UT Neutral citation number: **[2023] UKUT 00266 (TCC)**

UT (Tax & Chancery) Case Numbers:
UT-2023-000053; UT-2023-000054

Upper Tribunal
(Tax and Chancery Chamber)

Decided on the papers

COSTS — Tribunal decision refusing Privacy Applications – application for costs on basis of unreasonable behaviour – costs application granted

Judgment given on: 9 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

TONI FOX-BRYANT
DAVID BRIAN PRICE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicants: Gareth Fatchett of FS Legal Solicitors LLP, instructed by the Applicants

For the Respondent: Zsuzsa Elek, solicitor in the Legal Division of the Financial Conduct Authority

DECISION

1. On 31 July 2023, this Tribunal released its decision ("the Decision") refusing the Privacy Application made by the Applicants; the Decision was published under reference [2023] UKUT 00224 (TCC).

2. On 9 August 2023, the Financial Conduct Authority ("the Authority") applied for its related costs to be paid by the Applicants, and attached a Schedule of Costs amounting to £2,805 (together "the Costs Application").

3. On 9 October 2023, I issued an interlocutory decision allowing the Costs Application ("the Costs Decision"). Costs decisions are not normally published in this jurisdiction, because they concern routine matters of little interest to the wider public.

4. The Authority subsequently applied for the Costs Decision to be published on the basis that it would provide guidance to parties in a similar position. No objection was received from the Applicants. I noted that in *Breen v HMRC* [2023] UKUT 252 (TCC), the Upper Tribunal had recommended that reasoned decisions about Unless Orders be published, so that "other judges and the public can understand the decision-making process involved". I similarly decided that publication of the Costs Decision was in accordance with the principles of open justice.

5. The text set out in the following paragraphs is identical to that in the Costs Decision already issued to the parties, other than that the introductory paragraph has been replaced by these first five paragraphs. I have also amended the wording of the Order in the final paragraph to put it beyond doubt that the date for compliance runs from the date of issue of the Costs Decision, not from the date of its publication.

The law

6. Rule 10(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Tribunal Rules") provides that the Tribunal may make a costs award in a case such as this if it "considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings".

7. Rule 10(7) reads:

> "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; and
>
> (b) if the paying person is an individual and the order is to be made under paragraph (3)(a), (b) or (d), considering that person's financial means."

8. Rule 10(8) allows the Tribunal to ascertain the costs by summary assessment.

The Costs Application and subsequent communications

9. The Costs Application was made under Rule 10(3)(d) on the basis that the Applicants acted "unreasonably" in bringing the Privacy Application and in conducting the related proceedings.

10. On behalf of the Applicants, on 24 August 2023 Mr Gareth Fatchett of FS Legal Solicitors LLP responded to the Costs Application ("the Response"). The Response included an application that the Authority pay the Applicants' costs of the Response ("the Cross-application"). The Authority provided a reply to the Response and to the Cross-application on the same day.

11. On 19 September 2023, the Tribunal drew the attention of the Applicants to Rule 10(7) and gave them further time to provide evidence and submissions in relation to their financial means. On 26 September 2023, the Tribunal received an email from Mr Fatchett together with a bundle of documents. On 28 September 2023, the Authority provided a further response.

Unreasonable behaviour?

12. In *Catanã v HMRC* [2012] UKUT 172 (TCC), Judge Bishopp considered the phrase "acted unreasonably in bringing, defending or conducting the proceedings" in Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Judge Bishopp held at [14] that the cases the Rule was "designed to capture" included those where "an appellant has unreasonably brought an appeal which he should know could not succeed". In *Distinctive Care v HMRC* [2019] EWCA Civ 1010 at [25], the Court of Appeal endorsed the approach taken in *Catanã*. Rule 10(3) of the Upper Tribunal Rules has identical wording, and I find that the meaning is the same.

13. The Decision sets out the law relating to Privacy Applications; this was not in dispute. In particular, the applicant must "produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited"; a "possibility" of severe damage or destruction of a person's livelihood is not enough, there must be a "significant likelihood" of such damage or destruction occurring.

14. In the Costs Application, the Authority submitted that:

> "The Applicants failed to present cogent evidence in support of their contention that the publication of the Decision Notices would cause serious harm to them. Indeed, any reading of the (well-rehearsed) case law on privacy should have led the Applicants/their legal advisor to recognise that the Application had no hope of success. The evidence of Ms Fox-Bryant did not even come close to meeting the evidential threshold and Mr Price's evidence was even thinner."

15. I agree with those submissions. Ms Fox-Bryant said in her witness evidence that publication would "ruin" her professional career, as the damage caused would be "irreversible", but these statements were unsupported and unparticularised. Mr Price did not provide any evidence at all as to how publication would cause him damage. In addition, key facts and the Applicants' identities were already in the public domain. I concluded in the Decision that:

> "the Applicants have failed to demonstrate a 'real need for privacy' by providing 'cogent evidence' that publication would cause them to suffer 'disproportionate damage', or that it would otherwise be 'unfair' to publish the Decision Notices"

16. I also agree with the Authority that both Applicants acted unreasonably. Even a cursory reading of the relevant case law would have alerted them and/or Mr Fatchett to the very significant gap between their evidential position and the requirements for a successful Privacy Application.

17. I reject Mr Fatchett's submission that the Costs Application could not succeed because the Decision did not include a finding that the Applicants acted unreasonably. The issue the Tribunal had to decide in the Decision was whether or not to allow the Privacy Application. The question as to whether the Applicants acted unreasonably is a matter for this decision, and the relevant threshold has self-evidently been met, for the reasons given by the Authority and set out at §14 and §15 above.

Financial means

18. Mr Fatchett's response on Rule 10(7) consisted of an email reading:

> "Please see the attached Bundle in two parts in relation to financial hardship. This evidence was used by the FCA to reduce the costs to zero."

19. The attached bundle ("the Financial Bundle") contained correspondence and evidence relating to the Applicants' financial means in the context of the penalty charged by the FCA.

20. In Ms Fox-Bryant's case, the Authority would have imposed a financial penalty of £826,592, consisting of £670,490 of "disgorgement" and £156,100 as a punitive element. In Mr Price's case, the Authority would have imposed a financial penalty of £767,244, consisting of £622,344 of disgorgement and £144,900 as a punitive element. However, because both Applicants provided the Authority with the evidence in the Financial Bundle, the Authority accepted that paying the full penalties would cause the Applicants serious financial hardship, and limited the penalties to the disgorgement elements. Although Mr Fatchett's email to the Tribunal says that the evidence in the Financial Bundle "was used by the FCA to reduce the costs to zero", it was in fact used to reduce the proposed penalties.

21. Having considered the evidence in the Financial Bundle on the basis that there has been no relevant material change to the Applicants' financial position since that information was provided to the Authority, I find as follows:

(1) Ms Fox-Bryant's assets include a 50% interest in a property; that interest, net of mortgage liabilities, is worth £277,903. She also has a Self Invested Personal Pension ("SIPP") valued at £549, 532. The Authority's practice is only to take into account 25% of pension savings (£137,383), presumably on the basis that this percentage can be drawn down as a tax-free lump sum, and I have taken the same approach. Her car is worth £17,820. She is working on a self-employed basis, earning £35,393pa after expenses and tax, and her living costs are £29,712, leaving a surplus of £5,681. From these figures, I find that Ms Fox-Bryant has net assets of £388,787.

(2) Mr Price's net asset position was summarised by the Authority in a letter dated 9 January 2023 as totalling £390,075. This included £18,225 of premium bonds, which as the Authority pointed out in its further response, are easily realisable assets. He has monthly pension income of £2,767 compared with outgoings (excluding income tax) of £1, 628; on an annual basis this comes to £33,211 less £19,536, leaving £13,756. Even allowing for tax, there is still a surplus.

22. I considered whether I should take into account the penalties sought by the Authority. The Applicants have appealed those penalties, and did not ask me to decide the Costs Application on the basis that these sums will be payable to the Authority. In my judgment, this costs decision should be made on the basis of the Applicants' current financial means, without taking any view on the possible outcome of their appeals.

23. From the figures set out at §21 it is therefore clear that the Applicants are able to afford to pay the sum sought by the Costs Application. For completeness I add that there is a significant difference between the penalties originally proposed by the FCA, and the costs now being sought. The former were greater than the Applicants' net worth, while the costs are £2,805, well below 0.5% of their combined assets.

Other matters relating to the Costs Application

24. The Applicants made no submissions on quantum, and having reviewed the costs, I find them to be reasonable and proportionate. In particular, they are limited to Counsel's fees, although the Authority could properly have claimed its related internal legal costs.

25. Whether or not to make a costs award involves the exercise of the Tribunal' discretion. In deciding whether it was fair and just to make the award, I considered the factors set out earlier in this decision notice; I also took into account that the Authority warned the Applicants of the risk of costs, given the unmeritorious nature of the Privacy Applications.

26. I agree with the Authority that a summary assessment is appropriate.

The Cross-Application

27. I reject the Cross-Application. The Authority was entirely correct as to the test of "unreasonable" conduct, and also correct that the Applicants acted unreasonably.

Order

28. I assess the costs at £2,805 and order that the Applicants pay those costs to the Authority within 28 days of 9 October 2023 (the date the Costs Decision was issued to the parties).

ANNE REDSTON
UPPER TRIBUNAL JUDGE

Released to the Parties 06 November 2023