UT Neutral citation number: [2024] UKUT 00184 (TCC)

UT (Tax & Chancery) Case Number: UT/2022/000099

Upper Tribunal
(Tax and Chancery Chamber)

By remote video hearing

COSTS – whether a clear winner before the FTT – yes – appeal allowed – costs awarded but reduced to take into account conduct and other factors

Heard on 24 April 2024
Judgment given on: 25 June 2024

Before
MR JUSTICE PETER ROTH
DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

ULSTER METAL REFINERS LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr David Bedenham of Counsel, instructed by CTM Tax Litigation Limited

For the Respondents: Mr James Puzey and Mr Joseph Millington of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. Ulster Metal Refiners Limited ("the Appellant" or "UM") is a company based in Northern Ireland of which Mr Henry Donaldson is the director. The Appellant appealed to the FTT against a decision made by HM Revenue & Customs ("HMRC") to deny credit for input tax on the basis that it knew or should have known that the transactions in question were connected with fraud. On 12 August 2021, the FTT issued its decision ("the FTT Decision") allowing the Appellant's appeal in relation to around 90% of the VAT denied.

2. The Appellant's appeal had been allocated as "complex" under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"), and the Appellant had not opted out of costs. On 7 September 2021, the Appellant applied to the FTT for an order that its costs be paid by HMRC.

3. On 7 April 2022, the FTT issued a decision ("the Costs Decision") refusing that application on the basis that:

(1) there was no "clear winner";

(2) some of Mr Donaldson's evidence had been untruthful; and

(3) Mr Donaldson had conducted the litigation "tactically" and failed to act with candour.

4. The UT (Judge Jonathan Richards, as he then was) granted the Appellant permission to appeal against the Costs Decision on the following ground:

> "The FTT erred in concluding that there was 'no clear winner' of the substantive appeal. It should have concluded the Company was the 'clear winner' and gone on to consider whether the criticisms it made of the Company's conduct of the litigation (when weighed against the criticisms it made of HMRC's conduct) justified an exception to the general rule that the Company should have its costs of the substantive appeal."

5. For the reasons explained in the main body of this judgment, we find that the Appellant was the "clear winner" because it had succeeded in relation to around 90% of the disputed VAT, and that the FTT had therefore made an error of law. From that starting point, we reduce the Appellant's costs to take into account the fact that HMRC had been successful in part, and make a further reduction to reflect Mr Donaldson's conduct. Overall, we award the Appellant 40% of its costs.

THE FTT RULES

6. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") is headed "Orders for costs", and so far as relevant to this case, reads as follows:

> "(1) The Tribunal may only make an order in respect of costs…—
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; . . .
>
> (c) if—
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer…has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or

(d) …

(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)-(5) ….

(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.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply; …"

CPR 44

7. Part 44 of the Civil Procedure Rules ("CPR") contains "General Rules about Costs". CPR 44.2 is headed "Courts discretion as to costs" and includes the following provisions:

"(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) …

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) …

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings…;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; …"

THE BACKGROUND

8. This case has a long history. On 1 October 2012, HMRC denied the Appellant its right to deduct input tax of £462,854 on purchases of soft drinks during VAT periods 03/11 to 06/11. The suppliers were Irwin Enterprises ("Irwin"), Paul Magee Wholesale Beverages ("Magee"), and PCB Logistics Limited ("PCB"). Around 90% of the denied VAT related to Irwin, a company owned and controlled by Mr Fearghal Keenan.

9. HMRC denied the right to deduct on the basis that the Appellant knew or should have known its transactions were connected to the fraudulent evasion of VAT, following the principle set out by the ECJ in Cases C-439/04 and C-440/04 *Axel Kittel v Belgium; Belgium v-Recolta Recycling SPRL*, EU:C:2006:446.

10. The Appellant's appeal was heard by the FTT (Judge Cannan and Mr Adrain) in November 2015 ("the First Decision").

(1) In relation to the PCB and Magee deals, the Appellant had accepted that they traced back to a fraudulent trader, so the only issue in dispute was whether Mr Donaldson knew or should have known that this was the case. HMRC was successful on that issue.

(2) In relation to the Irwin deals, the Appellant did not accept that the purchases traced back to a fraudulent trader. Although the FTT agreed with the Appellant, it went on to refuse its appeal on the basis that there had been a different sort of fraud from that pleaded by HMRC.

11. The Appellant appealed that decision to the Upper Tribunal, see [2016] UKUT 342 (TCC)) (Arnold J and Judge Hellier), but was unsuccessful; this was followed by a further appeal to the Court of Appeal in Northern Ireland. On 9 May 2017, the Court of Appeal (McBride J and Gillen and Weir LJJ) held that it had been procedurally unfair for the FTT to have decided the appeal on the basis of a "third man theory", in other words, a ground which had not been pleaded, without having given the Appellant "sufficient opportunity to respond to the new case", see [2017] NICA 26. The Court remitted the appeal to a differently constituted FTT for rehearing, and subsequently awarded the Appellant all its costs to date.

12. After carrying out "substantial further work" on the Irwin deal chains, HMRC filed and served their Statement of Case for the remitted hearing; this repeated their earlier submission that the Irwin deals traced to fraudulent traders.

13. The Appellant applied to strike-out certain passages of that Statement of Case and/or to bar HMRC from putting forward what it said was "the self-same case that was rejected by Judge Cannan". The application submitted that HMRC's approach was an abuse of process "made more egregious by the fact that the Appellant is, because of the passage of time, at a serious disadvantage in attempting to call relevant evidence" in response. Mr Donaldson filed and served a witness statement in support of the application, in which he said the Appellant would be prejudiced if HMRC were permitted to repeat the deal chain submissions, because he was no longer able to call Mr Keenan to give evidence.

14. The strike-out application was dismissed by Judge McNall in a decision published on 13 June 2019 under reference [2019] UKFTT 385(TC). Judge McNall found that the Court of Appeal had remitted the case to be reheard "in its entirety", and that HMRC were therefore able to put forward the same submissions about the Irwin deal chains.

15. The remitted hearing took place between October 2020 and February 2021 before Judge McNall and Mr Farooq. Mr Donaldson and his accountant, Mr Liban Ahmed of CTM Tax Litigation Ltd, both provided witness statements, gave oral evidence and were cross-examined. In the course of the hearing, HMRC accepted that the denial of input tax on certain deals could not be maintained, and the VAT in dispute accordingly reduced to around £380,000.

16. The FTT Decision was issued on 12 August 2021, under reference [2021] UKFTT 286 (TC). The FTT allowed the Appellant's appeal in respect of the Irwin transactions on the basis that HMRC had failed to prove the deal chains, but dismissed its appeal against the Magee/PCB transactions. The FTT also made a number of findings about Mr Donaldson's dishonesty and his approach to litigation. We return to these findings, and to the FTT's criticisms of HMRC's case in relation to the Irwin deals, later in our judgment.

17. On 30 September 2021, as a result of the FTT Decision, HMRC applied a £427,278 credit to the Appellant's VAT account.

THE COSTS DECISION

18. Both parties made costs applications.

(1) HMRC applied for (a) the costs of the strike-out application and (b) 10% of its costs of the main hearing to reflect their success in relation to the Magee/PCB deals. Because the case had been allocated as complex and the Appellant had not opted out, the costs were claimed under Rule 10(c), and in the alternative, under Rule 10(b) on the basis that the Appellant had acted unreasonably in conducting the proceedings.

(2) The Appellant applied for all its costs (including those relating to the strike-out hearing) under Rule 10(c), on the basis that it was "ultimately successful" in relation to 90% of the denied invoices.

19. On 7 April 2022, Judge McNall issued the Costs Decision. He first set out Rule 10(b) and (c) of the FTT Rules, and then continued:

> "The decision to award costs is always discretionary. CPR 44.2 provides guidance as to the framework for that discretion. Applying that guidance, the Tribunal has a discretion as to whether costs are payable by one party to another, and, if it decides to make an order about costs, the 'general rule' is that the unsuccessful party will be ordered to pay the costs: CPR 44.2(2)(a), albeit the Court may make 'a different order'. CPR 44.2(4) and (5) make 'conduct' a relevant consideration when exercising the discretion to make a costs order."

20. Judge McNall awarded HMRC its costs of the strike-out application on the basis that it was "the clear winner", while the Appellant was "the clear loser", and the "general rule" should

therefore apply. The award was made under Rule 10(1)(c), but Judge McNall said he would in any event have made a costs order in favour of HMRC because the application had been pursued in part "on a basis that was untrue and which the Appellant knew to be untrue". He made that finding because Mr Ahmed's evidence at the hearing was that there was never any intention of calling Mr Keenan as a witness.

21. Judge McNall then turned to the substantive hearing, saying:

> "26. In relation to the substantive appeal, each party was successful in part. UM's appeal succeeded in relation to the Revenue's failure to establish connection to fraud for one set of deals. Its appeal did not succeed in relation to other sets of deals where the Appellant, through its director Mr Donaldson, was found to have had actual knowledge of connection to fraud.
>
> 27. It is fair to say, arithmetically, that the scales ended up tilted in favour of the Appellant because there were about 135 denied invoices, with the Appellant ultimately succeeding in relation to about 90% of them. However, I decline to follow the arithmetic approach when it comes to deciding on costs. It is too simple, and fails to capture the bigger picture.
>
> 28. Standing back, it does not seem to me as if the substantive appeal did produce a clear winner. Neither party really got what they wanted. UM ended up paying more tax than it wanted to (ie not getting back its input tax claimed on the Magee and PCB deals); and HMRC failed to get as much as it wanted (ie having to pay UM the input tax claimed on purchases from Irwin Enterprises Ltd). It does not seem to me as if the exact figures, and the fact that one may over-top another, really matter for the purposes of this analysis.
>
> 29. In my view the 'general rule' does not apply. It seems to me that this is a case in which 'a different order' should be considered: CPR 44.2(2)(b)…"

22. He went on to refuse the Appellant's application for costs, and explained his reasons as follows:

(1) Mr Donaldson had been untruthful "in relation to all the groups of deals".

(2) The FTT Decision "is pervaded with comments which were adverse to Mr Donaldson's credibility, and those are findings which simply cannot be ignored".

(3) As regards the PCB/Magee deals, Mr Donaldson "actually knew of the connection to fraud", and "it does not matter that those deals, empirically, amounted to just a small proportion of the overall deals in dispute".

(4) In conducting the litigation, Mr Donaldson had engaged in "a misguided game of forensic 'hide and seek' with HMRC, rather than "putting his cards fairly and candidly on the table", and he had also not been "candid" with the FTT.

(5) The costs order should be "appropriately reflective of all the circumstances, including…the strong public interest in discouraging the deployment of dishonest evidence to obtain public funds (ie VAT)".

(6) It was therefore "not going too far, and is fair and just, to deprive UM (despite its success in relation to a large proportion of the deals in issue) of the ability to recover any of its costs from HMRC".

23. He also declined to award HMRC its costs in relation to the PCB/Magee deals because:

(1) HMRC had waited until the hearing itself to abandon its pursuit of some of the deals; and

(2) HMRC's case in relation to the Irwin Deals had already been considered and rejected by the FTT in 2015.

24. Judge McNall therefore made no award of costs in relation to the substantive hearing.

THE STARTING POINT

25. Judge Richards gave the Appellant permission to appeal against the Costs Decision on the single ground set out at the beginning of this decision, in summary whether the FTT had erred in concluding that there was "no clear winner" of the substantive appeal and had thus begun its consideration of the costs position from the wrong starting point.

The CPR case law

26. The principles to be applied when deciding whether to make a costs order under the CPR were summarised by Gloster J (as she then was) in *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm) ("*Kidsons*") at [10]:

> "The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (*Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at paragraph 11 per Clarke J. As Mr. Kealey submitted, the general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2). In *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see paragraph 143, per Rix LJ. The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party: *Scholes Windows v Magnet (No 2)* [2000] ECDR 266 at 268. As Longmore LJ said in *Barnes v Time Talk* [2003] BLR 331 at paragraph 28, it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": *BCCI v Ali (No 4)* 149 NLJ 1222, per Lightman J. Success, for the purposes of the CPR, is "not a technical term but a result in real life" (*BCCI v Ali (No 4)* (*supra*)). The matter must be looked at "in a realistic … and … commercially sensible way": *Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) at paragraph 3 per Mann J."

27. In *Day v Day* [2006] EWCA Civ 415, a mother and a son were in dispute as to the beneficial ownership of the net proceeds of a property sale. Ward LJ gave the leading judgment; he held at [17] that "in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case". He went on to find that the judge below had failed to identify the successful party, and this was a "fundamental error of principle" which allowed the Court of Appeal to intervene. Sir Martin Nourse delivered a concurring judgment, in which he said that as a result of the failure to identify the successful party "this court is entitled, indeed bound, to interfere with the judge's exercise of his discretion".

28. In *Hutchinson v Neale* [2012] EWCA Civ 345 ("*Hutchinson*"), the issue was whether the trial judge had been wrong to start from the position that there should be no order for costs where the successful party was guilty of dishonesty in the conduct of his case. Pitchford LJ gave the only judgment with which Patten LJ agreed. Having considered earlier authorities he said at [28]:

> "The starting point for the consideration of any order for costs of an action is (CPR 44.3(2)(a)) that costs should follow the event. It is from this point that the court will, in an appropriate case, consider the conduct of the parties (rule 44.3(2)(b)). There is no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point."

The approach under the FTT Rules

29. The approach to be taken by the FTT (and by the UT on appeal) was considered by Nugee J (as he then was) in *Bastionspark LLP and others v HMRC* [2016] UKUT 425 (TCC) ("*Bastionspark*"). At paragraph 16, he said:

> "There is therefore no equivalent of CPR Part 44 which contains general rules about costs, and in particular no equivalent of CPR 44.2(2) under which if the court decides to make an order about costs, 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. But although there is no express provision to this effect, it does not seem surprising that if the FTT is to have a discretion over costs, the starting point will usually be that if any order for costs is made at all, it will be that costs should follow the event, that is that the loser will pay the winner. This is what fairness and justice would seem normally to require."

30. The appellants' counsel, Ms McCarthy, had drawn attention to *BPP Holdings v HMRC* [2016] EWCA Civ 121 ("*BPP*"), a judgment of Ryder LJ which was subsequently upheld by the Supreme Court. Nujee J said at [19]:

> "Mr Davey QC, who appeared before me for HMRC, did not dispute that where a costs order is made, the general rule is that costs should follow the event. He also accepted that although the CPR do not apply in the tribunals, case law decided in relation to the CPR can be informative; and that a key issue for the FTT in deciding on an appropriate order for costs is that of identifying the successful party in the proceedings. That I accept, and I accept that *BPP* is illustrative of the general principle that the FTT will look to cases decided under the CPR as helpful guidance, but I would sound a note of caution. Under the CPR the court has to identify the successful party in order to apply (or decide not to apply) the general rule under CPR 44.2, and as appears from the authorities (below) there has been a tendency for courts to seek to identify one or other of the parties as "the successful party" (and the other as "the unsuccessful party"). But it is not obvious, at any rate to me, that the exercise that the FTT is engaged in is necessarily quite the same. No doubt in a case where there is a clear winner and loser, one would normally expect the costs to follow the event in the FTT as in a court. But that is not because any of the rules require this approach but simply because that is likely to be the fair and just outcome and hence in accordance with the overriding objective applicable in the FTT. It by no means follows that in a case where both sides have had some measure of success the FTT has to, or ought to, approach the question of what is fair and just by seeking to identify one or other party as *the* successful party. I would have thought that what the FTT should be doing is seeking to identify a fair and just outcome, and that that is likely to be one that reflects, by one means or another, the fact that the parties have each been successful in part."

31. At [21] he noted that both parties had agreed, following *Day v Day*, that a failure to identify the successful party was an error of law, but he continued:

> "I will therefore proceed on this basis, although again sound a note of caution: I agree that if the FTT identifies a party as successful when they are not (or

> fails to identify them as successful when they are), this is an error of principle which undermines their decision. But it does not necessarily follow that the question of whether a party is successful is always a yes/no, or hard-edged, question to which there is only one right answer. In some cases it may be that the question is rather whether the decision of the FTT is one that was open to it on the facts."

32. We summarise the position as follows:

(1) Under CPR 44.2(a) the starting point is "the general rule" namely that "the unsuccessful party will be ordered to pay the costs of the successful party".

(2) There is "no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point", see *Hutchinson.*

(3) It is important to identify the "successful party" or, conversely, the "unsuccessful party" at the outset, because only then is the court likely to approach costs from the right perspective, see *Barnes v Time Talk* cited in *Kidsons.*

(4) A failure correctly to identify the successful or unsuccessful party is a "fundamental error of principle" which allows or requires the appeal court to intervene, see *Day v Day.*

(5) Identifying the unsuccessful party is "a matter for the exercise of common sense" (see *BCCI v Ali*), and may be the person "who has to write the cheque at the end of the day" (see *Day v Day*).

(6) Although the FTT Rules do not mirror the CPR, Nugee J accepted in *Bastionspark* that a failure by the FTT judge to identify the successful party was "an error of principle" which undermines its costs decision, and "in a case where there is a clear winner and loser" the FTT should take the same position as under the CPR, because that would result in a "fair and just outcome".

Submissions and discussion

33. On behalf of HMRC, Mr Puzey and Mr Millington submitted that Judge McNall had begun from the correct starting point because:

(1) he had acknowledged the "general rule" that "the unsuccessful party will be ordered to pay the costs";

(2) he had recognised the Appellant as being the "arithmetical" winner; and

(3) he had said (emphasis added) that it was "fair and just, to *deprive* UM (despite its success in relation to a large proportion of the deals of the ability to recover any of its costs". In HMRC's submission, the use of the term "deprive" only made sense if Judge McNall had first recognised that the Appellant was the "clear winner".

34. We acknowledge that Judge McNall began by setting out the general rule, and that he also recognised that the Appellant had succeeded in relation to around 90% of the disputed invoices. However, he also explicitly stated that "it does not seem to me as if the substantive appeal did produce a clear winner", and he explained that conclusion as follows:

> "Neither party really got what they wanted. UM ended up paying more tax than it wanted to (ie not getting back its input tax claimed on the Magee and PCB deals); and HMRC failed to get as much as it wanted (ie having to pay UM the input tax claimed on purchases from Irwin Enterprises Ltd). It does not seem to me as if the exact figures, and the fact that one may over-top another, really matter for the purposes of this analysis."

35. It is clear from this passage that Judge McNall began his analysis from the position that the Appellant was not the successful party. We have no hesitation in agreeing with Mr Bedenham that this was incorrect. Although the CPR does not apply in the FTT, and a more nuanced and flexible approach may be appropriate where both parties have succeeded in part, in this case there was no basis for departing from the normal starting point. The dispute related to specific identifiable deals; the Appellant succeeded in relation to 90% of those transactions, and HMRC in consequence applied a credit of £427,278 to its VAT account. On a common sense view, the Appellant was the overall winner, and the FTT should have begun its consideration of the costs position from that starting point. The fact that Mr Donaldson was dishonest does not change that: see *Hutchinson* cited above.

Conclusion on the starting point

36. The FTT failed to begin its consideration of the costs position from the starting point that the Appellant was the clear winner, and this was an error of law.

THE UT'S JURISDICTION

37. Section 12 of the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), is headed "Proceedings on appeal to Upper Tribunal" and so far as relevant provides:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) …
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate".

38. We thus have the jurisdiction either to either remit the case to the FTT with directions, or re-make the decision. We decide that it is in the interests of justice to take the latter course, for the following reasons:

(1) Neither party invited us to remit the case, and both provided detailed written and oral submissions as to the correct outcome were we to find that there had been an error of law in the Costs Decision.

(2) This case relates to purchases made in 2012, over a decade ago, and there have already been at least six hearings at various levels of the judicial system.

(3) Remaking the decision avoids the delay and the additional costs which would be incurred were the case to be remitted, and makes proportionate use of judicial and tribunal resources.

REMAKING THE COSTS DECISION

39. In remaking the decision, we started from the position that the Appellant was the overall winner. However, it was common ground that we should also take into account:

(1) HMRC's success in relation to the Magee/PCB deals; and

(2) the parties' litigation conduct, in the light of the relevant case law, the FTT's findings and both parties' submissions.

HMRC's success

40. Mr Bedenham accepted that it was in the interests of justice to reduce the costs award by 10% to reflect HMRC's partial success, and that the sum should be further discounted so HMRC recovered their related costs.

41. We agree. We reduce the Appellant's costs award by 10% to reflect the fact that HMRC was successful in part, and add a further discount of 5% so HMRC recovers their costs in relation to those deals. We recognise that 5% is an approximation, given that the costs claim submitted by the Appellant included both the strike out and substantive appeal, so the quantum of the latter has not yet been calculated. However, from the information before us we find that 5% is a reasonable approximation.

Case law guidance on conduct issues

42. In *Hutchinson,* Pitchford LJ said at [28]:

> "What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties."

43. In *Arroyo v Equion Energia Ltd* [2016] EWHC 3348 (TCC), Stuart-Smith J (as he then was) reviewed the authorities before saying at [17]:

> "Drawing these strands together, the discretion under CPR 44.2(1) is unfettered. The rule requires the Court to have regard to "all the circumstances", including those listed, and does not exclude from consideration circumstances to which costs cannot be discretely attributed... Even when what is being considered is conduct, rather than the loss of one or more issues, it will generally not be just to deprive a successful party of part of its costs because of conduct which has had no adverse impact on the incidence of costs. Put another way, if what is complained about has had no impact on costs, it will require cogent reasons to justify depriving a successful party of part of its costs on the basis of the complaint."

The FTT's findings relating to HMRC's conduct

44. The FTT criticised HMRC for re-running the case which had already failed in the First Decision, saying that "despite having had the best part of 10 years to get their house in order and despite this appeal having already been through the FtT, Upper Tribunal and Court of Appeal, HMRC's case remains confused and confusing" and that their tracing of the Irwin deals "could not be trusted" see [67]-[71].

45. The FTT also held that HMRC's case in relation to the Irwin deals was "affected by a collection of factors which, taken together, seriously undermine the integrity of the whole case", that it contained "endemic and incurable problems", and was "so pervaded with inconsistency, anomalies and flaws, that it cannot safely be relied on", see [71] and [93].

46. At [72] the FTT said that those problems:

> "do not arise from bad faith on the part of HMRC's officers, but…arose simply in consequence of the ordinary human factors - principally, the pressure of work in an extremely busy investigations unit with an overburden of investigative work. Mistakes crept in, and, over the course of time, became embedded in the analysis and increasingly difficult to disentangle. Even after several days of evidence and submissions before us, and despite the assistance of experienced counsel for HMRC, they remain near impossible to disentangle."

The FTT's findings about Mr Donaldson

47. The FTT made the following findings about Mr Donaldson's dishonesty:

(1) Despite his denials, Mr Donaldson actually knew the Magee/PCB deals were connected to fraud: see the detailed findings at [122] to [133].

(2) His evidence about the credit and contract limits for the Irwin deals was untrue. He had said he did not think those limits posed a risk, but the FTT held at [106] that "[w]e do not consider that evidence to have been truthful: there was an obvious risk where the Appellant was doing dozens of deals with Irwin coming to hundreds of thousands of pounds".

(3) Mr Donaldson had alleged that HMRC's witnesses were lying about Irwin's Intrastat records, despite having already obtained those records. He therefore knew the allegation he had made was wrong. When Mr Puzey put to him in cross-examination that "it was not honest to allege that HMRC's witnesses were lying", Mr Donaldson said he meant only to accuse *Irwin* of dishonesty. The FTT characterised this response as "unimpressive and evasive", see [53].

(4) Although Mr Donaldson denied knowing that the Irwin deals were connected with fraud, the FTT did not believe him, see[96].

48. In addition, the FTT found other parts of Mr Donaldson's evidence to be unreliable, unsatisfactory and improvised, see [113], [114] and [111]. In relation to his conduct of the litigation, the FTT found at [54] that he had engaged in "a misguided game of forensic 'hide and seek'" with HMRC rather than "putting his cards fairly and candidly on the table", and had also not been "candid" with the FTT. In the Costs Decision, Judge McNall summarised the position by saying that the FTT Decision was "pervaded with comments which were adverse to Mr Donaldson's credibility".

The parties' submissions

49. Mr Bedenham submitted that it was HMRC's conduct that was relevant, and had HMRC properly assessed their evidence about the Irwin deals, the Appellant would not have incurred any related costs. Although he did not seek to go behind the FTT's findings about Mr Donaldson's dishonesty or his litigation conduct, Mr Bedenham submitted that none of this would have arisen had HMRC recognised that their case could not succeed. In particular, any findings about dishonesty relating to the Irwin deals were of little or no relevance, given that the burden of proof rested on HMRC and they had failed to prove the deal chains. Mr Bedenham also said that Mr Donaldson's conduct did not increase the costs of the appeal "in any material way".

50. Mr Puzey's main submissions in response, with which we agree, were that:

(1) There is a significant difference between HMRC's failure to make good their case and Mr Donaldson's conduct: HMRC had completely reviewed the evidence to support the tracing, and the officers in question gave honest evidence, whereas Mr Donaldson was untruthful, unreliable, unsatisfactory and improvisatory.

(2) It is correct that the issue of whether Mr Donaldson "knew or should have known" the Irwin deals were connected with fraud only arose for determination if HMRC had first proved the deal chains. However, both issues formed part of a single hearing, and HMRC spent considerable time before the hearing reviewing Mr Donaldson's multiple witness statements in the context of the rest of the evidence; preparing and carrying out cross-examination, and generally preparing HMRC's case on the "knew or should have known" issue. Had Mr Donaldson given honest, straightforward evidence, that time and the related costs would have significantly reduced. Any sum awarded to the Appellant should therefore reflect the "unwarranted increase" in time and costs caused by Mr Donaldson's conduct.

51. In addition to those main points, Mr Puzey also submitted that a person such as the Appellant, who had dishonestly sought to obtain money from public funds by making a fraudulent VAT repayment claim, deserved an additional costs sanction so as to reflect the public interest and to act as a deterrent.

Conclusion

52. In deciding whether to make a costs order, and if so, the quantum of that order, our jurisdiction is at large. We have regard to all the circumstances, including the conduct of both parties and the fact that the Appellant was the overall winner, to arrive at a fair and just outcome.

53. As set out above, we discount the Appellant's costs by 15% to take into account HMRC's success in relation to the Magee/PCB deals. We also agree with Mr Puzey that the remaining 85% must be reduced to reflect Mr Donaldson's conduct, in particular in relation to his dishonesty. In deciding the amount of that further reduction we take into account that HMRC were required to spend time (and the related costs) which would not have been necessary had Mr Donaldson given honest, straightforward evidence, and if he had been candid in his dealings with HMRC and with the FTT. We do not accept Mr Puzey's submission that cases involving public funds are in a special category (when compared, say, to frauds perpetrated on vulnerable individuals) but the fact that the dishonesty had an impact on public funds is a relevant factor. Altogether, we reduce the share of its costs which the Appellant can recover from 85% to 40% for those reasons.

THE DECISION AND THE COSTS

54. We allow the Appellant's appeal, and order HMRC to pay the Appellant 40% of its costs of the substantive hearing on a standard basis. Unless previously agreed between the parties, those costs are to be subject to detailed assessment in accordance with Rule 10(7)(a) of the FTT Rules.

55. Any application for costs in relation to this appeal against the Costs Decision 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, as required by Rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE ROTH
JUDGE ANNE REDSTON

RELEASE DATE: 25 June 2024