and so a claim at common law would be excluded. It therefore made sense to proceed first with the Appeal.

6. It seems to me unlikely that either party contemplated in 2010 that almost ten years later the Appeal would still not have been determined, even in the FTT let alone any further appeal.

7. Preliminary issues relating to time limits to enforce EU law rights for BT and the availability of relief were referred to and decided by the Upper Tribunal (Tax and Chancery Chamber) on 3 August 2012. These were directed on the basis that no questions of fact were to be decided by the Upper Tribunal. One of the questions was whether section 39(5) of the Finance Act 1997 had lawfully abolished a bad debt relief claim arising before a specified date. Another was whether section 80 of the Value Added Tax Act applied, so that in the circumstances BT had a right to reclaim overpaid VAT under that statutory provision.

8. The Upper Tribunal held that section 39(5) had to be disapplied, to give effect to EU law, so that BT's bad debt relief claim was not barred. It held that BT's claim did not

fall within section 80 because the output tax was due when payable, even though it turned out later to have been overpaid.

9. The Court of Appeal reversed the decision of the Upper Tribunal on section 39(5) but upheld its decision on section 80. Although the Court of Appeal upheld in principle BT's entitlement by some means to a repayment, it appeared at one time that a claim for unjust enrichment or damages might be statute-barred. BT was then refused permission to appeal by the Court of Appeal and the Supreme Court. That was as long ago as 2014.

10. HMRC considered that as a result of the legal issues decided by the Court of Appeal BT's Appeal was bound to fail, but BT did not agree. It then issued an application in the FTT for directions to pursue the Appeal. At that stage it was, I assume, pursuing the legal arguments that appeared to give it the best prospect of mounting a successful claim, or at least seeking to have determined an issue that, logically, needed to be decided first.

11. HMRC sought clarification from BT about the basis for its contention, then it applied in July 2016 for a summary dismissal of the Appeal. That was on the basis that there was no argument left to BT after the court's decision, either because the relevant legal questions had been finally decided between the parties or because of an issue estoppel.

12. That matter was first heard by a judge of the Tax Chamber of the FTT in 2017 and, after an adjournment, again in February 2019. Inexplicably there has been no decision issued yet. Enquiries have revealed that there is likely to be one sent out in a few weeks, although this cannot be regarded as certain. The FTT judge will have to decide whether there remains the possibility of a valid claim by BT under section 80.

13. The year 2017 also saw the end of the Franked Investment Income ("FII") group litigation. In 2015, after issues had previously been decided in the Supreme Court and the Court of Justice of the European Union, the Court of Appeal decided that a common law restitutionary claim could lie in respect of overpayment where a time bar excluded the applicable statutory remedy. The Supreme Court allowed HMRC's appeal on other points but did not interfere with that conclusion. As a result of recent decisions, including the FII litigation, BT's common law claim has started to look more promising than it had done previously.

14. However if BT is right in saying, as it said to the FTT, that there <u>was</u> a valid claim under section 80, that would exclude any common law claim. The Supreme Court has decided that issue in the FII litigation. HMRC on the other hand were contending that there was no valid section 80 claim, in which case there would be no bar to a common law claim.

15. BT now seeks the lifting of the stay on the Claim, so that it can serve Particulars of Claim and require HMRC to file admissions or a Defence. It issued an application on 8 August 2019 seeking to lift the stay generally and directions for statements of case. That is the application that is before me for decision. The application seeks an order that the draft Particulars of Claim annexed to it should stand as the Particulars of

Claim, that acknowledgment of service be dispensed with and that HMRC must file admissions and/or a Defence in 28 days.

16. HMRC opposes the application on the basis that BT is contending in the FTT that its Appeal based on a valid claim under section 80 should proceed. If BT is right about its section 80 claim then it cannot have its common law claim; but in any event, in the interests of economy and pursuant to the overriding objective, there should not be two concurrent sets of proceedings because, after all, it was for that reason the stay was granted in the first place.

17. It appeared to me from the submissions of Mr Cordara QC on behalf of BT in support of the application, that what BT really intends and wishes to do is to proceed now with the Claim and not proceed further with the Appeal at this stage. The Appeal has become inordinately protracted, as indeed has the disposal of the application to strike out the Appeal, which if it was decided against HMRC could be only the starting point of the preparation for a final hearing of relevant factual and legal issues in the FTT.

18. Given that HMRC were seeking to strike out the Appeal, which would open the door to the common law claim, it did strike me as a little surprising that there was no common ground between the parties of what should most conveniently happen. I do, however on reflection, accept the argument of HMRC that it was not made clear by BT before the hearing exactly what its concerns were. I can accept that because it was unclear to me, on reading the papers, what exactly was the reason underlying BT's application.

19. However, it became apparent in the course of argument that BT is anxious that it should not be open to HMRC to defend the claim using the very argument that BT was advancing in the FTT as to why a remedy under section 80 is available. There are two arguments (one of fact and one of law) and it is unnecessary to explain them in detail or express any view on them, but they might establish that, notwithstanding the decision of the Court of Appeal on the questions of law that were before it, there was a right to repayment under section 80, as amended. If established, that would amount to a defence to the common law claim.

20. BT also said that in other cases HMRC have taken a different approach to the question than it is taking in this Claim. That would explain BT's concern to know whether HMRC is minded to plead by way of Defence that the claim is barred as BT had rights under section 80, as amended. If it is so minded then BT will need to pursue the Appeal. It is clearly more appropriate for that question to be decided in the FTT if it has to be decided at all. On the other hand, if HMRC does not plead a section 80 defence to the claim, then BT may well take the view that the Appeal is not necessary.

21. BT also says that its claim, if not barred by section 80, is open and shut and will be determined swiftly. I express no view on that except that I accept that it is the view that BT has formed, in view of recent developments in the law.

22. The relevant question therefore seems to be whether it is necessary for questions about the validity of BT's section 80 claim to be decided. That seems to me to depend on whether HMRC intends to rely on section 80 as a defence. It must be consistent with the overriding objective and good case management to reach, as soon as possible, a time when it is clear whether or not a determination of the Appeal will be necessary at this stage or at all. If it is unnecessary, further costs in that regard can be saved in the Claim that BT wants to pursue can be heard.

23. As a result of an intervention from the bench it emerged that HMRC was willing to write to BT confirming that it will not defend the claim on the basis of section 80 applying, either the originally enacted section or the amended section. In the light of that, Mr Cordara accepted that if a letter was written to that effect, in clear terms, BT would be content for the Appeal to be stayed, not withdrawn or dismissed, so that the common law claim could then proceed.

24. Ms Mitrophanous QC on behalf of HMRC objected strongly to the notion that there would only be a stay of the Appeal. She submitted it was not right that both sets of proceedings would remain on foot but one and then the other could be stayed, thereby potentially running up costs in both cases. She said that if the decision of the FTT on the strike-out application went against HMRC then the FTT proceedings should continue until they have been fully determined, and the Claim should remain stayed unless BT was willing to withdraw the Appeal.

25. That rather purist approach seemed to me to depart unnecessarily from the reality of things as they stand. The reality is that neither party says that it now wishes to pursue an argument based on the relevance of section 80. BT now wishes to pursue the Claim instead, and HMRC does not wish to rely on a section 80 as a defence. If that is formally confirmed by the statements of case then it seems likely that it will be unnecessary for the Appeal to be progressed further. Whatever other defence HMRC may rely on could then be tried.

26. Following the hearing HMRC wrote to BT. The letter does not give a simple, unqualified assurance but HMRC says that its position is that the fact that section 80 did not apply was made clear by the decision of the Court of Appeal in 2014 and by the rejection of BT's application for permission to appeal. The letter did however say that: "BT does not have a section 80 claim for [the period in dispute], did not ever have such a claim and did not ever make such a claim." The letter expressly refers to section 80(1B).

27. BT's letter in response was to the effect that it took HMRC's letter to be confirmation that section 80 as a whole cannot and did not ever apply in the circumstances of the case and it intended to rely on that confirmation.

28. It does therefore seem reasonably clear that HMRC will not plead section 80 by way of a defence to the Claim. If that is so, then BT wishes to pursue the Claim and does not wish to pursue the Appeal, at least at this time. If on the other hand, despite what it has now written, HMRC will rely on section 80 as a defence that needs to be known, so that appropriate case management of the Claim and the Appeal can take place.

29. Further, as Mr Cordara submitted, there is very little prejudice to HMRC in any event in requiring it to plead a defence or make admissions to the quite short Particulars of Claim that have been prepared in final draft and sent to HMRC already. Certainly there is no prejudice that cannot be compensated if appropriate by a costs order.

30. As to any further prejudice there could, it seems to me, be no justification for the Appeal proceeding while the Claim is being pursued at the same time, although what has been done with the Appeal (which is currently stayed as a result of a Covid-19 direction from the President of the Tax Chamber) is a matter for the FTT and not for me to decide.

31. Although BT appears content that the stay be lifted only for the purpose of exchange of statements of case, it seems to me to be appropriate to lift the stay generally. The Appeal is currently stayed and will not be progressed in any event until a decision has been given on HMRC's strike-out application. If events take an unexpected turn, either party can re-apply, on paper if appropriate, for the stay of the claim to be re-imposed.

32. The only remaining question, as I see it, is whether the lifting of the stay should await the outcome of the FTT judge's decision of the strike-out application. There appears to me to be no good reason for it to do so. If the Appeal is struck out that is all the more reason for the Claim to be reactivated. If HMRC's application to strike out is dismissed the position will still be that BT does not wish to pursue the Appeal at a time that HMRC contends that the Appeal should fail. In those circumstances too, a more convenient course would be to lift the stay on the Claim. When the decision on HMRC's application in the FTT is known and the stay there is lifted, the parties can make such applications as they see fit in relation to the Appeal.

33. For the reasons that I have given I therefore allow BT's application and will direct that the stay on the Claim is now lifted.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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