[2018] UKUT 0155 (TCC)

Appeal number: UT/2017/0024

Procedure – costs – First-tier Tribunal Procedure Rule 10 – whether Respondents acted unreasonably in bringing, defending or conducting the proceedings – whether Appellant's schedule of costs claimed complied with Rule 10(3)(b) – whether any breach of that rule should have been waived – guidance on content of schedule of costs

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DISTINCTIVE CARE LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE GREG SINFIELD**
JUDGE KEVIN POOLE

Sitting in public at the Royal Courts of Justice, London on 26 February 2018

Michael Firth, instructed by Reynolds Porter Chamberlain LLP solicitors, for the Appellant

Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the appeal of the appellant, Distinctive Care Limited ("DCL"), from the decision of the First-tier Tribunal ("FTT") (Judge Barbara Mosedale), neutral citation [2016] UKFTT 0764 (TC), by which the FTT dismissed DCL's application for an order for costs against the Respondents ("HMRC") in relation to an appeal which had been notified to the FTT and subsequently by the FTT to HMRC, whereupon HMRC immediately withdrew their original decision and confirmed that they would not defend the appeal.

2. Put briefly, the FTT decided that there were certain procedural defects in relation to the costs application which it was inclined to waive, but that it was not prepared to waive one defect, namely the failure of the costs application to make clear that it was calculated as a straight one thirtieth apportionment of the total time spent by DCL's advisers in dealing with 30 almost identical appeals, rather than individually by reference to the time spent in relation DCL's own appeal.

3. Accordingly, the FTT dismissed the application for costs. However, it also indicated that if the procedural defects in the costs application had not been fatal, it would have refused the application in any event, on the basis that HMRC's prompt withdrawal from the proceedings at the first possible opportunity after their commencement could not be characterised as acting unreasonably in defending or conducting the proceedings.

4. The FTT also made some comment about two further matters "in case this goes higher":

> (1) as the appeal concerned the issue of an information notice under Schedule 36 Finance Act 2008, it expressed some provisional views on the reasonableness of HMRC's decision to issue such a notice, and on the question of whether an examination of reasonableness should encompass HMRC as a whole or only the officer who actually issued the notice, and
>
> (2) it considered the scope of any potential award of costs in the light of the phrase "costs of and incidental to … proceedings", in particular with reference to costs incurred prior to the notification of the appeal to the FTT.

5. The appeal to this Tribunal was brought with permission of Judge Berner, granted after an oral hearing of DCL's application for permission, following the refusal of such permission on the papers by Judge Bishopp.

The facts

6. The FTT's main findings of fact, which are not the subject of any challenge were brief and are as follows (with errors as to dates corrected in square brackets):

> "1. On 3 March 2015, HMRC issued the appellant with an information notice under Schedule 36 Finance Act 2008 paragraph 1. The appellant appealed this to HMRC on 25 March 2015, and following a review, to the Tribunal on 24 July 2015. The Tribunal notified HMRC of the appeal on 7 September [2015]. On [22] September 2015 HMRC withdrew the information notice and notified the Tribunal it would not defend the appeal. The Tribunal allowed the appeal on 16 November [2015].
>
> 2. On 3 December 2015 the appellant submitted to the Tribunal a claim for costs in the sum of £2,500 on the basis of unreasonable behaviour by HMRC. The appeal was categorised as 'basic' so unless there was unreasonable behaviour, or wasted costs, the Tribunal has no jurisdiction to award costs. The appellant did not alleged *(sic)* there were wasted costs. The application was accompanied by a 'breakdown of costs'."

7. The FTT made some more detailed findings at [27] to [33]:

> "27. The appellant acquired a property in 2008 in respect of which HMRC considered no SDLT return had been made. This was discovered close to four years later, so to protect HMRC's position on time-limits, an SDLT determination was issued on 12 January 2012. Eight days later, the appellant lodged an appeal with HRMC against the determination.
>
> 28. The *Vardy* case in late 2012 confirmed HMRC's belief that the scheme was ineffective but also revealed that they could not be certain who was liable to pay the SDLT in each case without consideration of the transaction documentation. The information notice that was later issued was to demand this documentation.
>
> 29. In late 2012, Mr Kane asked HMRC's Central Policy team ('CenPOL') if HMRC were able in law to issue an information notice in circumstances where HMRC had already made a determination. CenPOL advised in early 2013 that they could do so.
>
> 30. Mr Kane's team relied on this advice to issue information notices in some 40 other cases. The information notice the subject of this appeal was issued by Mr Kane's team, in reliance on this advice, but over two years later, on [3 March] 2015.
>
> 31. The information notice was appealed to HMRC on [25] March 2015. The appellant accepted HMRC's offer of a review, and the issue of the information notice was upheld on review by letter dated 26 June 2015. The appellant lodged an appeal with the Tribunal on 24 July 2015.
>
> 32. In August 2015, the same team, but in relation to a different taxpayer, were advised by CenPOL that they could not issue an information notice where there was a pre-existing determination. The next day, Mr Kane spoke to the same person in CenPOL who had given the 2013 advice. That person confirmed he had changed his mind but did not indicate to Mr Kane when he had changed his mind.
>
> 33. There was a dispute as to when CenPOL changed its view and in particular whether it was before or after the decision and review decision at issue in this appeal. I had no evidence on this: Mr Kane simply did not know. Ms Choudhary's *[sic]* view was that if it was the appellant's proposition that CenPOL changed its view before the information notice

> was issued, then the appellant had the burden of proof: Mr Firth said HMRC had the burden of proof on this as only HMRC could possess the evidence of this. I agree with the appellant over this for the reasons given by the FTT in the decision of *Royal Borough of Kensington & Chelsea* [2014] UKFTT 729 (TC) at§§60-63. So I find the change of view was sometime before the issue of the information notice as HMRC were the only party who could have known the truth on the date of the change and they adduced no evidence on it.
>
> 34. On 7 September 2015 the Tribunal notified the appellant's appeal against the information notice to HMRC. On 22 September 2015, some 15 days later, HMRC wrote to the Tribunal conceding the appeal and to the appellant withdrawing the information notice."

8. By way of supplement to these basic facts, the FTT referred to certain further facts in the course of its decision:

> (1) The grounds of appeal given in DCL's notice of appeal to the FTT was "a bare statement that the information notice was 'ultra vires'. No explanation of what DCL meant by this (if anything) was given to HMRC" (at [47]);
>
> (2) DCL did not send its costs application to HMRC; HMRC only became aware of it when the FTT sent a copy to them by email on 15 December 2015 (at [6]);
>
> (3) The breakdown of costs which accompanied the costs application did not state the dates on which the work was carried out, or the names or grades of the persons performing the work, and it was therefore impossible to decide if the respective claimed hourly rates were commensurate with the experience of the relevant individuals (at [13] and [16]);
>
> (4) The breakdown of costs did not in fact represent time spent actually working on DCL's appeal; instead it represented one thirtieth of the total time spent by DCL's advisers in advising DCL and its other 29 clients who were in exactly the same position (i.e. they had implemented an SDLT avoidance scheme, they had received a determination and then they had received a schedule 36 information notice), and this fact was not made clear on the costs schedule and indeed only came out orally at the hearing of the costs application. The application itself was accordingly misleading (at [18] – [20]);

The legislation

9. The jurisdiction of the FTT to award costs originates from section 29 of the Tribunals, Courts and Enforcement Act 2007, which provides (in relevant part) as follows:

> "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."

10. The relevant procedure rules for this purpose are The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"), which provide, in relevant part, as follows:

"Orders for costs

10. (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) …

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

…

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

…

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed."

11. Rule 7 of the FTT Rules provides, in relevant part, as follows:

> "Failure to comply with rules etc.
>
> 7. (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> …"

12. Finally, rule 2 of the FTT Rules provides, in relevant part, as follows:

> "Overriding objective and parties' obligation to co-operate with the Tribunal
>
> 2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> …"

The FTT's decision

13. As identified by the FTT (at [4] of its decision), the issues it had to decide were the following objections made by HMRC to DCL's application:

> "(1) The application was (says HMRC) not properly made as it was not copied to HMRC and was not accompanied by a proper schedule;
>
> (2) HMRC had not (says HMRC) behaved unreasonably in the conduct or defence of the appeal.
>
> (3) Costs claimed were not (says HMRC) incidental to proceedings."

Issue (1) – Procedural irregularities

14. The FTT identified (at [6] to [12] of its decision) that the application had not been properly made because it had not been sent to HMRC by DCL and HMRC had not even received it from the FTT until after the 28 day period referred to in Rule 10(4). The FTT indicated, however, that "because of its relatively trivial nature, I would have been inclined to exercise my power under Rule 7(2)(a) to waive the breach."

15. The FTT however considered that there was a more serious breach of the FTT Rules, because it found (at [20]) the schedule of costs to have been "however inadvertently, misleading". This was because it did not disclose the basis upon which it had been prepared, namely that it represented a one thirtieth apportionment of the total time spent by DCL's representative in dealing with 30 effectively identical appeals (including that of DCL); this was a point which had only come out at the hearing of the application. As the FTT put it (at [19] to [20]):

> "19. Whilst it may have been entirely appropriate to deal with the 30 appeals in this manner, my concern was that it was not made apparent to HMRC or the Tribunal that the schedule did not represent actual time spent on the appellant's appeal but merely an apportionment of time spent dealing with 30 appeals en bloc. On the contrary, the 'breakdown of costs' appeared to be an ordinary schedule of costs, listing actual time spent by various individuals on the appeal. So, for instance, the schedule recorded that 'RPC' spent 20 minutes reviewing the legislation solely on behalf of the appellant whereas, it seems from what Mr Firth said, 'RPC' had actually spent 10 hours reviewing the (identical) legislation en bloc for all 30 cases.
>
> 20. The schedule was, however inadvertently, misleading. Cornerstone Tax had, on their case, actually spent £75,000 in costs on the 30 appeals; whether that was a reasonable amount of work to carry out on 30 identical appeals being dealt with en bloc was a different question to one of whether it was reasonable to spend £2,500 working on a single appeal. Moreover, it seemed to me, and the appellant's counsel agreed, that the former question was one for detailed assessment on taxation. By presenting a claim for £2,500, however, the appellant submitted a claim for costs in an amount which parties would reasonably expect to be dealt with on summary assessment."

16. The FTT considered that the failure to explain the basis upon which the schedule of costs had been calculated was "certainly a breach of the spirit of Rule 10(3)(b)"; it went on to say this (at [23]):

> "I consider it was also an actual breach of Rule 10(3)(b) because the 'breakdown of costs' was not a schedule of what was actually claimed:

> what was actually claimed was one-thirtieth of a larger schedule of costs, a copy of which had not been provided. Either way, it is in the Tribunal's discretion whether to award costs and the failure to explain with the application how the costs were actually calculated meant that I would not exercise my discretion in the appellant's favour. Whether or not it was an actual breach of the requirement to provide a schedule of costs, the appellant had not taken care to ensure that the schedule provided gave an accurate picture of how the costs it claimed had been calculated. It should have done so. For that reason I would not exercise my discretion in the appellant's favour, either to waive the various breaches of the rules or to make a costs award in its favour."

17. On this basis, the FTT refused the application. However, "in case this matter goes further", it went on to consider the other two issues it had identified (see [13] above).

Issue (2) – whether HMRC had acted unreasonably

18. As to the issue about whether HMRC had acted unreasonably, the FTT approached the question first by assuming that HMRC were unreasonable to issue the original information notice. Even on that basis, it would have rejected DCL's case (see [44] – [45] of its decision), on the basis that HMRC did not act unreasonably after the appeal had been lodged[1]:

> "44. As a matter of law, omissions can be unreasonable, and an unreasonable failure to withdraw a decision can be conduct leading to a costs order. Nevertheless, the omission to withdraw a decision and/or the omission to overturn a decision on review is not behaviour that is 'defending' or 'conducting' an appeal unless and until a notice of appeal is lodged. The quality of the original decision and the review decision only become relevant at that point so far as Rule 10 is concerned. So actually defending an untenable decision may well be or become unreasonable, but withdrawing an untenable decision without taking any active steps in the appeal is not unreasonable conduct within Rule 10: the decision is not defended, nor is a defence conducted.
>
> 45. An omission to withdraw such an assessment *after* an appeal is lodged may be unreasonable behaviour for the purposes of Rule 10 but it seems to me that it could only be unreasonable because the behaviour *after* the lodging of the appeal is unreasonable and that means that the defendant has to have a reasonable time to consider the appealed assessment. By any measure, HMRC acted reasonably in this case because they withdrew the information notice two weeks after notification of the appeal and without taking any steps to defend the appeal."

19. In any event, the FTT found that it was not in fact unreasonable for HMRC to have issued the information notice: see [61] of the FTT's decision.

---

[1] Obvious typographical errors in the original wording have been corrected.

20. Finally, insofar as the reasonableness of the conduct of individual officers or subdivisions of HMRC mattered (as opposed to the overall unreasonableness of HMRC acting as a body), the FTT expressed the view that Officer Kane had acted reasonably in issuing the notice, but that CenPol had acted unreasonably in failing to inform him that their previous advice had changed (see [63] and [64] of the FTT's decision). The FTT would have agreed that CenPol's unreasonableness would have been attributed to HMRC as a whole, but for the fact that the FTT was not satisfied that CenPol's original advice was in fact unreasonable (see [65] of the FTT's decision).

Issue (3) – costs of and incidental to the proceedings

21. Whilst the matter was irrelevant in view of the FTT's decision on procedural irregularity, after reviewing the authorities, it concluded that costs incurred before the commencement of the appeal to the FTT which were "of use and service" in the proceedings were "incidental" and potentially recoverable (see [77] of the FTT's decision). Thus the cost of preparing the notice of appeal to the FTT would be "incidental" as would the costs of any other "preparation for the proceedings which is actually used in the proceedings" (see [78]). Costs incurred in dealing with a tax investigation would however not be "incidental", as they were incurred in order to bring the dispute to an end without litigation.

22. As to the costs of making an appeal to HMRC, the FTT expressed the view that where (in direct tax cases such as the present) an appeal to HMRC was a necessary condition precedent to an appeal to the FTT, then the question of whether the costs incurred in making the appeal to HMRC were "incidental" to any appeal subsequently made to the FTT depended on whether the taxpayer's purpose in notifying the appeal to HMRC had been simply to fulfil the necessary precondition for appealing to the FTT or to pursue the option of a review; it expressed the view that in the former case the costs incurred in making the appeal to HMRC would be "incidental" to the proceedings before the FTT and in the latter case they would not. On the facts of this case, any award of costs that the FTT had been minded to make would have been limited to the costs of preparing the notice of appeal to the FTT and the subsequent costs (see [81], [82] and [86] of the FTT's decision).

The Arguments

Issue (1) – Procedural non-compliance

23. Mr Firth argued, in outline, that the FTT had been wrong to find that DCL had breached Rule 10 (apart from the breach of Rule 10(4) and the failure to provide further details of the individual fee earners whose time was being claimed for, both of which the FTT appeared to have been willing to waive as "relatively minor breaches"); that if any such breach had in fact occurred then the FTT was wrong not to have exercised its discretion to waive the breach; and that the refusal of the FTT to exercise its discretion to award costs in the light of any actual breach of Rule 10(3)(b) or supposed breach of the "spirit" of that Rule was also unsustainable.

24. In Mr Firth's submission, the terms of Rule 10 were quite general. There was no guidance as to their detailed application. There was nothing to indicate, for example, that details of full names and grades of fee earners whose time was being claimed needed to be included in a costs schedule. The omission to send the schedule and application direct to HMRC was a matter which even the FTT had described as "trivial". HMRC's main complaint appeared to relate to the "one thirtieth" point. There was nothing in this, however. The costs set out in the schedule were the costs which were being claimed by DCL in respect of the work which had been done for it and charged to it. The fact that the representative might have spent a great deal more time than that charged in advising other taxpayers was irrelevant. In any event, HMRC were well aware that the representative was dealing with 30 nearly identical appeals (indeed it had made suggestions about this appeal being treated as a lead appeal for all those cases) and could not reasonably claim to have been misled by the schedule. If DCL had been making the costs application without the assistance of the original representative, it would not even have known of the other work done for other clients. Thus, apart from the admitted failure to send the costs application and schedule to HMRC within the relevant time limit, there had been no breach of Rule 10.

25. However, even if such a breach had occurred, the FTT's dismissal of the costs application on the basis of that breach was unreasonable. As the FTT should have been well aware, when considering whether to waive a breach of the rules, the FTT was required to exercise its discretion judicially, taking into account all relevant factors and disregarding all irrelevant factors. In this case, the FTT had simply focused on the fact of there being (in its opinion) a breach and had founded its refusal to exercise any discretion to waive it purely on the breach itself. No consideration had been given to the usual range of factors, including the seriousness of the breach, the reasons for it, any prejudice caused by the breach (or its waiver) and the prejudice caused to DCL by reason of any refusal to waive it. He referred to the approach to such matters set out in *BPP Holdings Limited v HMRC* [2014] UKFTT 644 (TC), endorsed by the Supreme Court at [2017] UKSC 55. This was not a case of a clear breach of a simple rule such as a time limit; the phrase "sufficient detail to allow the Tribunal to undertake a summary assessment" was "extremely vague". In the light of a proper consideration of all the relevant factors, the only reasonable course open to the FTT would have been to waive any breach that it found to have existed. And insofar as the FTT was to be understood to have relied on "the spirit" of the rules in refusing to waive any breach, that was clearly far too vague a basis to found any proper exercise of the FTT's discretion.

26. In response, Ms Choudhury submitted that the undisclosed basis upon which the schedule of costs was drawn up was a clear breach of Rule 10(3)(b). That rule required the schedule to be in sufficient detail to enable the FTT to make a summary assessment of the costs if it chose to do so. The question of whether £2,500 was an appropriate amount was a very different question from whether one thirtieth of £75,000 was an appropriate amount; as DCL had accepted, any question about the reasonableness of the £75,000 figure was one which ought to be dealt with on a detailed assessment by a costs judge. In effect, DCL was seeking to mislead the FTT into making a summary assessment of costs which could only properly be quantified by a detailed assessment.

27. As to the refusal of the FTT to exercise its discretion to waive this obvious breach, the finding of the FTT, at [22], that the schedule was "misleading" had clearly been regarded by the FTT as sufficiently serious, on its own, to exclude any exercise of such discretion. That was not a decision which the Upper Tribunal ought to interfere with, falling as it did within the wide margin of appreciation allowed to the FTT in making such decisions.

Issue (2) – Whether HMRC had acted unreasonably

28. Mr Firth started from the proposition that the Rules exposed a taxpayer to risk in respect of costs in relation to what he called "the quality of the taxpayer's decision in respect of the proceedings". He derived this from *Catanã v HMRC* [2012] UKUT 172 (TCC), [2012] STC 2138, where the Upper Tribunal referred to the phrase "acted unreasonably in bringing, defending or conducting the proceedings" in Rule 10(1)(b) as being:

> "… quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed…"

29. In his submission, it could not have been the draftsman's intention, construing the Rules purposively, that a taxpayer should be at risk in respect of costs in this way but that HMRC should not be at similar risk in respect of the quality of their decision-making prior to (but resulting in) the proceedings. The draftsman could not have intended such a "fundamental asymmetry" such that HMRC's pre-appeal decision making was "immune" from any risk in respect of costs. It is a mere procedural formality that it is the taxpayer, rather than HMRC, that notifies an appeal to the FTT and accordingly the word "bringing" in Rule 10(1)(b) should be interpreted to include HMRC's making of an appealable decision.

30. In the alternative, if HMRC have acted unreasonably in making an appealable decision, then they should be regarded as being under a continuing obligation, from that time, to withdraw it. Their omission to do so, once proceedings before the FTT have been commenced by notification of the appeal by DCL, amounted to HMRC acting unreasonably in defending or conducting the proceedings. Essentially, their conduct or defence of the proceedings was tainted by the unreasonableness of their original appealable decision and their failure to withdraw it before commencement of proceedings; it did not matter that they withdrew it promptly after they were notified of commencement of proceedings as they should have withdrawn it much earlier and they were the authors of their own misfortune in costs by failing to do so. By reference to the three-stage question in *Shahjahan Tarafdar v HMRC* [2014] UKUT 0362 (TCC) ("*Tarafdar*"), HMRC were under an obligation to withdraw their unreasonable decision from the moment they made it, so their failure to do so until well after the proceedings were under way was quite sufficient to engage the FTT's jurisdiction to make a costs order. In the present case, HMRC as a body believed at the time the original information notice was issued that they had no power to issue it, therefore their conduct in doing so, and in failing every day thereafter to withdraw it, must have been unreasonable.

31. In response, Ms Choudhury effectively argued that Mr Firth was seeking to strain the plain words of Rule 10(1)(b) too far in support of his argument. Any suggestion that "bringing" an appeal might include the act of HMRC making an appealable decision would potentially push back the time from which the FTT could order costs to the making of that decision, even if proceedings never resulted; and in relation to Mr Firth's alternative argument, it was simply not sustainable in the light of the wording of the Rules, which clearly only applied to conduct after proceedings had been commenced (as to which, the FTT had found HMRC did not act unreasonably). In short, the FTT only had a costs jurisdiction in respect of the "proceedings" before it.

32. As to the supposed unreasonableness of HMRC's behaviour, Ms Choudhury submitted that the FTT was right to consider the reasonableness of HMRC's conduct as a whole and not merely, as Mr Firth had suggested, by reference solely to the conduct of CenPol. The FTT had been correct to consider HMRC's actions as a single body and was entitled to find that, as a body, they had not acted unreasonably. She went on to say that if the reasonableness of HMRC's conduct was judged by reference to the conduct of a single part of it, there was no good reason why that part should be CenPol rather than Mr Kane.

Issue (3) – costs of and incidental to the proceedings

33. Mr Firth argued that DCL's costs incurred in attempting to resolve the dispute before proceedings ought to be recoverable by analogy with the pre-action conduct in the Courts under the CPRs. Notifying an appeal to HMRC and then going through the review process ought, therefore, to attract the same treatment. There was no principled basis for saying that this treatment applied where the appeal to HMRC was only notified in order to press ahead to an immediate appeal to the FTT, and not when the taxpayer wished to take advantage of the (statutorily encouraged) review procedure.

34. Ms Choudhury argued that there was no parallel to be drawn with the CPRs. Those rules made it clear that non-compliance could result in a costs sanction, whereas no similar provision applied in relation to pre-action conduct under the FTT Rules.

Discussion

Issue (2) – was the FTT wrong to find HMRC had not acted unreasonably for the purposes of Rule 10(1)(b)?

35. We consider it appropriate to address first the question of whether the FTT's jurisdiction to award costs was engaged at all in this case, which must logically precede any consideration of its exercise of such jurisdiction. This involves a consideration of Issue (2) identified above.

Over what period is conduct to be assessed?

36. The FTT's jurisdiction to award costs against HMRC only arises if "the Tribunal considers that [HMRC] or their representative has acted unreasonably in bringing, defending or conducting the proceedings". The FTT's view on this point was that even if the original issue of the information notice had amounted to "acting

unreasonably", HMRC had still not acted unreasonably "in bringing, defending or conducting the proceedings" – as referred to at [18] above. But Judge Mosedale went on to say that in any event she did not consider HMRC to have acted unreasonably – see [61] and [67] of the FTT's decision.

37. Logically, before assessing whether a party has acted unreasonably, it is necessary to define the time span over which that party's actions are to be assessed and tested for reasonableness. To put it another way, the focus of the FTT's enquiry must be on the reasonableness of the *relevant* actions. Rule 10(1)(b) states that the enquiry must consider whether the relevant party "acted unreasonably in bringing, defending or conducting the proceedings".

38. As was said by the Upper Tribunal in *Catanã* at [14] in relation to the meaning of the phrase "bringing, defending or conducting the proceedings" in Rule 10(1)(b):

> "It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

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

40. In *Marshall & Co v HMRC* [2016] UKUT 0116 (TCC) (a case to which neither party directed us in the course of the hearing), the Upper Tribunal said the following about the period over which a party's conduct is to be assessed:

> "The reference to "the proceedings" in Rule 10(1)(b) is to proceedings before the Tribunal which has jurisdiction of the appeal, whilst it has such jurisdiction. In *Catanã* this Tribunal approved (at [9]) the following statements from *Bulkliner Intermodal Limited v HMRC* [2010] UK FTT 395 (TC):
>
> > "..... It is not possible under the 2009 Rules ... for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe* ... remain good law. … That is not to say that

> behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and anor (trading as Farthings Steak House) v McDonald (Inspector of Taxes)* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

41. Contrary to the submissions of Mr Firth, there is, in our view, no warrant in Rule 10(1)(b) for extending its clear wording to include an assessment of a respondent's conduct prior to commencement of proceedings before the FTT – even if that conduct effectively forces an appellant to commence proceedings which should not reasonably have been necessary. In our view to hold otherwise would, as well as doing clear violence to the actual wording of Rule 10(1)(b), involve the FTT in a potentially wide-ranging assessment of the reasonableness of the entirety of HMRC's conduct leading up to the proceedings, as well as flying in the face of authority. We do not consider that it could have been the intention of the draftsman of the FTT Rules to require such an assessment which would, in many cases, necessitate a detailed enquiry into the factual history (quite possibly both complex and hotly disputed) of matters predating the FTT's involvement.

42. Nor do we consider that Mr Firth's "asymmetry" argument, ingenious though it may be, provides any real support for the purposive interpretation of that Rule for which he contends. It is well settled that the purpose of legislation is to be derived primarily from the words actually used in it, and we see no ambiguity in the wording of Rule 10(1)(b) which leaves the door open for Mr Firth's argument. We consider that the word "proceedings" in this context clearly means "proceedings before the FTT" and does not have a wider meaning which encompasses any earlier stage of the appeals or review process before the relevant notice of appeal is delivered to the FTT. The Upper Tribunal has already said as much in *Catanã* and *Marshall*.

43. Mr Firth's subsidiary argument, summarised at [30] above, cannot in our view succeed either. It is essentially a different way of putting his primary argument, in that it seeks to bring within the ambit of the FTT's enquiry for the purposes of Rule 10(1)(b) an examination of the reasonableness of HMRC's original decision and subsequent conduct leading up to the commencement of proceedings. In our view, the dangers of this approach are amply demonstrated by the present case, in which the parties argued at some length about the reasonableness of HMRC's original decision and the FTT ultimately disagreed with the reasoning of both sides. As stated at [39] above, echoing the point that had already been made by the FTT in *Bulkliner* and endorsed by the Upper Tribunal in *Catanã*, there can be situations in which conduct prior to the commencement of proceedings can inform the FTT's assessment of a party's conduct during the relevant period but such cases are likely to be at the margin and this is clearly not such a case. Where (as here) withdrawal of a decision follows promptly upon notification of an appeal to the FTT against that decision, it is all the harder to conceive how prior conduct might be regarded as engaging the FTT's jurisdiction to award costs in relation to the proceedings in question.

How is conduct to be assessed?

44. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) ("*MORI*") at [22] and [23], the Upper Tribunal endorsed the approach set out by the FTT in that case to the question of whether a party had acted unreasonably. That approach could be summarised as follows:

> (1) the threshold implied by the words "acted unreasonably" is lower than the threshold of acting "wholly unreasonably" which had previously applied in relation to proceedings before the Special Commissioners;
>
> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
>
> (3) actions include omissions;
>
> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
>
> (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
>
> (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
>
> (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
>
> (8) the power to award costs under Rule 10 should not become a "backdoor method of costs shifting".

45. We would wish to add one small gloss to the above summary, namely that (as suggested by the FTT in *Invicta Foods Limited v HMRC* [2014] UKFTT 456 (TC) at [13]), questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

46. In assessing whether a party has acted unreasonably, this Tribunal in *MORI* went on to say this (at [49]):

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework

> under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT rules."

Application of the test in cases involving withdrawal from proceedings

47. In the present appeal, HMRC withdrew from the appeal shortly after it was notified to them and before taking any steps in the proceedings.

48. In *Tarafdar*, the Upper Tribunal gave some guidance on the specific application of the "acting unreasonably" test in the context of withdrawal from the proceedings (at [34]):

> "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) what was the reason for the withdrawal of that party from the appeal?
>
> (2) having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) was it unreasonable for that party not to have withdrawn at an earlier stage?"

49. We agree with this approach, and not just (as in *Tarafdar*) where withdrawal takes place at a much later stage in the proceedings.

50. As Judge Mosedale said (at [45] of the FTT's decision, quoted at length at [18] above) after citing the passage from *Tarafdar* set out above, "[b]y any measure, HMRC acted reasonably in this case".

51. Strictly speaking, it could be said that HMRC might, pursuant to the second limb of the *Tarafdar* test, have withdrawn from the proceedings immediately upon receiving notification of the appeal to the FTT (rather than 15 days later). Therefore, it was not quite accurate to say (at [51] of the FTT's decision) that "the Tribunal does not get beyond question (2)"; however, from reading the FTT's decision as a whole, it is clear that it took the view that such a prompt withdrawal afforded HMRC the protection afforded by the third limb of the *Tarafdar* test.

What is the approach on an appeal about "acting unreasonably" to the Upper Tribunal?

52. The Tribunal in *Catanã* (at [16]) sounded a warning about an appellate tribunal disagreeing with the primary fact-finding tribunal's conclusion as to whether a party had acted unreasonably:

> "The principal difficulty facing Mr Catanã in this appeal is the fact that, as I have mentioned above, the making of a costs direction is a matter for judicial discretion. If I am to allow this appeal I have to be satisfied, not that I would, or even might, have made a different direction myself, but that Judge Kempster exercised his discretion in an unreasonable manner – that is, he failed to apply the correct law, took into account the

> irrelevant, ignored the relevant or reached a conclusion which no judge, properly exercising his discretion, could reasonably have reached. That is, plainly, a difficult task."

53. In similar vein, this Tribunal in *MORI* made the following comments (at [16]):

> "A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment. An appeal against such a judgment, on a question of law, needs to be approached with appropriate caution. As Jacob LJ observed in *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, at [7], it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error, for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test) it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffmann said in *Biogen v Medeva* [1997] RPC 1, at p45:
>
> > 'Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'"

54. In the circumstances set out above, it is clear to us that the FTT applied the correct test in reaching the conclusion that it did on Issue (2). As such, its conclusion is unimpeachable. For what it is worth, we would have reached the same conclusion ourselves. The threshold condition in Rule 10(1)(b) is therefore not satisfied and no power arises to make an award of costs in this case.

Issue (1)

55. Whilst it is not necessary, in view of the conclusion we have reached above, to consider the remaining issues, we do so in order to provide guidance on the interpretation of the FTT Rules for parties in a similar situation in future.

56. The concerns of the FTT were that the schedule of costs, as presented, was "misleading" because "its true basis was not obvious … The appellant should have taken more care to ensure that the basis of how it calculated its costs claim was made clear in its application …" The FTT then went on to reject the application on the specific basis set out at [23] of its decision, set out at [16] above.

57. First, we do not consider the FTT's finding as to a supposed breach of the "spirit" of Rule 10(3)(b) to be relevant. We are not aware of any principle of construction that invites or requires a consideration of the "spirit" of a provision. We presume therefore that the FTT had in mind the purpose of Rule 10(3)(b) and was expressing a view that, interpreted purposively, there had been a breach of that Rule.

58. Rule 10(3)(b) requires the schedule of costs to be "in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs … if it decides to do so." The FTT must therefore be taken to have found that, by omission of the relevant details, the schedule did not provide "sufficient detail"; the missing detail comprised, most

crucially, a statement that the figures had been calculated not by reference to the individual time spent on the appeal of this sole appellant but as a one thirtieth apportionment of the time spent "en bloc" on the thirty similar appeals being conducted by DCL's representative. The mischief, as the FTT perceived it, was that "[b]y presenting a claim for £2,500 … the appellant submitted a claim for costs in an amount which parties would reasonably expect to be dealt with on summary assessment", whereas a claim for costs of £75,000 on 30 appeals was "one for detailed assessment on taxation".

59. When considering the extent of the detail required in a schedule of costs claimed, there are in our view two important factors in Rule 10 to be taken into account. The first is the one focused on by the FTT, namely that the schedule must be "in sufficient detail to allow the Tribunal to make a summary assessment", but there is also a second factor. Rule 10(5)(a) provides that "[t]he Tribunal may not make an order under paragraph (1) against a person … without first giving that person an opportunity to make representations". This is an important safeguard. In a situation where a representative is known to be advising a number of parties on closely associated matters involving the same points of law, it gives the prospective paying party the opportunity to raise the point and put forward submissions as to why the amounts claimed might, in the light of it, be excessive.

60. It appears that HMRC had taken up that opportunity in the present case – at [21] of the FTT's decision, it is recorded that "HMRC's grounds of objection had included that a number of other identical claims for costs had been submitted on behalf of other appellants for whom Cornerstone Tax acted". No further details are provided in the FTT's decision, but we note that HMRC's original objection to the application for costs mentioned the point briefly, when pointing out the perceived shortcomings in the schedule which had been (belatedly) provided:

> "For the avoidance of doubt, HMRC do not accept that the schedule … complies with [Rule 10(3)(b)] … It does not, for instance, contain any dates. Moreover, this "schedule" has been used in other costs applications submitted by Cornerstone on behalf of other clients following the withdrawal of information notices by HMRC and the granting of their appeals."

61. Clearly, therefore, HMRC were already alert to the issue in general terms when they received the costs application. It would have been open to them, in making their submissions in response, to expand on the point and effectively raise the issues which were subsequently seized on by the FTT at the hearing.

62. We mention this point only to observe that if the requirement for a schedule of costs is that it should contain "sufficient detail to allow the Tribunal to undertake a summary assessment" of the costs, that requirement must be interpreted in the light of the provisions in Rule 10(5) which enable the responding party to highlight and question aspects which arise from the facts and circumstances already known to it. Even if the failure to state the basis of preparation of the schedule might be regarded as potentially misleading (which will depend on the facts of the case), the prospective paying party has the opportunity to highlight the point, based on the facts known to it,

before the schedule falls for consideration by the FTT. Thus, insofar as the paying party is aware of the surrounding facts and circumstances which might lead to the conclusion that the schedule claims an excessive amount, it is able to bring those circumstances to the attention of the FTT and argue for a more reasonable basis of calculation.

63. Because of our conclusion on Issue (2), we do not need to consider whether the FTT was correct to regard the schedule of costs in this case as not complying with Rule 10(3)(b). However, even if there were such a failure to comply, we consider that the FTT ought to have exercised its power to waive the breach under Rule 7, bearing in mind the overriding objective contained in Rule 2.

64. As such a waiver is essentially a case management matter for judicial discretion, an appellate tribunal will not interfere unless it can be shown that the judge exercised that discretion on an improper basis. We consider Mr Firth is right to say that the general guidance endorsed in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 at [33] is applicable to this case:

> "… an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

65. However, Mr Firth submitted that the FTT should have taken all relevant matters into account in reaching its decision but failed to do so. As stated at [23] of the FTT's decision, the sole reason given by the FTT for refusing to exercise its discretion to waive "the various breaches" (two of which were referred to as "relatively minor") was that "the appellant had not taken care to ensure that the schedule provided gave an accurate picture of how the costs it claimed had been calculated. It should have done so."

66. We agree with Mr Firth on this point. There has been no detailed guidance on the specifics of what should be contained in a schedule of costs, so it could not be said that DCL was in clear breach of some explicit requirement. The FTT acknowledged that there was "no reason to suppose Cornerstone Tax nor the appellant intended to mislead …" The FTT considered only what it regarded as the seriousness of the breach and there is no mention in the FTT's decision of any wider consideration of the reasons for the breach, the prejudice caused to HMRC by it or the prejudice which would be caused to DCL by refusing to waive it. DCL (subject to the other weaknesses in its application) would have suffered clear prejudice as a result of losing all entitlement to costs even if it had been able to establish unreasonable conduct on the part of HMRC in the proceedings; and HMRC had suffered little or no prejudice because they had the opportunity (and knowledge of the relevant facts, at least in sufficient outline) to raise the method of calculation of the schedule in their response to the application under Rule 10(5). In failing to consider these wider issues before reaching its decision, we consider the FTT erred in law.

67. Thus, if we had not dismissed the appeal on the basis of Issue (2), we would have held that the FTT erred in law in dismissing the application on the basis of Issue (1) and we would have remade the decision of the FTT accordingly by waiving any supposed breach of Rule 10(3)(b) arising from the failure to state explicitly the "one thirtieth" basis upon which the schedule had been drawn up.

68. As to the "sufficient detail" that is necessary in order for a schedule of costs to comply with Rule 10(3)(b), we have the following general observations.

69. We consider the FTT was correct to indicate that the name of each fee earner should be stated, along with the hourly rate for that fee earner and a sufficient statement of the level of experience and expertise of that fee earner to enable the FTT to form a view of the appropriateness of the hourly rate claimed and to assess whether it was reasonable for the relevant work to have been done by a fee earner of that standing. The fee earner's professional qualification or other status should be identified (e.g. paralegal, trainee solicitor, solicitor, chartered tax adviser, accountancy qualification) and approximate length of experience in that role. The geographical location of the fee earner will also usually be relevant – it is well established that appropriate hourly rates vary by location. Clearly, the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each occasion. Any disbursements claimed must also be clearly identified, giving the amount of the cost incurred, what it was incurred on and how that expenditure relates to the proceedings. The schedule should also make clear the extent to which any VAT charged is recoverable as input tax by the claiming party, so that it should not properly be recoverable from the paying party. Finally, if the figures in the schedule are calculated as some apportioned part of a larger figure, it would always be advisable for details of the apportionment to be included in the application.

Issue (3)

70. Given our decision in relation to Issues (1) and (2) above, we do not need to decide Issue (3). The only observation we would wish to make on the FTT's decision on this point is that we have doubts about the distinction which the FTT drew between:

> (1) a situation in which a taxpayer appealed to HMRC in order to pursue the option of a review (where the Judge considered that, in principle, the costs of lodging the appeal with HMRC should not be recoverable), and
>
> (2) the situation in which a taxpayer appealed to HMRC merely "to fulfil the necessary conditions to bring an appeal before the Tribunal" (where she considered that in principle the costs of lodging the appeal with HMRC should be recoverable).

71. It seems to us that defining the scope of a possible order for costs by reference to the subjective intentions of a potential appellant at a particular early stage in the process is hedged around with too many difficulties and uncertainties to form a reliable basis for decision. Without deciding the point, we consider the better view is that

whether or not a statutory review is in contemplation, the costs of making an appeal to HMRC (and indeed of making any further representations in the context of a statutory review, should one subsequently take place) are not "incidental" to the proceedings before the FTT and should not therefore be recoverable under any costs order.

Disposition

72. We agree with the FTT that HMRC did not act unreasonably in bringing, defending or conducting the proceedings and, accordingly, DCL's appeal is dismissed.

Costs

73. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

UPPER TRIBUNAL JUDGE GREG SINFIELD

UPPER TRIBUNAL JUDGE KEVIN POOLE

RELEASE DATE: 15 MAY 2018