TC03307

Appeal number: TC/2010/01576

PROCEDURE – COSTS-Appellant's application for costs in complex case-whether entitled to costs relating to HMRC's conduct prior to commencement of appeal proceedings-No-whether HMRC entitled to costs incurred after refusal of Appellant to accept offer of settlement in excess of amount awarded-Yes-applications allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

STOMGROVE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 16 January 2014

Mr Bernard Rice, B J Rice & Associates for the Appellant

Miss Beatrice Collier, Counsel , instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to two applications for costs consequent upon the determination of the appeal of the Appellant ("Stomgrove") against a determination that the Respondents ("HMRC") made in 2008 that Stomgrove should have paid primary and secondary Class 1 National Insurance Contributions. Stomgrove lodged an appeal against this determination, and after an extension of time having been agreed with Stomgrove for the service of its statement of case HMRC decided not to contest the appeal.

2. As the appeal had been designated as a Complex case, Stomgrove made an application for costs of £4,993.75. That is the first application that is the subject of this decision. The second application is HMRC's application for costs which was made following the refusal of an offer by Stomgrove to accept £4500 in settlement of its claim for costs.

Background and Findings of Fact

3. This matter has an unfortunate and protracted procedural history involving voluminous amounts of correspondence over a period in excess of five years much of which was produced to me but which I do not need to deal with in detail. I heard no oral evidence but from the chronology of events and documents produced I make the following findings of fact.

4. On 3 February 2010 Stomgrove lodged a Notice of Appeal with this Tribunal against the determination made by HMRC on 21 May 2008 in respect of Class 1 National Insurance Contributions in an amount of £1,182,709.66. The appeal was allocated by the Tribunal as a Complex case under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). HMRC never filed a statement of case in relation to the appeal. There is some dispute as to how the substantive appeal was determined, HMRC contend that an agreement was concluded pursuant to s 54 of the Taxes Management Act 1970 on or about 10 June 2010, whereas Stomgrove dispute whether a valid agreement was entered into. In any event it is common ground that the substantive appeal has been determined because HMRC are not contesting it and that the only remaining issue before the Tribunal is the determination of the costs applications before me.

5. On 7 June 2010 Stomgrove made an application for costs to the Tribunal and enclosed a Schedule of Costs for work performed by B J Rice & Associates in a sum of £4,993.75. This Schedule set out four categories of work for which costs were claimed. The first category was in respect of seven hours worked by Mr Rice following the receipt of HMRC's determination but before it was decided to appeal. The second category was in respect of two and three quarter hours worked by Mr Rice in formulating and submitting the Notice of Appeal. The third category was in respect of two hours worked by Mr Rice after the Notice of Appeal was lodged and the final

category was half an hour accepting the determination of the appeal and communicating the same to Stomgrove. At Mr Rice's hourly rate of £320 this added up to £3,760 in total, which had been uplifted to £4,250 to allow for "general management" and increased to the amount claimed through the addition of the applicable VAT.

6. On 30 June 2010, having been notified by the Tribunal of Stomgrove's application, HMRC wrote to the Tribunal explaining that it did not object to an order for costs being made in Stomgrove's favour, but requesting that the amount be subject to detailed assessment by the Supreme Court Costs Office as it was of the opinion that the amount claimed was unreasonable. In a letter of the same date to Mr Rice Mr Maguire of HMRC explained why it felt the amount claimed to be unreasonable. First, Mr Maguire maintained that the Guideline Hourly Rate was in excess of the £217 applied by the SCCO for fee earners in Mr Rice's position, secondly those rates included an amount for overall care so a further sum for "general management" should not have been included, thirdly he felt the hours worked were excessive so he offered payment for 8 hours work and finally on the basis that Stomgrove was registered for VAT he maintained that no claim for VAT should be made. Mr Maguire then made an offer to settle the costs for £1,736, stressing that the offer was made in accordance with Part 47.19 of the Civil Procedure Rules 1998 ("CPR") . On 28 July 2010 Mr Rice wrote to HMRC rejecting the offer outright. On 5 August 2010 Mr Maguire wrote to Mr Rice increasing HMRC's offer to £2,295, again in accordance with CPR Part 47.19.

7. On 10 August 2010 Judge Avery Jones endorsed HMRC's letter to the Tribunal with the words "I direct as in the third paragraph", that paragraph in the letter containing HMRC's request that the costs be subject to detailed assessment by the SCCO, as permitted by the Rules.

8. Both parties at this stage considered that the endorsed letter amounted to an order for costs in favour of Stomgrove and a direction that these costs be assessed. On 17 August 2010, HMRC wrote to Mr Rice saying that as an impasse on the settlement discussions had been reached Mr Rice should commence proceedings in the SCCO to have the costs assessed.

9. On 12 October 2010 Mr Rice wrote to the Tribunal asking the judge to make a direction so that the assessment could be set in train with the SCCO, which elicited a response to the effect that the judge's endorsement on the letter of 30 June 2010 amounted to such a direction. On 25 February 2011 Mr Rice signed a notice of commencement of assessment which needed to be served on HMRC but it appears that notice was never served. Instead Mr Rice filed with the SCCO a request for a Default Costs Certificate in which Mr Rice incorrectly certified that the notice of commencement had been served on HMRC and no points of dispute had been

received. The papers were returned by the SCCO on 19 April 2011 on the basis that no final order for costs was enclosed.

10. Mr Rice therefore wrote again to the Tribunal, on 27 April 2011, asking for a proper final costs order to be produced. The Tribunal, in its reply dated 6 June 2011, stated that the appeal was no longer before the Tribunal so no direction could be made but that if the parties were willing to propose a memorandum of the agreement the parties had come to regarding the disposal of the appeal, including a provision about detailed assessment of the costs, a Tribunal Judge would endorse it. I have to say at this stage the Tribunal had not made things easy for the parties. The informal nature of Judge Avery Jones's directions turned out to be unhelpful and it appears to me that the Tribunal was wrong to say in its letter of 6 June 2011 that the appeal had ended, because the question of costs still had not been determined. At that stage therefore, as Miss Collier observed, the Tribunal could have set aside Judge Avery Jones's direction and made a more formal direction that the costs be subject to a detailed assessment.

11. Unfortunately, the parties could not agree on the memorandum suggested because while HMRC had drafted it on the basis that it was liable for costs on the standard basis Stomgrove wished costs to be awarded in the indemnity basis. Stomgrove then, on 12 August 2011, wrote to the Tribunal applying for costs to be awarded on an indemnity basis. This was the first time Stomgrove asked for costs on an indemnity basis. Stomgrove did not indicate why it sought an assessment on an indemnity basis, such as on account of unreasonable behaviour of HMRC.

12. On 19 September 2011 the Tribunal wrote to Mr Rice saying that as the application for costs on an indemnity basis had not been agreed by HMRC the application would have to be dealt with at a hearing. In the meantime HMRC attempted to progress matters by itself applying for detailed assessment of the costs by the SCCO but once again this was refused on the basis that no proper order for costs had been made. Mr Maguire wrote to Mr Rice on 29 September 2011, the day after this refusal, and pointed out that at the hearing Master Haworth urged the parties to reach an amicable settlement. Mr Maguire fully engaged with that suggestion, pointing out that indemnity costs were rarely awarded and made an offer of settlement of £3,000. The offer was made on the basis that the Tribunal Rules did not permit an order to be made in respect of costs incurred before an appeal was notified (and Mr Magiure quoted case authority for that proposition) so that Mr Maguire discounted the 7 hours spent by Mr Rice on the matter before that time, but he did agree to Mr Rice's hourly rate of £320 for the rest of the time. On this basis the costs concerned would amount to £1,786 but Mr Maguire increased this to £3,000 to take account of Master Haworth's comments.

13. As was the case with HMRC's previous offer, Mr Rice did not engage in any settlement discussions and rejected the offer in his letter of 12 October 2011 on the basis that excluding costs prior to the notification of the appeal was "a nonsense". Mr Rice said he took this position "with some confidence without even reading the

cases". Mr Magiure sent Mr Rice copies of the cases concerned on 17 October 2011 in which he increased the offer of settlement by £750, an offer which was rejected by Mr Rice who was still looking for the full amount of his bill. It was clear at this stage Mr Rice had read the cases sent to him (*Bulkliner* and *Walker*, which are referred to below) but did not accept them as authority for the proposition that costs incurred prior to the notification of the appeal were not recoverable.

14. Stomgrove's application was listed for a hearing to be held on 16 April 2012 before Judge Nowlan. Mr Maguire made another attempt to settle the matter, writing to Mr Rice on 25 January 2012, proposing that the costs be assessed by the SCCO if not agreed but on the basis there was no order for costs on the application. Quite reasonably, Mr Maguire pointed out that even on an indemnity assessment some costs are usually disallowed and that conduct would need to be unreasonable to a high degree to justify assessment on an indemnity basis. Mr Maguire warned Mr Rice that if the matter proceeded to a hearing HMRC would apply for its costs of the application. Mr Rice replied on 9 February 2012 requesting an increased sum in full and final settlement of £5,250 plus VAT to reflect the fact that further costs had been incurred since the original invoice. Mr Maguire engaged with this offer in his letter of 13 February 2012, offering £4,500, plus a sum of £750 which Master Haworth had awarded Stomgrove in respect of HMRC's failed application to the SCCO. This offer was rejected on 28 February 2012. HMRC state that the offer of £4,500 has never been withdrawn and therefore has remained open for acceptance. Mr Rice disputed this, but I have seen no evidence to support his contention so I accept that the offer was not withdrawn.

15. Stomgrove's application and that of HMRC for their own costs incurred since they made their original offer of settlement was heard on 16 April 2012 and Judge Nowlan released his decision on the applications on 25 July 2012. During the course of the hearing the history of the various offers of settlement emerged. Judge Nowlan's decision records that when he indicated during the hearing that HMRC's original offer was in the correct range there was a further negotiation between the parties that led to them agreeing that the correct outcome was that neither party should pay the other anything and he determined the applications on that basis. It was clear that Judge Nowlan, characteristically, was endeavouring to deal with the matter on a pragmatic basis.

16. It appears that Judge Nowlan was mistaken in his understanding that the decision he made had been agreed because Stomgrove applied for permission to appeal against the decision to the Upper Tribunal. This application was refused by Judge Nowlan but when renewed to the Upper Tribunal was granted by Judge Bishopp on 18 October 2012. On 27 March 2013 Judge Sinfield, sitting in the Upper Tribunal set aside Judge Nowlan's decision and remitted the two costs applications for reconsideration by a differently constituted panel.

17. The applications were listed before me for hearing on 30 August 2013. The hearing was adjourned because of the late filing of HMRC's skeleton argument.

HMRC accept that the costs of that abortive hearing should be borne by them. Before adjourning the hearing, however, I urged the parties to have another attempt at reaching a settlement but that was unsuccessful.

Procedural Issues

18. The parties have asked me to consider their applications for costs and determine them on a summary basis notwithstanding Judge Avery Jones's direction that the costs be subject to a detailed assessment by the SCCO. I also need to consider whether the proceedings are still alive before this Tribunal. HMRC submit that the substantive appeal was settled by agreement under s 54 of the Taxes Management Act 1970, although Stomgrove disputes that. I do not believe it matters whether there was a s 54 agreement or not, the fact of the matter is that HMRC are not contesting the appeal so there is nothing for the Tribunal to adjudicate upon. Technically, in those circumstances the appeal could be determined by the Tribunal allowing the appeal but that has not formally happened. It is clear that if there was a s 54 agreement it did not deal with costs and therefore whatever the correct analysis, a s 54 agreement or a substantive appeal decided in favour of Stomgrove, in my view I have jurisdiction to deal with applications for costs pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (" the Rules").

19. With regard to Judge Avery Jones's direction it is quite clear that because of the approach taken to it by the SCCO it cannot be implemented. In those circumstances, in so far as it is necessary, I set it aside under Rule 5(2) of the Rules which enables the Tribunal to make a direction setting aside an earlier direction.

20. HMRC have requested that I make a summary assessment of the costs claimed by both parties pursuant to Rule 10(6) of the Rules. Stomgrove made no request that I should direct a detailed assessment by the SCCO. I shall therefore proceed to make summary assessments, first in respect of the Schedule of Costs submitted by Stomgrove on 7 June 2010 claiming £4,993.75 and secondly in respect of the Schedule of Costs submitted by HMRC on 9 January 2014 in an amount of £18,309.99. As agreed by the parties I shall also deal with the costs of the hearing of the applications.

Relevant Law

21. The power for this Tribunal to award costs derives from Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007 (“TCEA”) which so far as relevant provides:

> " (1) The costs of and incidental to-
>
> (a) all proceedings in the First-tier Tribunal, and

(b) [...] shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

22. Rule 10 of the Rules gives effect to the FTT's discretion to order costs, pursuant to the authority given in Section 29 of TCEA. This rule so far as relevant provides as follows:

" (1) The Tribunal may only make an order for costs (or, in Scotland,expenses)-

(a) […] ;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

(c) if-

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a wriiten request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph ; or

[…]

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(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 in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

[…]

(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 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 a standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 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;

[…] "

23. As this case was allocated as a complex case and neither party applied for it to be excluded from the costs regime I have jurisdiction under Rule 10(c) to award costs, and as indicated above, I am going to do so after making a summary assessment.

24. Rules 47.18 and 47.19 (1) of the Civil Procedure Rules 1998 as in force at the relevant time dealt with the liability for costs of detailed assessment proceedings and the effect on costs of without prejudice offers to settle proceedings as follows:

"47.18 (1) The receiving party is entitled to his costs of the detailed assessment proceedings except where-

(a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or

(b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.

(2) In deciding whether to make some other order, the court must have regard to all the circumstances , including-

(a) the conduct of all the parties;

(b) the amount,if any, by which the bill of costs has been reduced; and

(c) whether it was reasonable for a party to claim a particular item or to dispute that item.

47.19 (1) Where-

(a) a party (whether the paying party or the receiving party) makes a written offer to settle the costs of the proceedings which gave rise to the assessment proceedings ; and

(b) the offer is expressed to be without prejudice save as to the costs of the detailed assessment proceedings , the court will take the offer into account in deciding who should pay the costs of those proceedings."

25. The question as to whether the power in s 29(1) TCEA extends to costs incurred prior to proceedings being commenced in the FTT was considered by Judge Bishopp in the Upper Tribunal in *Catana v HMRC* where he noted at [7]:

> "…the tribunal may only make an order in respect of costs "of and incidental to" the proceedings. There is no power to make an order in respect of anything else,and particularly, in the context of this case, in respect of the investigation into Mr Catana's tax affairs which proceeded the proceedings."

26. He agreed, at [8], with the following observation of Judge Berner at [11] in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC) that:

> "…one thing that has not changed is that the Tribunal's jurisdiction continues to be limited to considering actions of a party in the course of the "proceedings", that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the 2009 Rules, any more than it was under the Special Commissioners' regulations, for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe,* and *Carvill v Frost* [2005] STC (SCD) 208 remain good law. That is not to say that the behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and another (trading as Farthings Steak House v McDonald* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

27. Consequently, Judge Bishopp concluded at [10] :

> "…It follows that so much of Mr Catana's application as respects any costs he incurred before the proceedings before the First-tier Tribunal were brought cannot succeed, irrespective of its underlying merits which, consequently, I shall not explore."

28. Shortly before *Catana* was released two conflicting decisions of the FTT on the interpretation of costs "of and incidental to" the proceedings were released.

29. Judge Kempster, in *G Wilson (Glaziers) Ltd v Revenue and Customs Commissioners* [2012] UKFTT 387 (TC),cited the judgment of Sir Robert Megarry VC in *Re Gibson's Settlement Trust,Mellors v Gibson* [1981] Ch 179 in which it was held that the phrase "of and incidental to" extend rather than reduce the ambit of the order with the result that costs that would otherwise be recoverable are not to be disallowed just because they were incurred before the action was brought. Judge Kempster therefore concluded that under s 29 of TCEA costs which had been incurred prior to the bringing of proceedings could be awarded provided they were "of and incidental to" the proceedings.

30. By contrast, in *Thomas Maryan T/A Hazledene Catering v The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 215 (TC) Judge Tildesley, having examined the reasoning in *Carvill v Frost* and *Gamble v Rowe*, both decisions of the Special Commissioners, as well as the FTT's decision in *Thomas Walker v The Commissioners for HMRC* (TC/2009/12751 & 13399) observed at [87]:

> "…The Appellant in his submissions makes reference to the use of the phrase *and incidental* for his proposition that the Tribunal may consider costs that have been incurred prior to the notification of the appeal to the Tribunal. The Tribunal disagrees. The use of the word incidental does not extend the period for when costs can be considered but simply expands the definition of costs to include indirect costs which have been incurred after the commencement of proceedings before the Tribunal."

31. This reasoning is consistent with the reasoning of Judge Bishopp in *Catana.* I am bound by *Catana* as it is an Upper Tribunal decision and I should follow it. I should therefore proceed on the basis that the FTT has no power to award costs in respect of matters which preceded the proceedings, that is prior to the lodging of the notice of appeal.

32. Mr Rice, who contends that *Catana* is of no application in this case because it concerned an application under Rule 10 (1) (b) rather than is the case with Stomgrove's application here, Rule 10 (1) (c), relies on *McGlinn v Waltham Contractors* [2005] EWHC 1419 (TCC) where Judge Peter Coulson QC, sitting in the Technology and Construction Court , held at [9] that as a matter of principle the costs incurred in complying with a Pre-Action Protocol may be recoverable as costs "incidental to " any subsequent proceedings. I do not, however see a correct analogy between costs of this nature, which relate to a process that a party is bound to follow before issuing civil proceedings and the costs in relation to the disputing of a notice of assessment to tax.

33. Mr Rice also relied on the observation of Judge Berner in *The Bowcombe Shoot v HMRC* [2011] UKFTT 64 (TC) at [32] that :

> "… as far as conduct is concerned, it is necessary to have regard to the whole course of a party's conduct, both before the appeal is made and during the proceedings themselves."

In my view this observation was made in the context of Judge Berner's consideration of the relevant behaviour to take into account when considering whether to award costs on an indemnity basis. He was not considering the question as to whether costs incurred before proceedings commenced could be recovered which was not at issue in the case before him, but the question as to whether behaviour that preceded the commencement of proceedings could be taken into account in determining whether costs incurred after such commencement could be assessed on the indemnity basis on the grounds of unreasonable behaviour on the part of the paying party. This issue is therefore only relevant to the question as to whether any award of costs to Stomgrove should be on the indemnity basis.

Discussion

34. I now turn to my consideration of the two applications in the light of the factual and legal background.

Stomgrove's application

35. Mr Rice submits that Stomgrove should be awarded the full sum of £4,993.75 in respect of the four categories of work referred to in paragraph 5 above. He submits that due to HMRC's unreasonable behaviour in making the determination in the first place which was withdrawn before its statement of case was filed the award should be on an indemnity basis and on the basis of Mr Rice's hourly rate of £320, rather than the SCCO's guideline rate of £217. As indicated above, Mr Rice submits that Stomgrove should be able to recover costs incurred prior to the commencement of proceedings, that is in respect of the first two categories of work referred to on the Schedule of Costs. He submits that *Catana* and *Thomas Maryan* were cases concerned solely with the award of costs under Rule 10(1)(b) on the grounds of unreasonable behaviour. Those cases have no application to a case such as the present, where the application is made under Rule 10(1) (c) because of the allocation of the appeal as a Complex case, and the approach in *Mcglinn v Waltham Contractors* should be followed.

36. I reject all of these submissions. First, in my view the governing provision as to the extent of the FTT's power to award costs is s 29(1) TCEA as identified in paragraph 21 above. All the provisions of Rule 10 are governed by that provision without distinction. Therefore, whether the award is made under Rule 10 (1) (b) or (c) no costs may be awarded which are not "costs of or incidental to" the proceedings in the FTT. On the authority of *Catana,* which is binding on me, costs incurred before the proceedings were commenced cannot be regarded as incidental to the proceedings. Accordingly, the first category of work performed by Mr Rice must be excluded. For the same reasons, it is arguable that the second category also should be excluded, although HMRC have conceded, perhaps generously, that for the purposes of these

proceedings, that the costs for the work in the second category are recoverable. It is common ground that costs incurred in relation to the third and fourth categories are recoverable.

37. As far as the claim for costs on an indemnity basis is concerned, I accept, as *Bowcombe Shoot* demonstrates, behaviour before the proceedings are commenced can be taken into account. That case also demonstrates that for indemnity costs to be awarded the conduct concerned must "take it out of the norm" by being unreasonable to a high degree. Mr Rice makes generalised comments about the conduct of HMRC which relate purely to the merits of the determination. There was insufficient evidence before me to establish that the decision to make the determination was unreasonable to a high degree. It appears that HMRC decided not to contest the appeal within three months of Stomgrove's notice of appeal having been lodged. In those circumstances, Stomgrove has not satisfied me that HMRC's behaviour has crossed the threshold of being unreasonable to a high degree. In any event, bearing in mind the limited categories of costs being claimed it is unlikely that the award of costs on an indemnity basis would have made any material difference in practice.

38. With regard to Mr Rice's hourly rate, I am not persuaded that the circumstances justify payment at a rate in excess of the guideline rate. Mr Rice suggests that the higher rate is justified as he was acting both as instructing solicitor and advocate, but I do not accept that such a situation justifies an uplift in the circumstances of this case. I would not have expected the Costs Judge to have taken that position if the costs had been subject to detailed assessment. I also accept Miss Collier's submission that no uplift for general management should be awarded as general management costs are incorporated into the hourly rate.

39. Consequently, the amount to be awarded should be in respect of the two and a quarter hours in the second category and the two and a half hours in the third and fourth categories. At the guideline rate of £217 per hour this amounts to £1,030.75 plus VAT and that is the award which I make in favour of Stomgrove. There will, of course, need to be added to this the £750 awarded by Master Haworth. I also award an amount of £651 plus VAT, representing 3 hours of Mr Rice's time at the guideline rate for his attendance at the abortive hearing on 30 August 2013.

HMRC's application

40. In normal circumstances the question as to whether HMRC should be entitled to their costs where, as in this case, HMRC have effectively conceded the substantive appeal would not arise. Normally in Complex cases the costs shifting regime operates so as to give rise to an award of costs in favour of the winning party and HMRC have always accepted that Stomgrove was entitled to costs on that basis, the only dispute being over the amount claimed which I have now determined, as set out above.

41. HMRC justify their application on two grounds. First, they rely on Rule 10(1) (b) which, as we have seen, gives the FTT to make an order for costs against a party if it considers that the party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. HMRC contend that Stomgrove's conduct of its own costs application has been unreasonable in that it has refused to accept the offer made on 13 February 2012 of £4,500 in settlement of the amount claimed in its application of £4,993.75 and instead pursued what has become protracted litigation.

42. Secondly, if the FTT had decided to order that the costs be assessed by the SCCO pursuant to Rule 10 (6) (c) then the CPR would have applied to that process as stipulated by Rule 10 (7) (a). In those circumstances, Miss Collier submits, the costs of the detailed assessment would be assessed by the Costs Judge as provided for by CPR 47.18 during which process the judge could (and would) take into account pursuant to CPR 47.19 HMRC's reasonable offers to settle Stomgrove's costs. On this basis, Miss Collier submits that HMRC should be awarded all of its costs incurred since it made its first offer of settlement of £1,736 on 30 June 2010, assuming (as I have found to be the case) Stomgrove is entitled to costs of an amount less than that offer.

43. Mr Rice submits that it is with the benefit of hindsight that it is contended that it was unreasonable to have refused HMRC's offers at the time they were made and denies that there has been any unreasonable behaviour on the part of Stomgrove.

44. In my view the correct approach to be taken in this case is to consider whether in the round since HMRC's first offer was made Stomgrove's conduct has been unreasonable to the extent that I should award HMRC any part of the costs claimed by them and I should do so without reference to the CPRs. Rule 10(7) (a) is in effect a steer to the Costs Judge conducting a detailed assessment to apply the CPRs as if the proceedings had taken place in a court to which the CPRs apply, with appropriate modifications. The CPRs do not apply to the FTT and although they may in certain cases be instructive, it is important to bear in mind that tax cases are statutory appeals involving a dispute between the taxpayer and an organ of the state and have a different character to ordinary civil litigation, so that the usual terminology of "claimant" and "defendant" and the detailed rules in the CPR regarding the effect of without prejudice offers made in the course of litigation are of limited relevance. That is not to say that the offers of settlement are not to be taken into account in deciding whether Stomgrove's conduct has been unreasonable. In my view they are highly relevant to the issue.

45. I have no hesitation in finding that Stomgrove's behaviour since HMRC's offer of £4,500 was made on 13 February 2012 was unreasonable. In that regard I make no distinction between the behaviour of Stomgrove itself, and that of Mr Rice on the

basis that Mr Rice was acting on instructions. However, I observe that the whole tenor of Mr Rice's approach has been uncompromising. In particular, he failed to take the strong hint from Master Haworth in September 2011 that the parties should attempt to reach an amicable settlement, to which Mr Maguire responded promptly and positively as I have recorded in paragraph 12 above. Mr Rice's response at that time to the effect that he could take the position he did on the issue of costs pre-dating the commencement of proceedings without reading the cases Mr Maguire had referred to in support of HMRC's position was reckless. At no stage has Mr Rice shown any real desire to compromise, which in my experience is usually essential in costs matters where there is always going to be room for dispute on particular items.

46. Mr Maguire's letter of 25 January 2012, written just after the hearing of 16 April 2012, was measured and reasonable in its approach and content. He noted that Stomgrove had now belatedly applied for costs on an indemnity basis and sensibly warned Mr Rice as to the high hurdle to be passed if costs were to be so awarded. He also warned Mr Rice that he would seek HMRC's costs if the matter proceeded to hearing on 16 April.

47. I am prepared to give Stomgrove the benefit of the doubt at this point and say that in the absence of an offer reasonably close to the amount claimed it was reasonable for it to challenge HMRC's position at the hearing scheduled for 16 April on the costs incurred prior to the proceedings in the FTT, *Catana* not having been decided at this point.

48. That, however, in my view ceased to be the position on 9 February 2012 when Mr Rice, quite unreasonably, countered HMRC's offer with an offer in excess of the amount originally claimed, namely £5,250 plus VAT. At that point in my view HMRC would have been entitled to take the view that further attempts at compromise would be pointless and take its chances at the hearing scheduled for 16 April. However, HMRC proceeded to make on 13 February 2012 its very generous offer of £4,500. In my view no reasonable adviser, having been offered approximately 90% of the amount claimed against a background of real doubt as to whether a large proportion of the claim was recoverable in any event would have advised against acceptance of such an offer. As I have found, this offer remained open, even after the hearing on 16 April and the decision in *Cantana* when HMRC might have been encouraged to believe that ultimately it would be successful in its contentions that costs incurred before the proceedings were commenced were not recoverable. It was still open at the time of the hearing on 30 August 2013, when I joined the chorus of those (Master Haworth and Judge Nowlan) who urged the parties to settle, a chorus which as far as Mr Rice and Stomgrove concerned fell on deaf ears. This leads me to the straightforward conclusion that its rejection of HMRC's wholly reasonable offer

of £4,500 amounted to unreasonable conduct on Stomgrove's part and caused HMRC, at public expense, to incur further substantial costs.

49. It is therefore my starting position that HMRC should be entitled to all of their costs incurred after 9 February 2012 in relation to the proceedings in this Tribunal. That means I must disallow the first eight items on HMRC's Schedule of Costs in relation to work on documents as they relate to costs incurred before that date. I must also disallow items 16 to 26 as they appear to relate to the proceedings in the Upper Tribunal which I have previously directed should not be the subject of this hearing. I have made pro rata adjustments to the amounts charged for attendances on clients and opponents for such matters and disallowed the costs for attending the Upper Tribunal hearing on 22 March 2013. On the same basis, I must disallow the items for the period between 20 November 2012 and 22 March 2013 on Counsel's fee note. I also disallow the items on Counsel's fee note for 30 August 2013 and 7 and 8 January 2014 so as to avoid duplication in respect of the abortive hearing on 30 August 2013 and have disallowed HMRC's own costs in respect of that hearing.

50. Consequent upon these adjustments (a total deduction of £5,698.10) the total amount to be awarded to HMRC, including Counsel's fees, amounts to £12,611.89.

51. I have considered whether I should reduce that amount further on grounds of proportionality, bearing in mind the amount at stake and the fact that it far outweighs the amount awarded to the winner in the substantive proceedings. However I cannot escape the fact that these costs have been incurred entirely because of the unreasonable behaviour of Stomgrove in refusing the settlement offer. In the circumstances, I do not believe that it is appropriate that any of the costs concerned should fall on the public purse and I therefore award HMRC costs of £12,611.89 in respect of their application.

52. This is a sorry outcome for Stomgrove but they and their adviser have been the authors of their own misfortune. Mr Rice, in particular, has had an unshakeable conviction in his own rectitude which has led to his inability to deal with the matter in a pragmatic fashion.

53. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

5

RELEASE DATE: 5 February 2014