



[2019] UKFTT 619 (TC)

TC07403

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Appeal number: TC/2017/06627

PROCEDURE – application for costs – rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – application allowed in principle – supplementary claim invited following Court of Appeal decision in Distinctive Care Ltd v HMRC – hourly rate claimed reduced to CPR rate for litigants in person – hours taken found to be disproportionate in some instances – final claim reduced accordingly.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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CHRISTOPHER SWALES

Appellants

- and -

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

Respondents

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TRIBUNAL: RICHARD THOMAS

30 **Decision made on the papers on 31 August 2018 having read the application by the Appellant, representations by Oladapo Sanusi, litigator, for the Respondents, a supplementary application by the appellant and further representations by Kevin Maguire, legal costs manager, for the Respondents.**

DECISION

1. On 11 February 2019 the Tribunal (Judge Richard Thomas and Elizabeth Bridge) sitting in the Magistrates Court, Cambridge heard the appeal of Mr Christopher Swales (“the appellant”) against a decision made by an officer of the Respondents (“HMRC”) on 31 May 2017 to refuse his claim to a refund of VAT under the DIY Builder’s scheme.

2. On 25 April 2019 the Tribunal released its decision in the case, cited as [2019] UKFTT 277 (TC) (“the FTT Decision”). The Tribunal upheld the appellant’s appeal. HMRC did not make any application for permission to appeal the decision and have, as I understand it from the papers, now paid the appellant the amount of his claim.

3. On 9 May 2019 the appellant sent the Tribunal an application under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (“the Rules”) for his costs to be paid by HMRC¹. That application was copied to the respondents (“HMRC”), and on 25 May 2019 Mr Sanusi, who had represented HMRC at the hearing, made representations on it on behalf of HMRC, and so HMRC, as the potential “paying person”, have been given an opportunity to make representations within the terms of rule 10(5) of the Rules.

4. Following a request by the Tribunal both parties stated that they were content for the Tribunal to decide the matter on paper and I started to do so in July. In the course of drafting a summary of the existing case law on a costs application in this Tribunal I examined a then recently published Court of Appeal decision, *Distinctive Care Ltd v HMRC*, (“DCL”) which I considered had overturned previous practice of this and the Upper Tribunal about the costs which might be taken into account. Accordingly on 22 July I directed that the appellant might make a supplementary claim in the light of the DCL decision and that HMRC might respond, and also, as they had requested, they might make submissions about the amount of the appellant’s costs, in the light of my informing the parties that I had come to the conclusion that I should in principle award the appellant his costs. The parties complied with the directions and I have taken the appellant’s revised claim and HMRC’s submissions into account.

The law on costs

5. The power to award costs is conferred by section 29(1) of the Tribunals, Courts and Enforcement Act 2007 (“TCEA”) which provides:

“29 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,

¹ The appellant, who has not been legally represented, referred in his application to “wasted costs”, but I have taken it to be, as its terms clearly show, only an application under Rule 10(1)(b) of the Rules. Rule 10(1)(a), which is about wasted costs, cannot apply where there is no representation.

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.

5 (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.”

6. The Rules are included in the term “Tribunal Procedure Rules” and rule 10(1) of the Rules provides:

“10 Orders for costs

10 (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) and costs incurred in applying for such costs;

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

(c) [*inapplicable to Standard cases which this was*]

Binding authority on the Tribunal’s approach to Rule 10

7. On 13 June 2019 the Court of Appeal (Lewison, Floyd and Rose LJ) issued their decision in *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010 (“DCL”). Giving the only reasoned judgment with which the other two Lords Justices agreed, Rose LJ (a former President of the Upper Tribunal (Tax and Chancery Chamber)) discussed a number of previous cases in the Upper Tribunal and in this Tribunal and laid down the correct way to interpret both Rule 10 and the meaning of “of and incidental to” in s 29 TCEA.

8. It would be a pointless exercise for me to rewrite what Rose LJ said in what would undoubtedly be a far clumsier manner than hers, so I set out below the passages which seem to me to bear closely on the circumstances of this case and the way I should approach it. I start with:

30 “19. ... The earliest conduct that is relevant for the purposes of rule 10(1)(b) is the bringing of the proceedings, that is the proceedings before the FTT. There is no ambiguity in the FTT Rules as to what is involved in the bringing of proceedings in this appeal; it is the sending or delivering of the notice of appeal pursuant to rule 20 of the FTT Rules.

35 The tribunal case law supports this view. In *Catană² v HMRC* [2012] UKUT 172 (TCC) (*‘Catană’*) the FTT refused to make a costs order in the taxpayer’s favour following the compromise of an appeal against his tax assessment. Mr Catană was dissatisfied with the compromise agreement reached and the tribunal decision recording the compromise

² In this excerpt and elsewhere I have taken the liberty of replacing the tilde shown over the final ‘a’ in the appellant’s name with what I believe to be the correct diacritic for a Romanian name, which that of Mr Catană clearly is.

was ultimately set aside. Mr Catană applied for his costs of the initial proceedings. Judge Bishopp described the phrase ‘bringing, defending or conducting the proceedings’ as:

5 ‘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 the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.’”

10 9. Rose LJ continued by discussing several cases from a number of Chambers of the Upper Tribunal. She then said at [25]:

15 “25. Drawing those tribunal decisions together, in my judgment the passage from *Catană* and the questions posed by the UT (IAC) in *Cancino* show the correct approach to the application of rule 10(1)(b). I would sound a note of caution about the proviso discussed in *Bulkliner* and *Marshall & Co* that pre-commencement conduct may be relevant if there is bad faith. That should not be read as suggesting that there is some exception to the general principle such that if an assessment or penalty is issued in bad faith by HMRC, that can in some way bring conduct before the start of the appeal within the scope of rule 10(1)(b). There may be circumstances in which behaviour before the appeal is brought is relevant to the tribunal’s assessment of the reasonableness of conduct post-commencement but an applicant cannot extend the scope of the tribunal’s inquiry by alleging bad faith at an earlier stage on the part of HMRC. The parties and the tribunal must always bear in mind first that the focus should be on the standard of handling the case rather than the quality of the original decision: see *Maryan (t/a Hazeldene Catering) v HMRC* [2012] UKFTT 215 (TC) and secondly, that the jurisdiction to award costs is intended to be exercised in a straight-forward and summary way and should not trigger a wide-ranging analysis of HMRC’s conduct relating to the applicant’s tax affairs.”

25 30 10. In relation to the question whether a failure by HMRC to withdraw a notice or assessment once they (not the Tribunal) had received an appeal, Rose LJ said:

35 “29. The reasonableness or otherwise of the failure by HMRC to withdraw an appealable decision once they are notified of the appeal to the FTT has been addressed by the Upper Tribunal in a number of cases. In *Tarafdar* the taxpayer appealed against a refusal of an application for costs against HMRC. He argued that the flaw in HMRC’s tax assessment had been pointed out to HMRC at an early stage but HMRC had continued to defend a hopeless action until they decided following the commencement of FTT proceedings not to defend the appeal. The UT stated at [34]:

40 ‘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:

45 (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?’

5 30. The UT also stated at [33] of *Tarafdar* that the proper enquiry is
‘whether HMRC had unreasonably prolonged matters once they were in
the tribunal, or whether they should have withdrawn the assessment at
an earlier stage’. In *MORI* the UT described MORI’s case as asserting
10 that the information and explanations available to competent, trained
HMRC officers at various stages of the proceedings prior to the hearing
at which HMRC abandoned its defence had been sufficient to enable the
officers acting reasonably to conclude that the claim ought not to be
defended further: see [43]. The UT approved the statement of the FTT
15 in that case that a failure to undertake a rigorous review of assessments
at the time of making the appeal to the tribunal can amount to
unreasonable conduct. The authority cited for that was *Southwest
Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC). In that
case the FTT (Judge Raghavan) rejected the suggestion that HMRC’s
20 failure to settle the case at the internal review stage prior to the FTT
appeal being lodged could amount to HMRC unreasonably defending or
conducting proceedings. Judge Raghavan said that the earliest acts he
could consider, whether these were framed as HMRC continuing to
defend the appeal or as an omission in not settling the case sooner, were
those arising after the appeal was notified. Judge Raghavan went on at
25 [45], however, to reject HMRC’s contention:

‘... that it was not until the witness statements drew together matters
which it said had been presented in a “piecemeal” fashion that HMRC
was in a position to settle. While it is no doubt a welcome bonus for
HMRC if the evidence the appellant chooses to rely on ... draws
30 matters together in a comprehensive and well structured way for
HMRC to consider, that is not the function of witness statements.
Rather it is to be assumed that HMRC will once proceedings are
started review all the relevant material that has been put before it,
something which it will need to do in any event to finalise a Statement
of Case and List of Documents, and will make an ongoing assessment
35 of whether a case should continue to be defended.’

31. I agree with that statement although I take the reference there to
‘once proceedings are started’ as meaning once HMRC has been notified
of proceedings. It would be inconsistent with the structure of the FTT
40 Rules to treat the conduct of the respondent prior to being notified of the
appeal as conduct ‘in the proceedings’ for the purposes of rule 10(1)(b).
The FTT Rules do not require the appellant to serve the notice on the
respondent and in the present case DCL did not do so. It is the tribunal
itself that gives notice of the proceedings to the respondent under rule
45 20(5). At that point HMRC must consider their position in relation to
the case in order either to notify the appellant of any new grounds under
rule 24(4) or to deliver the statement of case to the tribunal and the
appellant within the 60 days allowed by rule 25(1)(c). HMRC must act
promptly, once notified, if it becomes clear that the appeal cannot
50 properly be defended.

32. In the present case, DCL do not complain that HMRC delayed in withdrawing the notice after they had been notified of the appeal by the FTT. Any failure to arrive at that conclusion sooner, before being notified of the existence of the appeal, does not amount to conduct by HMRC in the proceedings.”

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11. The final relevant issue which Rose LJ discussed was whether costs incurred before the start of Tribunal proceedings, ie the notification of the appeal to the Tribunal, can be treated as “costs of and incidental to” the proceedings. On this matter she said:

“34. The question whether costs incurred before the start of tribunal proceedings can be recovered as ‘costs of and incidental to’ those proceedings where the tribunal’s power under rule 10(1)(b) is exercised also does not arise for decision, given my earlier conclusions. Judge Mosedale in the present case referred to a number of FTT decisions where it appears some tribunals have treated costs incurred before the start of proceedings as incidental to those proceedings and some have held that only costs incurred in bringing, defending or conducting the proceedings are recoverable. Since there appears to be some inconsistency in practice and the point is of wider significance, it is convenient for this court to consider it.

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35. As Judge Mosedale noted in her decision, the phrase “costs of and incidental to” used in section 29 of the TCEA is also used in other contexts. The wording echoes that used in section 51(1) of the Senior Courts Act 1981 that ‘the costs of and incidental to all proceedings’ in, amongst other courts, the civil division of the Court of Appeal and the High Court, shall be in the discretion of the court. CPR 7.2(1) provides that ‘proceedings are started when the court issues a claim form’. CPR 44.2(6)(d) provides expressly that the orders which the court may make under that rule include an order that a party must pay costs incurred before the proceedings have begun.

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36. The use of the ‘costs of and incidental to’ wording in section 29 cannot be accidental and must have been intended to mean that, subject to any relevant difference in the FTT Rules compared with the Civil Procedure Rules, the same costs are in general recoverable once rule 10(1)(b) comes into play as are recoverable on an assessment of costs following civil proceedings covered by section 51 SCA. Those costs do include some pre-action costs. In *In re Gibson’s Settlement Trusts* [1981] Ch 179, Sir Robert Megarry V-C considered an appeal from the taxation of costs of an originating summons issued by trustees of a settlement trust. One issue raised was whether the taxing officer had been right to allow recovery of costs incurred before the summons was issued. The Vice-Chancellor held:

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i) on an order for taxation of costs, costs that would otherwise be recoverable are not to be disallowed by reason only that they were incurred before the action was brought;

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ii) where the costs order is for costs of and incidental to proceedings, the words ‘incidental to’ extend rather than reduce the ambit of the order;

5 iii) it is important to identify the proceedings, in the sense not only of the correct stage of the proceedings but also by determining the nature of those proceedings: ‘Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate’: page 186B.

10 37. The Vice-Chancellor cited the judgment of Lord Hanworth MR in *Pêcheries Ostendaise (Soc. Anon) v Merchant’s Marine Insurance Co* [1928] 1 KB 750 which referred to costs for ‘materials ultimately proving of use and service in the action’ and commented that it would be ‘most unfortunate if the costs of obtaining evidence while it was fresh after an accident could not be allowed, even if litigation seemed probable, merely because no writ had then been issued’: page 186D. He went on to say at page 187B-E:

15 ‘(5) Obviously the test cannot be simply whether the materials in question proved in fact to be of use in the action, for otherwise when a case is settled before trial ... it would often not be possible to say with any certainty which materials had been or would have been of use in the action. Nor would it be right to penalise the successful litigant for obtaining materials which appeared likely to be of use in the action but which, in the event, were never used because the other party did not contest the point. ... Neither the fact that at the time when the costs were incurred no writ or originating summons had been issued, nor the fact that the immediate object in incurring the costs was to ascertain the prospective litigant’s chances of success, will per se suffice to exclude the costs from being regarded as part of the costs of the litigation that ensues. Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes.’

20 38. Although there is no equivalent in the FTT Rules to the express provision in CPR 44.2(6)(d), I consider that the power in rule 10(1)(b) to award costs of and incidental to the proceedings can include costs incurred before the appeal was notified to the FTT. Which costs are properly recovered is a matter for the costs officer who is experienced in these matters to decide. I would, however, say this as regards the costs incurred by the parties in steps taken before the FTT appeal is lodged. The ability of the applicant to recover the costs of notifying the appeal to HMRC does not, in my view, turn on whether the taxpayer chooses the option of internal review or decides to bring the appeal straight to the tribunal. I agree with the UT’s comment that defining the scope of a possible order for costs by reference to the subjective intentions of a potential appellant at a particular stage is ‘hedged around with too many difficulties and uncertainties to form a reliable basis for decision’: [71].

25 39. I also disagree with the implication of Judge Mosedale’s test that the costs of the internal review itself can never be incidental to the appeal because they are incurred to bring the dispute to an end without litigation. It is the nature of the work done and the scope of the ultimate appeal that determine whether those costs are incidental to the appeal, not the subjective intention of the party when incurring the costs. For

example, materials gathered or produced for the purpose of the internal review may then be recycled in the appeal before the FTT. Those costs are clearly of and incidental to the appeal even though they were largely incurred at the earlier stage.”

5 12. The only other decision I need to mention is that in *MORI*. In the FTT Judge Raghavan had set out the approach he had adopted towards a rule 10 claim in nine paragraphs (“the *MORI* points”), which were approved of by the Upper Tribunal. They were:

10 “(1) It was to be noted that the test in the Tribunal Rules that a party or representative had “acted unreasonably” required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted “wholly unreasonably”. This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395(TC) at [9].

15 (2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings

20 “...whether they are part of any continuous or prolonged pattern or occur from time to time”.

25 (3) The point is I think mentioned in the context of contrasting the Tribunal’s rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners’ costs power which was in relation to behaviour which was “in connection with the hearing in question”. Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably (*sic* – is not correct?). It will of course rather depend on what the conduct is.

30 (4) Actions for the purpose of “acting unreasonably” also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)

35 (5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC) at [45]).

40 (6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting. (*Southwest Communications Group Ltd* at [39]).

45 (7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* 20 [2012] UKFTT 215(TC)).

(8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) 30 Judge Hellier stated at [27]:

5 “It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable ... before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong...”

10 (9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a “backdoor” method of costs shifting.”

13. The first step then is for me to determine (having regard to the *MORI* points and Judge Bishopp’s statement in *Catană* and HMRC’s representations) whether what the appellant complains of in HMRC’s conduct was unreasonable. The next step is, if it was unreasonable, to determine whether that conduct was in the course of defending or conducting the proceedings. That means, having close regard to *DCL*, I should look at the conduct of HMRC from the point in time when they were notified by the Tribunal of the appeal, but nonetheless I must bear in mind what the Court of Appeal in *DCL* said at [25] (see §9). Finally if I determine that the conduct was unreasonable and was in the course of defending or conducting the proceedings I have to decide whether to exercise my discretion to award costs (and of course then to summarily assess those costs, if that is what I decide to do).

The appellant’s complaints of unreasonable conduct

14. The appellant’s application refers to nine matters which I set out below³.

25 (1) *The action of HMRC in issuing a penalties letter to him on 2 May 2017*⁴.

15. The appellant says that:

30 “... the letter was issued by [HMRC] on 2 May [2017] at the onset of the application for a refund advising that the Appellant may be liable to a penalty due to the claim. This remains an issue as the threat has not been retracted notwithstanding that the FTT decision has been awarded in the Appellant’s favour. Further it is possible that this adverse documentation may be retained on record and impact on other HMRC transactions. Notwithstanding, the very fact that this letter was issued is tantamount to unreasonable and threatening conduct. Although the Appellant suspects that the rationale behind this letter was intimidation to influence dissolution of the claim, the reverse has transpired as the Appellant deemed it necessary to proceed to a formal hearing in order to settle the matter. The deliberations associated with this issue took unnecessary time and contributed to the inevitability of a formal hearing.”

³ I have made some typographical amendments such as inserting apostrophes.

⁴ The appellant’s schedule erroneously says “2019” but it is clear from eg the FTT Decision at [44] that it must be 2017.

16. This section of his application also refers to what Mr Sanusi told him after the hearing. That is irrelevant to the application.

(2) *The HMRC personnel involved in the case*

17. The appellant says he dealt with at least 8 different officers and that:

5 “ ... Their statements have often been contradictory and confusing and
they have repeatedly reintroduced matters which were previously raised,
answered and assumed by the Appellant to have been resolved. It is
evident that to have such a sizeable [HMRC] team pursuing a retired 71
10 year old pensioner for a relatively small claim is not only excessive but
is heavy handed and uneconomical.”

18. He added:

15 “ ... In the Appellant’s opinion the FTT hearing could have been avoided
and the duration of the entire process significantly reduced if [HMRC]
had employed fewer case officers with a single designated contact (as
the leader), obtained professional advice regarding technical issues, and
adopted a reasonable and genuine approach focused on resolving the
dispute. Instead it appears that they adopted an strategy of denying the
claim whatever the reason given and often submitted obscure
explanations even if the evidence did not exist.”

20 (3) *Planning Approval – Drawings*

19. Here the appellant’s complaint is:

25 “During the course of the communication the Respondent has insisted
that the Appellant has not complied with the planning approval. On
numerous occasions the Appellant, who is a retired architect with a
masters degree in environmental planning, has insisted that he has
complied with the approval and has gone to extensive lengths to ensure
that the UDC planners were aware of the completed building. He has
repeatedly advised that if the existing walls of the new dwelling were
retained, even though this is not a requirement of the planning approval,
30 there would be some serious technical repercussions (as reported at the
hearing) that would render the building unfit for purpose, uninhabitable
and even hazardous. Had the Respondent taken the trouble to verify
these matters with another independent architect, they would have
discovered their authenticity and further realised that the planners and
building control officers would never allow the construction of a
35 building that is contrary to the safety of the occupants and general
public. This would have saved the necessity of attending the ADR and
the hearing and the consequent unnecessary associated costs of the
Appellant and others. It is submitted that the Respondents may have
40 misguidedly believed that they were fully conversant with details of
design, planning and construction and that they did not need to consult
with specialists on technical matters.”

(4) Planning Approval – Separate Use & Disposal

20. And here it is that:

5 “Notwithstanding the fact that the Planning Approval has no conditions which restrict any aspect of use or disposal including ownership, sale, rental, lease or occupation, the Respondent has continuously insisted that the new dwelling is in some way tied to the existing house and therefore not a separate and distinct building that would qualify for zero rating. As noted at the hearing the Appellant proposed the maxim ‘if it isn’t written it doesn’t exist’ and that the absence of any conditions pertaining to disposal and/or occupation cannot be interpreted to imply that something else applies. On repeated occasions the Respondent has refused to accept this simple principle by ignoring it which has led to the continuance of this matter and the wasting of time and costs.”

15 *(5) Misunderstandings and Confusion*

21. The appellant says that HMRC continuously misread or misunderstood many of the documents “including but not limited to the following incongruities”:

20 “a) Reported on an earlier planning application in another location of the site and not the final scheme which was on the footprint of the existing shed^[1];

b) Mistaken the building control submission for the planning application^[2];

25 c) Assumed that there were conditions in the planning approval document that didn’t exist i.e. restrictions on the sale and/or occupation of the dwelling

30 d) HMRC appear to have had some difficulty in deciding on their reasons for rejecting the claim. On 2 May 2017 grounds for the first decision were not explicitly stated. The second decision on 31 May 2017 implied (but not unambiguously) that the new dwelling was ‘ancillary’ to the existing building but did not state which building^[3];

e) HMRC misleadingly only quoted part of one paragraph VCONST [14170] and also out of context

35 f) Then surprisingly the claim was again rejected by HMRC without superseding the first decision on the grounds that the new building did not comply with the planning approval.

40 There are other confusing issues that are not repeated here but are clearly stated in the formal FTT Decision. The consequence of these inaccuracies has led to extensive, unnecessary and misleading correspondence and ultimately the necessity of holding the ADR and the FTT hearing.”

(6) *Annexe*

22. The appellant says that:

5 “Throughout the negotiations the Respondent has claimed that the term ‘annexe’ indicates that the new building is tied to the existing house. This has been answered on a number of occasions by the Appellant and is precisely reported in the FTT Decision. The Respondent has equivocally not included this assertion in their SoC although they have raised the matter in writing on various occasions. The correspondence and research relating to this term has taken inordinate time and cost, all for no apparent reason.”

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(7) *ADR (Alternative Dispute Resolution)*

23. Here he says:

15 “The ADR settlement was altogether unsatisfactory from the Appellant’s standpoint as it necessitated going back to Planning to question the intent of what they had written in their approval – an action which could have prejudiced the original approval. He did nevertheless sign the ADR exit agreement purely in an attempt to end the protracted dispute which was taking a toll on his health. Subsequent to a visit with a planning officer, Mr Clive Theobald which is documented in the Appellant’s [Statement of Case] and the FTT Decision, it was clear that the [planning authority] would only issue a written ruling by way of a Lawful Development Certificate, and not simply a letter as was required by [HMRC]. Attempts to explain this to [HMRC] fell on deaf ears and they insisted on obtaining the letter with the verbatim text stated in the exit agreement. This put the Appellant in the impossible position of being unable to perform and ultimately resulted in the formal FTT hearing. This action by the Respondent was again unnecessary and wasteful.”

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30 (8) *Respondent’s Statement of Case*

24. The appellant says that the Statement of Case submitted by [HMRC] was most confusing based on the various contradictory assertions made by two officers of HMRC. He says that the particulars of this are clearly recorded in the FTT Decision and that this matter also resulted in undue time and cost in preparing the Appellant’s case and supporting evidence including case research.

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(9) *Respondent’s Assumed Role as a Planning Officer*

25. Here the appellant says that it was apparent that HMRC assumed the role of planning officials by reason of their statements regarding what the planning approval meant or should have been, notwithstanding what it actually said. He refers to passages in the decision in *Lady Henrietta Pearson v HMRC* [2013] UKFTT 332 (TC) (“*Pearson*”) which we quoted in the FTT Decision and adds that:

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“This action by [HMRC] resulted in unnecessary research and correspondence ultimately leading to the ADR and FTT hearing, both of which could have been avoided.”

HMRC’s representations

5 26. In his representations⁵ Mr Sanusi says that the grounds for claiming costs fail to meet the criteria for claiming them because:

(1) the reasons given fall outside the Tribunal’s jurisdiction due to being events before or after litigation or not forming part of the Tribunal appeals process; [SEP]

10 (2) the issues raised in the Appellant’s claim amount to complaints about the process and conduct of HMRC which should be addressed by an HMRC complaints team and as such “it is not a judicial matter”; [SEP]

(3) the claim fails [SEP] to address whether HMRC acted unreasonably in bringing, defending or conducting the proceedings;

15 (4) HMRC submit that they have the right to pursue litigation unless and until they consider, acting reasonably, that it was not in their interests to do so. HMRC have a responsibility to pursue cases based on the available evidence in the interests of fairness and justice; and that HMRC are of the opinion that the Appellant’s claim was ineligible for DIY builder’s scheme;

(5) this appeal was conducted as smoothly as possible by HMRC. [SEP]

20 Discussion

27. I now go through each of the appellant’s complaints of unreasonable conduct,

(1) The action of HMRC in issuing a penalties letter to him on 2 May 2017.

28. The straightforward answer to this complaint is that whether the conduct is reasonable or not (and the Tribunal’s views on this are made clear in the FTT Decision),
25 the conduct took place before the appeal was made and thus proceedings had not started, and it cannot amount to unreasonable action in defending or conducting the proceedings, as required by rule 10(1)(b).

29. I agree with HMRC’s submissions (1) and (2) on this aspect of the appellant’s complaints. The conduct in issuing such a letter at the stage in the dispute at which it
30 was raised can be the subject of a complaint to HMRC and if necessary further eg to the Revenue Adjudicator, but cannot be adjudicated on by the Tribunal even by an award of costs.

(2) The HMRC personnel involved in the case

30. The appellant is being somewhat disingenuous here. For example he refers to
35 Mrs Regnard, but she was involved with the appellant through a helpline for the VAT DIY Builders’ scheme long before the claim was even made (see FTT Decision at [28] – [34]). Each of the officers he mentions had their own discrete function, including Mr

⁵ I have substantially recast paragraphs 1 to 5 and 7 of the HMRC representations to omit redundancies, ungrammaticalities and non sequiturs.

Sanusi. Where there was confusion though was during the time where Mr Heggie (an officer of the VAT DIY Unit who reconsidered the appellant's claim and who was involved in the ADR) and Mr Hartley, the review officer, were simultaneously dealing with the case and giving different messages to the appellant (see FTT Decision at [69] to [79]).

31. This period of confusing messages from different officers started before the appeal was made but ended after that and so proceedings had started. But the confusion engendered after the proceedings had started is adequately covered by my findings on item (4) "Planning Approval – Separate Use & Disposal".

10 (3) *Planning Approval – Drawings*

32. The issue the appellant raises here is the central issue in the appeal, and at the hearing of the appeal (following an application by the appellant) it was established that it was in fact the only issue in dispute. It was HMRC's submission throughout the proceedings and before that, going back possibly to the original refusal letter (although that is so obscurely worded that it is very difficult to tell) that the appellant had not complied with the planning permission granted to him, and so fell foul of Note 2(d) to Group 5 in Schedule 8 to the Value Added Tax Act 1994 ("VATA") and accordingly by s 35(4) of that Act the claim failed.

33. The question for me is whether HMRC's conduct in insisting that the appellant, a professional architect familiar with the planning process, had breached the terms of his planning permission so as to make what he did unlawful without their having sought to take professional advice from an independent architect or planner or even the Valuation Office (an agency of HMRC) was unreasonable. Allied to this omission is the fact that HMRC knew that the appellant was not legally represented and so were under a duty imposed on them to undertake a rigorous review of assessments at the time of making the appeal to the tribunal and by, among other things, the Equal Treatment Bench Book⁶ to bring to the Tribunal's and the appellant's attention case law which might be thought to undermine HMRC's arguments.

34. I consider that the omissions by HMRC to rigorously consider the strengths and weaknesses of their case at an appropriate time amounted to unreasonable conduct. HMRC had convinced themselves that the drawings accompanying the planning application and included in the permission had the legal effect that the appellant's demolition of the walls of the existing building was unlawful. In particular they interpreted certain dotted lines on the plans as supporting their case and refused to budge despite the appellant's professional explanation of his own drawings in his detailed and comprehensive letter to HMRC of 3 May 2017 in response to the initial rejection of his claim. This in my opinion was unreasonable, not only because HMRC were seeking to put themselves forward as experts in planning and architectural

⁶ Chapter 1 paragraph 74: Opposition Counsel in a party-and-party case and the State's representative in tribunals where the State is the respondent, are expected to draw to the court/tribunal's attention a fair picture of the law and not omit cases which go against his or her side's interests. They should be reminded of this.

drawings, but more importantly because the question whether the drawings envisaged the retention of walls was irrelevant given the decision in *Lady Pearson v HMRC* on the basis of which we held that the appellant succeeded and that HMRC's argument was fallacious.

5 35. I am mindful that *MORI* at point (8) says that the fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it and that in *Catanã* Judge Bishopp said that the test is whether HMRC have unreasonably resisted an obviously meritorious appeal. *MORI* at point (5) says that a failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct. I note that in *DCL* at [30] Rose LJ is rather more forceful in saying that she agreed with Judge Raghavan's statement in *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC) that:

15 "it is to be assumed that HMRC will once proceedings are started review all the relevant material that has been put before it, something which it will need to do in any event to finalise a Statement of Case and List of Documents, and will make an ongoing assessment of whether a case should continue to be defended."

20 36. But was this conduct in the course of defending or conducting the appeal? It first manifested itself in HMRC's anonymous letter of 20 June 2017, before the proceedings started. It was repeated by the review officer in his letter of 7 August 2017, also before the proceedings started. Those proceedings started on 4 September 2017 when the appellant gave his Notice of Appeal form to the Tribunal. On 19 September the Tribunal asked HMRC to produce a Statement of Case ("SoC"). But on 18 November the Tribunal, on the application of both parties, stayed the requirement to produce an SoC until ADR had been completed. On 29 March 2018 the appellant notified the Tribunal that ADR had not been successful and on 15 May 2018 the Tribunal directed HMRC to produce their SoC which they did on 6 August 2018, still maintaining their initial view of Note 2(d) which turned out to be the only argument they wished to run at the hearing.

30 37. It is clear to me that no one in HMRC did what Rose LJ in *DCL* said was required, that is to conduct "a rigorous review of the subject matter of the appeal when proceedings are commenced", failure to carry out which can amount to unreasonable conduct. The production of the SoC was delayed in this case and was clearly produced in the course of defending the proceedings. Even had the SoC been produced at the normal time it would still have been in such a course: in fact it cannot fail to be. The SoC is the obvious point at which the rigorous review must be carried out. The SoC however reveals no such rigorous review, but essentially repeats the views of the review officer. A "rigorous review" by an appeals caseworker such as Mr Sanusi must involve more than a repetition or recasting of the review officer's views. It must consider at least consider the statute and case law on the issue, and the latter must include cases which do not support HMRC's case. I know that any review did not consider *Pearson* because Mr Sanusi confessed at the hearing that he had never heard of the case. It is telling that despite our giving him the opportunity to comment on *Pearson* in post-hearing submissions he did not do so.

38. Had the SoC referred to *Pearson* and said that despite no appeal being made by HMRC against it to the Upper Tribunal, HMRC disagreed with it and had it put forward arguments to say why or cases to the opposite effect (if they exist), then I might have accepted that there had been a rigorous review at least of the case law. But instead the
5 SoC referred only to cases which related to the effectiveness of retrospective planning applications which was not a relevant point in this appeal.

39. And I repeat the point that a properly rigorous review should have required HMRC to at least consider whether they should take professional advice on a subject where they as lay persons disagreed with an appellant who was an expert in the subject.

10 40. It is also clear from the “Exit Agreement for Partial Resolution” dated 19 December 2017 (after the start of proceedings) included by the appellant in his own “statement of case” (FTT Decision at [80] to [83]) that Mr Heggie for HMRC had not carried out any review, let alone a rigorous one, of their position on Note 2(d).

15 41. I therefore find that by not carrying out, after the appeal was made to the Tribunal, a review of the arguments put forward by HMRC in relation to Note 2(d) of Group 5 Schedule 8 VATA and persisting in taking the case to a hearing without professional advice, HMRC were acting unreasonably in the defending and conducting of the hearing.

20 42. This is sufficient to determine the matter in the appellant’s favour, but in case I am wrong I go on to consider the remaining complaints.

(4) Planning Approval – Separate Use & Disposal

25 43. By “separate use and disposal” the appellant is referring to Note 2(c) of Group 5 Schedule 8 VATA, which provides that if it is a condition of the planning permission that a building in question cannot be used or disposed of separately from another building, zero-rating and hence the scheme for refund of VAT does not apply. Note 2(c) was not referred to in the initial rejection letter (other than by being included in a quotation of the whole of Note 2), but was raised in the appellant’s letter asking for reconsideration which did consider Note 2(c) separately explaining why the work did not fall foul of any of the paragraphs of Note 2. Mr Heggie who carried out the second
30 look, did put the “separate use or disposal” aspect of Note 2(c) squarely in issue, but he did not suggest that the planning consent (which he had undoubtedly seen) did contain any restriction on use or disposal separately.

35 44. The appellant’s reply of 13 June 2017 pointed out again that there was no condition in the permission restricting use or disposal separately, and added that it did not use the word “ancillary” at all, so that the guidance was irrelevant. An anonymous letter of 20 June in response to that said that the appellant would have to demonstrate that the “annexe” could be sold or used separately.

40 45. The next step was a request for a review by the appellant. The review conclusions letter did not consider Note 2(c) but upheld the original decision on the basis of Note 2(d). Following the appeal to the Tribunal in response to this letter, the parties attempted ADR. The Exit Agreement showed that Mr Heggie who represented HMRC

in the ADR process was still arguing that Note 2(c) was relevant, indeed it recited that information and evidence about separate use or disposal would assist in subsequent litigation and that the appellant would try to obtain confirmation in writing from the local authority that the building could be used or disposed of separately.

5 46. The appellant then informed Mr Heggie that the local authority would not do so except in the form of a Lawful Development Certificate which Mr Heggie had already said was not sufficient evidence. The appellant did inform Mr Heggie of a conversation he had with the planning officer who confirmed that there was nothing in the approval regarding occupation or disposal and that if the council had wanted to prevent such
10 separate use or disposal it would have said so in the application.

47. The Note 2(c) issue was not contained in HMRC's Statement of Case and Mr Sanusi confirmed at the hearing that it was not in issue.

48. In my view the conduct of HMRC and Mr Heggie in particular was unreasonable. Mr Heggie's letter of 31 May 2017 was deeply flawed.

15 49. He set out the precise terms of Note 2(c) in the letter, terms which made it absolutely clear that the prohibition of separate use or disposal must be found in terms of the planning consent. But as I have mentioned (§43) Mr Heggie could not point to any terms in the consent to that effect, and did not. His argument was based on HMRC's VAT Construction Manual (VCONST) and a single sentence in
20 VCONST14170 ("§14170") about the usage by planners of the word "ancillary" in consents. His conclusion was that the planning permission and approval showed that the building constructed was ancillary to the existing building on the site, and therefore the claim failed.

25 50. This was unreasonable, indeed wholly unreasonable, because the single sentence of §14170 that he mentioned must to make sense be read with the preceding sentence, the first sentence of §14170, which says:

"You should not expect the wording of Note 2(c) to appear as an explicit condition in the planning permission."

30 51. After the sentence quoted by Mr Heggie (which with that quoted by me forms the first paragraph of §14170), the rest of §14170 consists of examples of the way that Note 2(c) had been expressed in planning permissions. Two examples follow: they use the word "ancillary" and also refer to the building "not being severed as an independent and unconnected residence" and that the building "shall at no time be sold or let as a separate dwelling". §14170 then goes on to say:

35 "The reason for imposing *a restriction in a planning notice* is often a good aid to deciding if it amounts to a Note 2(c) prohibition. In cases of uncertainty as to whether or not *a restriction* amounts to a Note 2 (c) prohibition, the planners' views should be sought by the trader." (my emphasis)

40 52. After this §14170 covers model planning conditions. It says:

“Planning Permission Circular 11/95, issued by the Office of the Deputy Prime Minister, provides the following model *planning condition* where the creation of an additional dwelling would be unacceptable for planning purposes:

5 The extension (building) hereby permitted *shall not be occupied at any time other than for purposes ancillary* to the residential use of the dwelling known as [].

This model condition doesn’t meet Note 2(c).

10 Planning Authorities aren’t obliged to follow this *model condition* and can set their own *condition*. The Tribunal has examined alternative conditions in the cases below. Where a condition is framed in the same way, the Tribunal’s decision can be followed, except where indicated. If you are in any doubt about whether a covenant, *planning consent* or similar document meets Note 2(c), you should consult the Construction
15 Unit of Expertise.”

53. The Tribunal cases referred to are 13 in number and all date from before 2009. What §14170 contains from each is the terms of the planning consent and how it deals with separate use and disposal.

20 54. It is obvious then that the whole of §14170 is predicated on the assumption that what Note 2(c) is all about is the terms of the planning consent, and the need to establish whether the wording of that consent permits separate disposal and use or not. This is not a surprising assumption as it is a correct understanding of the words in Note 2(c), which could hardly be plainer. There is nothing in §14170 which could possibly have enabled Mr Heggie to rationally conclude that the presence of the word “ancillary” in
25 the consent was determinative. Yet that is not all: even if the word “ancillary” was determinative, Mr Heggie was wrong to say as he did that the planning *application* had anything to do with the question. Worse still, as the appellant pointed out, the word “ancillary” is nowhere to be found in the planning consent.

30 55. In my view it was not unreasonable for Mr Heggie to raise a new point in the way he did. Although the claim refusal letter gave the appellant two options if he disagreed: to have a review from an independent officer, or to go directly to the Tribunal he chose neither but asked for a reconsideration. This is what Mr Heggie did. What I do not know is whether Mr Heggie would have raised the “separate disposal and use” point of his own motion if the appellant had not, as he did, sought to rebut the suggestion not
35 made, that separate disposal and use was not prevented. The appellant did this it seems because the refusal letter did set out the terms of Note 2(c) though only in the context of reciting Note 2 as a whole: the refusal letter did not refer to Note 2(c) as one of the grounds for refusal. What was unreasonable was the content of Mr Heggie’s letter with, in particular, its seriously misleading part-quotation from the VCONST Manual.

40 56. That however is not the end of Mr Heggie’s participation in conduct that might be thought (and was thought by the appellant) to be unreasonable. Having received the appellant’s bemused reply in which he once again pointed out the absence of any term in the consent on the subject and the absence of the word “ancillary”, HMRC insisted that the appellant had to demonstrate that the “annexe” could be used or sold separately

“and when such right was granted”. This shows a total lack of understanding of what Note 2(c) requires and of the planning system which, as §14170 shows, will impose, where appropriate, a restrictive condition, not grant a right which absent any restriction the owner has anyway. The permission to carry out works is nothing to do with whether the owner has the right to use or dispose of the building once erected, unless there is a condition which qualifies the owner’s rights.

57. Notwithstanding that the subsequent review letter failed to mention Note 2(c) at all and that the Grounds of Appeal reiterated the absence of any restriction, Mr Heggie took it on himself to persuade the appellant to try to seek further evidence from the planning authority. HMRC say he agreed; the appellant says it was under duress. What followed the agreement is telling. The appellant included in his bundle not only the Exit Agreement but also emails between himself and Mr Heggie to this effect:

58. The appellant told Mr Heggie that the local authority would not issue a letter as required by HMRC but would issue an LDC. The local authority had told him that there was no relevant condition and if it had been the authority’s requirement it would have been in the permission.

(1) Mr Heggie said an LDC was not necessary as it wouldn’t show the position at the right time, and he still needed a letter from the local authority.

(2) The appellant said that an LDC was necessary as the local authority wouldn’t issue a written reply other than an LDC.

(3) Mr Heggie said an LDC would not demonstrate the requirements needed for the claim to be eligible, as it would not demonstrate that the building can be sold etc separately.

(4) The appellant said that Mr Heggie had placed him in an untenable position, in that he would not accept an LDC, and an LDC is the only document the local authority would give in writing.

(5) Mr Heggie replied that the requirement for confirmation was not meant to be unreasonable or obstructive, but his decision could not be revisited without it even though he recognised that the appellant might not be able to obtain it.

59. In my view the requirement was unreasonable and wholly misguided. It was not necessary because Note 2(c) was not in issue at the Tribunal and it was in any event based on a misunderstanding of the law and HMRC’s own guidance.

60. I must consider whether the unreasonable conduct I have found was in the course of defending the proceedings. The original letter from Mr Heggie was clearly before the start of the proceedings, but the ADR and post-ADR matters were after the start of proceedings. I add that if the conduct after the start had been less serious than I have held it to be so that I was in some doubt about whether it amounted to unreasonable conduct, I may well have thought that the conduct of Mr Heggie before the start would have tipped the balance as being part of an course of unreasonable conduct. But that is not a decision I have to take.

61. It follows from my decision on item 3 that my finding here adds nothing further to what can be claimed. If I am wrong about item 3 and it was not unreasonable for HMRC to take that matter to the Tribunal, I would have needed to consider whether to award the appellant some of his costs – those that can be specifically related to this issue, if necessary by apportionment. I am aware of course that in *Catană*, Judge Bishopp referred to an unmeritorious case being defended as giving rise to an award of costs against HMRC, but I do not read what he said as necessarily preventing an award against HMRC even if they win the case on a meritorious point, but have caused an appellant to spend sums in dealing with hopeless arguments that HMRC persisted in pursuing until at the doors of the Tribunal. But again I do not need to do so.

62. My finding on item 4 then simply reinforces my finding on item 3.

(5) Misunderstandings and Confusion

63. With one exception these are all matters of incompetence rather than unreasonable conduct. The exception is the misuse of VCONST14170 which I have covered in relation to item 4.

(6) Annexe

64. This was another subject which was pursued by HMRC but not included in the issues for the hearing. Given my findings about items 3 and 4 I simply say that HMRC seemed to have pursued this issue beyond the point when they should have stopped doing so.

(7) ADR (Alternative Dispute Resolution)

65. Given my findings on items 3, 4 (particularly) and 6 this adds nothing in itself to the catalogue of unreasonableness.

(8) Respondent's Statement of Case

66. This was I agree a confusing and ill-written and constructed document. The main problem was that it obscured the fact that the only issue for the hearing was the Note 2(d) one. But given my findings on items 3 and 4 this adds nothing in itself to the catalogue of unreasonableness.

(9) Respondents Assumed Role as a Planning Officer

67. I agree that HMRC seem to have unreasonably arrogated to themselves an ability to pronounce on planning law and interpret planning applications and consents, but given my findings on item 4 this again adds nothing in itself to the catalogue of unreasonableness.

Conclusion

68. As I have decided that HMRC's conduct in defending the proceedings was unreasonable I then need to decide whether to exercise my discretion to award the appellant his costs. This discretionary aspect of the exercise I am engaged on was considered in *Willow Court Management Co (1985) Ltd v Alexander and ors* [2016] UKUT 90 (LC) (Judge Martin Rodger QC (Deputy President of the Upper Tribunal (Lands Chamber)) and Judge Siobhan McGrath (President of the First-tier Tribunal

(Property Chamber)) (“*Willow Ct*”), one of the cases also considered by Rose LJ in DCL – see §9.

69. In *Willow Ct* the Tribunal said:

5 “28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

...

20 30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.”

30 70. I do not set out the circumstances referred to in [30] of *Willow Ct* as they related mainly to claims for costs *against* an unrepresented litigant. Here it is a claim by an unrepresented litigant against an agency of Government with its own lawyers and ready access to counsel. That itself is one of the circumstances I take into account and that inclines me to exercise my discretion in the appellant’s favour. I also consider that there was a serious effect on the appellant, not only in terms of cost but of anxiety. In his application for costs the appellant said this:

“12. Other Costs

35 After the hearing an unfortunate incident transpired. The Appellant and his wife went into John Lewis where the Appellant suffered a memory loss event (called transient global amnesia). Essentially all recollection of the day’s events in court and other non-related experiences could not be recalled. A John Lewis first-aider arranged for a taxi to take the Appellant and his wife to A&E at Addenbrookes where he was attended to and apparently recovered. Whilst there do not appear to be any side effects, the risk of a stroke is of concern to the family – please refer to attached Discharge Summary. According to the consultant at Addenbrookes this incident was probably due to the stress of the hearing.

The Appellant does not know if he is entitled to claim for this event and if so what quantum. He will abide by whatever the court decides.

71. I did not consider that this unfortunate event could be said to itself amount to unreasonable conduct by HMRC⁷. The most that can be said is that HMRC's conduct in taking the case to a hearing caused the appellant stress which may have contributed to his transient global amnesia. But it does seem to me to be a relevant circumstance to weigh up in deciding to exercise my discretion.

72. Having taken all the circumstances into account I consider that the effect of HMRC's conduct on the appellant was serious and that I should exercise my discretion in the appellant's favour. I therefore award him his costs.

The costs claimed

73. I now make a summary assessment of the costs, as I see no need to refer this relatively small and straightforward case

74. The appellant produced a schedule of his costs with his application. The costs he claims are for his own work on the appeal starting with the date of the submission of his appeal to the Tribunal and in his application he has used a chargeout rate of £65 per hour, which is what he, as a retired architect, charges local residents for the minor planning and architectural work he still does.

75. I considered that I should be guided⁸, when making a summary assessment, by the costs rules of the courts set out in the Civil Procedure Rules ("CPR") and in particular in CPR Part 44 – General Rules about Costs – and Part 46 – Costs Special Cases – and the associated Practice Directions.

76. Rule 44.2 CPR says:

“(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

⁷ In their submissions on the amount of the claim HMRC said that any expenses or damages arising from the “alleged hospital incident” do not form part of, nor are they incidental to, the costs of the appeal. I do not need to consider whether costs incurred *after* a hearing can be incidental on the basis of the DCL decision because the appellant did not include any costs for this incident in his application. I do however agree with the appellant that use of the adjective “alleged” by HMRC is unnecessary and implies that despite the evidence produced by the appellant there was some doubt about his veracity.

⁸ That I should be so guided was also urged on me in HMRC's submissions on the amount of the costs, received after I had informed both parties that I had found for the appellant in principle and that I would only assess his costs at the rate of £19 per hour in accordance with the CPR.

77. Rule 46.5(3) CPR (Litigants in Person) provides that:

“(3) The litigant in person shall be allowed –

(a) costs for the same categories of –

(i) work; and

5 (ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person’s behalf;

...

10 (4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be –

(a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or

15 (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46.”

78. Practice Direction 46 at paragraph 3.4 says:

20 “3.4 The amount, which may be allowed to a self represented litigant under rule 45.39(5)(b) and rule 46.5(4)(b), is £19 per hour.”

£19 per hour is therefore the rate I award.

79. The appellant’s revised schedule of costs, including pre-appeal costs and a new entry for the costs of preparing the application and the two claims schedules, shows what he is claiming for broken down as follows:

Date	Item	Hours
3/5/17	1. Respond to HMRC penalties letter dated 2/5/17	3
3/5/17	2. Respond to HMRC letter dated 2/5/17	16
13/6/17	3. Respond to HMRC letter dated 31/5/17	6
26/6/17	4. Respond to HMRC letter dated 13/6/17	6
4/9/17	5. Notice of Appeal to Tribunal	2
3/11/17	6. Photographic evidence - prepare	6
4/12/17	7. ADR submission	12
18/12/17	8. Prepare for ADR - review correspondence & notes	6
19/12/17	9. ADR (by telephone)	4
13/2/18	10. Prepare for UDC Planning Authority visit - review approvals and notes	4
14/2/18	11. Visit UDC Planning Authority	2
14/2/18 - 9/3/18	12. Correspondence with HMRC re Lawful Development Certificate	6
29/3/18	13. Notify FTT that ADR unsuccessful	1
29/6/17 - 16/3/18	14. Research precedent cases - 9 No. reviewed	24
4/2/19	15. Prepare SoC for FTT Hearing & review all documentation	40

11/2/19	16. Attend FTT Hearing in Cambridge	5
	17. Time to prepare submission for pre-appeal costs	7
	18. Time to prepare submission for post-appeal costs	30
	Total hours	180
	Hourly rate	£19
	Total claim	£3,420

80. The previous claim was for 112 hours (items 5 to 16) at £65 per hour totalling £7,280.

81. In their representations about the amount of the claim HMRC argue that items 1 to 4 in the appellant’s claim relate solely to the “internal appeal” [a typo I think for “internal review”] and are therefore not costs “of or incidental to” the appeal to the FTT. They base this argument on what Rose LJ said in *DCL* at [39]:

“I also disagree with the implication of Judge Mosedale’s test that the costs of the internal review itself can never be incidental to the appeal because they are incurred to bring the dispute to an end without litigation. It is the nature of the work done and the scope of the ultimate appeal that determine whether those costs are incidental to the appeal, not the subjective intention of the party when incurring the costs. For example, materials gathered or produced for the purpose of the internal review may then be recycled in the appeal before the FTT. Those costs are clearly of and incidental to the appeal even though they were largely incurred at the earlier stage.”

82. It is apparent to me from what was said by the appellant at the hearing and in particular from a close scrutiny of the documents in the case that the work done by the appellant from his response to the refusal of the claim to the submission of the appeal to the Tribunal was clearly incidental to the hearing itself. Documents he prepared prompting the reconsideration by Mr Heggie and further correspondence and documents prepared for the review process clearly had a close connection to the arguments that the appellant thought he had to put before the Tribunal and which he included in his own statement of case. I therefore reject HMRC’s arguments on this point.

83. In relation to the items in the appellant’s application (as supplemented), HMRC suggest the following time as appropriate:

Item	Hours in claim	HMRC hours
1	3	0.1
2	16	1
3	6	0.5
4	6	0.5
5	2	4
6	6	0.5*
7	12	(
8	6	(10**
9	4	(

10	4	0***
11	2	0***
12	6	1*
13	1	0.1
14	24	0
15	40	10
16	5	5
17	7	(3#
18	30	(
	180	

* (Item 6) HMRC put the appellant to “strict proof as to the nature of the photographic evidence” referred to, with 0.5 hours suggested as a compromise. In relation to item 12 HMRC put him to “proof” (not “strict proof”) “as to how many letters and/or emails were sent during this period, with 1 hour suggested as a compromise.

** HMRC offer 10 hours for items 6, 7 & 8 combined.

*** HMRC say 10 hours was claimed for items 10 and 11 and that was disproportionate. Both the original claim and the revised schedule show 6 hours.

HMRC offer 3 hours for items 17 & 18 combined.

10 **Assessment of the claim**

84. I first make the point that in a summary assessment of costs I do not think it is appropriate for HMRC to put the appellant to “proof” or “strict proof” of any matters put forward in an application. Under the Rules HMRC may make representations about the principle of an award of costs and about the amount, both of which they have done.

15 I am aware that in their initial representations on the principle HMRC asked for a detailed assessment of costs by a Court but I have exercised my discretion to make a summary assessment and HMRC did not renew their request once I had told them I would make a summary assessment.

20 85. I bear in mind that although the appellant is a litigant in person he has clearly done substantial research into the case law, both that cited by HMRC and by the Tribunal, as well as into the planning rules and that he has produced thorough and detailed responses to all points raised by HMRC. This thoroughness, and the Tribunal’s experience of hearing the appellant at the hearing, leads me to the view that I should accept the appellant’s evidence of the time it took him to prepare the material in question unless from my scrutiny of the relevant documents in the papers it seems to me that the time taken was disproportionate to the matter in issue. This it seems to me is consistent with the approach in CPR44.4(1)(a)(ii) – costs to be proportionate and reasonable in amount – and CPR44(2)(b) – benefit of doubt to given to the receiving party in an assessment of the standard basis (which this is). Here the time taken has a direct bearing on the amount.

86. I now consider those items which HMRC do not accept in full.

87. *Item 1:* in my view 2 hours is not an unreasonable time to spend responding to a letter from HMRC threatening penalties for undefined reasons, asking for responses to 6 questions by return of post and attaching two Compliance Check Factsheets of

substantial length and importance (Human Rights Act and Penalties for Inaccuracies in Returns and Documents). HMRC's suggestion of 6 minutes based on CPR PD47 paragraph 5.22(1) is laughable – that is what a lawyer (or clerk) is expected to take to deal with a routine email or piece of correspondence. This was anything but routine.

5 88. *Item 2:* I do not consider that 16 hours was a disproportionate amount of time to take to understand HMRC's letter of refusal (a substantial task in itself) and to research and create this highly detailed technical response and to check and proof read it.

89. *Item 3:* I do not consider that 6 hours was a disproportionate amount of time to take to understand Mr Heggie's reconsideration letter and to research and create this highly detailed technical response and to check and proof read it.
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90. *Item 4:* Given that much of the material in the letter was repeating what the appellant had already said to Mr Heggie I agree with HMRC that 6 hours, the same as for Item 3, seems excessive and disproportionate. I allow 2 hours.

91. *Item 6:* It seems to me that 6 hours to prepare photographic evidence for the ADR is a disproportionate amount of time. I assume the photographs are those at pages 26 to 30 of the appellant's statement of case and some were clearly taken during the works and before the ADR was arranged, so that they existed on the appellant's computer or on a card in his camera. I allow 2 hours.
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92. *Items 7, 8 & 9:* I am at disadvantage in that I have not seen any ADR papers apart from the Exit Agreement. HMRC have not said why they think 22 hours was disproportionate but 10 was not, for example by comparing the 12 hours for preparation claimed with the time taken by Mr Heggie and other HMRC staff to prepare their submissions for the ADR. I cannot say that the 22 hours was disproportionate, especially bearing in mind CPR44(2)(b).
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93. *Items 10 and 11:* There seems to be some confusion here by HMRC. Their representations say that the items relate to "Visit by Planning Authority". In fact it was a visit by the appellant to the authority. Perhaps HMRC were confused by the heading in the appellant's statement of case "visit by planning authority" but that related to a unscheduled visit to the property on 25 May 2018 as item 7 and "Annexure" A8 of the appellant's statement of case shows. The claim by the appellant is for 4 hours preparation and 2 hours meeting, not 10 hours in total as HMRC say. Given this discrepancy and misunderstanding I cannot see any basis for holding that the 6 hours claimed was disproportionate.
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94. *Item 12:* Having seen the email chain referred to I agree with HMRC that 6 hours was disproportionate: I award 1.5 hours.
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95. *Item 13:* This seems to be one email from the appellant and a response from Mr Heggie which is self-explanatory. I award 30 minutes.

96. *Item 14:* HMRC characterise what the appellant says was "research precedent cases" was "routine research" and not reasonably claimable at all or, alternatively, that 24 hours claimed was unreasonable. To call this "routine research" is ridiculous, and
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the compiler of the representations seems to have had no idea of what the appellant did, as explained in part 5 of his statement of case. There he refers to having sought to discover whether any decision of the Tribunals dealt with the interpretation of planning drawings and to his having considered 6 decisions of Tribunals which he names. It is clear he has read and understood them and is capable of analysing what they say. I myself had to research this case law to enable me to write the FTT Decision. Two of the cases the appellant cites and analyses were not mentioned by HMRC so I needed to examine them closely. It did not take me 24 hours to examine the 6 cases to see if they did stand for what the appellant said they did, but I am familiar with the law and with understanding Tribunal cases: the appellant isn't, so I cannot say that 24 hours for this exercise was disproportionate, again bearing in mind CPR44(2)(b).

97. *Item 15*: The statement of case produced by the appellant is an impressive document of 69 pages of which 8 consist of the appellant's own statement and the rest of annexed documents and photographs. It includes the appellant's response to HMRC's statement of case. But much of what is in this statement was, to use Rose LJ's phrase in *DCL*, "recycled" from earlier correspondence. I think that 40 hours is disproportionately long for this exercise. HMRC suggest 10 but I will award 20.

98. *Items 17 & 18*: The appellant has added these in his second revised claim saying that he does not know if they are allowable. HMRC do not argue that they are not, so I consider them. The original application is a lengthy document detailing very many ways in which HMRC are said to have been unreasonable in their conduct. Again much is recycled here and I agree with HMRC that 30 hours was disproportionate, and I allow 10. Seven hours also seems disproportionate for the relatively simple supplementary application and I allow 2.

99. I add that it should not be thought by the appellant that I consider he is to blame in any way because I have reduced his claim. Since he was not (I assume) keeping contemporary records of his time spent on the claim and its aftermath, the exercise of claiming must include a large element of guesswork and reconstruction of the past. And it may be that he did in fact spend all the hours he claims on this task. But there is a limit to the latitude I can allow a litigant in person who will in a task like this inevitably take longer than a lawyer or VAT expert. Clearly much thought and work has gone into ensuring the documents he sent to HMRC were clear, comprehensive and well argued, but I have decided in some instances that a reasonable litigant would have taken less time.

100. I have reduced the number of hours of work which the appellant has claimed by 62 hours from 180 to 118. I have stood back and looked at whether the overall result of my assessment still looks like a disproportionately high claim, but I do not think it is, having regard to the amount at stake and the other circumstances, again including CPR44(2)(b).

40 **Decision**

101. Under Rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 I order that HMRC pay an amount of £2,242 (118 hours at £19 per hour).

102. 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
5 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.

10 **RICHARD THOMAS**
TRIBUNAL JUDGE

RELEASE DATE: 04 SEPTEMBER 2019