[2019] UKFTT 169 (TC)

TC07019

PROCEDURE – application for adjournment – order for costs – rule 10(1)(b) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

Z LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at [*venue withheld***] on [***date withheld***].**

Michael Firth, instructed by TT Tax, for the Appellant

Ben Hayhurst and Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns the decision of the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), to revoke the approval of the appellant, Z Limited ("ZL"), as a duty representative under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR 1999"). The decision to revoke ZL's approval as a duty representative is contained in a letter from HMRC to ZL dated 20 June 2017.

2. Following the revocation of ZL's approval as a duty representative, ZL appealed against the decision to the First-tier Tribunal ("FTT"). ZL also commenced judicial review proceedings in the High Court challenging the revocation decision and seeking an interim injunction requiring HMRC to maintain ZL's status as a duty representative pending the appeal. More details of these proceedings are set out below.

3. As part of the statutory appeal proceedings before the FTT, ZL applied for various issues to be heard as preliminary issues. HMRC objected to that application. The FTT arranged a case management hearing to hear that application. That hearing was scheduled for [*the hearing date*].

4. Shortly before the hearing, HMRC requested an adjournment of the case management hearing pending a hearing in the Court of Appeal in the judicial review proceedings, which was due to take place on 28 September 2018.

5. I heard HMRC's application for an adjournment at the commencement of the hearing on [*the hearing date*]. Having heard both parties, in an oral decision, I granted the adjournment and made an order under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("FTR") for costs of the hearing to be borne by HMRC. The parties agreed to agree the form of the order following the hearing.

6. On 22 October 2018, HMRC requested full written findings of fact and reasons for the decision to grant the adjournment and make an order for costs. This is the full decision.

7. This decision is published in anonymized form. I have adopted the pseudonym "Z Limited" for the appellant.

Background

8. I have set out in the following paragraphs a brief history of the dispute and chronology of the proceedings.

(1) On 6 March 2017, HMRC issued a letter to ZL stating that they were minded to revoke its approval as a duty representative because they were not satisfied that ZL was a 'fit and proper' person to hold such approval.

(2) On 20 March 2017, ZL made submissions as to why its approval should not be revoked but HMRC revoked ZL's approval on 20 June 2017.

(3) On 6 July 2017, ZL filed its notice of appeal against the decision with the FTT.

(4) On 11 July 2017, ZL requested that HMRC grant temporary and/or conditional approval to its remaining as a duty representative pending appeal but HMRC refused that request in a letter dated 18 July 2017.

(5) On 7 August 2017, ZL filed a claim for judicial review challenging both HMRC's revocation decision and the decision to refuse temporary approval. ZL also sought an interim injunction requiring HMRC to maintain ZL's status as a duty representative pending its appeal.

The remedies sought by ZL in the application for judicial review included:

> (a) a declaration that Regulation 9(2) of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR 1999") is contrary to EU law and of no effect;
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> (b) a declaration that Regulation 21(1) WOWGR 1999 is contrary to EU law and of no effect;
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> (c) a declaration that the requirement for overseas businesses, in particular those established in the EU, which have no UK business or fixed establishment, to have a duty representative in order to hold goods in an excise warehouse is contrary to EU law and of no effect;
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> (d) a declaration that HMRC's policy of requiring authorised warehousekeepers and duty representatives to carry out checks on the supply chains of goods passing through their warehouses in order to obtain or maintain approval is unlawful.

(6) On 2 October 2017, ZL made an application to stay the appeal before the FTT for 60 days pending the conclusion of its application for judicial review.

(7) On 11 October 2017, HMRC notified the FTT of its objections to ZL's application for a stay of the FTT proceedings.

(8) On 13 October 2017, an oral hearing on ZL's application for permission to apply for judicial review took place before Mr Justice Holman. (The decision is found at [2017] EWHC 2582.) Holman J refused permission to apply for judicial review on the grounds that ZL had an alternative remedy (i.e. the statutory appeal to the FTT). He also refused ZL's application for interim relief.

In relation to the application for permission for judicial review, on the basis of a concession by Mr Hayhurst, Holman J concluded that the FTT would be in a position to consider and adjudicate upon the lawfulness of the duty representative regime as part of the statutory appeal. He said this (at [13] to [18]):

13. The claimants very strongly submit that in a whole range of ways the relevant regulations and also the publication EN 196 are unlawful. They say that they offend EU law. They say that they are discriminatory against foreign owners of dutiable goods. They say that they are disproportionate to any legitimate purpose. By their claim for judicial review they seek a range of declarations which are set out in paras. (iii) to (vii) of the section "remedies sought" at the very outset of their statement of facts and grounds in support of this claim for judicial review. They seek also the interim injunction and that the decision of HMRC be quashed.

14. Mr Webster has rightly said that the statutory First-tier Tax Tribunal is not itself empowered to make declaratory orders. The extent of the power of the tribunal under s.16(4) of the 1994 Act is confined to a power to direct that the decision in question is to cease to have effect, and certain consequential powers. The only express basis within s.16(4) upon which the First-tier Tax Tribunal can exercise those powers is if they are satisfied that the Commissioners "could not reasonably have arrived" at the decision in point. So Mr Webster submits that there is no power in the tribunal to make any of the declarations that the claimants seek, and, further, that the only trigger to the exercise of any power is that the decision is one that HMRC could not reasonably have arrived at. He therefore submits that it is much more appropriate, and in his submission necessary, that these issues between these parties should be resolved by proceedings in judicial review in which this court can, if it thinks fit, make declarations.

15. On behalf of HMRC, Mr Hayhurst has expressly said, and conceded that all the issues that the claimants raised as to the lawfulness of the underlying regulations and/or the document EN 196 can properly be considered and ruled upon by the First-tier Tax Tribunal. He accepts that that tribunal does not have a power to make declarations as such, but he also concedes that as necessary steps in their reasoning they can adjudicate upon all the matters that the claimants wish to raise as to the lawfulness of this whole scheme.

16. In para.15 of the "Claimants' skeleton argument for permission hearing (13 October 2017)", Mr Webster and Mr Firth nevertheless put the following rhetorical question:

"Put another way, the jurisdiction of the FTT assumes the lawfulness of the duty representative regime. What decision could the FTT reach, in accordance with its jurisdiction, if it considered and accepted that the whole regime was unlawful? A declaration that HMRC's decision to withdraw registration was unreasonable would be obviously unsuitable."

17. With respect to Mr Webster and Mr Firth, I do not find the answer to their rhetorical question a difficult one. It seems to me that, empowered by the concession of Mr Hayhurst, if the FTT consider and accept that the whole regime is unlawful, they will be well able boldly to say so. It is true that they could not make a formal declaration, but a

> holding to that effect by a specialist tribunal of this kind would (subject to any onwards appeal) be very far-reaching.
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> 18. Mr Webster makes a separate point that a statutory power based on being satisfied that HMRC "could not reasonably have been arrived at" the decision is not wide enough, or may not be wide enough, to empower the First-tier Tax Tribunal to investigate and rule upon the underlying lawfulness of the scheme and regime itself. I cannot accept that submission. If it be right, as the claimants argue, that the material parts of these regulations and/or the document EN 196 are unlawful, then it could not be reasonable of HMRC to take action pursuant to a regulation or document which is itself unlawful. So it seems to me, as Mr Hayhurst has conceded, that it will be well within the power of the tribunal to consider all the arguments which the claimants wish to develop as to the underlying lawfulness of the scheme and the regulations, as well as also, of course, to deal with the fact-specific issues in this case.

(9) On 20 October 2017, ZL sought permission to appeal the decision of Holman J to the Court of Appeal. ZL also sought interim relief pending permission to appeal.

(10) On 24 October 2017, ZL applied to the FTT for four issues which were relevant to the remedies sought in the judicial review proceedings to be determined as preliminary issues. In summary, those issues were:

(a) whether Regulation 9(2) of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR 1999") is contrary to EU law;

(b) whether Regulation 21(1) WOWGR 1999 is contrary to EU law;

(c) whether the requirement for overseas businesses to appoint a duty representative in order to allow ZL to hold goods on their behalf under duty suspension arrangements was contrary to EU law;

(d) whether HMRC's interpretation of the conditions imposed by Notice 196 as applicable to authorised warehousekeepers and/or duty representatives was disproportionate.

ZL also identified in its application that the FTT would need to determine whether it had jurisdiction to determine these issues as part of the appeal.

(11) On 6 November 2017, HMRC submitted its statement of reasons in relation to ZL's application for permission to appeal to the Court of Appeal in relation to the claim for judicial review.

(12) On 30 November 2017, HMRC filed a notice of objection to the FTT to the application for matters in the statutory appeal to be heard as preliminary issues. The notice of objection also set out HMRC's objections to ZL's request for the FTT to consider the question of whether the FTT had jurisdiction to hear those issues.

(13) On 31 January 2018, the FTT wrote to the parties to confirm that ZL's request for a stay and a preliminary issues hearing would need to be decided at a

hearing. The parties were asked to provide dates at which they would be available for a hearing.

(14) After lengthy correspondence between the parties and the FTT, on 15 June 2018, the FTT gave notice to the parties that a case management hearing would take place on [*the hearing date*].

(15) By way of an order dated 30 July 2018, Underhill LJ adjourned the application for permission to appeal to the Court of Appeal in relation to the application for judicial review to an oral hearing. The reasons Underhill LJ gave for requiring an oral hearing included: that his consideration of the question of whether the FTT's jurisdiction under section 16 of the Finance Act 1994 Act was a suitable alternative remedy would be assisted by oral submissions; and that case management issues regarding the interaction of the FTT and judicial review proceedings were also better dealt with at a hearing. Paragraph [3] of the order is in the following terms:

> "[3]…the questions of whether the FTT's jurisdiction under section 16 of the 1994 Act is a suitable alternative remedy having regard to the particular relief sought is one on which I would be assisted by oral submissions. But an additional reason for a hearing is that even if there is a potential gap between the remedies available by way of statutory appeal and judicial review it does not follow that any judicial review proceedings should proceed forthwith; it may make better sense to allow the current statutory appeal, including any challenge to the compatibility of the provisions of EU law, to be decided by the FTT (and, in the event of an appeal, by the UT) first, at which point a decision can be made about whether there remains any undecided claim or issue in relation to which permission to apply for judicial review should be granted (and whether it should be retained in this court), in which case the right course at this stage is simply to stay the application. The questions can only usefully be considered at an oral hearing, at which point the progress of the FTT proceedings can be considered; the material helpfully supplied on 13.4.18 does not give me clear feel of how things were expected to progress as at that date and of course I do not know how they have in fact progressed. If in the end I do grant permission, thought will need to be given to case management, including any request for expedition to ensure a sensible dovetailing of the judicial review and FTT decisions; that too is most usefully done at a hearing"

(16) On 2 August 2018, the permission hearing was listed for 28 September 2018.

The preparation for this hearing

9. ZL filed its skeleton argument with the FTT and HMRC on 11 September 2018. The skeleton argument set out ZL's arguments that the FTT did not have jurisdiction to hear the matters listed in its application and, on the assumption that the FTT did have jurisdiction, its arguments in favour of dealing with the matters listed in its application as preliminary issues.

10. On 14 September 2018, HMRC filed its skeleton argument with the FTT and with ZL. The skeleton argument set out HMRC's objections to the ZL's reopening of the question of jurisdiction and its reasons for objecting to dealing with the matters listed in ZL's application as preliminary issues. In the covering email to the FTT timed at 15:37, which was copied to ZL's representatives, applied for an adjournment to the hearing pending the decision of the Court of Appeal on the application for permission for judicial review.

11. By an email to the FTT and to HMRC timed at 16:26 on the same day, Mr Tristan Thornton of TT Tax, on behalf of ZL, objected to the application for an adjournment noting, in particular, that the hearing had been listed on 15 June 2018 and that HMRC had been aware of the impeding hearing before the Court of Appeal since 30 July 2018 and of the date of that appeal since it was listed on 2 August 2018. He also raised various issues in relation to the arguments set out in HMRC's skeleton argument questioning, in particular, HMRC's approach to the jurisdiction of the FTT in these matters and HMRC's interpretation of Underhill LJ's order.

12. On 17 September 2018, by an email to the FTT marked for my attention, HMRC responded to some of the issues raised in Mr Thornton's email of 14 September 2018.

13. Later on 17 September 2018, HMRC submitted by an email a copy of a note summarising the conclusions of a recent case held before Judge Vos in the case of *Universal Cycles Limited v Revenue & Customs Commissioners* (at the time unreported, but now reported at [2018] UKFTT 564 (TC)), which HMRC submitted was relevant to the issues before the FTT in relation to the application for an adjournment.

The application for an adjournment

14. In summary Mr Hayhurst made the following arguments in support of an adjournment.

> (1) It is clear from Underhill LJ's order for an oral hearing that the questions as to whether the remedy available to ZL before the FTT under s16 FA 1994 is an appropriate alternative remedy and the implications of that issue for case management will be central to the issues before the Court of Appeal. That hearing would inevitably touch upon issues of the jurisdiction of the FTT. In these circumstances, with a hearing before the Court of Appeal imminent, it was appropriate for the FTT to defer consideration of such issues and await the determination of the higher court.
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> (2) HMRC had not anticipated that the hearing would consider the jurisdiction of the FTT to hear the matters set out in ZL's application. It had assumed that the hearing would be limited to determining whether or the matters identified in ZL's application should be heard as preliminary issues.

(3) The jurisdiction issue relates to four issues which Holman J has already decided as part of the judicial review proceedings should be determined by the FTT. There was no justification for reopening the jurisdiction issues now.

(4) The fact that the application is made late should not detract from the fact that it is the appropriate course of action.

(5) The adjournment need not delay the case unduly. The hearing could be rescheduled for a date shortly after the Court of Appeal hearing.

15. Mr Firth made the following points for ZL.

(1) The hearing before the Court of Appeal was simply a permission hearing. It would not decide the whether or not the FTT had jurisdiction to hear the matters listed in ZL's application.

(2) If permission was granted, the proceedings would not determine whether or not the FTT had jurisdiction to hear the matters of which ZL complained. They would simply be determining whether or not the remedy available to ZL under s16 FA 1994 was a suitable alternative remedy.

(3) The statutory appeal was fundamentally different from the judicial review claim and should be allowed to proceed independently. Under s16 FA 1994, the question for the FTT was whether the decision to revoke ZL's approval as a duty representative was one which "could not reasonably have been arrived at". Those issues would not extend to the lawfulness of Regulation 9 or Regulation 21 as no action had been taken under those regulations.

(4) HMRC's only explanation for the lateness of the application is that it did not appreciate that the hearing would address the jurisdiction of the FTT. That explanation is not tenable. The question of jurisdiction was clearly referred to in ZL's application. It was referred to in correspondence to which HMRC was a party when the FTT was seeking to find available dates for the hearing. HMRC knew about the Court of Appeal hearing on 30 July 2018 and about the date of that hearing only a few days later.

(5) Holman J's decision rested upon a concession by Mr Hayhurst that all the issues that ZL had raised as to the lawfulness of the underlying regulations could properly be consider and adjudicated upon by the FTT (see [15] in that decision). The FTT could not rely on a concession to found its jurisdiction. It was inevitable that the FTT would have to consider whether or not it had jurisdiction. Furthermore, in the context of a hearing to determine whether various matters should be heard as preliminary issues, the jurisdiction of the FTT would be in issue; it would be illogical for the FTT to order a hearing of a matter over which it had no jurisdiction.

(6) An adjournment would lead to unnecessary delay. The difficulties in finding appropriate times for hearings had already been demonstrated by the delays in finding a date for the current hearing.

16. I decided to grant the application for the adjournment pending the outcome of the hearing before the Court of Appeal.

17. The Tribunal has power to adjourn a hearing under FTR rule 5(3)(h). In exercising that power, the Tribunal will aim to give effect to the overriding objective to deal with cases "fairly and justly" (FTR rule 2(1)) which includes "avoiding delay, so far as compatible with proper consideration of the issues" (FTR rule 2(2)(e)).

18. I agree with Mr Firth that the matters before the FTT are materially different to those that are being considered by in the judicial review claim and acknowledge that the hearing before the Court of Appeal is merely a permission hearing. As Underhill LJ acknowledges in paragraph [3] of his order to which I refer at [7(15)] above, there may be some merit in allowing the statutory appeal before the FTT to proceed before the courts reach a conclusion on whether or not the statutory appeal process provides a suitable alternative remedy in the context of a claim for judicial review.

19. It may be that such a course of action would in the final analysis lead to the least delay in the proceedings as a whole. However, it is also clear from Underhill LJ's order that the Court of Appeal may hear submissions that are relevant to the scope of the FTT's jurisdiction under s16 FA 1994 and that the Court of Appeal wishes to consider the case management of the proceedings in the widest sense. I agree with Mr Firth that I would need to address the question of jurisdiction before considering whether or not it is appropriate to hear the issues identified in ZL's application as preliminary issues. Against that background, if the hearing were to proceed, there would be a risk of my reaching conclusions that may be inconsistent with any approach that the Court of Appeal may wish to take. There would also be a risk of pre-empting the Court of Appeal's consideration of the case management issues.

20. Although I accept Mr Firth's concerns about the time that it might take to re-list this hearing, the potential conflicts with the Court of Appeal's consideration of the case management and jurisdiction issues outweigh that risk. The appropriate course is to grant the adjournment pending the outcome of the permission hearing before the Court of Appeal.

Costs

21. I raised the question of costs and asked the parties for submissions on this issue.

22. For the most part, the parties reiterated the points that they had already made in relation to the question of whether an adjournment should be granted regarding the question of jurisdiction. Mr Hayhurst also referred to the fact that costs should ordinarily follow the event.

23. I made an order for costs of the proceedings against HMRC under FTR rule 10(1)(b).

24. The question of the jurisdiction of the FTT to hear the issues referred to in ZL's application had, at all times, been part of the application. The issue had been clearly identified in the original application dated 24 October 2017 and was discussed in subsequent correspondence at a time when the FTT was seeking to list the hearing of

the application. There was no basis on which HMRC could reasonably have expected it not to form part of the proceedings at the hearing.

25. The question of jurisdiction was not res judicata as Mr Hayhurst suggested. Holman J clearly relied on a concession by Mr Hayhurst himself in arriving at the conclusion that the matters referred to in ZL's application could be adjudicated upon by the FTT. It was inevitable that the FTT would have to consider the question of jurisdiction as part of the consideration of whether the matters listed in ZL's application should be heard as preliminary issues.

26. Accordingly, HMRC should have known that this hearing would address the question of jurisdiction and it should have come as no surprise to HMRC that Mr Firth's skeleton argument, which was sent to HMRC and the FTT on 11 September 2018, addressed the question of jurisdiction. If HMRC had reservations about that issue being canvassed before the FTT as part of the case management hearing it could and should have raised that issue more promptly, in particular, following the order of Underhill LJ on 30 July 2018 and the listing of the permission hearing by the Court of Appeal on 2 August 2018.

27. I have reached the conclusion that an adjournment should be granted on the circumstances of the case. However, in my view, HMRC's concerns about the risk of conflict with the Court of Appeal's consideration of the issues at the permission hearing could and should have been raised at an earlier stage. If that had been done, the parties and the FTT may even have been able to agree to rearrange the listing of the hearing so that it could take place shortly after the Court of Appeal hearing. For the matter to have been raised at such a late stage was in my view unreasonable conduct within FTR rule 10(1)(b). The advisers and counsel to ZL should not have been put in a position where, having prepared fully for a hearing of an application that was made on 24 October 2017, they were left seeking to defend the need for a hearing less than two working days before the hearing was scheduled to take place.

Rights to appeal

28. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 06 MARCH 2019