[2016] UKUT 0221 (TCC)

Appeal number: UT/2014/0057

PROCEDURE - COSTS - application by Respondents to set aside protective costs order in favour of Appellant - application granted – whether Upper Tribunal has power to make protective costs and costs capping orders – yes – procedure and criteria for protective costs and costs capping orders

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

ROBERT DRUMMOND

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 21 April 2016

The Appellant in person assisted by Andrew Stephenson, as permitted by rule 11(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an application by the Respondents ('HMRC') to set aside my order, dated 24 September 2015, in relation to the costs of the proceedings in this appeal, which has yet to be heard. The order, made on the application of the Appellant ('Mr Drummond'), was that there would be no order as to costs save where a party or its representative has acted unreasonably within rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('UT Rules'). HMRC considered that the order was a Protective Costs Order ('PCO') of the type discussed by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600 ('*Corner House*'). In an application dated 22 October 2015, HMRC sought to have the order set aside on the basis that

(1) the Upper Tribunal ('UT') has no jurisdiction to make such an order; and

(2) in any event, the order should not have been made in this case.

HMRC abandoned the first ground for having the order set aside in their skeleton argument for the application hearing.

2. For the reasons set out below, I have decided that the order, dated 24 September 2015, should be set aside but that the UT has jurisdiction to make a PCO and other prospective orders in relation to costs. Although the original order has been set aside, I consider that Mr Drummond should be permitted to make another application for protection from costs if he wishes to do so in the light of this decision and that HMRC should have the opportunity to make submissions in response.

Background

3. Mr Drummond appealed to the First-tier Tribunal ('the FTT') against the refusal by HMRC of his claim for a refund of £14,240.79 VAT incurred by him on the construction of a house to be occupied by him and his family as their dwelling. The claim was made under section 35 of the Value Added Tax Act 1994 ('VATA94'). Section 35 VATA94 provides for the refund of VAT to persons constructing certain buildings, including a building designed as a dwelling. A building is not a 'building designed as a dwelling' where the separate use or disposal of the dwelling is prohibited by the term of any statutory planning consent (see note (2)(c) to Group 5 of Schedule 8 VATA94). The new house was built on a paddock adjacent to Mr Drummond's business, Evergreen Park, which is a site containing static retirement homes. Evergreen Park was owned by Evergreen Park Limited, of which Mr Drummond is a director, while the paddock was owned by Mr Drummond personally. The planning permission for the new house was subject to a condition that limited the occupation of the dwelling to a person solely or mainly employed or last employed prior to retirement at the caravan park business and any spouse, dependants, widow or widower of such person. HMRC took the view that the condition was a prohibition on the separate use of the new house which meant that it was not a building designed as a dwelling and did not qualify for a refund of VAT under section 35 VATA94.

4. In a decision released on 19 December 2012, with reference [2013] UKFTT 036 (TC), ('the Decision'), the FTT found that the restriction on occupancy in the planning permission effectively imposed a prohibition on the separate use of the house and

dismissed Mr Drummond's appeal. The case had not been categorised as a Complex case under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') and so no question of costs arose at that stage.

5. Mr Drummond applied to the FTT for permission to appeal against the Decision. He also applied for any decision in relation to permission to be stayed pending the outcome of his application to the planning authority for a retrospective variation of the planning consent to remove the condition. In December 2013, the planning authority granted Mr Drummond's application and removed the condition. By that time, however, the UT had released its decision in *HMRC v Asim Patel* [2014] UKUT 0361 (TCC).

6. Mr Patel had appealed to the FTT against HMRC's refusal to refund input tax incurred on building works claimed under section 35 VATA94. HMRC refused Mr Patel's claim on the ground that the planning permission obtained did not relate to the works undertaken. Mr Patel had obtained planning permission for an extension to an existing dwelling but it became clear when the building works started that it would be necessary to demolish and rebuild the dwelling. The planning authority did not object to the revised works and Mr Patel did not obtain a new planning permission. Mr Patel appealed to the FTT. The appeal was stayed to allow Mr Patel to obtain retrospective planning permission for the works, which he did. Following the grant of retrospective planning permission, the FTT held that the input VAT was repayable and allowed Mr Patel's appeal. HMRC appealed to the UT which held that retrospective planning permission did not assist in that case because Mr Patel had not obtained it until after the time limit for making a claim under section 35 VATA94 had expired. The UT did not express any view on whether the claim would have been upheld if the retrospective planning permission had been given in time to make a claim.

7. In a decision released on 1 October 2014, the FTT (Judge Jonathan Cannan), relying on *Patel*, refused Mr Drummond permission to appeal on the ground that planning permission had been obtained retrospectively. Judge Cannan pointed out in his decision that another appeal, which could be relevant to Mr Drummond's case, was before the UT. That case was *HMRC v Shields* [2014] UKUT 453 (TCC) and the decision was released on 24 October 2014. In *Shields*, the UT held that a condition of planning permission for a dwelling that requires it to be occupied by a person who works at a specified location prohibits the use of the dwelling separately from the specified location and that a building subject to such a condition was not a 'building designed as a dwelling'. The UT in *HMRC v Burton* [2016] UKUT 20 (TCC) reached the same conclusion on a condition of planning permission with the same wording as that imposed on Mr Drummond.

8. On 27 October 2014, Mr Drummond applied to the UT, under Rule 21 of the UT Rules, for permission to appeal against the Decision on four broad grounds. I considered the application on the papers and, in a decision dated 12 November 2014, granted Mr Drummond permission to appeal on the ground that it was arguable that the *Asim Patel* case could be distinguished. I refused permission to appeal on other grounds.

9. Mr Drummond asked for his application for permission to appeal on the other grounds to be reconsidered by the UT at an oral hearing. At that hearing, on 22 April 2015, Mr Drummond was assisted by a friend, Mr Andrew Stephenson, who spoke on

his behalf as he did at the hearing of this application. At that hearing, it became clear that Mr Drummond did not rely (or did not solely rely) on the retrospective grant of the planning permission but sought to argue that the planning condition was invalid or unenforceable from the start. Although it appeared that this point had not been argued before the FTT that the condition was invalid or unenforceable, I formed the view that the point could be raised on appeal in relation to the ground for which I had already given Mr Drummond permission to appeal as a possible distinguishing feature between Mr Drummond's case and *Asim Patel*.

10. In the earlier decision, I had pointed out that the usual practice in the UT is to order the unsuccessful party to pay the costs of the successful party and that, if he were to be unsuccessful in his appeal, Mr Drummond could be required to pay HMRC's costs. I repeated the warning at the oral hearing. Mr Drummond was very concerned that he might be required to pay costs.

11. In an email dated 12 September 2015, which was copied to the Solicitor's Office of HMRC, Mr Drummond asked the UT to consider making a ruling in advance on whether, if his appeal were to be unsuccessful, an award for costs would be made against him. Mr Drummond contended that the grounds of his appeal were unique and also of specific public interest and that it is essential for the matter to be heard. In an email to the UT, dated 15 September 2015, HMRC's Solicitor's Office stated:

> "Further to the Appellant's email, the Respondents do not propose to make submissions in response, unless the Tribunal considers that they would be of assistance. Accordingly, the Respondents respectfully await the Tribunal's communication on this point."

12. I regarded Mr Drummond's email as an application for a PCO. I was satisfied that the UT had the power under rule 10(5) of the UT Rules to make such an order. In *Asim Patel*, the UT had issued a decision on costs, [2014] UKUT 0484 (TCC), in which, Judge Bishopp said, at [8]:

> "A taxpayer in Mr Patel's position, successful before the F-tT, has only limited means of protecting himself from an adverse costs direction if HMRC secure permission to appeal, that is by seeking a direction, as soon as the appeal is notified to him, that whatever the outcome of the appeal no direction for costs should be made. I infer that Mr Patel was unaware of that possibility - and I am conscious that it is not a well-known course of action, and one by no means certain of success - and there is no criticism to be made of him for his failure to make such an application."

In the *Asim Patel* costs decision, Judge Bishopp was dealing with an application by HMRC for their costs of a successful appeal to the UT which had already been heard and determined so his comments were obiter.

13. I interpreted the email of 15 September 2015 from HMRC as indicating that they did not object to Mr Drummond's application. I assumed that HMRC had decided, without saying so in terms, to apply the practice, known as the 'Rees Practice', of not seeking their costs on appeal where there would be financial hardship for the taxpayer and the point at issue is one of significant interest to taxpayers as a whole. This practice was first formulated in a Parliamentary statement made by Mr Peter Rees, then Minister of State at the Treasury, on 12 March 1980. The Rees Practice applied in particular but

was not limited to appeals where HMRC are the appellants. In a written ministerial statement on 30 March 2009, Stephen Timms, then Financial Secretary to the Treasury, confirmed that HMRC would continue to apply the Rees Practice in tax cases in the UT. The UT has no jurisdiction in relation to whether HMRC apply the Rees Practice in a particular case, save possibly on an application for judicial review.

14. In fact, HMRC had already considered whether the Rees Practice should be applied to Mr Drummond's appeal in response to an email from him in April 2015. In a letter to Mr Drummond, dated 2 September 2015, HMRC's Solicitor's Office explained that his case did not meet the relevant criteria and refused to apply the practice. Neither the letter nor its contents were disclosed to the UT until shortly before the hearing of the application to set aside the costs direction in April 2016.

15. On the basis of my understanding of the parties' positions, I decided to grant Mr Drummond's application and make the costs order on 24 September 2015. Because the order was not in exactly the terms sought by Mr Drummond and in the absence of express agreement by HMRC, I made a specific direction that, as provided by rule 6(5) of the UT Rules, any party that wished to challenge the order could do so by applying for another direction which amends, suspends or sets aside the disputed direction. I also directed that any such application must be made within 28 days and would, unless agreed, be considered at an oral hearing. The date for lodging an application with the UT was, therefore, 22 October. On the afternoon of that day, HMRC served an application for the order to be set aside on the UT and Mr Drummond by email.

16. The application was considered at the hearing on 21 April 2016. Mr Howard Watkinson appeared for HMRC. I am grateful to Mr Watkinson for his helpful skeleton argument and submissions in which, conscious of his duty to the UT in view of the fact that Mr Drummond, assisted by Mr Stephenson who is not a lawyer, was a self-represented litigant, he fairly set out all the issues.

Power of UT to make costs orders

17. HMRC abandoned their first ground for having the order set aside in their skeleton argument. Mr Watkinson told me that HMRC accepted that the UT has the power to make a PCO for the reasons given by Judge Berner on this issue in an unpublished decision (*Robert Ames v HMRC* UT/2015/0180). In my view, HMRC are right to accept that the UT has the power to make a PCO by virtue of section 29 of the TCEA and rule 10 of the UT Rules. Because the decision in *Ames* is unpublished, I consider that I should set out my reasons for reaching the same conclusion as Judge Berner on this issue.

18. The power of the UT to make costs orders is found in section 29 of the Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007') and rule 10 of the UT Rules.

19. Section 29 TCEA sets out, in as far as it is relevant:

> "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,

> 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.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

20. In so far as it is relevant to the application in this case, rule 10 of the UT Rules, which deals with orders for costs, states:

> "Orders for costs
>
> 10(1) The Upper Tribunal may not make an order in respect of costs … in proceedings transferred or referred by, or on appeal from, another tribunal except -
>
> (a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal
>
> ...
>
> (4) The Upper Tribunal may make an order for costs … on an application or on its own initiative ...
>
> (6) An application for an order for costs or expenses may be made at any time during the proceedings …
>
> (7) The Upper Tribunal may not make an order for costs or expenses against a person (the 'paying person') without first -
>
> (a) giving that person an opportunity to make representations ..."

21. The nature of the 'full power' in section 29 TCEA 2007 can be ascertained from section 25 which sets out, so far as is relevant:

> "25 Supplementary powers of Upper Tribunal
>
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal -
>
> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
>
> …
>
> (2) The matters are -
>
> …
>
> (c) all other matters incidental to the Upper Tribunal's functions.
>
> (3) Subsection (1) shall not be taken -
>
> (a) to limit any power to make Tribunal Procedure Rules;
>
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."

22. Section 29(2) TCEA 2007 provides that the UT has full power to determine by whom and to what extent the costs are to be paid. Although that power is subject to the Tribunal Procedure Rules, the UT Rules contain no limitation on that power. Rule 10 provides no express power or provision for the UT to make prospective orders that the two-way costs shifting regime should not apply or should only apply to a limited extent

but rule 10 of the UT Rules is expressed in the widest possible terms, providing that the UT's power is not restricted to making orders 'for costs' but extends to orders 'in respect of costs'.

23. It is significant, in my view, that nothing in the UT Rules limits the UT's power in relation to costs. As the Senior President of Tribunals observed in *BPP Holdings v HMRC* [2016] EWCA Civ 121 at [25] and [35], the UT has by section 25(1)(a) TCEA 2007 the same powers, rights, privileges and authority in England and Wales as the High Court and section 25(3)(b) provides that those powers are not to be taken to be limited unless they are expressly so in the UT Rules. I consider that, in the absence of any limitation, it follows that the UT has the same power as the High Court to determine by whom and to what extent costs are to be paid. It is, therefore, necessary to examine what powers the High Court has to make costs orders.

24. The costs rules are codified in the Civil Procedure Rules ('CPR'). In considering the CPR, I am conscious that they do not apply directly to the UT even when it is exercising the same powers as the High Court. Nevertheless, I consider that where the UT Rules are silent or provide only limited guidance on costs matters, the relevant CPR and the authorities that interpret them can provide valuable assistance in filling the gap. The CPR are not merely to be transposed to the UT, however, but must be applied in a way that is consistent with and, if necessary, adapted to the overriding objective in the UT Rules (see the comments of the Senior President of Tribunals in *BPP* at [32] and [33]).

25. Part 44 of the CPR contains general rules about costs. CPR 44.2(1) provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Although CPR 44.2(1) is in similar terms to section 29(2) TCEA 2007, it does not have the breadth of rule 10 UT Rules which envisages that the UT may make an order "in respect of costs … in proceedings". Further, CPR 44.2(1) must be read in the context of CPR 44.2(2) which states that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party although the court may make a different order. There is no equivalent to the CPR 44.2(2) general costs rule in section 29 TCEA 2007 or the UT Rules, however, it is the practice of the UT to apply the general rule that the loser pays the successful party's costs.

26. The High Court can make three types of orders removing or restricting a party's liability for costs prospectively, namely a PCO, a costs capping order ('CCO') under CPR 3.19 and an order under CPR52.9A limiting costs in an appeal ('ACO'). The situations in which such orders may be made can overlap and, if they do, a court or tribunal will have a discretion as to which, if any, order to make.

27. The CPR do not contain any rules in relation to PCO's. PCOs have been recognised in English public law since *R v Lord Chancellor ex parte CPAG* [1999] 1 WLR 347 where Dyson J set out some guidelines but refused to make a PCO on the facts of that case. The leading authority on the power to make PCOs and the procedure to be adopted is *Corner House*. In that case, Lord Phillips of Worth Matravers MR, who gave the decision of the court, said at [72]:

> "72. … Dyson J said [in *CPAG*] the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with

this statement, but of itself it does not assist us is identifying those circumstances."

28. At [74], Lord Phillips set out the following guidance:

> "74. We would therefore restate the governing principles in these terms:
>
> (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> (i) the issues raised are of general public importance;
>
> (ii) the public interest requires that those issues should be resolved;
>
> (iii) the applicant has no private interest in the outcome of the case;
>
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
>
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

29. Having set out some examples of types of PCOs, which included an order capping the unsuccessful claimants' liability for costs if they lost, Lord Phillips observed, at [76], that there is "room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise."

30. The governing principles set out in *Corner House* have been considered and refined by the Court of Appeal in subsequent cases. It is now clear that the principles in *Corner House* are guidelines which are not to be read as statutory provisions but are to be interpreted and applied flexibly (see *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436 ('*Compton'*) at [23] and *Morgan & Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 ('*Hinton Organics'*) at [40]). Exceptionality is not an additional criterion to be satisfied but a prediction as to the effect of applying the principles set out in [74] of *Corner House* (see *Compton* at [24] and [83]). The general public importance and public interest requirements are a matter of evaluation for the judge but a case that will clarify the true construction of a statutory provision which applies to and potentially affects the whole population raises issues of general public importance (see *Compton* at [75] – [77]). Although private interest is a factor to be taken into consideration, it is not a bar to a PCO (see *Hinton Organics* at [37] - [39]). I understood HMRC to agree with the following approach to the issue of private interest, derived from *Ames*. It is inevitable that all tax appeals will have an element of private interest but it is the extent of the general public importance of the issue which must be taken into account, alongside other factors relevant to the fairness and justice of making such an order in appeal proceedings.

31. I can see no reason, as a matter of principle or policy, why the governing principles set out in *Corner House* should not be applied in the case of applications for PCOs in appeals to the UT. It seems to me to be obvious that consistency and good administration require the UT, when considering whether to make a PCO, to apply the *Corner House* principles, as modified by subsequent cases and bearing in mind the overriding objective in rule 2 of the UT Rules which is not the same as the overriding objective in the CPR.

32. CPR 3.19 provides for CCOs and includes the following:

> "(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
>
> (a) it is in the interests of justice to do so;
>
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
>
> (c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –
>
> (i) case management directions or orders made under this Part; and
>
> (ii) detailed assessment of costs.
>
> (6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –
>
> (a) whether there is a substantial imbalance between the financial position of the parties;
>
> (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
>
> (c) the stage which the proceedings have reached; and
>
> (d) the costs which have been incurred to date and the future costs."

33. For the same reasons as I have given for the application by the UT of the *Corner House* principles in relation to PCOs, I consider that the UT should apply the conditions and considerations in CPR 3.19 to applications for CCOs in appeals to the UT.

34. CPR 52.9A allows the court to make an ACO which limits the costs recoverable by a successful party in an appeal when a case passes from a 'no costs' or 'low costs' jurisdiction to one with full costs-shifting powers. CPR 52.9A provides:

> "Orders to limit the recoverable costs of an appeal
>
> 52.9A (1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
>
> (2) In making such an order the court will have regard to -
>
> (a) the means of both parties;
>
> (b) all the circumstances of the case; and
>
> (c) the need to facilitate access to justice.

> (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
>
> (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."

35. CPR 52.9A was introduced with effect from 1 April 2013 to deal with the unsatisfactory situation illustrated by Court of Appeal's decision in *Eweida v British Airways Plc* [2009] EWCA Civ 1025 ('*Eweida*') when a party was exposed to costs as a result of an appeal from the Employment Tribunal ('ET') or Employment Appeal Tribunal ('EAT') to the Court of Appeal. The issue in *Eweida* was described by Jackson LJ in *The Manchester College v Hazel & Anor* [2013] EWCA Civ 281 ('*Manchester College*') at [29] to [31] as follows:

> "29. In [*Corner House*] and a subsequent line of cases the Court of Appeal developed rules for protective costs orders in the context of judicial review. Such orders were made both at first instance and on appeal. In [*Eweida*], the claimant, who was appealing from the EAT to the Court of Appeal, applied for costs protection on the basis that she was moving from a 'no costs' jurisdiction to a costs shifting jurisdiction. The Court of Appeal dismissed her application, on the grounds that it did not have power to make a protective costs order or a costs capping order.
>
> 30. The outcome of *Eweida*, although correct on the law as it stood, was unsatisfactory for a number of reasons. Many individuals of modest means who litigate in 'no costs' jurisdictions are often without legal representation. Indeed, the claimants in this case litigated before the Ashford Employment Tribunal without representation. It is usually unjust to subject such litigants to a risk of adverse costs when they proceed to a higher level. This is particularly so if they win at first instance and are dragged unwillingly into an appeal. It may also be unjust to impose a costs risk if the litigant loses at first instance, but has proper grounds for bringing an appeal. This was the case with Mrs Eweida.
>
> 31. Of course it is not always desirable to suspend costs shifting rules when a case comes up from a 'no costs' jurisdiction. A classic example is an appeal from the EAT where one party is a well-resourced employer and the other party is an employee or a group of employees backed by their union. Such a case may well involve issues of principle or practice on which substantial sums turn. Obviously, in cases like that, there is no reason to disapply the normal costs shifting rules.
>
> 32. It is against this background that the Rule Committee has recently promulgated the new rule 52.9A. This rule will come into force on 1 April 2013. It provides as follows:
>
> …
>
> 33. This new rule is intended to address the mischief which has emerged in cases such as *Eweida*. Where justice so requires, the court can exclude or limit costs recovery when a case passes from a 'no costs' or 'low costs' jurisdiction to a court with full costs shifting powers. The new rule will not only apply to appeals from the EAT to

> the Court of Appeal. The enactment of this rule constitutes implementation of recommendation 71 in the Review of Civil Litigation Costs Final Report (published in January 2010)."

36. Mr Watkinson observed that an ACO is a particular species of costs protection available under the CPR for cases that do not fall within the *Corner House* guidelines because they contain some private interest element but should be considered for costs protection because they originated in a 'no costs or 'low costs' regime. Mr Watkinson submitted that the Court of Appeal found itself without the power to make such an order in *Eweida* and a change in the CPR was required. He submitted that, if I were to decide that the UT could make an order based on the policy behind CPR 52.9A then I would be engaging in judicial legislation as the UT Rules had not been changed to incorporate a provision equivalent to CPR 52.9A. He contended that CPR 52.9A itself does not apply in the UT because the CPR do not apply to the UT although he accepted that may not preclude the UT from looking to the policy behind the rule.

37. I agree that an ACO is simply a species of PCO. As such, I consider that the UT has the power to make such an order under the TCEA 2007 and the UT Rules for the same reasons as I have stated at [18] – [23] above. I do not regard that as straying into judicial legislation. The UT Rules do not provide expressly for an ACO but, unlike the Court of Appeal in *Eweida*, the UT has the benefit of the guidance provided by CPR 52.9A when deciding how to exercise its power to make orders in relation to costs. Like the ET and EAT, the FTT is a no costs jurisdiction except in a case that has been categorised under rule 23 of the FTT Rules as a Complex case and the appellant has not asked for it to be excluded from potential liability for costs under rule 10. The injustice identified by Jackson LJ in *Manchester College* at [30] has the same potential to arise in the UT as in the High Court and Court of Appeal. In my view, the UT would not be giving effect to the overriding objective in the UT Rules if, having the power to make a costs order to mitigate the potential injustice, it refused to do so where such an order would be appropriate under CPR 52.9A.

38. In summary, I consider that, as the High Court has the power to make PCOs, CCOs and ACOs and nothing in the UT Rules expressly limits the UT's power to make similar orders in respect of costs, the UT can make costs orders including PCOs, CCOs and ACOs in appropriate cases. In exercising the same powers as the High Court to make a PCO, CCO or ACO, I take it as axiomatic that the UT should look to the same rules and criteria that govern the High Court when it exercises those powers, bearing in mind that the UT is governed by the UT Rules and especially the overriding objective in those rules and not the CPR. Whether to make such an order is a matter for the UT, in its discretion, to decide based on its evaluation of the circumstances of the case.

Application to set aside the costs direction

39. HMRC applied for the costs direction of 24 September 2015 to be set aside on the grounds that it did not contain any reasoning and it was, therefore, unclear whether the direction had been made on *Corner House* principles or by analogy with CPR 52.9A. Mr Watkinson's skeleton quoted the comments of Smith LJ in *Compton* on the need to give reasons for making a PCO on the papers. Smith LJ said at [93]:

> "… a complete failure to provide any reasons for a decision made on consideration of the papers ought to amount to a compelling reason why the decision should be reviewed on the merits. If the judge gives no

> reason at all for making the order, the defendant cannot know whether he has even applied his mind to the correct issues. I do recognise the need for judges to be able to deal with paper applications with reasonable expedition and I would certainly not wish to impose a requirement for a reasoned judgment. However, I do think that a note of two or three sentences explaining the basic reasoning is essential."

40. I note that in *Compton*, Simon J had the benefit of written grounds from the defendant resisting Mrs Compton's application for a PCO. It is clear that the absence of any indication from HMRC that they opposed Mr Drummond's application had led me to assume that HMRC consented to it and to issue a short direction without reasons. I have considered whether, in the circumstances, I should refuse to set aside the direction but I have concluded that I should set it aside because not only are HMRC entitled to know the reasons why the order was made but, more fundamentally, I had made the order based on a misunderstanding of HMRC's position. It seems to me that a refusal to set aside the direction in such circumstances would not be consistent with the overriding objective of the UT Rules, as set out in rule 2(1), of applying those rules to enable the UT to deal with cases fairly and justly. Further, I had foreshadowed the possibility of such action in the direction itself and so to do so should not be a surprise and is not unfair to Mr Drummond.

41. Having set the direction aside, I consider that Mr Drummond should be invited to resubmit his application, amended if need be in the light of this decision, and HMRC should be given an opportunity to make submissions in response. In order to assist the parties (in particular, Mr Drummond who is unfamiliar with UT procedure), I set out briefly below what I consider to be the relevant issues that should be addressed in an application for a PCO, CCO or ACO and submissions in response.

42. All applications for a PCO, CCO or ACO should include:

> (1) a description of the circumstances of the case, including the amount involved, the financial resources of the applicant, the level of costs already incurred and the further costs likely to be incurred in the appeal (including whether the applicant's representative is acting pro bono);
>
> (2) the order sought;
>
> (3) why the order should be made in the case;
>
> (4) what consequences are likely to follow if the application is not granted;

The statements in the application about the applicant's financial resources and the costs already incurred and likely to be incurred in the appeal should be supported by evidence.

43. In addition, an application for a PCO should state why the issues raised are of general public importance and the public interest requires that the issues should be resolved. The application should also set out what interest the applicant has in the outcome of the case.

44. In the case of a CCO, the application should also state why the applicant considers that there is a substantial risk that, without a CCO, costs will be disproportionately incurred and why that risk could not be adequately controlled by effective case management or detailed assessment of costs.

45. Any submissions in response should state whether the respondent opposes the application and, if so, on what grounds. In addition, the response should include an estimate of the costs likely to be incurred by the respondent in the appeal that are potentially recoverable from the applicant.

Decision

46. For the reasons given above, I grant HMRC's application and make the directions set out in the appendix to this decision.

JUDGE GREG SINFIELD
UPPER TRIBUNAL JUDGE

RELEASE DATE: 13 May 2016

APPENDIX

DIRECTIONS

IT IS DIRECTED THAT:

1. The order in relation to costs released on 24 September 2015 is set aside.

2. The Appellant may submit a further application for an order in respect of the costs of the proceedings and such application must be served on the Tribunal and the Respondents not later than 28 days from the date of release of these directions.

3. The Respondents must serve any submissions in response to an application under Direction 2 on the Tribunal and the Appellant not later than 14 days after receipt of such application.

4. The Appellant may serve a reply to any submissions by the Respondents under Direction 3 on the Tribunal and the Respondents not later than 7 days after receipt of the Respondents' submissions.