



Claim No. RL-2018-000005
Appeal ref: CH-2020-000147

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
B E T W E E N :

Date: 30 April 2021

Before :

James Pickering QC
(sitting as a Deputy High Court Judge)

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Claimants/Respondents

- and -

(1) IGE USA INVESTMENTS LIMITED
(FORMERLY IGE USA INVESTMENTS)

**(personally and in its capacity as a partner in GE Commercial & Consumer
Finance Holdings Limited Partnership)**

(2) GE CAPITAL INVESTMENTS

**(personally and in its capacity as a partner in GE Commercial & Consumer Finance
Holdings Limited Partnership)**

(3) GE CAPITAL FINANCE

~~(4) GE COMMERCIAL & CONSUMER FINANCE HOLDINGS LIMITED~~
~~PARTNERSHIP~~

(5) GE CAPITAL CORPORATION (HOLDINGS)

(6) GE (HOLDINGS)

(7) INTERNATIONAL GENERAL ELECTRIC (U.S.A.)

Defendants/Appellants

Thomas Bell (instructed by **PricewaterhouseCoopers LLP**) for the **Defendants/Appellants**

Gareth Tilley (instructed by **HM Revenue & Customs**) for the **Claimants/Respondents**

JUDGMENT APPROVED

James Pickering QC (sitting as a Deputy High Court Judge):

Introduction

1. On 31 December 2020, I handed down judgment in this matter (reported at [2020] EWHC 1716). This supplemental judgment deals with the issue of costs.
2. The matter before me was an appeal against the order of Deputy Master Nurse dated 2 June 2020. In that order, the Deputy Master had dismissed an application for disclosure of specific documents pursuant to paragraph 18.1 of the Disclosure Pilot Scheme (CPR PD51U) (“**the Pilot Scheme**”). In broad terms, he did so on the basis that, for various reasons, he lacked jurisdiction to make the order sought.
3. Essentially, therefore, there were 2 issues before me. The first issue was whether the Deputy Master had been correct to find that he had no jurisdiction to make an order (“**the Jurisdiction Issue**”). The second issue was whether, if there was jurisdiction, the court should exercise its discretion to make such an order in any event (“**the Discretion Issue**”).
4. As for the Jurisdiction Issue, GE appealed on the basis that the Deputy Master had been wrong to find that he did not have jurisdiction. HMRC resisted the appeal, arguing that the Deputy Master had been correct in his reasoning. On that issue, I found that the court did indeed have jurisdiction and therefore allowed the appeal. In short, therefore, on the Jurisdiction Issue, GE was successful.
5. As for the Discretion Issue, GE argued that, assuming I had jurisdiction, I should go on to make the disclosure order sought. HMRC, however, again resisted, arguing that even if I did have jurisdiction this was not an appropriate case to make an order. On that issue, I found that (having already allowed the appeal on the Jurisdiction Issue), I should indeed exercise my discretion to make the order sought. On the Discretion Issue, therefore, GE was also successful.

The parties’ respective arguments on costs

6. As to costs, GE argued that it had been successful on both the Jurisdiction Issue and the Discretion Issue and that, in the normal way, costs should follow the event.
7. HMRC, on the other hand, argued that a different order should be made. In broad terms, it was argued that the disclosure application had been made by GE for the purposes of another interim application – namely, HMRC’s application to amend its Particulars of Claim to introduce an allegation of fraud – and that while in respect of the disclosure application before me it was GE which had been successful, in respect of the application to amend it was HMRC which had been successful. This being the case, so HMRC argued, either the costs should be in the fraud claims, or alternatively there should be no order for costs.

My judgment on costs

8. It is undoubtedly correct that in relation to the matter which was before me it was GE which was successful. As set out above, GE won on both the Jurisdiction Issue and the Discretion Issue. It was of course open for HMRC to concede one or both issues but instead it resisted both. Prima facie, therefore, costs should indeed follow the event such that HMRC should pay GE’s costs of both the original hearing before the Deputy Master and also those of the appeal before me: CPR 44.2(2)(a).
9. In the light of HMRC’s submissions, however, I have considered whether I ought to make a different order. In particular, I have considered what happened at the application to amend which was heard by Zacaroli J within a few days of my allowing the appeal on the disclosure issue.
10. In HMRC’s written submissions as to costs, I was referred to [136] of Zacaroli J’s judgment in support of its contention that its position on the appeal before me was effectively vindicated. To give the above paragraph context, however, it is worth setting out the complete section in which [136] appears as follows (with underlining added):

“Discretion to permit a pleading of fraud at this stage

134. GE contends that even if the fraud plea is not barred by limitation, the court should exercise its discretion to refuse the amendment for six reasons: (1) the representations are insufficiently particularised; (2) it does not sit well for HMRC to allege fraud when fraud was not mentioned once during the 8-year enquiry; (3) the internal decision to rescind the Settlement Agreement expressly disavowed fraud; (4) the lack of tenable reason for pleading fraud at this stage suggests that the reason is tactical expediency; (5) HMRC's own fraud investigation unit (the "FIS") concluded there was insufficient evidence to warrant a criminal investigation; and (6) HMRC's conduct in relation to the disclosure of documents relating to the referrals to FIS was far below the standard the court expects of a litigant.

135. I am not persuaded, on the basis of these reasons to exercise my discretion against allowing the amendment.

136. The lack of particularisation relates to the Main Purpose Representation and the Hybrid Opportunity Representation, neither of which will proceed to trial for other reasons. As to the second, third, fourth and fifth reasons, the fact that HMRC may have refrained from asserting or pleading fraud when they felt that it was not necessary to do so, but now do so only because it is necessary in order to overcome defences raised by GE, ought not to preclude them from doing so. These points may provide forensic fodder for GE's case on the strength of the fraud allegation and/or for arguments in relation to costs if the claim fails, but they do not in my judgment provide a strong enough reason to deny the amendment. As to the point relating to FIS, it was in any event faced with a different and more targeted question to that posed by the Full Disclosure Representation or the claims based on deliberate non-disclosure and its opinion is not relevant. Finally, and without embarking on a detailed examination of the circumstances of the disclosure application, I do not think that HMRC's conduct in resisting disclosure of the FIS documents or the reasons presented in support of it, justify refusing an amendment if (as I have found) the amendment otherwise ought to be permitted."

11. In short, therefore, in the above part of his judgment Zacaroli J was dealing with the various arguments which had been raised by GE as to why the fraud amendment should be refused. While it seems that in the event the FIS documents which were in

fact disclosed pursuant to my order transpired to be of little or no benefit to GE in its attempt to resist the amendment, it does not follow from the above passage of Zacaroli J's judgment that HMRC's position at the appeal before me was (to use HMRC's own expression) vindicated. Not only does HMRC's position commit the fallacy of hindsight but it also misses the point that GE sought those documents, first, to resist the proposed fraud amendment but, second, in the event that such amendment was allowed, to resist the fraud allegation at trial.

12. This being the case, it seems to me that the position can be summarised as follows. As for the Jurisdiction Issue, HMRC chose to resist GE's position thereby causing costs to be incurred. It was ultimately unsuccessful and it seems to me clear that it ought to bear the costs. As for the Discretion Issue, HMRC again unsuccessfully resisted GE's position and while it is true that the fruits of the disclosure exercise failed to persuade Zacaroli J not to allow the fraud amendment, it does not seem to me – as stated above – that this retrospective analysis can be seen as a vindication of HMRC's position taken on the appeal. Again, therefore, it seems to me that there is no reason for me to depart from the usual order that HMRC should bear the costs of the Discretion Issue too.

Conclusion

13. In conclusion, therefore, I order that HMRC should pay GE's costs of both the original hearing before the Deputy Master and also of the appeal before me.
14. It is common ground that in the event that I order costs in favour of GE (as I have) that (1) such costs should be subject to detailed assessment if not agreed, and (2) HMRC should make a payment on account of such costs in the sum of £40,000. I will therefore make an order in the above terms and invite counsel to draw up the appropriate draft minute for my approval.

JPQC

April 2021