



[2019] UKFTT 556 (TC)

TC07350

*COSTS – application by Appellant for costs on ground that Respondents acted unreasonably
- application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/02532

BETWEEN

HARE WINES LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Application for costs determined on 27 August 2019 on written submissions only

DECISION

INTRODUCTION

1. This decision concerns an application by the Appellant ('Hare Wines') for an order that the Respondents ('HMRC') pay Hare Wines' costs of £6,245 incurred in relation to the appeal. The application was made on 12 July 2019 under section 29 of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') and Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'). Under rule 10(1)(b), the First-tier Tribunal ('FTT') may make an award in respect of costs if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings. In summary, Hare Wines claims that HMRC acted unreasonably in defending the proceedings because the obvious flaws in HMRC's decision making process made the appeal indefensible. HMRC oppose the application on the ground that they have not acted unreasonably.

2. For the reasons given below, I do not consider that HMRC acted unreasonably in defending these proceedings and, accordingly, Hare Wines' application for costs must be refused.

BACKGROUND TO THE APPLICATION

3. There is no dispute between the parties about the events leading up to the appeal. The relevant facts may be summarised as follows.

4. Hare Wines was incorporated in 2014 and traded as a wholesaler of alcoholic beverages. Following the introduction of the Alcohol Wholesaler Registration Scheme ('AWRS'), Hare Wines applied, on 10 March 2016, for approval under the AWRS to carry on a controlled activity, namely the wholesale of alcohol, in accordance with section 88C of the Alcoholic Liquor Duties Act 1979 ('ALDA'). On 10 February 2017, HMRC wrote a letter ('the Minded to Refuse Letter') to Hare Wines which indicated that HMRC were minded to refuse Hare Wines' application on three grounds and invited representations by 23 February, failing which the application would be refused. Hare Wines' response to the Minded to Refuse Letter was contained in a letter, dated 23 February 2017, from its representatives (the 'Rainer Hughes Letter').

5. By letter dated 20 March 2017 ('the Decision Letter'), HMRC refused Hare Wines' application for approval under the AWRS. None of the matters raised in the Minded to Refuse Letter is set out in the Decision Letter. Enclosed with the Decision Letter was a further letter (the 'Response Letter') from HMRC Solicitor's Office, responding to specific points raised in the Rainer Hughes Letter.

6. On 23 March 2017, Hare Wines submitted a notice of appeal to the FTT appealing against the refusal of approval under the AWRS in the Decision Letter on the grounds that the Decision Letter did not make clear the reasons for the refusal but simply set out certain "key points" that were said to have been taken into account. Hare Wines disputed the allegations set out in the Decision Letter and disputed that the facts alleged showed that it was not a fit and proper person.

7. On 11 April 2017, the FTT invited the parties to agree case management directions and such directions were agreed between the parties on 18 April. On 25 April, however, HMRC applied to vary the direction in relation to disclosure of documents to limit the disclosure obligation. Hare Wines objected to HMRC's application to vary the agreed disclosure direction. Following a hearing on 8 May, the FTT refused HMRC's application. HMRC appealed the FTT's decision to the Upper Tribunal.

8. On 25 May 2017, HMRC served their Statement of Case. On 7 June, the FTT stayed the appeal pending various appeals against the refusal of applications by HMRC to vary the disclosure direction in this and several other appeals.

9. In *HMRC v Hare Wines and Another* [2017] UKUT 465 (TCC) (*'Hare Wines UT'*), the Upper Tribunal (Henry Carr J and Judge Hellier) upheld the FTT and dismissed HMRC's appeal. In [27] of its decision, the Upper Tribunal noted that:

“Without expressing any views as to the ultimate outcome of the appeal, there is a good arguable case that the [Decision Letter] is inadequate and incomplete, in that the reference to ‘key points’ begs the question of what was taken into account by the decision-maker, and what was disregarded.”

10. HMRC appealed against the Upper Tribunal's decision to the Court of Appeal. In *HMRC v Smart Price Midlands Ltd and Hare Wines* [2019] EWCA Civ 841 (*'Hare Wines CA'*), the Court of Appeal allowed HMRC's appeal on the ground that the original disclosure direction had been too broad.

11. Giving the only judgment, Rose LJ made the following comments in relation to Hare Wines' appeal at [59] and [60]:

“59. ... The main problem is the opacity of the reasons given for the refusal of approval. If what happened in the Hare Wines appeal is at all typical of HMRC's process in determining applications, it reveals a chaotic decision-making process which is almost bound to generate appeals and create case management problems in any tribunal proceedings. I agree with the comment of the Upper Tribunal in *Hare Wines UT* that the [Decision Letter] is inadequate and incomplete. ...

60. This confused position has made it difficult for Hare Wines properly to formulate its grounds of appeal and has then been compounded by HMRC's statement of case. That document appears in one section simply to replicate the brief reasons given in the Refusal letter but in a later section raises a host of other points without explaining in some cases whether and why HMRC have apparently rejected the arguments put forward in the Rainer Hughes letter.”

12. Following the release of the decision of the Court of Appeal in *Hare Wines CA* on 16 May 2019, HMRC reconsidered the decision that was the subject of the appeal and, by letter dated 19 June, withdrew the Decision Letter. Although the Decision Letter was cancelled, HMRC stated that the decision would be remade after reconsideration of the evidence by persons other than the original decision-maker.

13. On 2 July, the parties agreed an order by consent that:

- (1) Hare Wines' appeal was allowed;
- (2) any application by Hare Wines for costs must be filed and served by no later than 4pm on 12 July; and
- (3) any response by HMRC to the application for costs must be filed and served by 26 July.

Both Hare Wines' application for costs and HMRC's response were made within the time limits specified.

LEGISLATION

14. There is no general power to award costs in the FTT. Such power as the FTT has is found in section 29 of the TCEA and rule 10 of the FTT Rules. Section 29 of the TCEA provides

that the FTT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the FTT Rules.

15. Rule 10 of the FTT Rules rule relevantly provides:

“(1) The Tribunal may only make an award in respect of costs ... –

(a) ...;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting of proceedings; or

(c) ...”

16. Rule 10(1)(a) relates to wasted costs as defined by Section 29(5) of the TCEA Rule. Under that rule, the FTT may order a legal or other representative whose improper, unreasonable or negligent act or omission has caused a party to incur costs to meet those costs. Legal or other representative for this purpose is defined as any person exercising a right of audience or right to conduct the proceedings on behalf of a party. That is not the situation in this case and rule 10(1)(a) is not relevant to these proceedings. Rule 10(1)(c) relates to proceedings that have been allocated as a Complex case and is also not relevant to this appeal.

CASE LAW ON COSTS

17. The proper approach to be taken in relation to applications for costs on the basis of unreasonable behaviour when an appeal before the Tribunal is withdrawn or not defended has been discussed in a number of cases. The case law was summarised by the Upper Tribunal in *Marshall & Co v HMRC* [2016] UKUT 116 (TCC) (*Marshall*) at [10] – [13] as follows:

“10. The scope of Rule 10(1)(b) has been discussed in this Tribunal in *Catanã v Revenue and Customs Commissioners* [2012] UKUT 172 (TCC), where Judge Bishopp, at [14], stated:

‘Mr Catanã has made a number of points about the phrase “bringing, defending or conducting the proceedings”. It is, quite plainly, an inclusive phrase designed to capture cases in which 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 proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side.’

11. The reference to ‘the proceedings’ in Rule 10(1)(b) is to proceedings before the Tribunal which has jurisdiction of the appeal, whilst it has such jurisdiction. In *Catanã* this Tribunal approved (at [9]) the following statements from *Bulkliner Intermodal Limited v HMRC* [2010] UK FTT 395 (TC):

‘..... It is not possible under the 2009 Rules ... for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe* ... remain good law. That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and anor (trading as Farthings Steak House) v McDonald (Inspector of Taxes)* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal.’

12. Where HMRC eventually withdraw from a case against a taxpayer, in relation to the pre-2009 costs regime the Special Commissioners held in *Carvill v Frost* [2005] STC (SCD) 2008 that failure by HMRC properly to have reviewed its decision to pursue a claim would be relevant. The Commissioners stated (at [73]):

‘Mr Brennan [counsel for the Revenue] told us that it was no part of our role in a costs application to look into the internal workings of the Revenue and examine the nature and extent of an internal review; if the taxpayer has a claim for administrative or other failing then that must be pursued elsewhere. It seems to us, however, at least in the circumstances of this case, that where we are required to determine the reasonableness or otherwise of the Revenue’s conduct in pursuing a case from which it eventually decided to withdraw, internal action, such as the adequacy or otherwise of a review of the issues on which the Revenue’s case is founded and which is carried out whilst the appeal is within the jurisdiction of this Tribunal, is directly relevant to the findings we are required to make as to the Revenue’s conduct.’

13. Again in the context of the withdrawal by HMRC of a case before the FTT, the decision of this Tribunal in *Tarafdar (t/a Shah Indian Cuisine) v Revenue and Customs Comrs* [2014] UKUT 362 (TCC) is relevant. In *Market & Opinion Research International Ltd v Revenue & Customs Comrs* [2015] UKUT 12 (TCC), this Tribunal endorsed (at [18]) the test set out in *Tarafdar* at [34]:

‘In our view, 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?’”

SUBMISSIONS

18. Hare Wines submits that it should be awarded costs under rule 10(1)(b) because HMRC acted unreasonably in defending the proceedings. Hare Wines’ primary position is that HMRC should never have defended the appeal and, in doing so, acted unreasonably. Hare Wines submits that, because of obvious flaws in the decision making and reasoning process, the appeal was indefensible from the outset. Hare Wines contends that the flaws in the decision making should have been apparent to HMRC once they had considered the grounds of appeal filed by Hare Wines on 23 March 2017.

19. Hare Wines’ alternative position is that HMRC should have conceded the appeal after the Upper Tribunal released its decision in *Hare Wines UT* on 6 December 2017 which included the comment, set out at [9] above, that there was a good arguable case that the Decision Letter was inadequate and incomplete.

20. HMRC’s overarching position is that they have not acted unreasonably in defending or conducting proceedings. They make three distinct submissions in support of that proposition.

21. The first is that any conduct which pre-dates the filing of the Notice of Appeal cannot be taken into account by the FTT when considering whether a party has acted unreasonably. HMRC rely on [36] – [43] of *Distinctive Care Limited v HMRC* [2018] UKUT 0155 (TCC) (*‘Distinctive Care’*) as showing that conduct before the proceedings have commenced cannot

be taken into account in assessing the reasonableness of a respondent's conduct. HMRC say that Hare Wines asserts that the Response Letter and Decision Letter amounted to HMRC acting unreasonably. HMRC contend that the Decision Letter and the Response Letter cannot be the basis of an allegation of unreasonable conduct because they pre-dated the Notice of Appeal.

22. HMRC's second submission is that, bearing in mind the information available to HMRC, it could not be said that Hare Wines' appeal was obviously meritorious. HMRC accept that the Decision Letter could have contained more detail but contend that the deficiencies were remedied by the Statement of Case which showed that HMRC had sufficient grounds to justify the refusal of Hare Wines' AWRs application and resist the appeal. HMRC submit that the fact that the reasons for refusing the application set out in the Statement of Case were not the same as those contained in the Decision Letter did not mean those reasons could not be advanced as part of HMRC's case.

23. Finally, HMRC submit that they did not act unreasonably in not withdrawing the Decision Letter and conceding the appeal when it was stayed pending the outcome of the appeals against the disclosure direction. Hare Wines' appeal was stayed from 7 June 2017 until after the release Court of Appeal decision on 16 May 2019. HMRC contend that the appeal was still at an early stage and had not progressed beyond the lodging of the Statement of Case before the Decision Letter was withdrawn and the appeal allowed by consent.

DISCUSSION

24. There is ample authority for the proposition that conduct before the commencement of proceedings is not relevant, or of only marginal relevance, in assessing the reasonableness of a party's conduct for the purposes of rule 10(1)(b) of the FTT Rules. It is implicit in the phrase "bringing, defending or conducting the proceedings" as explained by the Upper Tribunal in *Catanã* and *Marshall* - see [17] above. The position was succinctly set out by the Upper Tribunal in *Distinctive Care* at [39]:

"In agreeing with this formulation [in [14] of *Catanã*], we consider that in a costs application made against an appellant, the actions of that appellant (and its representative) in bringing the proceedings are to be considered; for an application made against a respondent, the actions of that respondent (and its representative) in defending the proceedings are to be considered; and in both cases their respective actions (and those of their representatives) in conducting the proceedings are to be considered. These are the relevant actions to be considered for the purposes of Rule 10. It may be that some earlier actions of one party or the other might inform the FTT's assessment (for example by demonstrating bad faith), but the focus of the assessment remains on these relevant actions, not on any earlier actions."

25. In my view, however, that interpretation of the phrase "bringing, defending or conducting the proceedings" does not assist HMRC in this case. It seems clear to me that, contrary to HMRC's submission, Hare Wines is not contending that the Decision Letter and Response Letter are unreasonable conduct. As set out at [18] and [19] above, Hare Wines' case is that HMRC should have conceded the appeal on considering Hare Wines' grounds of appeal or, at the latest, after reviewing the Upper Tribunal's decision in *Hare Wines UT*. Hare Wines contends that HMRC acted unreasonably in continuing to defend the proceedings after those dates, both of which post-date the commencement of proceedings. That does not dispose of the application however: the question is whether, in continuing to defend the proceedings, HMRC acted unreasonably.

26. Defending an appeal that is clearly indefensible is likely to be regarded as unreasonable conduct. That seems to me to be an example of what Judge Bishopp said in *Catanã*, see the

passage from *Marshall* at [17] above, when he referred to a respondent who has unreasonably resisted an obviously meritorious appeal. The context of Judge Bishopp's words makes it clear that by "obviously meritorious", he did not mean merely "having some merit". The words are in contrast to "should know could not succeed" immediately before. I consider that shows that "obviously meritorious" means "clearly would succeed" in this context. Any other interpretation would mean that HMRC would be acting unreasonably in every case where they continued to defend an appeal even though they had identified that the appellant had a weak argument with a small chance of success and so had some merit. It could not be said that Hare Wines' appeal was obviously meritorious in the sense that it was obvious that it would succeed. Nor, in my view, could it be said that HMRC's position was clearly indefensible. The most that can be said is that the Upper Tribunal observed, without prejudice to the outcome of the appeal, that Hare Wines had a good arguable case that the Decision Letter was inadequate and incomplete, and the Court of Appeal agreed. In addition, the Court of Appeal made critical comments about HMRC's decision making process. That is a long way from saying that HMRC should have known that Hare Wines' appeal would succeed. In fact, the Court of Appeal recognised that there were issues that remained to be resolved before Hare Wines' appeal could be determined which is why it remitted the appeal to the FTT for further directions. In conclusion, I do not consider that HMRC have acted unreasonably in defending the proceedings.

27. That conclusion is sufficient to dispose of the application but, for completeness, I deal briefly with the questions posed in *Tarafdar*. The reason for withdrawing the Decision Letter given by HMRC in their letter of 19 June 2019 was the comments made by Rose LJ in *Hare Wines CA*. Hare Wines do not suggest that there was any other reason. Given that the reason for cancelling the Decision Letter was the comments contained in the decision of the Court of Appeal released on 16 May 2019, I consider that HMRC cannot be criticised for not having withdrawn the Decision Letter before that date. In my view, HMRC did not behave unreasonably in not withdrawing the Decision Letter at an earlier stage in the proceedings because the comments of the Upper Tribunal did no more than suggest that Hare Wines had a good arguable case. It was not until the comments of Rose LJ in the Court of Appeal that the deficiencies in HMRC's case became clear. That leaves the question of whether HMRC should have withdrawn the Decision Letter more promptly after the release of the Court of Appeal's judgement. The delay was just over one month which seem to me to be a reasonable period for HMRC to consider Rose LJ's comments and what action to take. Hare Wines does not argue that the delay was unreasonable.

DECISION

28. For the reasons set out above, the application by Hare Wines for an order under rule 10(1)(b) of the FTT Rules that HMRC pay its costs in relation to this appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

RELEASE DATE: 30 AUGUST 2019