SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 38
XA17/19
XA22/19

OPINION OF LORD MALCOLM

in the applications for leave to appeal

by

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

and

DCM (OPTICAL HOLDINGS) LIMITED

Applicants

against a decision of the Upper Tribunal (Tax and Chancery Chamber)
dated 5 December 2018

Applicants: Roxburgh; Office of the Advocate General
Respondent: Welsh; Harper MacLeod LLP

11 July 2019

[1] There are an increasing number of situations in which the Inner House is asked to grant permission to appeal to the Court of Session, for example from a decision of the Sheriff Appeal Court (under chapter 40 of the Rules of Court) or from the Upper Tribunal (under chapter 41). An applicant must lodge "proposed" grounds of appeal. If permission is granted, the actual grounds of appeal will then be lodged. In *Khaliq* v *Gutowski* [2018] CSIH 66 (a case regarding a decision of the Sheriff Appeal Court) when delivering the

opinion of the court the Lord President (Lord Carloway) noted that there is no provision in the rules for the court to grant leave on restricted or specific grounds. "Accordingly the task for the procedural judge is simply to determine whether permission (*simpliciter*) should be granted or not."

[2] The approach in *Khaliq* reflects general practice in the Court of Session. If the Sheriff Appeal Court were to grant leave on specific grounds, it is unlikely that the Inner House would consider itself disabled from considering other matters. If the Inner House is granting leave to a party to lodge an appeal to the UK Supreme Court, it does not attempt to direct which matters should or should not be considered by the UKSC. And if an Outer House judge is granting leave for a reclaiming motion, there is no tradition of granting leave for a challenge restricted to particular grounds.

[3] This opinion addresses applications for permission to appeal by the parties involved in a decision of the Upper Tribunal (Tax and Chancery Chamber) dated 5 December, [2018] UKUT 0409 (TCC), namely HMRC and DCM (Optical Holdings) Limited. For the purposes of VAT, and in common with other opticians, DCM makes both taxable supplies of goods and exempt supplies of medical services. This gives rise to complexities as regards output tax chargeable and input tax recoverable. For present purposes it is not necessary to discuss the details of the parties' dispute. It concerns six appeals by DCM against six decisions and assessments of HMRC, each relating to a different time period. All six appeals were refused by the First-tier Tribunal. The Upper Tribunal allowed DCM's challenge regarding the decision on the first appeal, but refused the others.

[4] Both parties asked the Upper Tribunal to grant leave to appeal to the Court of Session. The relevant rule allows the Upper Tribunal to give permission on limited grounds (Tribunal Procedure (Upper Tribunal) Rules 2008/2698, Rule 45(5)). (The same applies in the

Court of Appeal, CPR 52.6(2).) HMRC sought permission to appeal on two grounds, but was given permission in relation to only one of them. (That appeal has been lodged and sisted pending the current applications.) HMRC now asks this court to grant permission in respect of the ground rejected by the Upper Tribunal. The Upper Tribunal refused DCM leave to appeal. It now presents two proposed grounds of appeal in support of its application for leave.

[5] Initially each party resisted the other's application, but at a continued hearing, while recognising that this was not binding upon the court, both stated that they were content that the other should obtain permission as sought, thereby allowing all the proposed grounds, and the already permitted ground, to be dealt with at a substantive appeal diet.

[6] At the first hearing, the court raised two preliminary matters:

1. If the court considered that one of DCM's two proposed grounds (the "amendments issue" and the "discounts issue") raised an arguable point of law which passed the second appeals test, was that an end of the matter, or should the court – as it was being asked to do – consider striking out the other ground?
2. Did HMRC require permission for the ground rejected by the Upper Tribunal (the "time bar issue") given that there was a live appeal by HMRC from the Upper Tribunal decision before the court? (Indeed standing the terms of section 13(5) of the Tribunals, Courts and Enforcement Act 2007, it might be said that HMRC's application is not competent.)

The continued hearing was fixed to allow parties to reflect and, if so advised, make submissions upon these matters. Both parties submitted that, in light of the decision in *Khaliq,* and unlike the position in the Upper Tribunal, the court could only grant permission

simpliciter. It could not allow certain proposed grounds and disallow others. As to HMRC's application, both parties suggested that leave was required if it was to be able to argue the time bar issue, given that it had been expressly rejected by the Upper Tribunal. This was said to be the combined result of the Upper Tribunal procedure rule referred to earlier, when taken against the background of section 13(3) of the 2007 Act.

Decision

[7] On the first issue, the observations in *Khaliq* are clear and unambiguous. It follows that if I am satisfied that one of the two proposed grounds of appeal presented by DCM satisfies the second appeals test, then I must simply grant permission without further qualification or caveat, thus allowing both grounds to be included in the subsequent grounds of appeal. I am so satisfied in respect of the amendments issue. The amendments issue applies only to appeals 2-6, whereas the discounts issue arises in all of them. It would be absurd if the discounts issue was live in all of the appeals apart from the first. The result is that DCM's application is granted, now on an unopposed basis, in full and without reservation.

[8] As for HMRC's rejected ground, namely the time bar issue, I do not think that it passes the second appeals test. However, if the Upper Tribunal had refused leave in respect of both of HMRC's proposed grounds, and they were presented to this court, the above view as to the time bar point would not prevent it being included in the actual grounds of appeal if the other ground passed the second appeals test – see *Khaliq*. It cannot be right that the opposite result flows from the grant of a restricted leave by the Upper Tribunal. This is a compelling reason to grant leave for HMRC's time bar issue; assuming that the application is competent and that leave is required, matters upon which I prefer to reserve my opinion.

[9] It is surprising that the regime for permission in the Court of Session diverges from that of the Upper Tribunal in the manner described above. The curiosities are increased when it is appreciated that the Upper Tribunal does not require to apply the second appeals test if and when it is asked to grant leave to appeal to the Court of Session, but, when posed the same question, by virtue of Rule of Court 41.57 this court is obliged to do so. (Reference can be made to the observations of Lord Drummond Young in *MCB (Cameroon)* v *Advocate General for Scotland* [2018] SLT 370, paragraphs 10/11.) I cannot think of any good reason for this state of affairs, given that the Upper Tribunal is being asked to allow a second appeal.

[10] Having regard to the above observations, this would seem to be an area of our procedures which is ripe for review.