[2022] UKFTT 00125 (TC)

TC 08456

Appeal number: TC/2012/09177

COSTS - Case allocated to complex category

Costs of an interlocutory application - Costs awarded to HMRC on the basis of Rule 10(1)(c), but, if not, would have been awarded on the basis of unreasonable conduct (being a materially misleading witness statement, subsequently found to be untrue) under Rule 10(1)(b).

Costs of a substantive hearing - Each party successful in part - Appeal allowed in relation to Revenue's failure to establish connection to fraud for one set of deals - Appeal dismissed in relation to other sets of deals, where the Appellant was found to have had actual knowledge of connection to fraud - No order as to costs.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ULSTER METAL REFINERS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in private on 4 April 2022

DECISION ON COSTS

1. Following 7 days of hearings, and the receipt of written submissions, on various dates between October 2020 and February 2021, the Tribunal released its decision on 12 August 2021: [2021] UKFTT 0286 (TC). For the reasons therein set out, it allowed, in part, Ulster Metal Refiners Ltd ('UM's) appeal against the refusal of input tax on 135 invoices, and dismissed UM's appeal in part. The total sum in dispute was about £462,000.

2. On 7 September 2021, UM applied for an order, under Rule 10(1)(c), that HMRC pay its costs of the substantive appeal.

3. On 9 September 2021, HMRC applied, under Rules 10(1)(b) and/or 10(1)(c), for:

(1) its costs in resisting the Appellant's strike-out application (the subject matter of a decision by the Tribunal released on 13 June 2019: [2019] UKFTT 395 (TC)); and

(2) 10% of its costs of the substantive hearing, namely those costs relating to what were referred to as the PCB and Magee deals, in which the Respondents were successful.

4. On 11 October 2021 and 19 October 2021, UM responded and objected to HMRC's application.

5. Rule 10(1)(b) empowers the Tribunal to make a costs order where it considers "that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings".

6. Rule 10(1)(c) provides for costs-shifting in an appeal allocated as a complex case, as this one was.

7. The decision to award costs is always discretionary. CPR 44.2 provides guidance as to the framework for that discretion. Applying that guidance, the Tribunal has a discretion as to whether costs are payable by one party to another, and, if it decides to make an order about costs, the "general rule" is that the unsuccessful party will be ordered to pay the costs: CPR 44.2(2)(a), albeit the Court may make 'a different order'. CPR 44.2(4) and (5) make "conduct" a relevant consideration when exercising the discretion to make a costs order.

The Application to strike-out

8. In June 2018, the Appellant applied to strike-out certain paragraphs of HMRC's Amended Statement of Case and/or to debar HMRC from advancing evidence of the facts and matters contained therein. I heard that application in 2019. My reserved decision is reported at [2019] UKFTT 395 (TC). It sets out the lengthy procedural history, up to and back from the Court of Appeal of Northern Ireland. I need not repeat it here.

9. The application produced a clear winner, and a clear loser. The Appellant applied, and its application was not successful. It was the clear loser.

10. I did not order - and (as far as I can recall) was not at the time invited to order - that the costs of that application be treated as costs in the appeal generally. As such, I can approach the costs of the application discretely from the remainder of the costs. There is no default position that the costs of the interlocutory application should be in the case. In the absence of contrary provision, both parties were at liberty to wait until release of the decision on the substantive appeal to apply for their interlocutory costs. That was "the final decision", because it was the decision which finally disposed of all the issues in the proceedings: see Rule 10(4).

11. There is no cross-application by UM for its costs of that application.

12. In my view, in relation to the application, with a clear winner and a clear loser, the "general rule" should apply. It is appropriate to make an inter partes costs order in favour of HMRC, on the footing that this appeal was allocated to the complex track, that neither party sought to opt-out of that costs regime, and that costs were consequently (albeit subject to my discretion) at large. In short, it is appropriate to make an order under Rule 10(1)(c). This was not a run-of-the-mill case management hearing. It was a "heavy", and hotly controverted, application, potentially dispositive of the substantive appeal, and causing the respective parties to incur significant sums by way of legal costs which would not have been incurred had the application not been made and pursued.

13. Strictly speaking, that disposes of the costs of the application, But it is relevant for me to note that, even if this were not a case subject to Rule 10(1)(c), I would nonetheless have made a costs order under Rule 10(1)(b) on the basis of UM's litigation conduct, and in particular "the manner in which a party has pursued or defended its case or a particular allegation or issue": CPR 44.2(5)(c).

14. It would not be appropriate for me to pass on in silence and not articulate my view that there was unreasonable conduct on the part of UM in connection with the Application, although this was not apparent at the time, but only came to light in the substantive hearing (in relation to which the costs are also at large, and which I am now invited by each party to determine in their favour).

15. HMRC record - accurately - that a significant part of the basis upon which UM advanced its application was the evidence of Mr Donaldson (albeit drafted by his representative, Mr Liban Ahmed: see item 11 of UM's Costs Schedule), given in a witness statement dated 22 March 2018, and supported with a Statement of Truth.

16. In summary, Mr Donaldson said, in March 2018, that UM would be prejudiced if HMRC were permitted to continue to resist the appeal because UM would have called Fearghal Keenan, but could no longer do so: see Paragraphs 35 to 41 of Mr Donaldson's witness statement, and especially Paragraph 41.

17. Latterly, at the substantive hearing of this appeal, UM sought permission to rely on a witness statement of Mr Liban Ahmed dated 12 October 2020 (ie produced

during the hearing itself). In the absence of opposition from HMRC, the Tribunal granted permission. Mr Ahmed thereby exposed himself to cross-examination by principal counsel for HMRC, Mr Puzey. Having thus opened the door, Mr Ahmed was asked - fairly - questions about Mr Keenan, and gave evidence that Mr Ahmed had decided, even before the first Tribunal hearing in 2015, that UM was not going to call Mr Keenan as a witness. That is obviously inconsistent with Mr Donaldson's March 2018 witness statement.

18. As the Tribunal remarked at Paragraph 44 of its Decision in the substantive appeal:

> "The oral evidence that Mr Ahmed and UM had never intended calling Mr Kirk or Mr Keenan to support the appeal was troubling and less than entirely satisfactory because, in a witness statement dated 22 March 2018, prepared or drafted by Mr Ahmed but subscribed to by Mr Donaldson, Mr Donaldson sought to argue (before Judge McNall) that HMRC's appeal should be struck out because he had wanted to produce evidence from Mr Kirk and Mr Keenan, but could no longer do so (i) because Mr Kirk had retired and said that he did not hold records from 2011 and would not provide further assistance; and (ii) Mr Keenan had not been seen or heard of for 2-3 years. It is clear that the gist of that written evidence in March 2018 was not true (and for present purposes it makes no difference - but is telling - that Mr Bedenham did not ask Mr Donaldson to confirm the truth of that statement). Moreover, in March 2018, Mr Donaldson would have known it not to be true because, as became clear in Mr Ahmed's evidence, neither Mr Kirk nor Mr Keenan were ever going to be called to give evidence (regardless of the precise nature of the case actually articulated by HMRC)."

19. The FtT did hold that the Application to strike-out had been pursued, in part, on a basis that was untrue and which the Appellant knew to be untrue.

20. As I remarked (albeit in a different context) in Stephen Mullens [2021] UKFTT 131 (TC):

> "The Statement of Truth is not couched in arcane, obscure or ambiguous language. It is meant for all litigants in all cases. It is deliberately plain and simple. It simply asks the maker to confirm that they are telling the truth. Telling the truth is not a concept encountered only in the context of litigation."

21. It is important that evidence is truthful and accurate. This applies with particular force where an application is being decided on the basis of written evidence, without any cross-examination. The giving of untrue, or misleading, evidence has the potential to seriously compromise the Tribunal's ability to deal with cases fairly and justly. It had such potential here, because, had the Tribunal taken a different view of UM's application, HMRC would have been debarred from participation in the substantive appeal, and the misleading nature of the evidence given in March 2018 would not have come to light. This is conduct of a kind which readily attracts a costs sanction. If

this aspect of the matter had not already been dealt with under Rule 10(1)(c), I would have had no hesitation in doing so under Rule 10(1)(b).

22. I am going to summarily assess HMRC's costs of the Application to Strike-out. There is a Schedule in Practice Form N260 supported by an Indemnity Certificate. The total is £15,100.48, ex VAT, being £9,975.48 base profit costs (being about 56 hours time) and £5,125 base Counsel's fees (most of which was at the standard Attorney-General panel rate of £110/hr, with a brief fee of £1,000 for the hearing).

23. I am being asked to assess on the standard basis, which means I must consider whether the costs are proportionate, reasonable in amount and reasonably incurred. I must resolve any doubt in favour of the paying party.

24. The costs are proportionate. The solicitors' rates are the then-standard rates, and Counsel's fees, being at the set hourly rates, are a fraction of the rates ordinarily payable for privately-paying specialist Revenue work. The costs are reasonable in amount and were reasonably incurred.

25. I summarily assess HMRC's costs as drawn. Within 28 days of the release of this decision, the Appellant shall pay HMRC's costs of the Application to Strike-Out, summarily assessed, in the sum of £15,100.48.

The substantive appeal

26. In relation to the substantive appeal, each party was successful in part. UM's appeal succeeded in relation to the Revenue's failure to establish connection to fraud for one set of deals. Its appeal did not succeed in relation to other sets of deals where the Appellant, through its director Mr Donaldson, was found to have had actual knowledge of connection to fraud.

27. It is fair to say, arithmetically, that the scales ended up tilted in favour of the Appellant because there were about 135 denied invoices, with the Appellant ultimately succeeding in relation to about 90% of them. However, I decline to follow the arithmetic approach when it comes to deciding on costs. It is too simple, and fails to capture the bigger picture.

28. Standing back, it does not seem to me as if the substantive appeal did produce a clear winner. Neither party really got what they wanted. UM ended up paying more tax than it wanted to (ie not getting back its input tax claimed on the Magee and PCB deals); and HMRC failed to get as much as it wanted (ie having to pay UM the input tax claimed on purchases from Irwin Enterprises Ltd). It does not seem to me as if the exact figures, and the fact that one may over-top another, really matter for the purposes of this analysis.

29. In my view the "general rule" does not apply. It seems to me that this is a case in which "a different order" should be considered: CPR 44.2(2)(b). Some illustrations of a "different order" are given in CPR 44.2(6), but that list is not exhaustive.

30. UM submits that it was put to appealing - in relation to the Irwin deals - denials of input tax by HMRC on a footing which had already failed once, before the FtT in 2015, but which was pursued by HMRC on the same footing in 2020. In part, this was the consequence of HMRC having sought to amend its Statement of Case so as to allege the species of fraud identified (the Court of Appeal said, impermissibly) by the FtT in 2015, but then having resiled from its own proposed amendments.

31. At first blush, one can understand why UM might consider itself to be vexed. But its complaint - latterly and in relation to costs - that HMRC's case on the Irwin Deals was bound to fail (and, hence, should not have been pursued at all) is not a knock-out point (i) because it is made with hindsight, and (ii) in terms of costs, and extra costs, UM had already fought its appeal against those denials once (and eventually, in the Court of Appeal of Northern Ireland, won, and got its costs there and below). If HMRC was fighting the same case over again, then so was UM.

32. That is not the whole picture. For the purposes of costs, it is a relevant circumstance that the Tribunal made significant criticisms of UM and in particular Mr Donaldson's evidence.

33. The shortcomings in UM's evidence went well beyond that already identified in relation to the Application to Strike-Out:

(1) In relation to all the groups of deals, Mr Donaldson gave evidence which the FtT assessed as untruthful: see the headline assessment of his credibility in Paragraph 50 of the Decision ("But overall, when it came to Mr Donaldson's factual evidence in response to HMRC's case, his evidence was not satisfactory and, in some regards, we do not consider that Mr Donaldson was telling us the truth");

(2) The FtT also made general criticism of Mr Donaldson's approach to this litigation generally: see Paragraph 54 of the Decision;

(3) In relation to the Magee and PCB Deals, Mr Donaldson actually knew of the connection to fraud: see Paragraphs 125, 126 and 130 of the Decision. In and of itself, that is not a finding of dishonesty. But, when it came to those transactions, Mr Donaldson was a knowing participant, and his evidence that he was not a knowing participant was not given truthfully, or with a reasonable belief in its truth.

34. I have to ask whether, because UM (through Mr Donaldson) has been found to have been untruthful in some respects, it is going too far to penalise UM in costs by depriving it of the ability to recover some or all of its own costs.

35. I need to make a costs order which is appropriately reflective of all the circumstances, including what I agree to be the strong public interest in discouraging the deployment of dishonest evidence to obtain public funds (ie VAT).

36. In my view, it is not going too far, and it is fair and just, to deprive UM (despite its success in relation to a large proportion of the deals in issue) of the ability to recover any of its costs from HMRC:

(1) Although UM succeeded in a substantial part of its appeal (the Irwin Deals) Mr Donaldson's evidence was untruthful, and was rejected in a number of important respects;

(2) Even in relation to the Irwin Deals, the Tribunal "had no doubt at all that Mr Donaldson and UM not only should have known better that Irwin was connected to fraud, but did know better": see Paragraph 99 of the Decision;

(3) In relation to two of the three sets of deals, UM, through Mr Donaldson, was a knowing participant in fraud. It does not matter that those deals, empirically, amounted to just a small proportion of the overall deals in dispute.

37. Those are all factors, whether taken individually or collectively, which attract censure, and which must sound in an adverse costs order, namely depriving UM of any ability to recover any part of its costs of the substantive appeal from HMRC.

38. The Decision is pervaded with comments which were adverse to Mr Donaldson's credibility, and those are findings which simply cannot be ignored.

39. HMRC cross-apply for an order that UM pay 10% of its costs of the substantive appeal - ie a proportion of its costs said to be reflective of the degree of its overall success. Those are put at £11,062 (being 10% of £110,625). This is an order potentially available in the Tribunal's costs management armoury, but I decline to so order. Although the arithmetic approach is neat, and thereby has some attraction, neatness is not the test - any more for HMRC than it was for the Appellant.

40. Standing back, it just does not seem to me that the making of such an order in favour of HMRC here would be fair or just, or an appropriate reflection either of the outcome or of the trial process which led to it.

41. Some of the criticisms made of HMRC by UM are not without force: for instance, (i) HMRC's pursuit, until the hearing itself, of certain deals and (ii) HMRC's pursuit of the Irwin Deals on the basis which had already been considered, and rejected, by the FtT in 2015. In my view, those points - which were (as UM identify) the subject to critical comment by the FtT - tend against the making of an order in HMRC's favour (and cannot, given the criticism of the integrity of Mr Donaldson's evidence, carry the matter so far as to justify the making of an order in UM's favour).

42. In conclusion, there will be no order as to the parties' costs of the substantive hearing including (for the avoidance of doubt) their costs of their respective applications for costs of the substantive hearing.

Permission to Appeal

43. 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.

Dr Christopher McNall

TRIBUNAL JUDGE
RELEASE DATE: 07 April 2022