Neutral Citation: [2022] UKFTT 00447 (TC)

Case Number: TC08656

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2021/00345

COSTS – complex track application for indemnity costs on the basis of unreasonable behaviour – application in response to strike out for failure to meet terms of rule 10(3)(b) (schedule of costs) – strike out application refused – costs awarded on standard basis subject to detailed assessment.

Judgment date: 02 December 2022

Decided by:

TRIBUNAL JUDGE AMANDA BROWN KC

Between

PETER WOODSTOCK HARRIS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application for costs without a hearing under rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) with the consent of the parties and the Tribunal considering that it was able to determine the matter without a hearing. Both parties had made substantive submissions in writing.

DECISION

INTRODUCTION

1. This matter concerns an application for costs bought by Mr Peter Woodstock Harris (**Appellant**) pursuant to section 29 Tribunal Courts and Enforcement Act 2007 (TCEA) and rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (FTT Rules).

2. The appeal to which the claim relates concerned a charge to tax in the sum of £928,573.12 levied by way of a partial closure notice (**PCN**) issued to the Appellant by HM Revenue & Customs (**HMRC**) in respect of the tax year ended 5 April 2017 The PCN was issued on 30 December 2020 following an application by the Appellant to the Tribunal pursuant to section 28A(4) Taxes Management Act 1970 (**TMA**) to compel HMRC to issue such a notice.

3. The Appellant appealed the closure notice to HMRC and simultaneously notified his appeal to the Tribunal on 30 December 2020. The Tribunal allocated the appeal to the complex category. The Appellant did not opt out of the costs' regime. As such the cost shifting rule prima facie applied in this appeal

4. The litigation appears to have been ill tempered and there were various delays and procedural skirmishes in the conduct of the appeal. HMRC made a number of applications which were resisted and refused. Disclosure was sought by HMRC and met in April 2022 following which (but only after further acrimonious correspondence) on 24 August 2022 HMRC notified the Tribunal that they were no longer opposing the appeal and invited the Tribunal to allow the appeal. The appeal was formally allowed by the Tribunal on 31 August 2022.

5. By way of an in-time application made on 27 September 2022 the Appellant applied for costs in the sum of £354,063.48 assessed on the indemnity basis (**Costs Application**).

6. On 10 October 2022 HMRC applied for the costs claim to be struck out on the basis that the schedule of costs (**Schedule of Costs**) did not provide sufficient detail to permit a summary assessment and failed to provide a statement that the costs claimed did not exceed the sum payable by the Appellant. As a consequence, it was contended that the Appellant had not made a compliant claim in accordance with rule 10(3) FTT Rules (**Strike Out Application**).

LEGISLATION

7. The legislation relevant to the claim for costs is provided for in section 29 Tribunal Courts and Enforcement Act 2007 (**TCEA**) and Rule 10 FTT Rules. In summary however, the award of costs in the Tribunal is more limited than in general civil litigation with the general rule that costs shifting does not apply. Where however, an appeal is allocated to the complex category and the appellant does not apply to opt out of the costs' regime, the winning party is entitled, on the making of a claim, to the payment of their reasonable costs.

8. In respect of the procedure to be adopted in connection with the Strike Out Application the relevant legislation is to be found in Rules 7 and 8 FTT Rules. Rule 8 FTT Rules provides the circumstances in which the Tribunal may strike out an appeal and Rule 7 FTT Rules provides that a failure to comply with rules shall not render the proceedings void and provides a wide discretion to the FTT to determine the consequences of a failure to comply with the rules.

9. The relevant legislative provisions are set out in the Appendix.

THE STRIKE OUT APPLICATION

10. I deal with the Strike Out Application first as is can be dealt with shortly.

11. HMRC do not identify a provision of the FTT Rules pursuant to which their application is made. That is for good reason. There is no such provision.

12. There has been no unless order made by the Tribunal and hence rules 8(1) and (3) are inapplicable.

13. Rule 8(2) provides for strike out where the Tribunal has no jurisdiction in relation to those proceedings. The Appellant was within the cost shifting regime (having been allocated to the complex category and not opted out of costs), he has submitted an in time claim and that claim was supported by a document purporting to be a schedule of costs. HMRC may question its adequacy however, even if it were inadequate the provisions of Rule 7 would not render the costs proceedings void and, as such there is no question as to the Tribunal's jurisdiction and no basis on which the Costs Application may be struck out.

14. HMRC's application to strike out is thereby REFUSED.

THE COSTS APPLICATION

THE SCHEDULE OF COSTS

15. The Costs Application was accompanied by the Schedule of Costs, a detailed chronology of the dispute and a draft order providing either for the payment of a summarily assessed sum or to be assessed if not agreed.

16. The Costs Application is a document of 10 pages. It states that the Schedule of Costs is provided in accordance with rule 10(3)(b) FTT Rules and "should the Tribunal decide to undertake a summary assessment of such costs."

17. The Schedule of Costs listed each fee earner at Ernst Young, provided a description of their grade and their hourly rate which was stated to be a 30% discounted rate from the standard scale rates. The Schedule stated:

> "All work described below includes letters, emails and calls with the Appellant, Respondents, Counsel and the Tribunal throughout" (original emphasis.

18. It then set out four detailed narratives of tasks ie. the first list provided:

> "Considering partial closure notice. Work on appeal of partial closure notice and grounds. Dealing with allocation of the appeal and consequential actions. Dealing with the Respondents' request for an extension of time to file their Statement of Case and subsequent application for a stay of proceedings, including preparing objections. Dealing with outcome of Respondents' failed application. Considering Respondents' (late) Statement of Case. Dealing with Respondents' request and application for an extension of time in relation to a stay. Dealing with Respondents' request for "further and better particulars" and further information. Dealing with Respondents' application for "further and better particulars" and further information. Work on "further and better particulars" requested. Dealing with other Case Management directions. Liaising with the Appellant, Respondents, Counsel and the Tribunal, including multiple correspondence on the merits of the Respondents' application, the means of resolving it, and arrangements for a case management hearing. Dealing with outcome of Respondents' failed application, and Respondents' subsequent failed application for the reasons given in Judge Bowler's order to be amended. Liaising with the Appellant, the Respondents, Counsel and the Tribunal re listing of final hearing."

19. Following each such narrative is then a list of the name of each fee earner, their description, total hours for all work carried out in in relation to the listed work, the discounted hourly rate, total fee (hours x rate) and any Counsel's fees/disbursements. Each section

provides the total hours and total fees. At the end of the Schedule of Costs the "Grand Total" shows £423,650.70 as the total solicitor fees incurred "but discounted to: £279,502.90". Counsel's fees of £10,000 and expenses of £6,000 (representing the Cost Lawyer's fee) are claimed plus VAT (in the sum of £59,100.58 representing 20% of the discounted solicitor fees, Counsel's fee and Cost Lawyer fee).

20. The Schedule of Costs does not use form N260 (the standard form for summary assessment under the Civil Procedure Rules (**CPR**).

21. The Costs Application notes certain points relevant to any summary assessment that the Tribunal might be "inclined" to make. These concerned: (1) that there had been an initial discount to scale rates and the further discount given by reference to the fees "actually charged" to the Appellant; (2) that the hours spent by Ernst Young had been occasioned by HMRC's conduct and that use of Counsel had been limited; and (3) by reference to the factors identified in rule 44.4 CPR the claim for costs was justified.

22. The Costs Application and Draft Order clearly invited a summary assessment of the full claim to costs with detailed assessment as an alternative.

23. HMRC's application (which the Tribunal is treating as an application for the Appellant's claim to be refused) is made on the basis that the condition to provide a schedule of costs is mandatory. The purpose of the schedule is said to be so as to permit the Tribunal to make a summary assessment and to provide the paying party with adequate detail of the costs being claimed so that such party can make appropriate submissions in response and/or agree the quantum. HMRC note that no application to waive the requirement to provide a schedule was made and that summary assessment was sought. Whilst HMRC do not object to the use of a non-standard form of schedule they contend that it should, nevertheless, include all the same information as would be provided on the N260. They also object to the four groupings which they note are not chronological. As noted in paragraph [18] the first group of identified tasks includes work on the application for the closure notice and preparation for final hearing of the substantive issue. HMRC claim that the way the schedule has been presented makes it "impossible" to understand why significant costs have been incurred at particular stages.

24. Whilst reserving their position to make submissions as to the reasonableness or proportionality of the claim if the application is not struck out HMRC make a number of observations including that £176,162.10 is claimed for drafting two witness statements of 5 and 10 pages respectively and that time valued at £29,871.80 was purportedly incurred post the communication by HMRC that the closure notice was to be withdrawn. The usual comments seen by this Tribunal in all costs claims against HMRC vis a vis time spent and hourly rates are also made. Culminating in a submission that the overall amount of the costs claimed is "absurd". Further allegations are made against Ernst Young, HMRC asserting that "a failure to provide sufficient particularisation of the costs claimed is a deliberate strategy intended to pressure the other party into making an offer in relation to the costs on the basis that it is impossible to identify which costs have been reasonably incurred in relation to the proceedings. Such conduct is highly prejudicial to the responding party and certainly should not be condoned".

ROLE OF THE SCHEDULE OF COSTS

25. Rule 10(3)(b) provides that a person making a claim for costs must send or deliver with the application a schedule of costs claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs if it decides to do so.

Distinctive Care

26. In *Distinctive Care Limited* [2016] UKFTT 0764 (TC) (**Distinctive**) the First-tier Tribunal (**FTT)** refused a claim for costs under section 10(1)(b) FTT Rules (an unreasonable costs order). This was on the basis that the FTT considered that the application for costs was defective as the schedule of costs which accompanied the claim failed to make clear that the sum claimed had been calculated as one thirtieth of the total costs incurred in respect of a group of appeals. There were other deficiencies with the schedule, but the FTT considered that could be remedied and, in accordance with rule 7(2) FTT did not render the claim void The FTT also indicated that it would have refused the substantive basis of the claim as it did not consider that HMRC's conduct in the proceedings had been unreasonable.

27. On appeal to the Upper Tribunal (**UT**) [2018] UKUT 155 (TCC) the UT agreed that the substantive basis of the claim to costs by reference to unreasonable conduct had not been made out and so rejected the claim for costs. However, the UT also provided guidance on the detail which is required to be provided for a compliant schedule of costs. Strictly, this guidance is obiter.

28. At paragraph 59 the UT notes:

> "When considering the extent of the detail required in a schedule of costs claimed, there are in our view two important factors in Rule 10 to be taken into account. The first is the one focused on by the FTT, namely that the schedule must be in sufficient detail to allow the Tribunal to make a summary assessment", but there is also a second factor. Rule 10(5)(a) provides that "[t]he Tribunal may not make an order under paragraph (1) against a person … without first giving that person an opportunity to make representations". This is an important safeguard. In a situation where a representative is known to be advising a number of parties on closely associated matters involving the same points of law, it gives the prospective paying party the opportunity to raise the point and put forward submissions as to why the amounts claimed might, in light of it, be excessive."

29. The UT went on to note that HMRC had, despite the alleged defect in the schedule of costs, nevertheless taken up the opportunity to raise an objection evidencing that they were alert to the issue and able to make submissions on it so as to ensure that any summary assessment was not excessive. The UT considered that the FTT had failed to take account of all relevant factors, and in particular that there was no particular prejudice to HMRC from the taxpayer's failure to make the basis of calculation clear, when refusing to grant relief for any inadequacy in the schedule of costs pursuant to rule 7 FTT Rules.

30. At paragraph 69 the UT makes the following observations as to the "sufficiency of detail" necessary in order for a schedule of costs to comply with Rule 10(3)(b) FTT Rules:

> "69. We consider the FTT was correct to indicate that the name of each fee earner should be stated, along with the hourly rate for that fee earner and a sufficient statement of the level of experience and expertise of that fee earner to enable the FTT to form a view of the appropriateness of the hourly rate claimed and to assess whether it was reasonable for the relevant work to have been done by a fee earner of that standing. The fee earner's professional qualification or other status should be identified (e.g. paralegal, trainee solicitor, solicitor, chartered tax adviser, accountancy qualification) and approximate length of experience in that role. The geographical location of the fee earner will also usually be relevant – it is well established that appropriate hourly rates vary by location. Clearly, the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each

> occasion. Any disbursements claimed must also be clearly identified, giving the amount of the cost incurred, what it was incurred on and how that expenditure relates to the proceedings. The schedule should also make clear the extent to which any VAT charged is recoverable as input tax by the claiming party, so that it should not properly be recoverable from the paying party. Finally, if the figures in the schedule are calculated as some apportioned part of a larger figure, it would always be advisable for details of the apportionment to be included in the application."

31. The UT decision was appealed to the Court of Appeal [2019] EWCA Civ 1010 but not in relation the question on the adequacy of the schedule.

32. As is apparent from [17] to [19] above the Appellant's Schedule of Costs provided:

(1) the name of each fee earner, together with their hourly rate and grade (thereby providing information of the level of expertise and experience)

(2) the hours spent by each fee earner by reference to the grouped activities

(3) the chronology provided with the Schedule of Costs provides a framework of reference over what period activities were undertaken

(4) a particularisation of the tasks representing a "brief description of the work done"

(5) the two disbursements incurred by way of counsel's fees and the fee for the cost draftsman thus identifying the relevance of the fees to the proceedings

(6) VAT is claimed in full indicating that the Appellant was not entitled to any input tax recovery

33. It did not however, identify:

(1) how long each fee earner had been in grade

(2) the location of each fee earner

(3) make clear the extent to which the VAT charged was recoverable as input tax

(4) the time spent by each fee earner by reference to the individual tasks listed under each activity class.

34. HMRC have not argued that the "deficiencies" identified at [33(1) and (2)] are relevant. They contend that the issues at (3) and (4) render it "impossible" both for the Tribunal to undertake a summary assessment and for HMRC to raise reasonable objections as part of the summary assessment process and accordingly, that the costs claim is so defective that it is not a valid claim. As regards (4) they contend that the Appellant was required to identify time spent by each fee earner on "each occasion".

What is summary assessment?

35. In order to assess whether the defects identified should carry the consequence claimed by HMRC the Tribunal considers it appropriate to consider the nature of summary assessment under the CPR.

36. By reference to rule 44.1(1) CPR, summary assessment is the procedure by which a court may, having made an order for a party to pay costs of a case, determine the amount of such costs. It is usually carried out by the judge hearing the matter. It is not intended to involve a lengthy consideration of each item of costs claimed but, rather, represents a proportionate means of justly, fairly and swiftly resolving the question of costs without the need for further costly proceedings regarding the costs themselves. In colloquial terms it is a somewhat rough

and ready means of dealing with costs; its roughness is justified on the grounds of proportionality.

37. It is significant to note that entitlement to costs (which will usually follow the event) is a distinct exercise from the quantification of those costs.

38. As a general rule (which will apply unless there is a good reason not to do so) a judge will summarily assess costs in fast-track cases or at the end of any other hearing which has not lasted more than one day (see Practice Direction 44.9.2). As is also apparent from the obiter comment of the judge in *Coward v Harraden* [2011] EWHC 3092 (QB) summary assessment may also be appropriate in relation to a matter determined on the papers where the court time taken was of the order of one day – in such a case however, the preparation of statements of costs would need to be directed.

39. It is, however, relevant to note that PD 44.9.4 provides: "Where an application has been made and the parties to the application agree an order by consent without any party attending, the parties should seek to agree a figure for costs to be inserted in the consent order or agree that there should be no order for costs." This provision appears to place the obligation on the parties to determine costs as part of the consent order.

40. The Tribunal considers that it is therefore apparent that the CPR essentially assumes that summary assessment is an exercise which will be carried out only where there is a judge with a sufficient familiarity with the proceedings to undertake the task.

41. Good reason to refuse summary assessment may include, inter alia, the paying party showing substantial grounds for disputing the sum claimed. This may include a challenge to charge out rates, the proportionality of the claim, uncertainty as to whether VAT was included and/or whether the recipient was VAT registered, and a claim to 100% of costs paid (see *TMO Renewables Ltd v Reeves and another* [2020] EWHC 789 (Ch)).

42. Such "good reasons" are at least indicative that the defects which underly them are, under the CPR at least, no justification for no order as to costs being made.

43. Practice Direction 44.9.5 provides that it is the duty of the parties to assist the judge in making a summary assessment in any case to which PD 44.9.2 applies. 44.9.5(2) requires the written statement show separately: 1) the hours claimed, 2) the hourly rate to be claimed, 3) the grade of the fee earner, 4) the amount and nature of the disbursements (other than counsel's fees for appearing at the hearing), 5) the amount of the legal representatives' costs for attending the hearing, 6) counsel's fees and 7) any VAT to be claimed on those amounts. 44.9.5(3) then provides that the written statement of the costs "follows as closely as possible" Form N260.

44. Form N260 provides for a description of each fee earner by name, grade and hourly rate claimed. It then provides for a breakdown of the time for each fee earner in respect of: attendance on the party (by reference to a further breakdown of personal attendances, letters/emails out, telephone attendances), attendance on the opponent (by reference to the same further breakdown) and similarly for attendance on others; site inspection and attendance at hearing. There is then a schedule of work done on documents which provides for a description of the work and hours per fee earner. N260 also requires the person signing it to certify that the costs set out do not exceed the costs which the party is liable to pay in respect of the work which the statement covers. This statement gives an assurance to the court that the indemnity principle has not been breached.

45. Summary assessment, by its very nature, does not permit of a detailed consideration of the application of the indemnity principle and where there is a genuine argument as to breach of the principle detailed assessment will be required (*Bailey v IBC Vehicles Ltd* [1998] EWCA 566 Civ).

46. PD 44.9.6 provides that failure by a party, without reasonable excuse, to appropriately prepare, file and serve a statement of costs will be taken into account by the court in deciding what order to make both as regards the costs claim itself and the costs of any further hearing or detailed assessment hearing that may be necessary.

47. In *Macdonald v Taree Holdings Ltd* [2001] EWCA Civ 312 (**Taree**) (subsequently confirmed and approved post the Jackson reforms in *Kingsley v Orban* [2014] EWHC 2991 (Ch)) the Court of Appeal determined that the court had a wide discretion where there has been a failure to file the statement of costs with the option of:

(1) Deciding that the party who did not prepare a statement of costs could be taken to be conceding costs and to make no order in their favour;

(2) Ordering an adjournment of summary assessment with an order for the costs of the adjournment to be paid by the party in default;

(3) Proceeding with summary assessment without the statement of costs (carrying with it the likelihood of a reduced costs order);

(4) Ordering a detailed assessment carrying the consequence of the associated costs of preparing for such detailed assessment and the necessary delay whilst such assessment takes place.

48. This position has also been adopted in The Guide to Summary Assessment of Costs (published on 1 October 2021) which explicitly provides that any failure to comply with the time limit for service of the statement of costs will be taken into account when deciding what order to make and any further hearing that may be necessary but that "any sanction should be proportionate". The Guide proceeds to then set out the various options as identified in *Taree*.

49. In *Tribe v Elbourne Mitchell LLP (Costs)* [2011] EWHC 1252 (Ch) the Court of Appeal held that in determining which of the various options to adopt the court should adopt a proportionate approach and consider "what, if any, prejudice has [the] failure to comply caused the other party? If no prejudice, then the court should go on and assess the costs in the normal way. If satisfied it has caused prejudice, the next question is: how should that prejudice best be dealt with?".

50. In *Group M UK Ltd v Cabinet Office* [2014] EWHC 3863 (TCC) Akenhead J applied the three-stage test set out in *Denton v TH White* [2014] EWCA Civ 906 for relief from sanction for breaches and concluded, in the facts of that case, that it would be wholly disproportionate to allow no costs.

51. In *Maersk A/S v Mercuria Energy Trading SA* [2021] EWHC 2856 (Comm) (**Maersk**) the successful party had submitted a defective statement of costs. The defects were identified at paragraphs 45 – 46 as that it did not provide a description of the fee earners, their grade or explain why rates used were in excess of guideline rates, and that the schedule had been broken down in broad general headings between two dates. The Court notes "… The consequences are that very large numbers of chargeable hours have been claimed by reference to rates which have been identified without any breakdown as to the work on documents that have been carried out and which are alleged, reasonable and proportionately, to support the sums claimed".

52. The Court determined that to undertake summary assessment by reference to the statement was impossible and that any attempt to summarily assess would represent a guess. In the circumstances a detailed assessment of costs was appropriate.

53. The Court also noted that had the statement been in a compliant form it would have been appropriate to undertake a summary assessment despite the size of the claim exceeding £100,000 but noting that "sums claimed for even relatively straightforward applications routinely exceed that sum and the fact that the sums exceeded £100,000 is not a good reason of itself for refusing to carry out summary assessment."

54. By reference to the above analysis it appears reasonable to conclude:

(1) The nature and purpose of summary assessment is that it is a task performed by a judge familiar with the case, it is an exercise which proportionately deals with an ancillary matter in the case where there is little controversy as to the determination of the extent (or quantum) of the claimant's claim.

(2) A failure to submit a statement of costs is a breach of the CPR but not one which automatically results in a refusal of the costs claim, even in such a situation the court must exercise its discretion in accordance with the overriding objective.

(3) Defects in the schedule of costs will be a matter taken into account when determining whether to summarily assess; the real consequence of such defects however will be that the claimant will incur the costs and delay associated with detailed assessment.

In the context of the CPR what did the UT mean by "on each occasion"?

55. Although the Tribunal is subject to the Tribunal Rules rather than the CPR it has been consistently accepted by this Tribunal that Part 44 CPR provides helpful guidance on the principles to be applied in connection with the award of costs in the FTT (see paragraph 7 *BAV-TMW Globaler Immobilien Spezialfonds v HMRC* [2019] UKFTT 233 (TC)) unless there is a conflict between the provisions of the CPR and the FTT Rules in which case the latter prevail.

56. As noted by the UT in *Distinctive* there is no detailed guidance as to the specifics of what is to be contained in schedule of costs so as to conform to rule 10(3)(b). The UT summarised the requirements as it saw them without explicit reference to the provisions of either PD 44.9.5(2) or to Form 260.

57. However, I consider that it is plainly right to apply the persuasive (but not binding) guidance of the UT by reference to the provisions of the CPR and the Courts application of them when determining the degree of particularisation envisaged by the UT when it stated that the schedule of costs should provide a breakdown of the work done "on each occasion".

58. Neither PD 44.9.5(2) nor Forn 260 provide for the dates on which tasks were performed to be particularised. The front section of N260 groups activities as identified in [44] and only by reference to total time spent per fee earner on each class of activity within the group. Further particularisation is provided on the time spent on key documents.

59. In my view, the circumstances in which summary assessment arise under the CPR help inform the level of detail prescribed in the Practice Direction and on N260. As indicated, summary assessment is a proportionate means of swiftly and cheaply assessing costs and, under the CPR, will usually be undertaken by the judge to which the matter (be that application, short (one day) trial or paper determination) was allocated. The judge in such a case will be well positioned by reference to the schedules produced by both parties and the submissions made by each in relation to the other's schedule as part of the summary assessment process, to determine whether to undertake the summary assessment or make an order for detailed assessment. It is in that context that any deficiencies/inadequacies with a schedule will be taken into account when considering the summary assessment exercise.

60. Under the FTT Rules there appears to be an assumption that all cases may be appropriate for summary assessment whether or not the matter has required a hearing or been determined on the papers, or indeed settled. The rules require the claiming party to produce a schedule of costs so as to facilitate summary assessment, should it be appropriate, and, for the paying party, pursuant to rule 10(5) FTT Rules, to make representations on the schedule prior to any decision being taken on summary assessment. The safeguards that apply under the CPR to prevent a generous summary award are therefore reflected in the FTT (as recognised by the UT in *Distinctive*).

61. As a consequence, the Tribunal considers that it must be envisaged that at least the level of particularisation as is required under the CPR is appropriate. More detail may be required where, as here, there has been no judicial determination of the appeal. The schedule of costs needs to provide a sufficient summary of the time and cost incurred in relation to key stages/activities (most specifically critical documents) in the appeal.

62. I therefore consider that the UT's guidance that "the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each occasion" must be interpreted so as to reflect the level of particularisation which would facilitate a rough, but swift assessment of the costs incurred in the appeal. This should not be a particularly onerous task in any case which has been judicially determined as it is reasonable for the claimant and the paying party to assume (save in exceptional circumstances) that the judge determining the case will consider the costs application.

63. Where, as here, there has been no such judicial determination the task may be more onerous, but it would always have been open to the Appellant to recognise this and simply apply for waiver of the requirement to provide a schedule of costs and to apply for and proceed to detailed assessment.

IS THE SCHEDULE OF COSTS DEFICIENT?

64. This is not a case where there has been a failure to produce a schedule of costs it is a question as to its adequacy for the purposes of summary assessment and the consequence of any deficiency.

65. HMRC take three specific issues with the Schedule of Costs:

(1) The breadth and asserted incoherence of the four groups of activities which precludes identification of the time spent by task or date

(2) The absence of a statement that the claim does not exceed the Appellant's liability to pay.

(3) The absence of a statement that the Appellant is not entitled to recover VAT

Groupings

66. The four groups of tasks set out in the Schedule of Costs do not have headings. HMRC have asserted, in essence, that the groupings are designed to obfuscate and defy a proper analysis of the costs incurred. HMRC contended that the Appellant was required to particularise each task undertaken rather than amalgamate them into groups.

67. The Appellant contends that the tasks in each group are associated and coherent despite not being chronological and are not required to be particularised more specifically.

68. There is some considerable force to HMRC's argument, and it is unclear why the Appellant's representatives sought to present the Schedule of Costs in the way that they have. There has been no explanation as to why the substance of N260 was not followed or why the costs associate with key stages or documents (as distinct from every stage or document) in the

appeal have not been particularised. A rationale of the grouping was provided but that explanation does not address why the need for a proportionate and sufficient particularisation of costs was not provided.

69. The Schedule of Costs as drafted would have rendered the task of summary assessment too time consuming and difficult to undertake for any judge attempting to do so particularly in the context that there had been no judicial determination.

70. The Tribunal finds, in this regard, that the Schedule of Costs is deficient.

Indemnity statement

71. PD 44.9.5(3) provides that a certificate in the form of a statement that "The costs stated above do not exceed the costs which the [party] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated" as set out in N260 is not required only in identified instances.

72. The certificate preserves the indemnity principle of cost recovery. I consider therefore that it is entirely appropriate that any claim for costs under the FTT Rules should provide an adequate assurance as to the application of the indemnity principle albeit that the precise formulation provided for in N260 need not be followed.

73. The Schedule of Costs prepared on behalf of the Appellant did not contain the statement. It did, however, set out the total costs incurred by reference to a discounted rate (indicating that the engagement terms provided for such a discount) and then identified that the claim was limited to £279,502.90 in respect of solicitors' fees plus Counsel's fees, expenses and VAT. In my view that is a clear indication that the Appellant was liable to and/or had already paid costs of the reduced sum and not the total costs incurred (even at the discounted rate).

74. On balance, I accept that the Schedule of Costs was not deficient in this regard.

VAT

75. The Appellant has sought to claim the full amount of VAT which was chargeable on the amount of the claim. It is therefore at least implicit that the Appellant considers that VAT represents a cost that he has suffered.

76. In the present case the Appellant is an individual. HMRC contend that is none to the point as a barrister is an individual and yet able to claim VAT. But a barrister will be registered for VAT and HMRC would know that. HMRC are well aware that the Appellant is not so registered. Further, the nature of the issue under appeal would preclude costs associated with it from being recoverable as input tax such VAT having quite obviously been incurred for private purposes.

Conclusion on deficiency

77. For the reasons set out in [68] and [69] above, I consider that the Schedule of Costs was deficient and did not comply with the terms of Rule 10(3)(b) FTT Rules.

CONSEQUENCE FOR THE CLAIM

78. As identified in [13] above, an inadequacy or deficiency in the Schedule of Costs does not render the costs proceedings void. Rule 7(2) FTT Rules provides that the Tribunal may take such action as it considers just.

79. In *Distinctive* the FTT considered it appropriate to apply Rule 7(2) FTT Rules in respect of some of the deficiencies identified in that taxpayer's schedule of costs, in particular that it was impossible to tell who had carried out the work, their level of experience, and therefore whether the hourly rate claimed was commensurate with experience. The FTT however

considered that the failure to address that the costs had been claimed at one thirtieth of the total costs incurred for a wider group could not be remedied under Rule 7(2). The UT disagreed and indicated that Rule 7(2) was an appropriate means of addressing the deficiency.

80. It is also clear by reference to *Taree* that, even in situations in which no schedule has been provided at all, the approach adopted under the CPR is to consider whether any real prejudice been caused to HMRC as the paying party.

81. This is an appeal in which the costs shifting provisions applied. HMRC capitulated on the appeal. It is apparent that the Appellant sought to resolve the issue of costs during the negotiations between the initial indication that HMRC were prepared to "settle" the appeal and them notifying the Tribunal that they no longer defended the PCN and yet the parties did not enter a section 54 TMA settlement agreement which the Tribunal would have expected to have dealt with the issue of costs both as to entitlement and assessment without the formalities associated with an application under rule 10 FTT Rules.

82. There can therefore be no assertion that HMRC were not well aware of the Appellant's right and intention to claim for costs.

83. The proceedings had reached a stage where the Appellant had incurred the costs of preparing and serving witness statements having commenced litigation and following a drawn-out enquiry which had necessitated an application for the issue of a partial closure notice. It would have been quite plain to HMRC that the Appellant, who had instructed a well known and reputable litigation practice, would be incurring substantial costs.

84. As identified above, under the CPR summary assessment is a process provided for in certain litigation and available, as appropriate, more widely. The role of the schedule of costs is to set out, applying the formula prescribed, the headline costs. The paying party has the right to make representations. Where the claim, for whatever reason, is not suitable for summary assessment judicial discretion may be applied to require detailed assessment.

85. A failure to submit any schedule of costs could, and has in the civil courts, resulted in a determination that no costs be awarded but only where to do so is in accordance with the overriding objective.

86. In present case the Appellant is entitled to claim costs. That should have been acknowledged by HMRC.

87. The Tribunal must decide, in all of the circumstances and in accordance with the overriding objective whether the defect identified in paragraph [70] above has so prejudiced HMRC that it should deprive the Appellant of an award of its costs.

88. In accordance with the approach adopted in *Maersk* it would appear that a relevant consideration in this regard is the size of the claim. Unlike the Commercial Court, costs claims in excess of £100,000 are comparatively rare in the Tribunal and claims as significant as the present claim even rarer.

89. Given the size of the claim it was entirely unrealistic of Ernst Young to even suggest that the costs be determined summarily even had the schedule been more fully particularised. That is not an excuse for the preparation of a deficient schedule, and it is surprising that Ernst Young determined to incur the costs in producing the schedule when they could simply have been avoided by way of an application to waive its production. However, given the inevitability of the nature of the order as to detailed assessment HMRC have suffered no prejudice whatsoever as a consequence of the defects in the Schedule of Costs.

90. In such circumstances, the proper course for this Tribunal to take is to exercise its powers under Rule 7(2)(a) FTT Rules and waive the requirement for a compliant schedule of costs

incurred and to order that the costs be awarded (see below for the basis on which they are awarded) to be subject to detailed assessment should the parties be unable to agree quantum. Through the process of detailed assessment HMRC will have the opportunity to make such challenges as they wish to make.

91. The Tribunal recognises that this is an outcome which differs from that granted in the matter of *Wincanton Hildings Ltd v HMRC* (currently unreported). As identified, where there is a defect in a schedule of costs it is a matter for the Tribunal's discretion as to whether to waive the breached requirement, require it to be remedied and/or make such order as to costs as the Tribunal considers appropriate. The order sought in *Wincanton* was an unreasonable costs order in a sum exceeding £700,000 in respect of an appeal which got no further than the making of a hardship application and in respect of which approximately 50% of the quantum claimed was entirely unparticularised. A wildly different scenario to the present claim.

BASIS OF AWARD

92. The Appellant has claimed that the costs for which HMRC are liable should be awarded on an indemnity basis. HMRC make no comment on the basis of assessment reserving their position pending the Tribunal's decision on their strike out application.

93. Part 44 CPR and the associated Practice Direction narrate the difference between standard and indemnity costs. In essence under the standard basis the court will disallow costs which are unreasonably or disproportionately incurred and unreasonable or disproportionate in amount. Any doubt under the standard basis is resolved in favour of the paying party. By contrast costs awarded on an indemnity basis will exclude only costs unreasonably incurred or unreasonable in amount and the benefit of the doubt is in favour of the receiving party.

94. For costs to be awarded on an indemnity basis the underlying conduct must be "unreasonable to a high degree" which "takes it out of the norm" (see *Excelsior Commercial & Industrial Holdings Ltd v Sailsbury Hammer Aspden & Johnson* [2002] EWCA 879 as applied in a Tribunal context in *Ad Hoc Property Management Ltd v HMRC* [2019] UKFTT 315).

95. "Out of the norm" has been held to add little to "unreasonable conduct to a high degree" (see *Bowcombe Shoot v HMRC* [2011] UKFTT 64 applied in *Ad Hoc Property Management Ltd*).

96. When considering whether there has been unreasonable conduct to a high degree the Tribunal should be wary of placing too much weight on the fact that HMRC capitulated (see *Catalyst Investment Group v Lewinsohn* [2009] EWHC 3501).

97. The Court of Appeal has also determined that "The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal" *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883.

98. The Appellants contend that HMRC's conduct was unreasonable to a high degree and was outside of the norm, as evidenced by:

(1) The length of the enquiry

(2) The number of late and/or resisted and refused applications made by HMRC many of which were academic

(3) Recalcitrant behaviour in correspondence with the Appellant

(4) The withdrawal of the closure notice

99. In essence the test to be applied for determining whether to award costs on an indemnity basis has a close parallel to the test applied by the Court of Appeal in *Distinctive* in respect of to an award of unreasonable costs pursuant to Rule 10(1)(b) FTT Rules.

100. The Court of Appeal, by reference to the approval of the Upper Tribunal judgment, determined:

(1) The earliest conduct that was relevant in the context of determining whether a party had behaved unreasonably was the point at which the proceedings commenced.

(2) The focus of the Tribunal was to be the handling of the litigation and not as to the quality of the original decision.

(3) Where a party withdraws from an appeal it is necessary to consider whether they had acted promptly once it was identified that the proceedings were to be discontinued.

101. When considering whether indemnity costs should be awarded the Tribunal does not consider the length of the enquiry to be a relevant factor.

102. HMRC's conduct in the appeal was certainly not ideal. However, they did not breach any direction of the Tribunal. They did make a series of contested applications which were refused but the Appellant did not apply for the costs of those applications to be granted in any event.

103. The litigation was not well managed, but (sadly) it certainly was not "out of the norm" either for HMRC or for many litigants.

104. Further, the rationale for HMRC's concession in the appeal was stated to be further disclosure by the Appellant of material/facts in April 2022. I do not propose to engage in an evaluation as to the nature and extent of additional disclosure made but it is clear that the disclosure was considered by HMRC to be sufficient to at least influence their position. They determined not to defend the appeal within a relatively short period thereafter.

105. Indemnity costs are not appropriate. It is not therefore necessary for the Tribunal to invite HMRC to make submissions on the basis on which the costs be awarded. The costs are awarded on the standard basis.

CONCLUSION

106. The Appellant is entitled to the reasonable costs incurred in and incidental to the appeal determined on the standard basis by way of detailed assessment if they cannot be agreed by the parties.

107. The Tribunal notes that such costs are to include the costs associated with the application for a closure notice as they are costs which are incidental to this appeal and were the very foundation of it and the start of the journey to its final resolution.

108. To the extent that costs are duplicated in the preparation of a detailed schedule, the costs of preparation of the summary schedule should not be allowed on the basis that the schedule was defective.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

109. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 02nd DECEMBER 2022

APPENDIX

Section 29 TCEA

Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

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.

…

Rule 7 FTT Rules

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case);

(d) restricting a party's participation in proceedings; or

(e) exercising its power under paragraph (3).

…

Rule 8 FTT Rules

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal:

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that:

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

Rule 10 FTT

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses):

(a) under section 29(4) of the 2007 Act (wasted costs) …

(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 … has not sent or delivered a written 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 of expenses under this sub paragraph …

(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 paragraphs (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) The amount of costs … 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 party and the person entitled to receive the costs (the "receiving party"); or

(c) assessment of the whole or a specified part of the costs … incurred by the receiving person, if not agreed.