[2018] UKFTT 771 (TC)

TC06905

Appeal number: TC/2018/00701

COSTS – application for an order for costs on the basis that the Respondents acted unreasonably in conducting the proceedings – yes - whether the Appellant's schedule of costs complied with Tribunal Rule 10(3)(b) – no – direction for a revised schedule of costs to be produced and settled by the Tribunal by way of summary judgment in the absence of agreement by the parties

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR E **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in private at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 December 2018

Mr David Bedenham, instructed by Memery Crystal LLP for the Appellant

Mr Alan Hall, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an application for an order for costs pursuant to Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") which was made by the Appellant on 4 April 2018, "on the basis that the Respondents have acted unreasonably in defending and conducting these proceedings". The proceedings in question are the appeal which was made by the Appellant on 22 December 2017 against an information notice issued to the Appellant on 4 July 2017 under paragraph 1 of Schedule 36 to the Finance Act 2008 ("Schedule 36").

Private hearing

2. At the start of the hearing, Mr Bedenham, on behalf of the Appellant, made an application under Rule 32 of the Tribunal Rules for the hearing to be conducted in private and for the ensuing decision consequently to be anonymised. The Respondents did not object to the application. The parties referred me to a decision by Judge Mosedale in *Mr E and 3 corporate applicants v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 590 (TC) where Judge Mosedale held that her decision in relation to an application for third party notices under Schedule 36 which concerned an investigation into the same taxpayer and related companies should be anonymised (see paragraph [81] of Judge Mosedale's decision). Both parties considered that the effect of Judge Mosedale's decision in that case would be completely undermined if the proceedings before me were not to be held in private or my decision were not to be anonymised. I agree. As a result, I ruled that the hearing should be held in private and the Appellant is referred to in this decision simply as "Mr E".

The relevant facts

3. There is no dispute between the parties as to either the relevant legal principles which are to be applied in this case or the relevant facts. They differ only in their conclusions as to how the relevant principles should be applied to the relevant facts.

4. The relevant facts can be summarised as follows:

> (a) on 4 July 2017, Mr Tim Brown, an Officer in the Respondents' Criminal Taxes Unit, issued an information notice to Mr E under paragraph 1 of Schedule 36 requiring the production of certain information and documents by 8 August 2017;
>
> (b) on 17 July 2017, Mr E's advisor – Gilbert Tax Consultants LLP ("Gilbert") – sent an appeal against the information notice to the Respondents;
>
> (c) on the same day, Gilbert wrote to the Respondents to provide certain information and documents voluntarily and without prejudice;

(d) on 1 August 2017, Mr Brown wrote to Mr E to say that he considered his request of 4 July 2017 to be reasonable and proportionate and to elaborate, on an item by item basis, on the reasons why he needed each requested item which continued to remain outstanding;

(e) on 30 August 2017, another advisor to Mr E – Bark & Co ("Bark") – replied, "without prejudice save as to costs", to Mr Brown's letter of 1 August 2017. In that letter, Bark sought clarification of a number of the outstanding requests, provided some information in relation to others and explained why Mr E would not be complying with others;

(f) on the same day, Bark requested a review of the decision set out in Mr Brown's letter of 1 August 2017;

(g) on 6 September 2017, Mr Brown replied to acknowledge receipt of both the additional information and the review request;

(h) on 19 September 2017, Ms Annette McDermott, an Officer in the Respondents' Solicitor's Office, wrote to Mr E to ask for an extension to the period within which the review would be conducted;

(i) on 12 October 2017, while the review was still being conducted, Bark wrote to Ms McDermott to provide her with further information for the purposes of her review;

(j) on 3 November 2017, Ms McDermott wrote to Mr E to ask for a further extension to the period within which the review would be conducted;

(k) on 24 November 2017, Ms McDermott sent her review conclusion letter to Mr E, upholding the decision of Mr Brown and setting out her reasons for doing so. In that letter, Ms McDermott stated that, in reaching her decision, she had considered all of the correspondence between the Respondents, on the one hand, and Mr E and his advisors, on the other hand;

(l) on 22 December 2017, Mr E gave notice to the First-tier Tribunal of his appeal against the information notice of 4 July 2017. The grounds of appeal set out in the notice of appeal were not new but instead simply reiterated the points which had been made in earlier correspondence by Mr E's advisors on his behalf;

(m) on 23 January 2018, Mr Brown wrote to Mr E to say that he intended to issue third party information notices under paragraph 2 of Schedule 36 to various banks in relation to Mr E's affairs;

(n) on the same day, Mr Brown issued a penalty notice to Mr E in respect of Mr E's failure to comply with the information notice of 4 July 2017;

(o) on 26 January 2018, Bark wrote to Mr Brown to say that the information notice of 4 July 2017 was the subject of an appeal to the First-tier Tribunal and that, consequently, it invited Mr Brown to withdraw the penalty notice;

(p) on 29 January 2017, Bark wrote to Ms McDermott "to correct and clarify some issues that you appear to have misunderstood". Bark said that the letter was "intended to correct what we believe to be clear factual misunderstandings and omissions in an attempt to clarify the issues further and invite you to revisit your decision accordingly". The letter informed Ms McDermott that she had misapplied the definition of "statutory records" as that term is used in Schedule 36, pointed out that Ms McDermott had failed to understand one of the explanations previously provided to the Respondents and invited Ms McDermott to revisit her original decision. The letter also enclosed Mr E's personal credit card statements which hadn't previously been disclosed;

(q) on 6 February 2018, Mr Brown wrote to Bark to acknowledge receipt of Bark's letter of 26 January 2018 and Bark's letter to Ms McDermott of 29 January 2018. In that letter, Mr Brown said that offshore bank statements had been requested in the information notice of 4 July 2017. He also defended the Respondents' original position in relation to the definition of "statutory records' for the purpose of Schedule 36 and concluded that "[b]ecause of this, I do not intend withdrawing the penalty notice issued to Mr [E] on 23 January 2018";

(r) on 9 February 2018, the First-tier Tribunal wrote to both parties to acknowledge the receipt of the appeal against the information notice of 4 July 2017. In its letter to Mr E, the First-tier Tribunal (inter alia) directed Mr E to provide to the Respondents, within one month of the date of its letter, a list of documents and authorities on which Mr E intended to rely at the hearing, copies of documents which Mr E had not previously sent to the Respondents and on which Mr E intended to rely at the hearing and copies of witness statements from each witness on whose evidence Mr E intended to rely at the hearing;

(s) on 13 February 2018, Bark replied to Mr Brown's letter of 6 February 2018 in relation to the penalty notice of 23 January 2018. In that letter, Bark again invited Mr Brown to withdraw the penalty notice pending the determination of the appeal against the information notice. Bark explained in that letter that, due to the time limit applicable to an appeal against the penalty notice, it wanted Mr Brown to respond to its request by 19 February 2018;

(t) on 20 February 2018, Bark wrote again to Mr Brown to say that, in the absence of any response to its letter of 13 February 2018, it was appealing against the penalty notice on behalf of Mr E;

(u) on 22 February 2018, Mr Brown wrote to Mr E to apologise for his delay in responding to Bark's letter of 13 February 2018 (caused by his being out of the office) and to confirm that he was willing to withdraw the penalty notice pending the outcome of the appeal against the information notice of 4 July 2017;

(v) on 2 March 2018, Bark wrote to Mr Hall in the Respondents' Solicitor's Office to request the Respondents' consent to a variation in the

directions which had been given to Mr E by the First-tier Tribunal on 9 February 2018 and to explain why it was seeking to make the relevant amendments;

(w) on 5 March 2018, Mr Hall wrote to Bark to say that his understanding was that the information notice of 4 July 2017 had been withdrawn by Mr Brown and that that information notice would "be replaced with other formal notices, which may include both 1st and 3rd party notices". He concluded by asking that Mr E's appeal against the information notice would "be allowed by consent";

(x) on the same day, Mr Hall wrote to Mr E to the same effect – noting that "information will be requested via new Sch 36 Notices, from the appropriate persons (including yourself)";

(y) on the same day, Mr Hall wrote to the First-tier Tribunal to say that the information notice of 4 July 2017 had been withdrawn "and so ask that the appeal be allowed by consent";

(z) on 6 March 2018, Mr Brown wrote to Bark to confirm that the information notice had been withdrawn and to say that he would "contact you again in due course in relation to the outstanding information and documentation…I do not believe that any time spent by Mr [E] or Bark or any of Mr [E]'s advisors, in relation to the Notice will have been wasted as it is my intention to issue revised information notices";

(aa) on 7 March 2018, the First-tier Tribunal wrote to the Respondents to confirm its receipt of the notification from the Respondents of their withdrawal of the information notice of 4 July 2017 and to confirm that it was allowing Mr E's appeal; and

(bb) as at the date of the hearing in relation to the present application for costs, no further information notices have been issued to Mr E since the information notice of 4 July 2017.

The relevant law

5. Under Rule 10(1)(b) of the Tribunal Rules, I am permitted to make an order in respect of costs if I consider that "a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings".

6. Rule 10 of the Tribunal Rules goes on as follows:

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

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of a withdrawal under rule 17 (withdrawal) which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(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 the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 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;…"

7. There have been a number of decisions in relation to applications for costs under Rule 10 of the Tribunal Rules. The most recent is the decision of the Upper Tribunal in *Distinctive Care Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 155 (TCC) ("*Distinctive Care*"). The principles which I derive from that decision and the other cases which are relevant in this context are as follows:

> (a) in *Ridehalgh v Horsefield* [1994] 2 WLR 462, the Court of Appeal defined "unreasonable" as meaning "what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the

resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable";

(b) in similar vein, Judge Hellier noted at paragraph [27] in *Leslie Wallis v The Commissioners for Her Majesty's Customs and Excise* [2013] UKFTT 081 (TC) that "[i]t seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…";

(c) the Upper Tribunal in *Distinctive Care* held that, before assessing whether a party has acted unreasonably, it is necessary to define the time span over which that party's actions are to be assessed and tested for reasonableness. Since the relevant rule is focused on whether the relevant party "acted unreasonably in bringing, defending or conducting the proceedings", in the case of a claim against the Respondents, the actions of the Respondents and its representative in defending or conducting the proceedings are to be considered (see paragraphs [37] to [39] in the Upper Tribunal decision in *Distinctive Care*);

(d) the Upper Tribunal in *Distinctive Care* reiterated that there is no warrant for extending the clear wording of the rule to encompass an assessment of the Respondents' conduct prior to the commencement of the proceedings before the First-tier Tribunal "even if that conduct effectively forces an appellant to commence proceedings which should not reasonably have been necessary" (see paragraphs [41] and [42] in the Upper Tribunal decision in *Distinctive Care*);

(e) however, the Upper Tribunal in *Shahjahan Tarafdar v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 0362 (TCC) ("*Tarafdar*") held that "the reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question of whether it was reasonable of HMRC to defend, or to continue to defend, the appeal" (see paragraph [19] in the Upper Tribunal decision in *Tarafdar*);

(f) nevertheless, the Upper Tribunal in *Distinctive Care* noted that, although "there can be circumstances in which conduct prior to the commencement of the proceedings can inform the First-tier Tribunal's assessment of a party's conduct during the relevant period… such cases are likely to be at the margin" (see paragraph [43] in the Upper Tribunal decision in *Distinctive Care*);

(g) the Upper Tribunal in *Distinctive Care* noted that, in accordance with the decision of the First-tier Tribunal in *Invicta Foods Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT

456 (TC), questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight (see paragraph [45] in the Upper Tribunal decision in *Distinctive Care*);

(h) in accordance with the decision of the Upper Tribunal in *Market & Opinion Research International Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0012 (TCC) ("*MORI*") the following approach should be adopted in considering whether a party has acted unreasonably. The phrase "acted unreasonably" gives rise to a lower threshold than the threshold of acting "wholly unreasonably" which had previously applied in relation to proceedings before the Special Commissioners. It is possible for a single piece of conduct to amount to acting unreasonably and actions include omissions. A failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct. There is no single way of acting reasonably and there may well be a range of reasonable conduct. The focus should be on the standard of handling the proceedings before the First-tier Tribunal and not to the wider dispute between the parties or the quality of the original decision. And, finally, the fact that an argument fails before the First-tier Tribunal does not necessarily mean that the party running that argument was acting unreasonably in doing so - to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary. And, finally, the power to award costs under Rule 10 should not become a "backdoor method of costs shifting" (see paragraph [44] in the Upper Tribunal decision in *Distinctive Care*, referring to paragraphs [22] and [23] in the Upper Tribunal decision in *MORI*);

(i) there is no compendious test of reasonableness for this purpose. On each occasion, the First-tier Tribunal needs to make a value judgment based on the facts and circumstances in question. The First-tier Tribunal needs to consider what a reasonable person in the position of the party concerned would have done or not done (see paragraph [46] in the Upper Tribunal decision in *Distinctive Care* referring to paragraph [49] in the Upper Tribunal decision in *MORI*);

(j) in a case where a party withdraws from proceedings, the First-tier Tribunal which is tasked with applying the "acting unreasonably" test needs to ask itself three questions as follows. First, what was the reason for the withdrawal of that party from the appeal? Secondly, having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings? And, finally, was it unreasonable for that party not to have withdrawn at an earlier stage? (see paragraphs [47] and [48] in the Upper Tribunal decision in *Distinctive Care*, referring to paragraph [34] in the Upper Tribunal decision in *Tarafdar*);

(k) in *Distinctive Care*, the Respondents had withdrawn from the proceedings 15 days after they had been notified of the appeal to the First-tier Tribunal and the Upper Tribunal approved of the conclusion which it

inferred had been reached by Judge Mosedale at first instance in that case to the effect that "such a prompt withdrawal afforded HMRC the protection afforded by the third limb of the *Tarafdar* test" (see paragraph [51] in the Upper Tribunal decision in *Distinctive Care*);

(l) the costs which may be recovered are those which are "of and incidental to the proceedings". That term encompasses only those costs which are incurred in the course of preparing for and pursuing the appeal. Since a taxpayer needs to obtain advice in preparing a notice of appeal, "work necessarily undertaken as a prelude to the preparation of a notice of appeal must, in principle, be "incidental to" the proceedings" (see paragraph [12] of the permission to appeal decision by Judge Bishopp, sitting as a judge in the Upper Tribunal, in *Stomgrove Limited v The Commissioners for Her Majesty's Customs and Excise* PTA/480/2014). However, although the Upper Tribunal in *Distinctive Care* said that it was not deciding the point, the costs of making an appeal to the Respondents or of making any representations in the course of any statutory review are not "incidental" to the proceedings before the First-tier Tribunal and therefore cannot be recovered (see paragraph [71] in the Upper Tribunal decision in *Distinctive Care*);

(m) when considering the extent of the detail which is required in the schedule of costs which is put forward by the applicant, it is important to bear in mind that the schedule must contain sufficient detail so as both to allow the First-tier Tribunal to make a summary assessment and to allow the paying party, based on its own knowledge of the facts and circumstances, to highlight and question aspects of the proposed costs before the First-tier Tribunal (see paragraphs [59] to [63] in the Upper Tribunal decision in *Distinctive Care*);

(n) the Upper Tribunal in *Distinctive Care* made some general observations on the level of detail to be included in the schedule. First, the schedule should set out the name of each fee earner, the hourly rate of the fee earner and a sufficient statement of the level of experience and expertise of the fee earner to enable the First-tier Tribunal to form a view on the appropriateness of the hourly rate claimed and to assess whether the relevant work should have been carried out by a fee earner of that standing. Secondly, the schedule should set out the professional qualification or other status of the relevant fee earner (for example, paralegal, trainee solicitor, associate solicitor, partner, chartered tax adviser etc.) and the approximate length of his or her experience in the relevant role. Thirdly, the geographical location of the relevant fee earner should be shown because that can clearly have an impact on the level of fees which are charged in each case. Fourthly, the time spent by the relevant fee earner should be shown, along with a brief breakdown of how the time was spent and the work involved. Fifthly, any disbursements claim should be identified, giving the amount incurred, what it was incurred on and how it relates to the proceedings. Sixthly, amounts in respect of VAT which are recoverable as input tax should not be included.

And, finally, if the figures in the schedule are an apportioned part of a larger figure, details of the apportionment should be included in the schedule (see paragraph [69] in the Upper Tribunal decision in *Distinctive Care*); and

(o) even if the First-tier Tribunal is satisfied that a party has acted unreasonably in the terms of Rule 10 of the Tribunal Rules, it still has a discretion as to whether or not to make a costs order although that discretion, like any other discretion which is conferred on the First-tier Tribunal, must be exercised judicially (see paragraph [20] in the Upper Tribunal decision in *Tarafdar*).

The arguments of the parties

8. As noted in paragraph 3 above, there was no dispute between the parties as to either the relevant legal principles which are to be applied in this case or the relevant facts. Nor did they disagree in identifying the time span or period over which the conduct of the Respondents was to be tested for reasonableness. Both parties agreed that that period commenced when Mr E began to prepare his notice of appeal to the First-tier Tribunal against the information notice – that is to say, shortly before 22 December 2017 – and ended when Mr E and his advisors were informed by the Respondents that the information notice was to be withdrawn – that is to say, upon the receipt by Mr E and his advisors of the letters from Mr Hall of 5 March 2018.

9. However, the parties did disagree on a number of issues as described below.

Have the Respondents acted unreasonably during the relevant period?

10. Mr Hall began by pointing out that the Respondents had neither "commenced" the proceedings before the First-tier Tribunal nor "defended" the proceedings before the First-tier Tribunal which had been commenced by Mr E. However, he did concede that the actions or omissions of the Respondents over the period defined above amounted to the "conduct" of those proceedings by the Respondents and therefore not very much turned on this point.

11. Mr Hall submitted that, in conducting the proceedings, whilst this was not the Respondents' finest hour, the Respondents had not acted unreasonably. On the contrary, as soon as Mr Hall in the Respondents' Solicitor's Office had been made aware of the appeal by the First-tier Tribunal, the Respondents had considered the evidence and had decided to withdraw the information notice. He said that, notwithstanding the letter from Bark to Mr Brown of 26 January 2018, he (ie Mr Hall) had not become aware that the proceedings had been commenced until the notice from the First-tier Tribunal of 9 February 2018 had been received by the Respondents and allocated internally for litigation. In that regard, he pointed out that the Respondents are a large organisation and have internal rules and procedures which are necessarily cumbersome. Thus, some tolerance should be afforded to them in giving them time to react to the news that proceedings had been commenced.

12. In reply, Mr Bedenham made the following submissions:

(a) this is not a case where Mr E and his advisors had raised new arguments at the point when the notice of the appeal against the information notice was given to the First-tier Tribunal. All of the arguments which were set out in the notice of appeal had been raised before the notice of appeal was given;

(b) in addition, although, in their letter to Ms McDermott of 29 January 2018, Bark had said that the purpose of the letter was to correct and clarify issues that Ms McDermott appeared to have misunderstood, the Respondents had not sought at any time to argue that anything in that letter had prompted them to change their minds about the information notice and, in any event, the Respondents had produced no evidence to suggest that that was the case. The only explanation which the Respondents had offered for their conduct was at paragraph [27] of their defence to the present application (the "Defence"). This stated that "[b]y reviewing all of the circumstances of the appeal on receipt of the notice from the Tribunal, and then withdrawing as soon as the HMRC litigation specialists considered that the evidential basis was insufficient, HMRC acted entirely reasonably. HMRC did not make "wrong assertions" and have not "persisted in the face of an unbeatable argument"." However, the Respondents had not provided any witness (or other) evidence as to why their litigation specialists "considered that the evidential basis was incomplete", when that conclusion was reached or the timing of the arguments or information which had led to that conclusion;

(c) furthermore, at the point when the Respondents decided to withdraw the information notice and therefore asked for the appeal to be determined by consent, both Mr Hall (in his letters of 5 March 2018 to Mr E and to Bark) and Mr Brown (in his letter of 6 March 2018 to Bark) alluded to the fact that further information notices would be issued to Mr E and, despite those assertions (which were repeated in paragraph [23] of the Defence), as at the date of the hearing, no such information notices had been forthcoming;

(d) these features demonstrated both that the Respondents should have withdrawn the information notice before 22 December 2017 – when Mr E submitted his notice of appeal to the First-tier Tribunal – and that, having failed to do so, the Respondents should have withdrawn the information notice immediately after receiving Bark's letter of 26 January 2018 which made the Respondents aware that Mr E had given notice to the First-tier Tribunal of his appeal against the information notice;

(e) the Respondents' statement in paragraph [29] of the Defence, to the effect that the fact that Mr E had chosen to incur costs between 9 February 2018 and 5 March 2018 was not due to any unreasonable conduct on the part of the Respondents, failed to take into account the fact that, as a result of the directions which had been issued by the First-tier Tribunal on 9

February 2018, Mr E was bound to be carrying on work and incurring costs in connection with the appeal;

(f) in both focusing (in paragraph [29] of the Defence) on the start date of 9 February 2018 and saying (in paragraph [30] of the Defence) that the delay between the notification to the Respondents and the Respondents' withdrawal was just 24 days and therefore short, taking into account the process within the Respondents of allocating and considering the merits of a case, the Respondents had failed to take into account the period from their receipt of Bark's letter of 26 January 2018, when they were made aware that the proceedings had commenced; and

(g) in summary, applying the three-stage test set out in *Tarafdar* and *Distinctive Care*, Mr Bedenham submitted that the Respondents should have withdrawn immediately after they became aware (by virtue of Bark's letter to them of 26 January 2018) that notice to the First-tier Tribunal had been given, that, consequently, the Respondents could have withdrawn on an earlier date than 5 March 2018 and that the Respondents' failure to do so was unreasonable given that all of the arguments which Mr E had set out in his appeal had been raised at an earlier date, the Respondents should have reviewed its own evidence at an earlier stage and the Respondents should have been aware that, as a result of the directions from the First-tier Tribunal, Mr E was going to be incurring costs in the period prior to the Respondents' withdrawal.

13. Mr Hall explained that the references in his letter of 5 March 2018 to Mr E, his letter of 5 March 2018 to Bark and paragraph [23] of the Defence to the fact that further information notices would be issued to Mr E were attributable to the fact that that was his understanding after speaking to Mr Brown. He added that, although the Respondents had chosen to withdraw the information notice, they might instead have left it on foot and simply varied it or waited for the First-tier Tribunal to do so at the hearing of the substantive proceedings. Furthermore, he said that Mr E had continued to provide information which was requested by the information notice throughout the period of the dispute and, indeed, even after Mr E had commenced the proceedings. In this regard, he referred to the information provided by Bark in its letters to Ms McDermott of 12 October 2017 and 29 January 2018.

14. Mr Bedenham replied that the fact that Mr E and his advisers had voluntarily provided certain of the information requested in the information notice was of no relevance whatsoever in this context. The Respondents had produced no evidence to show either that the fact that information was being supplied to them voluntarily was a factor in their decision not to withdraw earlier than the date on which they actually did or that the information provided to them after the proceedings had commenced had led to the Respondents' change of heart. Thus, the fact that Mr E and his advisers had chosen voluntarily to comply with certain requests in the information notice did not make the delay by the Respondents in withdrawing the information notice any more reasonable.

What costs can Mr E recover?

15. Mr Bedenham submitted that, if I were to conclude that the Respondents had acted unreasonably at any stage in their conduct of the proceedings, then the threshold test for an award of costs was satisfied and therefore all of the costs which were "of and incidental to the proceedings" were potentially within the scope of the costs order even though some of them may have preceded the unreasonable behaviour in question. Accordingly, all of the costs which were incurred by Mr E in preparing his notice of appeal and thereafter were potentially within the scope of the costs order.

16. Mr Hall said that that the way in which Rule 10 of the Tribunal Rules was expressed clearly implied that the costs which could be awarded must be limited to those which were incurred as a result of the unreasonable acts in question.

The schedule of costs

17. Mr Hall pointed out a number of deficiencies in the schedule of costs for which Mr E had applied. These included the following:

(a) the schedule clearly included a number of items which related to the period preceding the preparation of the notice of appeal. For example, it included references to work done in August 2017, long before the review conclusion letter of 24 November 2017;

(b) in addition, a lot of the entries were undated – for example, counsel's fees - so that it was impossible to determine whether or not they related to the period preceding the preparation of the notice of appeal;

(c) the schedule included amounts in respect of VAT without regard to whether or not such amounts might be recoverable; and

(d) the schedule included a reference to reviewing bank statements and yet no bank statements were involved in the proceedings, thereby suggesting that that work was more likely to have related to compliance with the information notice (as opposed to the proceedings commenced to appeal against the information notice) and also to have preceded the period in relation to which costs were potentially recoverable.

18. Mr Bedenham conceded that certain of the costs which were set out in the schedule did relate to the period which preceded the date on which Mr E began to prepare his notice of appeal to the First-tier Tribunal, and were therefore not within the potential ambit of a costs order. However, he submitted that it was possible to ascertain which of the costs that were set out in the schedule were in that category. As for the other deficiencies which the Respondents had pointed out, Mr Bedenham urged me to note the comment made by the Upper Tribunal in *Distinctive Care* at paragraph [63], when it noted that the First-tier Tribunal can always exercise its power under Rule 7 of the Tribunal Rules to waive any failure to observe Rule 10(3)(b) of the Tribunal Rules, bearing in mind the overriding objective in Rule 2 of the Tribunal Rules.

19. Mr Bedenham added that, in addition, given the circumstances, he wished any award that I was minded to make to extend to the costs of the application for costs and the proceedings in relation to the application.

20. There was a brief discussion on whether, were I minded to make an award of costs in this case, it would be appropriate for these to be determined by way of a detailed assessment pursuant to Rule 10(7) of the Tribunal Rules in the absence of agreement by the parties. However, both parties were amenable to my proposal that, were I to hold that the Respondents had acted unreasonably and then to set out the principles to be applied in determining which costs should then be recoverable and the manner in which those costs should be set out in the schedule of costs, the parties should then to try to agree on the relevant amount and, in the absence of agreement, have the matter resolved by way of a summary assessment by the First-tier Tribunal, if necessary after a further hearing.

Discussion

Preliminary point

Before commencing my analysis of the position, I should note that the application for costs in this case was made on 4 April 2018 and that the First-tier Tribunal gave notice of its receipt of the withdrawal by the Respondents which ended the proceedings on 7 March 2018. Rule 10(4) of the Tribunal Rules stipulates that an application for costs may not be made later than 28 days after the date on which the Tribunal sends notice under Rule 17(2) of the Tribunal Rules of its receipt of the withdrawal which ends the proceedings. I therefore consider that the application was made within the applicable time limit.

Have the Respondents acted unreasonably during the relevant period?

21. Given that the parties are in agreement in relation to the period over which the conduct of the Respondents is to be tested for reasonableness, the first issue for me to determine is whether, in my view, the Respondents have acted unreasonably at any stage in that period. In that regard, I need to bear in mind all of the points set out in paragraph 7 above but, in particular:

(a) the three-stage test set out in paragraph [34] in the Upper Tribunal decision in *Tarafdar* and repeated in paragraphs [47] and [48] in the Upper Tribunal decision in *Distinctive Care*. First, what was the reason for the withdrawal of that party from the appeal? Secondly, having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings? And, finally, was it unreasonable for that party not to have withdrawn at an earlier stage?

(b) the point made in paragraphs [41] and [42] in the Upper Tribunal decision in *Distinctive Care* to the effect that an assessment of the Respondents' conduct prior to the commencement of the proceedings before the First-tier Tribunal must be avoided "even if that conduct

effectively forces an appellant to commence proceedings which should not reasonably have been necessary"; and

(c) the point made in paragraph [19] in the Upper Tribunal decision in *Tarafdar* and paragraph [43] in the Upper Tribunal decision in *Distinctive Care* to the effect that, although the reasonableness of the original decision against which the appeal has been made is not directly in point, it is relevant to the question of whether it was reasonable of the Respondents to defend, or to continue to defend, the appeal and that therefore, although these cases are at the margin, "there can be circumstances in which conduct prior to the commencement of the proceedings can inform the First-tier Tribunal's assessment of a party's conduct during the relevant period".

22. Having taken all of that into account, I would start by observing that, insofar as the refusal of the Respondents to accept that the information notice should be withdrawn was unreasonable, that course of conduct largely occurred in the period before Mr E began to prepare his notice of appeal against the information notice. It was in that period that the Respondents refused to withdraw the information notice despite the arguments made on behalf of Mr E to the contrary which have ultimately prevailed with the Respondents.

23. In addition, even if it could be said that Mr Brown acted unreasonably in issuing the penalty notice of 23 January 2018 and refusing to withdraw that notice until 22 February 2018, thereby requiring Mr E to appeal against the penalty notice on 20 February 2018, the issue of that notice was not part of the proceedings in relation to the information notice but a quite separate dispute. Thus, even though those events occurred in the period following the commencement of the proceedings, I am not able to take them into account in this context.

24. It can be seen from the above that I need to address only:

(a) the conduct of the Respondents in the period following the preparation of the notice of appeal; and

(b) the conduct of the Respondents in that period in relation to the proceedings in respect of the information notice.

25. Taking that into account, my answers to the questions posed in paragraph 22(a) above are in the paragraphs which follow.

Why did the Respondents withdraw?

26. The reasons why the Respondents withdrew from the proceedings on 5 March 2018 were that, upon examining the arguments and evidence which had been presented to them on behalf of Mr E, they concluded that the information notice could not be sustained. In this context, as the Respondents have produced no evidence to show that any of the arguments or evidence that were provided to them on behalf of Mr E in the notice of appeal itself or after the commencement of the proceedings – for example, in Bark's letter to Ms McDermott of 29 January 2018 – played any role in

their reaching their decision, I have concluded that the arguments and evidence on which the Respondents based their decision were all available to the Respondents before the proceedings commenced.

Could the Respondents have withdrawn earlier?

27. Even if it can reasonably be said that the Respondents could have withdrawn the information notice at any stage in the period between their receipt of the letter from Gilbert of 17 July 2017 providing the initial response to the information notice and their receipt of the letter from Bark of 26 January 2018 which first informed them that proceedings had been commenced, I consider that the answer to this question must be that the earliest date on which the Respondents could have withdrawn from the proceedings was the date when they received the letter from Bark of 26 January 2018. This is because, prior to that date, the Respondents were unaware that the proceedings had commenced and it is impossible for a person to withdraw from proceedings before that person is aware that the proceedings exist.

28. It is therefore my view that the Respondents could have withdrawn from the proceedings at any time after they became aware that the proceedings had commenced – ie the date when they received Bark's letter of 26 January 2018 - and before they actually did so on 5 March 2018.

Was the failure to withdraw earlier unreasonable?

29. As for whether or not it was unreasonable for the Respondents not to have withdrawn at an earlier stage in the proceedings than 5 March 2018, the first point to make is that, as I have already mentioned in paragraph 27 above, the Respondents have produced no evidence to support the proposition that their decision to withdraw on 5 March 2018 was prompted by the discovery of any new arguments or evidence. Instead, they have simply said that the sole reason for their withdrawal was their conclusion upon reviewing the position that "the evidential basis was insufficient" (see paragraph [27] in the Defence).

30. I infer from that statement that, had that evidential basis been examined earlier, then the Respondents would have been in a position to withdraw at an earlier stage. So the question of whether or not the failure to withdraw earlier was unreasonable ultimately turns on whether it was reasonable for the Respondents to have examined the evidential basis for supporting the information notice only as and when they did so.

31. In his submissions at the hearing, Mr Hall conceded that this was not the Respondents' finest hour but made the point that, as the Respondents are a large organisation, an allowance should be made for the application of the internal rules and procedures within the Respondents and, in particular, the fact that Mr Hall became aware of the proceedings only after the Respondents received the letter from the First-tier Tribunal of 9 February 2018. I have also observed that, in *Distinctive Care*, Judge Mosedale appears to have considered that it was not unreasonable for the Respondents

to have withdrawn 15 days after they were notified of the proceedings and the Upper Tribunal did not demur from that.

32. However, each case needs to be considered on its own facts. I have reflected on this and I have concluded that, whilst I accept that the Respondents are a large organisation, they are a single body and their Officers should be regarded as the representatives of that single body. In this case, a decision was taken within the Respondents that Mr Brown, an Officer in the Respondents' Criminal Taxes Unit, would seek to obtain information from Mr E by way of an information notice and without involving the Respondents' Solicitor's Office. However, when Mr E requested a review of that decision, Ms McDermott, an Officer in the Respondents' Solicitor's Office, was made responsible for that review.

33. I think that it is reasonable for me to conclude that:

(a) as a member of the Respondents' Solicitor's Office, Ms McDermott would (or should) have considered the merits of the arguments which were being raised by Mr E's advisers and the evidential basis on which the information notice could be sustained before Mr Hall became involved and indeed throughout the period from the commencement of her review through to the time when Mr Hall became involved; and

(b) had she done so, the misgivings about the evidence which ultimately led the Respondents to withdraw from the proceedings on 5 March 2018 would have arisen at the point when she was considering those arguments and that evidence.

Certainly the Respondents have not provided any evidence which would negate those conclusions.

34. Whilst the period described in paragraph 33(a) above commenced prior to the submission by Mr E of his notice of appeal, it continued beyond both that date and the date when the Respondents had become aware that the proceedings had been commenced. For example, Bark wrote to Ms McDermott on 29 January 2018 stating that Bark "intended to correct what we believe to be clear factual misunderstandings and omissions in an attempt to clarify the issues further and invite you to revisit your decision accordingly". The letter informed Ms McDermott that she had misapplied the definition of "statutory records" as that term is used in Schedule 36, pointed out that Ms McDermott had failed to understand one of the explanations previously provided to the Respondents and invited Ms McDermott to revisit her original decision.

35. It is clear from the terms of both that letter and the letter from Bark to Mr Brown of three days' earlier that both Ms McDermott and Mr Brown were aware, before 29 January 2018, that Mr E had given his notice of appeal and therefore both of them were aware (or should have been aware) at that time that Mr E's advisers would be carrying out work in connection with the appeal.

36. On that basis, I believe that it was unreasonable for the Respondents not to have given more active consideration to the arguments which had been made on behalf of

Mr E at an earlier stage than they clearly did. This is not a perfect science. Whilst I believe that the Respondents acted unreasonably in failing to withdraw before 5 March 2018, I do not subscribe to Mr Bedenham's proposition that the Respondents should have withdrawn "immediately" after they received the letter from Bark to Mr Brown of 26 January 2018 because I believe that some allowance needs to be made for a process of internal consultation to have occurred within the Respondents after their receipt of that letter.

37. Although, as I said above, it is not a perfect science, I have concluded that, for the purposes of exercising my discretion in relation to costs, 2 February 2018 should be regarded as the earliest date on which the Respondents would have withdrawn from the proceedings if they had been acting reasonably. That date allows for the receipt by the Respondents of Bark's letter of 26 January 2018 on the following working day – Monday 29 January 2018 – and then a full week for the Respondents to have considered their position and reached the conclusion which they ultimately reached that withdrawing from the proceedings was appropriate.

What costs can Mr E recover?

38. I believe that it follows from the above conclusion that the costs which were incurred by Mr E after Friday 2 February 2018 and before Mr E and his advisers received the letters from Mr Hall of 5 March 2018 which informed him and them that the information notice was being withdrawn would not have been incurred if the Respondents had been conducting the proceedings reasonably and it is those costs which are within the scope of the award.

39. In addition, I consider that, as the application for costs has been upheld, it is appropriate for the costs of the application and these proceedings to be within the scope of the award as well.

40. It is only the costs described in paragraphs 38 and 39 above which are within the scope of the award and, apart from the costs of the application and these proceedings, not any costs which were incurred outside the period described in paragraph 38 above.

41. In that regard, I do not accept the proposition that, once it has been shown that a party has acted unreasonably in conducting the proceedings, the award should extend to all of the costs which have been incurred by the other party which are of or incidental to the proceedings, including those costs which were not incurred by the other party as a result of the unreasonable conduct in question. While neither party was able to refer me to an authority on this subject, it seems to me to be implicit in the terms of Rule 10 of the Tribunal Rules that the award should be limited to the costs which have been incurred in consequence of the unreasonable conduct. So, in this case, I do not think that it is appropriate for the costs which were incurred by Mr E in relation to the proceedings on or prior to 2 February 2018 to fall within the scope of the award.

The schedule of costs

42. Finally, I agree with Mr Hall that the schedule of costs in its current form is not acceptable. Mr E and his advisers need to rework the schedule in various respects. First, the schedule needs to be amended so that only the costs of the application and these proceedings and the costs which were incurred in the window described in paragraph 38 above remain. Secondly, the schedule needs to be amended so as to include, in relation to each of those costs, the information described in paragraphs [59] to [62] in the Upper Tribunal decision in *Distinctive Care*. Finally, I agree with Mr Hall that amounts in respect of VAT which are recoverable should not be included in the schedule because, in economic terms, they are not suffered once the recovery is taken into account.

Conclusion

43. I am hopeful that, if the changes described in paragraph 42 above are made, the parties will be able to reach agreement on quantum without further recourse to the First-tier Tribunal. However, should they be unable to reach agreement, each party has liberty to apply to the First-tier Tribunal for a summary assessment in relation to quantum.

Right to appeal

44. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 27 DECEMBER 2018