TC02124

Appeal number: LON/2008/349

PROCEDURE – application for named judge – refused – application to set aside earlier direction of Tribunal – occasions when Tribunal could make such a direction – application refused but permission to appeal earlier direction granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

DECISION
ON APPLICATIONS IN THE CASE OF

DDR DISTRIBUTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

DECISION

Background

1. This appeal was lodged in 2008 and was for some time stayed behind another appeal (*Blue Sphere Global Ltd)*. That appeal has now been resolved but it is apparent that HMRC at least do not consider that the appeal in *Blue Sphere* resolved all the issues at large in this appeal: this appeal is therefore now progressing to hearing.

2. On 12 August 2011 Judge M Cornwall-Kelly made a number of directions, the only two of which are relevant to this application were:

> 3. No evidence may be served in relation to dealings with or at the First Curacao International Bank.
>
> 6. The appellant's application of 5 May 2011 in relation to costs resulting from the late service of evidence by the Respondents is reserved for later decision by the Tribunal in the light of the evidence yet to be served and after full submissions by the parties.

3. On 10 May 2012 Judge D Demack made a number of directions. The three relevant to this application were:

> 3 Paragraph 3 of the Direction of Judge Cornwall-Kelly be set aside;
>
> 4 The Respondents be allowed to serve and adduce in evidence the witness statements of Peter Richard Birchfield and its exhibits and be allowed to rely on the contents of that statement at the substantive hearing of the appeal;
>
> 5 The appellant's application of 5 May 2011 in relation to costs resulting from the late service of evidence by the Respondents is reserved for later decision by the Tribunal in the light of the evidence yet to be served and after full submissions by the parties.

4. By letter of 26 June 2012 the appellant made three applications which were, in summary:

- To have its two applications (set out below) heard by Judge M Cornwall-Kelly;
- To have Judge Demack's directions 3 & 4 made on 10 May 2012 set aside and Judge M Cornwall-Kelly's direction 3 made on 12 August 2011 reinstated;
- To have Judge Demack's direction 5 and Judge M Cornwall-Kelly's direction 6, both of which reserved until the substantive hearing the question of costs in respect of HMRC's applications to admit late evidence, set aside, and the application of costs dealt with immediately.

Decision without hearing

5. I have decided to determine these applications without a hearing which I have the power to do under Rule 29 (Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009) ("the Rules") because, being interim applications, my decision does not dispose of the proceedings or any part of them. I have decided it is appropriate to determine these applications without a hearing as it is apparent to me from the appellant's representations that each should be decided against the appellant and I would not be assisted by any representations by HMRC.

Preliminary application: for hearing to be before named judge

6. This is an independent tribunal. It is axiomatic that neither party can choose the judge or, as the case may be, the panel of judge and member, which hears their case or any interim application made in respect of it.

7. It is also axiomatic that where a hearing of a substantive or interim matter has been commenced before a judge or panel, that judge or panel is seized of the matter and no other judge or panel could continue it part-heard. But in this case, there is no part-heard matter. Interim hearings have been held and the judges have respectively given their directions and reasons for them. The appellant has now made new application. It cannot choose the judge to hear it.

8. The allocation of a judge to a hearing is solely within the discretion of the President of the Tribunal (paragraph 14 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007) although this may be delegated to the Chamber President. Although the President might in his discretion choose to allocate the same judge to case manage any particular file for reasons of consistency and/or familiarity with the issues, that is a matter for the President's sole discretion and not something in respect of which it is proper for a party to make an application.

9. Nor is it within the power of any tribunal judge to allow such an application. The power of a tribunal judge to make a direction is as set out in Rule 5(2) of the Rules. That only permits a direction in relation to the "conduct or disposal of proceedings". It is implicit that this refers to the conduct of proceedings *by the parties* as the directions are given to the parties. A judge is not by Rule 5(2) given power to make directions to the *Tribunal* itself. The power of a judge to make directions cannot not therefore include a direction determining the panel to hear the proceedings. In any event, as I have said, by law that is a decision which is reserved to the President and not something in respect of which an application should be made.

10. As the Tribunal has no power to make such a direction, there is no point in considering the merits of the application. However, I note that even had I the power to order the composition of the Tribunal (which I do not) I would not accede to the application on its merits. On the face of its application, it is apparent that the appellant wishes Judge Cornwell-Kelly to hear its application because the appellant prefers the direction in respect of FCIB evidence given by that Judge to the direction given some months later by Judge Demack on the same issue. This is apparent because the appellant is asking for Judge Demack's direction to be set aside and Judge Cornwall-

Kelly's direction reinstated and because the appellant states that it prefers Judge Cornwall-Kelly's reasoning to Judge Demack's. It says:

> "We can see nothing within the reasoning of Judge Demack to rebut or answer the clear and more cogent reasons which were advanced by Judge Cornwall-Kelly…"

11. A Tribunal must be fair and must appear to be fair. If I had the power to accede to the appellant's application, and did so, it would have the appearance of manifest unfairness to HMRC, as the appellant would have been allowed to choose as the judge hearing its application that judge whose reasons the appellant preferred on the very issue that would be at stake in the third applications hearing.

12. On the contrary, the only fair thing to do for both parties, and the only way to guarantee the appearance of fairness, is for the appellant's applications to be determined by a third judge. And therefore I am determining the applications.

13. The appellant's application for Judge M Cornwall-Kelly to hear its applications is denied.

Application 1 – reinstatement of bar on new evidence

The Rules

14. This application, although not expressly, is made under Rule 6(5) as that is the only Rule under which it could be made. It provides:

> "If a party or other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction."

15. At first glance, it appears, therefore, that the appellant has followed the proper course of action. It wishes to challenge various Directions Judge Demack has made and it has done so by applying for a direction which sets them aside.

16. But legislation, including secondary legislation, such as our Rules, must be interpreted in such a way to avoid anomalous or absurd results as such results would not have been intended by Parliament. If any and every direction could be challenged merely by an application for that direction to be set-aside, the Tribunal and parties in any appeal could quickly become ensnared in an endless game of ping-pong. One party would challenge a direction it did not like unless and until it was set aside; the other party would then challenge the setting aside of that direction, ad infinitum.

17. That would be an absurd and anomalous result and Parliament could not have intended that. It used the word "may" in Rule 6(5). This should be interpreted, firstly, as leaving it open for a party to challenge a direction by another means (by appealing it), and, secondly, that it is not a liberty which can be exercised in every case of challenge.

18. With regards substantive decisions, they may be set aside in certain cases. It seems likely that Parliament intended that directions could be set aside in similar situations. Those situations are, subject to the overriding requirement of the set-aside being in the interests of justice (rule 38(1)(a)):

- Procedural irregularity (rule 38(2)(a)-(c));
- Non-attendance (rule 38(2)(d));
- Following a review undertaken on the basis of an obvious error of law (rule 41(1)(b) coupled with Tribunals, Courts and Enforcement Act 2007 s 9(4)(c)).

19. It seems likely Parliament intended Rule 6(5) to be used in similar situations and therefore it may be appropriate to make an application for a direction to be set aside where a party did not attend, there was procedural irregularity or there was an obvious error of law in the direction. Whether the judge would order the set aside would of course depend on whether he considered it to be in the interests of justice to so do.

20. It also seems to me, although not by any parallel with hearings of substantive matters, that Parliament must also have intended Rule 6(5) to be used in one other circumstance, and that is where there has been a change in circumstances. Indeed, it is commonplace for earlier directions to be set aside and displaced by later directions where the situation has changed, such as where parties have proved unable to keep to the directed timetable. After all, the objective of directions is to get the appeal on for hearing in the shortest possible time commensurate with fairness and ensuring in so far as possible that both parties are fully prepared. Failing to take account of changing circumstances would not achieve such an objective.

21. I note that the White Book (Civil Procedure in the High Court) states, in respect of the High Court's power to "vary or revoke" any earlier order, that this does not include a power to reverse itself simply because it had changed its mind. On the contrary, either an erroneous basis would have to be shown for the original order or a change in circumstances. See Section A 3.1.9. The court cannot act as an appellate court from its own orders. I consider that a similar state of affairs exists in this Tribunal.

22. In conclusion, in my view, Parliament only intended Rule 6(5) to be used in limited circumstances, and in particular where:

- Circumstances have changed;
- Obvious error of law in direction;
- Procedural irregularity in relation to the hearing at which direction made; or
- A party did not appear and was not represented at the directions hearing.

A judge would of course only grant the set-aside where it was in the interests of justice to so do.

23. The above may not be an exclusive list of all the circumstances in which Rule 6(5) may be used: there may be some additional circumstances in which Rule 6(5) would be appropriate, but such circumstances would be exceptional and would not include an application on the grounds simply that a party considers the original direction was wrong. To avoid an anomalous and absurd result Parliament cannot have intended Rule 6(5) to apply simply where a party considers that a direction is wrong: the only proper course of action in such a case would be for the party to apply to appeal it.

Application of Rule 6(5) to this case

24. The appellant does not suggest that circumstances have changed or that there was a procedural irregularity or that it did not appear or was not represented at the hearing in front of Judge Demack.

25. As is apparent from its application, it applies for the set-aside of Judge Demack's directions 3 & 4 on the grounds that it considers them to be wrong. In particular, its ground for saying they were wrong was that Judge Demack's direction was procedurally unfair to the appellant. This was because the appellant consented to the stay behind *Blue Sphere* in the belief that it was only to save costs of hearing both appeals simultaneously and not to allow in new evidence. It also criticises Judge Demack, amongst other things, for taking into account that the appellant had not attempted to have the appeal set down for hearing without (they say) taking into account the large quantity of new evidence served on them (including evidence from replacement officers). But the basis of their application is that it was procedurally unfair for entirely new evidence to be admitted at this stage in the appeal.

26. However, from what I have said above, it would only be proper for me to consider setting aside Judge Demack's decision if I were satisfied that it contained an error of law. In my view, the principles to be applied here are those set out in *R v First Tier Tribunal (Review)* [2010] 160 (AAC) (28 May 2010). In other words, to be satisfied there was an error of law it must be a clear, unarguable error of law such that an appeal is bound to succeed. Such an error is likely to be one that can be explained in a sentence or no more than a few paragraphs; and is likely to be something like an overlooked case authority or statutory provision (or, I would suggest, overlooked evidence).

27. Am I satisfied Judge Demack fell into such error?

28. Firstly, looking at the decision itself, this was to admit FCIB evidence. There is no obvious error of law in Judge Demack's decision on this. As is apparent from his paragraph 11 he took into account potential unfairness to the appellant as well as other matters such as delay. All that the appellant can say is that the weighing exercise Judge Demack performed in respect of the rival merits of excluding or allowing in the evidence did not lead to the result the appellant desired. But there is no obvious error

in Judge Demack's decision: he considered the factors which ought to have been considered.

29. Further, Judge Demack set-aside Judge Cornwall-Kelly's earlier direction. From what I have said, a Tribunal should only do this where:

- Circumstances have changed;
- There is an obvious error of law in direction;
- There was a procedural irregularity in relation to the hearing at which direction made; or
- A party did not appear and was not represented at the directions hearing.

It should not do so merely because it considered that the earlier direction was not one that it would have reached.

30. However, although Judge Demack did not consider the matter in these terms as expressed by me, it is clear to me that two of the above criteria were or may have been met and therefore for this reason too I do not perceive any *obvious* error in law in Judge Demack's decision to set aside Judge Cornwall-Kelly's direction.

31. Firstly, circumstances had changed. At the time of Judge Cornwall-Kelly's evidence HMRC did not then have the FCIB evidence: they merely had an expectation that they would acquire such evidence in relation to the appellant's case. The hearing in front of Judge Demack was occasioned because HMRC acquired and then applied to admit the evidence of Peter Richard Birchfield, which was evidence in respect of FCIB in relation to the transactions at issue in this appeal.

32. This was a clear change in circumstances, as in excluding it in August 2011 Judge Cornwall-Kelly could not have weighed the *relevance* of the FCIB evidence to this particular appeal, as such evidence was not in front of him at the time. Once the evidence existed (in the sense of a witness statement being compiled in respect of it), a later Tribunal could weight whether it was of such relevance it should be admitted despite any procedural unfairness to the appellant.

33. Secondly, Judge Demack may have considered that Judge Cornwall-Kelly's direction contained an obvious error of law. While it is normal to set a cut off date for evidence, after which no new evidence should be served, this always has to be tempered with the possibility that new evidence might emerge that is of such relevance to the appeal that it should be heard. For this reason it is normal to direct after close of evidence that no new evidence may be admitted *save with leave of the Tribunal*. Saving words such as these were not used by Judge Cornwall-Kelly which meant that he was excluding any future evidence without assessing its relevance: yet Mr Justice Lightman's decision in *Mobile Export 365 Limited* [2007] EWHC 1737 (Ch), which is binding on this Tribunal, is that:

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary" (paragraph 20).

34. So for both these reasons, it is not apparent to me that Judge Demack's decision contained an obvious error of law. I am not satisfied it contains an error of law at all. It is therefore not appropriate for it to be set aside.

35. That does not leave the appellant without a remedy. The proper remedy is for the appellant to seek permission to appeal Judge Demack's direction. Rather than require the appellant to make such an application now, I will rely on Rule 42 (reading "decision" to refer also to reasons for a direction and not just a decision disposing of an appeal) and treat its application to set-aside Judge Demack's direction as an application to appeal it.

36. Permission to appeal is granted where a party shows a reasonable prospect of success on appeal. While I am not satisfied that Judge Demack's decision contains an error of law, I am satisfied that there is an arguable error and that the appellant ought to be able to put its case on this to the Upper Tribunal. I give permission to appeal Directions 3 & 4 of Judge Demack's directions of 10 May 2012 and the reasons for those directions as explained in his written decision dated the same date on the grounds as set out in the appellant's representative's letter of 26 June 2012 under the heading "first application".

Application 2: for costs to be determined immediately

37. Both Judge Demack and Judge Cornwall-Kelly gave the identical direction that costs in respect of late evidence be reserved until later. It appears both judges considered that all the new evidence should be considered before a decision was made on where a costs award would lie.

38. The appellant does not agree. It considers that all new evidence has been served now and that the matter should be resolved now.

39. I do not consider that Judge Demack's direction (reiterating Judge Cornwall-Kelly's) should be set aside. Circumstances have not changed nor is it obviously wrong in law.

40. I do not consider that leave to appeal it should be given: I can see no arguable case that it was wrong for Judge Demack to reiterate Judge Cornwall-Kelly's direction.

41. All that remains now is for the costs application to be heard in accordance with the terms of both Judges' directions: however, unless and until the outcome of the appellant's appeal (if it chooses to make it) to the Upper Tribunal is known, any Tribunal hearing it will not be best placed to make the decision on, for instance, the extent to which the appellant has had to incur costs on evidence which is not admitted.

42. I therefore direct that the hearing of the costs application should not take place until the earlier of (a) the appellant notifying HMRC and this Tribunal that it does not intend to avail itself of the permission to appeal granted by me in this decision; or (b) the Upper Tribunal determining the appeal against the direction (or both parties agreeing the matter before determination).

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 8 July 2012