



**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07110

Appeal number: TC/2018/3137

COSTS – application for costs for unreasonable behaviour against appellant and ‘wasted’ costs against representative - whether Tribunal should infer reasons for withdrawal of appeal – whether unreasonable not to have withdrawn appeal earlier – yes; costs against appellant; – whether unreasonable for representative not to directly notify HMRC of withdrawal – yes but not proved to have caused costs to be wasted; no costs against representative

BETWEEN

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

-and-

**MARSHALL GLOVER LIMITED
-and-
CLB COOPERS**

TRIBUNAL: JUDGE Barbara Mosedale

Decided on the papers with representations from Ms Pape of CLB Coopers for the appellant and for CLB Coopers and Mr D Street, HMRC officer, for HMRC.

DECISION

BACKGROUND

1. On 10 May 2018, the appellant company lodged a notice of appeal with the Tribunal against HMRC's review decision of 11 April 2018 upholding HMRC's imposition of a penalty of £7,704.57. The penalty had been imposed on 30 January 2018 for failure to pay an accelerated payment notice ('APN') by the (revised) due date of 17 November 2017.

2. The grounds of appeal appeared to be that (a) the company had no assets to pay the APN and (b) HMRC had stalled negotiations of the company's tax liability the subject of the APN, whereas if HMRC had acted more promptly the appellant thought it would have settled its liability without the need for an APN. It appears accepted that the appellant had made an offer of settlement which HMRC had not accepted by the due date for payment of the APN.

3. The case was assigned to the 'basic' category which means that it was dealt with relatively informally. There was a letter from the Tribunal on 23 May 2018 which directed:

- (i) Both parties to exchange copies of documents on which they would rely in the hearing;
- (ii) Both parties to give dates to avoid;
- (iii) HMRC to prepare the bundle;

The letter also suggested, but did not require, that the parties could produce a skeleton argument no later than 7 days before the hearing.

4. The parties were notified in June 2018 that the hearing would be on 12 September. On 5 September, and in line with the option in the above letter, HMRC served a skeleton argument on the appellant. The appellant chose not to serve a skeleton.

5. At 4.30pm on 10 September, the appellant's representative notified the Tribunal that that the appellant was withdrawing from the appeal. (The letter also, mistakenly, said the appellant reserved its 'right to reinstate' the appeal within 28 days: there is in fact no right of reinstatement, just a right to apply for reinstatement, and in the event the right was not exercised).

6. At 12.30pm on 11 September, the Tribunal acknowledged the withdrawal of the appeal to the appellant and notified it to HMRC by email. In accordance with the Tribunal's standard practice, the letter to HMRC was sent to HMRC's appeals 'clearing house' email address. For whatever reason, HMRC's litigator Mr Street was not passed a copy of this email. So on following day, he travelled to the hearing centre only to be informed on arrival of the withdrawal of the appeal.

7. On 28 September 2018, HMRC applied for a 'wasted costs' order against the appellant which were in summary:

- (i) It was unreasonable for the appellant to withdraw so late in the appeal process when there was no reason for it (such as new evidence);
- (ii) It was unreasonable for the appellant not to have informed HMRC directly of the withdrawal, particularly when the appellant's representative

had been previously in direct phone and email contact with Mr Street, thus risking Mr Street having a wasted journey.

8. This was clarified with HMRC by the Tribunal. CLB Coopers were also give the chance to explain when it had been notified by its client of the withdrawal. HMRC then confirmed that they were applying for an unreasonable behaviour order against the appellant for the period 12 July 2018 to 6 September 2018 and a wasted costs order against the appellant's representative for 11-12 September 2018.

THE LAW ON UNREASONABLE BEHAVIOUR COSTS ORDERS

Unreasonable behaviour costs orders

9. The Tribunal has power to make an order for costs under Rule 10(1)(b) where:

the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

10. HMRC considered that the appellant had acted unreasonably in not withdrawing its appeal earlier. The proper approach for the Tribunal to follow when considering such a submission was set out by the Upper Tribunal in *Shahjahan Tarafdar v HMRC* [2014] UKUT 0362 (TCC) where the Tribunal said:

[34].....a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:

(1) What was the reason for the withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

11. When addressing the question of what conduct is unreasonable, the guidance given by the Upper Tribunal in *Catana* was that acting 'unreasonably in bringing, defending or conducting the proceedings' captured behaviour which where:

an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.

12. In *Distinctive Care Ltd* [2018] UKUT 155 (TCC), the Upper Tribunal endorsed what it had said in *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) ("MORI") at [22] and [23] on the meaning of unreasonable behaviour, which it summarised as:

[44]. . . .

(1) the threshold implied by the words “acted unreasonably” is lower than the threshold of acting “wholly unreasonably” which had previously applied in relation to proceedings before the Special Commissioners;

(2) it is possible for a single piece of conduct to amount to acting unreasonably;

(3) actions include omissions;

(4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;

(5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;

(6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;

(7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and

(8) the power to award costs under Rule 10 should not become a “backdoor method of costs shifting”.

[45.] questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

13. In *MORI* the Upper Tribunal had also said of acting ‘unreasonably’:

[49] It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. . . .

14. What is also clear from this is that the test is whether the behaviour is objectively unreasonable, in the sense that the Tribunal must consider what a reasonable person in the position of the appellant would have done.

THE APPLICATION AGAINST THE APPELLANT

Unreasonable behaviour in bringing the proceedings?

15. While the (alleged) unreasonable behaviour by the appellant can be either ‘bringing’ or ‘conducting’ the proceedings, HMRC only asked for costs for the appellant’s alleged unreasonable behaviour in conducting the proceedings, by, said HMRC, not withdrawing the appeal earlier. They asked for costs from 12 July 2018. However, it appears to me that this was not because anything happened on or just before 12 July 2018 which HMRC considered meant that the appellant should have withdrawn at that point; rather it seems HMRC asked for costs from 12 July 2018 because that was the date on which the HMRC litigator first incurred costs in defending this appeal.

16. In other words, in reality HMRC's case seemed to be that the appellant acted unreasonably by *bringing* the proceedings in the first place. The appeal was against penalties for late payment of an APN. Reading HMRC's skeleton argument submitted on 5 September 2018, it was clearly HMRC's view that the appeal should not succeed. The appellant had put forward only two grounds of appeal, as I have already said, and they were:

(1) The appellant had made an offer to HMRC to settle its tax liability and HMRC had delayed in responding for so long that the due date for the APN passed without any agreement being reached;

(2) Lack of funds to pay.

HMRC's view, with which I agree, is that these were almost bound to fail. I explain that in the next two paragraphs.

17. On ground 1, HMRC were under no duty or obligation to negotiate, let alone to accept an offer of less tax than they had calculated as owing. Therefore, when the due date for payment of the APN came round, the appellant remained liable to pay the APN. No explanation is given for why the APN was not paid (except lack of funds) in circumstances where the appellant was aware of the liability and aware that HMRC had not agreed to settle the matter for less tax than the assessment.

18. On ground 2, lack of funds by itself can never be a reasonable excuse. And the appellant put forward no explanation for its lack of funds so its lack of funds could not be a reasonable excuse.

Was it unreasonable to lodge the appeal?

19. While HMRC only alleged unreasonable behaviour because of the (alleged to be) late withdrawal of the appeal, the costs power of the Tribunal can be exercised without an application and so it is appropriate to consider whether it was unreasonable for the appellant to lodge the appeal in the first place.

20. In my view, it was unreasonable to lodge the appeal. The two grounds put forward, which were never elaborated upon by the appellant, were grounds without a reasonable prospect of success as explained above. The test of unreasonableness is objective. A reasonable person ought to understand that its grounds were those without prospect of success; in this case, the appellant was professionally represented and so certainly ought to have understood this.

Was it unreasonable to withdraw the appeal only 2 days before the hearing?

21. Even if I consider the application as made by HMRC to relate only to the withdrawal, I come to the same conclusion. Applying the 3-stage test from *Tarafdar*, I need to consider:

(1) What was the reason for the withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

Reason for withdrawal

22. I was not given any reason for the withdrawal by the appellant. All the appellant's representative said on this was that the appellant and CLB were in contact in the lead-up to the hearing, the appellant fully intended to attend the hearing, but then decided on 10 September that they did not wish to do so 'at that time'.

23. In short, I was not given any explanation for the appellant's decision to withdraw the appeal.

24. It is HMRC's application for costs, and HMRC's allegation that the appellant behaved unreasonably. Under normal rules it is for HMRC to prove that the appellant behaved unreasonably, and not for the appellant to prove that it did not. Nevertheless, in circumstances where the appellant knew from HMRC's application that the allegation was that it ought to have withdrawn its appeal earlier, its failure to explain its decision to withdraw is a silence from which, in my view, it is acceptable for the Tribunal to infer that the explanation would not be one consistent with reasonable behaviour.

25. My view on the proper inference to be drawn is reinforced by my view, explained above, that the appeal did not appear to have any arguable grounds. More likely than not, its lack of good grounds explains the appellant's decision to withdraw the appeal and its failure to explain why it was withdrawing the appeal.

26. I note that HMRC served an (optional) skeleton argument on 5 September. This may have been the catalyst for the appellant's withdrawal five days later although the appellant does not claim that this was the case. In this skeleton, HMRC do make clear that they considered the appellant's defence very weak (as explained above).

27. Whether or not the skeleton was the catalyst for the appellant's withdrawal, the question of reasonable behaviour is objective. So I considered whether, contrary to my conclusion above that it was unreasonable to lodge the proceedings at all, whether it would it have been reasonable for the appellant not to have realised the weakness in its grounds of appeal until it read HMRC's skeleton.

28. My conclusion was that it ought to have been obvious to the appellant from the start and without reading HMRC's skeleton, for the reasons given above, that its two grounds of appeal were without any real prospect of success.

Could the withdrawal have taken place earlier?

29. The second question to be considered is whether the withdrawal could have taken place earlier. Again, the appellant was aware that HMRC's case was that it could have withdrawn the appeal months earlier (as HMRC asked for its costs from July 2018), yet it offered no explanation of why the withdrawal took place only two days before the hearing. It is appropriate in such circumstances to infer from the silence that, whatever the cause of the withdrawal, that cause had existed throughout the proceedings and so the appellant could have withdrawn earlier.

30. That inference is consistent with my view, explained above, that the appeal did not have any arguable grounds and that this was the most likely reason it was withdrawn. So the withdrawal for this reason could have taken place earlier and indeed I have concluded it was unreasonable to lodge the appeal without grounds of appeal that had a prospect of success.

Was it unreasonable not to have withdrawn the appeal earlier?

31. Having inferred that the decision to withdraw the appeal was because the appellant did not have good grounds of appeal, and that this was always the case and that therefore the appellant could have withdrawn the appeal for this reason at any time from the moment the appeal was lodged, means that I find it was unreasonable not to have done so.

DECISION

32. I conclude that the appellant behaved unreasonable in lodging and conducting these proceedings; it should not have lodged them because it should have realised its grounds of appeal were virtually unarguable; it certainly should have withdrawn the appeal long before the hearing.

33. In these circumstances, in the exercise of my discretion, I consider that the appellant ought to pay HMRC's costs thrown away by bringing an appeal on grounds which did not have any real prospect of success.

QUANTUM

34. HMRC asked for its cost from 12 July 2018 (the date on which HMRC started to incur costs) until 6 September 2018. The choice of 6 September 2018 was not explained but I infer from HMRC's costs schedule that the intention was to apply for costs until the appellant's decision to withdraw on 10 September 2018. It was simply that HMRC had no costs in the period 7-10 September.

35. As I have concluded that the appeal should not have been lodged, I consider it reasonable to award against the appellant HMRC's costs from 12 July -6 September 2018 (inclusive).

36. While the appellant was given the opportunity to make representations on HMRC's costs schedule, it did not do so. All the work bar the bundle preparation was carried out by HMRC's litigator, Mr Street, whose charge-out rate was £196 per hour. He charged for 8.5 hours of work including taking his client's instructions, reading the papers, preparing his skeleton argument and preparing for the hearing. The charge of a more junior colleague (£126 per hour) for spending half an hour collating the bundle on Mr Street's instructions was £63. The total costs asked for by HMRC against the appellant were therefore £1,729. The charge-out rates and hours worked seem reasonable and I make the award in that sum.

THE APPLICATION AGAINST CLB

The law on wasted costs orders

37. The Tribunal's rules allow it to make in any case, including one categorised as basic, an order for costs under s 29(4) of the Tribunal Courts and Enforcement Act 2007. This is known as a 'wasted costs' order.

38. 'Wasted' costs have a very specific meaning under s 29(4) and they are limited to orders against the representative of the litigant to pay the whole or part of costs (s 29(5)) which were incurred:

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay.

39. In other words, a wasted costs order is an order against a representative to pay the other party's costs because of the representative's own behaviour.

40. Guidance on the meaning of 'improper, unreasonable or negligent' was said by the Upper Tribunal in *Bedale* [2014] UKUT 99 (TCC) to be found in the case of *Ridehalgh v Horsefield* [1994] Ch 205, which said:

41.

(i) "improper" "covers any significant breach of a substantial duty imposed by a relevant code of professional conduct" and extends to conduct "which would be regarded as improper according to the consensus of professional (including judicial) opinion ... whether or not it violates the letter of a professional code";

(ii) "unreasonable" describes "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case", and "it makes no difference that the conduct is the product of excessive zeal and not improper motive"; and

(iii) "negligent" is to be "understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession".

42. I note that in *Re a Barrister (wasted costs order)* (no 1 of 1991) [1992] 3 All ER 429 Macpherson J said at page 435h:

"A three stage test or approach is recommended when a wasted costs order is contemplated.

(i) has there been an improper, unreasonable or negligent act or omission?

(ii) As a result have any costs been incurred by a party?

(iii) If the answers to (i) and (ii) are yes, should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific amount is involved?"

The first stage - the alleged behaviour

43. HMRC's case is that CLB wrongly omitted to inform HMRC direct of its client's withdrawal of the appeal, thus causing HMRC to continue to prepare for, and actually to attend at the tribunal centre, for the hearing of the appeal. CLB accepts that it was the representative of the appellant.

44. CLB's position is that its client informed it of its decision to withdraw the appeal on 10 September 2018. HMRC do not question this statement. What they do say is that it was unreasonable not to have communicated this directly to HMRC at the same time as CLB communicated it to the Tribunal.

45. The Tribunal's records show that the appellant notified it of the withdrawal by email at 16.31 on 10 September. The Tribunal then communicated this to HMRC to its normal 'clearing house' email address at 12.22 on 11 September. For reasons which remain unexplained, Mr Street did not receive this email: either it was undelivered by the ISP or HMRC's clearing house failed to forward it to Mr Street. Unaware of the withdrawal of the appeal, Mr Street and his colleague travelled to the hearing venue on 12 September.

46. HMRC point out that CLB had Mr Street's direct email and telephone number and could have notified HMRC direct of the withdrawal. CLB do not deny this but they do say that they had no liability to do any more than tell the Tribunal of the withdrawal.

Decision on first stage

47. It is accepted that CLB omitted to inform HMRC of the withdrawal when CLB could easily and promptly have done so. Moreover, it seems to me that it must have been obvious to CLB that there would be a delay between the Tribunal's receipt of notification of the withdrawal and passing on the information to HMRC. CLB could not have anticipated what that delay might be but with the hearing being (at the point of withdrawal) only some 42 hours away, they should have appreciated the risk that Mr Street might not learn of the withdrawal in time to stop further preparation for the hearing and perhaps even to stop his travel to the hearing.

48. Could such conduct could be described as 'improper'? It was not suggested that it was a breach of any code of conduct which applied to CLB.

49. Nor was not a breach of a direction by the Tribunal: while the Tribunal does in standard cases direct parties to copy to the other party any communication sent to the Tribunal, that direction was not made in this case which was only categorised as basic. In any event, directions apply to the parties: they do not bind the representatives. I also considered whether the behaviour was a breach of the Rules, as Rule 2(4) states:

Parties must –

- (a) help the Tribunal to further the overriding objective; and
- (b) co-operate with the Tribunal generally

The overriding objective is to deal with cases fairly and justly which includes dealing with them proportionately (including as to costs) and to avoid delay. I considered that CLB had not acted with this obligation in mind; had they done so, they would have notified HMRC of the withdrawal at the same time as the Tribunal in circumstances when there was only 42 hours to go to the hearing. They should have appreciated the real risk that HMRC would continue to incur costs before the Tribunal passed on the message. But again, CLB was not a party to the proceedings, and this obligation did not apply to them.

50. I was unable to conclude that in these circumstances CLB's conduct was improper in the sense used in *Ridehalgh*.

51. Nor did I consider that CLB's conduct could be described as 'negligent'. There was no failure to act competently. Their actions were inconsiderate, but not incompetent.

52. The only possibly applicable heading seemed to be 'unreasonable'. Was CLB's inconsiderate behaviour such that it could be described as "conduct which is vexatious" or 'designed to harass the other side rather than advance the resolution of the case?' This gave me pause for thought: there was no suggestion that CLB *intended* to cause HMRC to incur unnecessary costs: their behaviour was inconsiderate but not designed to harass. However, properly understood I do not consider 'unreasonable' in this context is limited to intentional conduct: the question is whether the conduct is objectively vexatious rather than intended to be vexatious; otherwise the test in *Ridehalgh* would not have been qualified by the statement that it included over-zealous conduct and was not limited to conduct with an improper motive.

53. CLB in its defence points out that it knew by midday on 11 September that HMRC had been notified of the withdrawal because the Tribunal acknowledged the withdrawal to the appellant at that time. I accept that. But it does not alter the fact that CLB acted inconsiderately in not notifying Mr Street of the withdrawal the day before.

54. And I consider that CLB did act unreasonably in failing to take the simple step of notifying HMRC of the withdrawal of the appeal in circumstances where they had Mr Street's contact details and should have understood that, so close to the hearing, there was a real risk that HMRC would continue to incur costs on preparing for the hearing before the Tribunal notified HMRC it had been withdrawn.

Second stage – as a result have any costs been incurred by the other party?

55. HMRC incurred costs in preparing for the hearing on 11 September and travelling to the hearing on 12 September. Having said that, there is a real question whether those costs were incurred as a result of CLB's failure to notify rather than a failure by the ISP or HMRC's clearing house to pass on the Tribunal's message of 11 September to Mr Street. Should the failure of the Tribunal's email to reach Mr Street be seen as a break in chain of causation resulting from the appellant's *omission*?

56. I think it should be. CLB did tell the Tribunal; the Tribunal was bound to tell HMRC. CLB by its omission caused HMRC to incur any costs after CLB should have notified Mr Street and before Mr Street ought to have been notified, but was not, due to the failure of either the ISP or HMRC's clearing house.

57. Mr Street's schedule of costs indicate that he incurred costs on 12 September. That was after he should have received the Tribunal's email and therefore I do not think that CLB *caused* these costs to be wasted. He also incurred costs on 11 September but I cannot tell when in the day they were incurred so I will take it that HMRC has not proved that they were incurred before HMRC ought to have received the notification from the Tribunal.

58. In conclusion, while I consider CLB's behaviour was such that an award of wasted costs could have been made against them, in the circumstances the behaviour was not proved to have actually caused costs to be wasted.

Third stage – should I exercise my discretion to award costs against CLB?

59. Therefore I do not get to the third stage of considering whether to make an order of costs against CLB.

60. I comment in passing that I do not think a representative would be guilty of unreasonable behaviour in many cases where a withdrawal is not notified direct to the other party. I considered it unreasonable in this particular case because, firstly, it was so very close to the hearing, and secondly, CLB had HMRC's contact details and were in direct contact with Mr Street.

ORDER

61. The Tribunal ORDERS after summary assessment that Marshall Glover Ltd should pay to HMRC costs in the amount of £1,729 no later than 28 days after the date of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 24 APRIL 2019