[2014] UKUT 0175 (TCC)

Reference numbers: FS/2012/0001-5

PENSIONS REGULATOR – Financial support direction – procedure – whether Targets should be barred from pursuing parts of their pleaded cases on grounds that previous case management decision had created an issue estoppel – no - whether to allow issue to continue to be pleaded would be an abuse of process – no – application dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GRANADA RENTAL & RETAIL LIMITED
GRANADA MEDIA LIMITED
GRANADA GROUP LIMITED
GRANADA LIMITED
ITV plc **Applicants**

- and -

THE PENSIONS REGULATOR **Respondent**

- and -

BOX CLEVER TRUSTEES LIMITED **Interested Party**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 27 February 2014

Michael Furness QC and Edward Sawyer, Counsel, instructed by Hogan Lovells International LLP, for the Applicants

Jonathan Hilliard and Ben Faulkner, Counsel, instructed by Eversheds LLP for the Interested Party

Nicolas Stallworthy QC and James Walmsley, Counsel instructed by the Pensions Regulator, for the Respondent

DECISION

1. This decision relates to an application made by the Respondent, the Pensions Regulator ("TPR") for a direction to bar the Applicants (the "Targets") from pursuing parts of their Reply to TPR's Statement of Case which has been filed in these references. Box Clever Trustees Limited (the "Trustee"), the Trustee of the Box Clever Group Pension Scheme ("the Scheme") to which these references relate, has been joined to the reference as an Interested Party and supports TPR's application.

2. TPR makes its application in consequence of my decision released on 13 December 2013 ("the Decision") in which, *inter alia*, I decided to refuse the Targets' application for disclosure against TPR relating to TPR's consideration as to whether regulatory proceedings should be brought against the Granada Group's partner in the Box Clever Joint Venture, Carmelite, in respect of the Joint Venture. That application also sought an explanation of why TPR decided not to pursue Carmelite for a financial support direction ("FSD") to be issued pursuant to s43 of the Pensions Act 2004. I refer to that application as "the Carmelite Application".

3. In the references TPR is seeking FSDs against the Targets, which are five companies in the ITV Group, including some of the companies from the Granada Group now forming part of the ITV Group. It is part of the Targets' case in this reference that one of the reasons why it is unreasonable to pursue them for an FSD is because TPR has decided not to pursue the other Joint Venture partner, Carmelite, for an FSD. The Targets contend that this displays unreasonableness and inconsistency on TPR's part. Further details of the reasons why the Targets say TPR has acted unreasonably and inconsistently are set out in paragraphs 48 and 49 of the Decision.

4. I dealt with the Carmelite Application very briefly in paragraphs 189 to 192 of the Decision as follows:

> "189. In my view this application is misconceived. First, it would be invidious to ask the Tribunal in effect to conduct an enquiry as to whether the regulatory judgment of TPR in deciding not to pursue another entity, even one which potentially had joint and several liability in respect of the deficit in the Scheme, was right. The Tribunal has a statutory jurisdiction which is limited to determining what is the appropriate action to take in relation to the references that are made to it. If a party to a reference is of the view that TPR has failed in its duty by not pursuing a different entity, or not pursuing it quickly enough, then that is a matter that it may be able to test through an application for judicial review in the administrative court, although it was recognised by Mr Furness that the time to take that course had long since passed.
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> 190. Even if it were appropriate for the Tribunal to carry out such an enquiry, it is hard to see how the outcome of that enquiry should inform the question as to whether it was appropriate to issue an FSD against the Targets. As Mr Stallworthy put it, if TPR was right not to pursue Carmelite, it did not make it wrong to pursue the Targets. All this means is that TPR was not justified in pursuing the other party to the Joint Venture.

If TPR was wrong not to go after Carmelite it should not compound the error by not pursuing the Targets.

191. This latter point is an illustration of the fundamental point, which is sufficient to defeat the Carmelite application. This is, as Mr Stallworthy submits, that the question as to whether Carmelite should have been pursued or not is irrelevant to the issue as to whether in relation to the facts and circumstances that relate specifically to the Targets, it is reasonable to impose an FSD on them. No comparison with the position of Carmelite should influence that stand alone decision. It follows that I reject Mr Furness's submission that in assessing whether it was reasonable to impose an FSD on the Targets a relevant factor is whether it was unfair to the Targets that Carmelite was not pursued.

192. Consequently I must dismiss the Carmelite Application."

5. On 19 December 2013 TPR made an application for a direction barring the Targets from pursuing one of the grounds set out in their reference notice for disputing TPR's determination to issue an FSD against the Targets, namely the contention that TPR ought to have concluded that it was unfair and thus unreasonable to issue an FSD to the Targets given the failure by TPR to pursue Carmelite for an FSD. TPR also seek to bar the grounds, allegations and arguments expanding on this ground filed in the Targets' Reply to TPR's Statement of Case in the references.

Basis of TPR's application

6. The reasons put forward by TPR to support its application are:

(1) In paragraph 191 of the Decision the Tribunal determined that the question as to whether Carmelite should have been pursued or not is irrelevant to the issue as to whether in relation to the facts and circumstances that relate specifically to the Targets, it is reasonable to impose an FSD on them;

(2) That determination gives rise to an issue estoppel binding on the parties for the purposes of the substantive hearing of the references;

(3) All that the direction requested seeks to do is spell out consequences of the issue estoppel so as to ensure that the case is managed effectively and efficiently and further time is not occupied on matters already found to be irrelevant; and

(4) Even if the Decision did not give rise to an issue estoppel, directions should be given to avoid re-litigation of the Carmelite issue in the light of the Tribunal's express findings in paragraph 191 of the Decision.

7. The Targets contend that TPR cannot establish an issue estoppel in the present case because:

(1) the Tribunal's decision to refuse the Carmelite Application was not a final decision on the merits; and

(2) the Tribunal's conclusion on relevance in paragraph 191 of the Decision was not necessarily decided as part of the legal foundation of the Decision.

Furthermore, they contend that it would be unjust to rely on an issue estoppel in circumstances where the Tribunal only needed to consider TPR's submissions that the Carmelite issue was irrelevant to the extent necessary to inform its exercise of discretion on an interlocutory case management decision on disclosure; it did not need to examine the merits of the Targets' case on Carmelite with the intensity that would have been necessary if TPR had applied to strike it out (in which event the Targets could have adduced evidence; and the Tribunal would have needed to consider the totality of the Targets' case on "reasonableness" and be certain that the Carmelite aspect of the defence was bound to fail).

Issue estoppel

8. Issue estoppel is a well-established part of the law of *res judicata*. It appears to me from the authorities I was taken to that in order for an issue estoppel to arise, three conditions need to be satisfied:

(1) the same question must previously have been decided;

(2) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and

(3) the parties to the prior judicial decision must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised.

See for example, *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853 (HL) at 935A-C per Lord Guest (on which the above formulation is largely based) and the well-known exposition of the subject by Diplock LJ in *Thoday v Thoday* [1964] P 181 at 197-198.

9. The fact that the decision which is said to create an issue estoppel was an interlocutory decision is not a bar to its creation. I was referred to *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, CA where Diplock LJ referring to his judgment in *Thoday v Thoday* said at 642 B to E:

> "In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument to adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence. …".

10. This was further illustrated in a case on extradition, *R v Governor of Brixton Prison ex parte Osman* [1991] 1 WLR 281. This decision of the Divisional Court concerned a discovery application in a *habeas corpus* application resisting extradition, which was dismissed on the basis that the nine documents relied upon as demonstrating some foundation for the allegations made were irrelevant. Subsequently, the Secretary of State applied for parts of Mr Osman's witness statement referring to the documents to be struck out on the basis of public interest immunity and irrelevancy. This application was successful on the basis that there was an issue estoppel precluding any assertion that the documents were relevant. Mann LJ said at 291 C to D:

> "In regard to issue estoppel, no peculiarity of that doctrine has been asserted in regard to habeas corpus proceedings. I do not think that there is any. The issue estoppel in this case is said to arise from the decision of this court on 20 June 1990. That was a decision on an interlocutory application. That it was a decision on an interlocutory application does not, in my judgment, disable it from an ability to give rise to an issue estoppel. I can see no reason in principle why a final decision upon an interlocutory application should not be in this regard treated as is any other decision."

Mr Stallworthy relies on this case as being analogous to the situation in the application being considered here.

11. The court concluded that the issue estoppel had arisen in that case because the irrelevance of the documents had been an "essential element" in the disposition of the application for discovery and consequently there was an issue estoppel, which could only be avoided if new material was produced: see Mann LJ at 292G.

12. It is however important to look at all the circumstances regarding the decision which is said to create an issue estoppel and whether it can be said to have given rise to a final decision on the issue concerned. This was illustrated by the Canadian case of *Pocklington Foods Inc v The Queen in right of Alberta* 123 DLR 141, a decision of the Alberta Court of Appeal. In this case the Respondent's disclosure application had been largely unsuccessful, but the Respondent asked the judge to review his decision. The court rejected the Crown's contention that the matter was *res judicata* on the following basis:

> "McDonald J relied on the decision of this court in *Talbot v Pan Ocean Oil Corp.* (1977), 4 C.P.C. 107, 3 Alta. L.R. (2d) 354, 5 A.R. 61 (S.C.A.D.), in concluding that the principles of *res judicata* and issue estoppel do not apply to interlocutory procedural motions. The Crown seeks to distinguish the *Talbot* decision on the basis that *Talbot* applies only to cases of insufficiency or imperfection in the material relied on for the earlier application and does not apply to matters decided on the merits of the application before the court. We agree with McDonald J that the judgment of this court in *Talbot* decides the issue. *Res judicata* and issue estoppel do not apply to procedural interlocutory motions. While in the judgment of Clement J.A. in *Talbot,* there is considerable discussion of the position where a decision is made on the adequacy of the material rather than on the merits of the application, when read as a whole the decision supports the position taken by McDonald J in this case."

13. Mr Furness relies on this case for the proposition that issue estoppel does not apply to a procedural interlocutory application, as opposed to an interlocutory application such as that considered in *Fidelitas*, which decides an issue after arguments on the merits of the issue and is thus more akin to a decision on a preliminary issue. The issue in *Pocklington Foods* could be revisited because it was an interlocutory procedural application, which was always open to review.

14. Mr Furness also referred me to the Australian case of *Blair v Curran* (1939) 62 CLR 464 where Dixon J, in a passage which has often been cited with approval in English cases, said at 531-533:

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
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> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J in *R v Inhabitants of the Township of Hartington Middle Quarter (1)*, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.
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> In the phraseology of Lord Shaw, "a fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established (*Hoystead v Commissioner of Taxation (2)*). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.
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> The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or

necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order."

Mr Furness cites this case to illustrate the principle that for an issue estoppel to arise the earlier determination must have been fundamental and necessary to the decision made.

15. In the light of the principles which emerge from these cases I turn to consider TPR's application bearing the following questions in mind:

(1) Can the decision on the Carmelite Application which was an application for disclosure, be regarded as a final decision on the merits of the issue raised by the Targets in its reference notice, namely that one of the reasons it is not reasonable to issue an FSD is that TPR did not pursue Carmelite?

(2) Was the decision on the Carmelite Application fundamental and necessary to the decision on the merits of the Carmelite issue as raised by the Targets in their reference notice?

Discussion

16. Mr Stallworthy presents his case on two grounds; the first is on the question as to whether an issue estoppel arises (his primary ground) the second is whether it would be an abuse of process to allow the issue to be re-litigated. The reasoning set out below is equally applicable to both grounds.

17. Mr Stallworthy relies on the emphatic way in which I dismissed the Carmelite application in paragraphs 190 to 192 of the Decision which had been clearly put on the basis that the underlying issue was not relevant to the question of reasonableness. He submits that in these paragraphs I directly determined that the question whether Carmelite should have been pursued or not is irrelevant to whether it is reasonable to impose an FSD on the Targets. The determination of the issue was explicitly stated to be "fundamental" and "sufficient" to defeat the Carmelite Application and it was expressly in consequence of that determination of the issue that the Carmelite Application was dismissed.

18. Mr Stallworthy therefore submits that as a matter of sensible case management, a direction should be made now which reflects the irrelevance of whether or not Carmelite should have been pursued and avoids time and money being wasted on preparation of evidence and for a final hearing on irrelevant matters.

19. Mr Stallworthy therefore contends that my findings in paragraph 190 to 192 of the Decision amounted to a decision determining the Carmelite issue other than on purely procedural grounds and therefore is a decision on merits for the purposes of issue estoppel. It amounted to a decision that disclosure should not be granted because the Carmelite issue was fundamentally irrelevant and determined a point of principle.

20. I accept, as Mr Furness does, that I did conclude that the Targets' arguments about whether Carmelite should have been pursued are irrelevant. I also accept that it would have been possible to have determined the Carmelite issue generally and not merely the Carmelite Application on a strike out application on the basis that it had no reasonable prospects of success. Indeed it would have been logical to have considered the issue on that basis at the case management hearing in September 2013 alongside the other issues raised on the pleadings in this reference, and TPR could have done so at that point, but made a tactical decision that it would raise the issue after the Carmelite Application had been determined.

21. It is therefore the case that it was not the purpose in hearing the Carmelite Application that the merits of the Carmelite issue as a whole should be determined. Mr Stallworthy seeks to extrapolate from my reasoning as to why the Carmelite Application was being dismissed that the issue should be taken to have been determined.

22. However, as Mr Furness points out, the Carmelite Application was not extensively argued, as it undoubtedly would have been had the issue been on the table as, in effect, a preliminary issue. I therefore accept the distinction he draws between an application that has been set up for hearing as a purely procedural one, as the Carmelite Application was, dealing with the question of disclosure, and a hearing that has been set up to argue the merits of a preliminary issue. As Mr Furness observed, TPR opposed the Carmelite Application with some extremely broad-brush submissions that the pleaded Carmelite arguments were irrelevant, which were accepted.

23. In my view Mr Furness is correct when he says that I only needed to consider these submissions to the extent necessary to inform my decision on whether to exercise my discretion on an interlocutory case management decision on disclosure. As Mr Furness correctly submitted, there was no examination of the merits of the Targets' case on Carmelite with the intensity that would have been necessary if TPR had applied to strike it out. In that scenario, the Tribunal would have needed to consider the totality of the Targets' case on reasonableness and be certain that the Carmelite aspect of the defence was bound to fail.

24. In my view the decision in *Osman* can be distinguished on this basis. *Osman* proceeded on the basis that the original decision which was stated to have created an issue estoppel was a final decision on disclosure and the further application was seeking to re-litigate the same issue. In this case, as Mr Furness accepts, the Targets cannot seek to re-litigate the Carmelite Application, being an application for disclosure, but the question as to whether to strike out the Targets' pleadings on the underlying issue has not been specifically litigated. In my view the reasoning in *Pocklington* set out in paragraph 12 above applies, what has been determined is a procedural interlocutory application, not an interlocutory application on the merits.

25. In any event, my findings in paragraphs 190 to 192 of the Decision were not necessary to dismiss the Carmelite Application. My reasoning starts in paragraph 189, where I refer to it being invidious to ask the Tribunal in effect to conduct an

enquiry into the regulatory judgment of TPR, which it was not equipped to do, and it was clear from the fact that I put this reason first, that it was at the forefront of my mind. That indicates that I was focusing on whether it was appropriate to order disclosure rather than specifically on the merits of the issue itself. I therefore accept Mr Furness's submissions that following the reasoning in *Blair v Curran,* quoted in paragraph 14 above, the reasoning on relevance was not necessarily the foundation of the decision on the Carmelite Application.

26. There is also strong force in Mr Furness's submission that if the Targets were precluded from pursuing the Carmelite issue now then it would be unjust because the Targets would be precluded from having the opportunity of pursuing before an independent judicial tribunal all of the elements of their case on reasonableness which they advanced before the Determinations Panel. I accept that if I were to preclude those arguments now, I would be acting inconsistently with the principles underlying the Decision regarding the scope of the Tribunal's jurisdiction, which are that a party should be free to present its case in reliance on any facts and circumstances that were within the scope of the allegations made in the Warning Notice and which were canvassed before the Determinations Panel: see paragraph 114 of the Decision.

27. Both Mr Stallworthy and Mr Hilliard emphasised the need not to have the Tribunal consider issues that have been found to be irrelevant. Mr Hilliard in particular expressed concerns about both TPR and the Trustee having to consider what evidence would need to be adduced for the issue at trial.

28. In my view these concerns are overstated. TPR and the Trustee were required to disclose the documents on which they wished to rely in the reference at the time they filed their pleadings, and the Targets were required to do the same in relation to their Replies. The Targets sought to expand the documents to be put in evidence through the Carmelite Application but that failed. Any attempt to do so again through the "back door" will fail as that would amount to a re-litigation of the Carmelite Application. It is therefore the case that the Tribunal will consider the issue on the basis of whatever evidence is available within the scope of the disclosures already made, subject of course to any witness evidence which I suspect will largely refer to material already filed. I do not however consider that the consideration of the Carmelite issue in the context of all the issues which go to reasonableness alone will cause too much difficulty for TPR and the Trustee, but it should be open for example, for the Targets to argue that the fact alone that TPR did not pursue Carmelite, whether or not it was correct to do so, is a factor that the Tribunal should be able to consider in the overall mix.

29. It therefore follows that I answer the two questions I posed myself in paragraph 15 above in the negative and accordingly I dismiss the application.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE: 15 April 2014