TC02327

Appeal number: TC/2010/02769

PROCEDURE – indemnity costs – interim payment on account of costs – interest on costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARRETT PAUL CURRAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

RE: APPELLANT'S APPLICATION FOR A DIRECTION FOR INDEMNITY COSTS ETC

The Tribunal determined the application on 19 October 2012 without a hearing pursuant to rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Each party consented to the matter being decided without a hearing and the Tribunal considered that it was able to decide the matter without a hearing.

DECISION

1. This is an application by the Appellant, following his appeal being allowed by the Tribunal, for four orders in respect of costs:

(1) that the Respondents pay the Appellant's costs of, and incidental to, the appeal and that such costs be assessed on the indemnity basis if not agreed ("the indemnity costs issue");

(2) that the Respondents pay the Appellant £750,000 on account of costs set out at (1) above within 28 days of the date of that order (if not already paid by the Respondents) ("the payment on account issue"); and

(3) that the Respondents pay the Appellant interest on costs from the dates of payments made by the Appellant in respect of costs set out at (1) above to the date of that direction at 3% above the Base Rate (and 8% thereafter) ("the interest issue"); and

(4) if the amount of the interim payment made under (2) above exceeds the costs as assessed or agreed in accordance with (1) above, the Appellant shall within 28 days of the assessment or agreement repay to the Respondents an amount equal to the difference between the interim payment and the assessed/agreed amount (related to the payment on account issue)

The indemnity costs issue

2. The first point to note is that there is no dispute that the Appellant is entitled to his costs as a consequence of the decision of the Tribunal allowing the appeal. This appeal was categorised as Complex, so that the Tribunal has the general costs-shifting jurisdiction in rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). The issue between the parties, however, is the basis upon which such a direction should be made. Should costs be awarded on the standard basis or, as the Appellant seeks, on the indemnity basis?

3. The difference between the two bases is significant. Where indemnity costs are ordered there is a shift in the onus on a party to establish that the costs are reasonable. Whereas in the case of a direction on a standard basis the onus is on the party in whose favour the costs direction has been made, where indemnity costs are directed the onus shifts to the party ordered to pay the costs. Furthermore, in the case of indemnity costs there is no requirement that the costs are proportionate, that is to the importance of the case, the amount at stake, the complexity of the issues and the financial position of the parties. However, whichever basis is directed, there remains the requirement that costs must not be unreasonably incurred or unreasonable in amount.

4. I was referred to a number of authorities on the discretion of a court or tribunal to order indemnity costs. In my view the position is usefully summarised in the judgment of Briggs J in *The Bank of Tokyo-Mitsubishi UFJ Limited and another v*

Baskam Gida Sanayi VE Pazarlama AS and others [2009] EWHC 1696 (Ch) where, after reviewing the authorities, he said (at [26] and [27]):

> "[26] In my judgment those cases, together with the others summarised in the notes to CPR 44.4(3) on pages 1194 and following of Volume 1 of the 2009 White Book establish the following principles:
>
> i) The court's discretion to grant indemnity costs is not limited by any hard rules of exclusion.
>
> ii) Nonetheless the primary considerations relevant to the award of indemnity costs are first, whether the conduct of the party against whom the order is sought is such as to take the case out of the norm, and secondly, whether that party's conduct can properly be categorised as either deliberate misconduct, or conduct which is unreasonable to a serious degree.
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> iii) The bringing of a case alleging serious dishonesty may qualify for indemnity costs if on the material it can properly be categorised as speculative, weak, opportunistic or thin, if it is advanced on the basis of a constantly changing case, and if it is pursued on a very large scale without apology to the bitter end, including by hostile cross-examination, without constant regard to its merits. Some combination of those factors may justify the view that the litigation has been unreasonably pursued.
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> [27] It follows in my judgment that it is not enough for a party to assert simply that it has successfully fought allegations of the utmost gravity, regardless of the circumstances in which those allegations came to be made. Although a case in which such allegations are made may for that reason alone be out of the norm, especially a case of the present size and complexity, that is unlikely in itself to constitute a good reason for the award of indemnity costs."

5. The Appellant says that the conduct of the Respondents is such as to merit an award of indemnity costs. He submits that:

(1) the Respondents pursued serious allegations of impropriety over an extended period of time, maintaining those allegations, without apology, to the conclusion of the appeal;

(2) the Respondents advanced arguments which were "thin" and, in some respects, "far fetched"; and

(3) during the course of proceedings, the Respondents behaved in a constantly dilatory manner and advanced a constantly changing case in order to justify the allegations they made, only then to suffer a "resounding defeat".

6. As an alternative, or perhaps complementary, ground, the Appellant also submits that an award of costs on the indemnity basis ought to be made as a consequence of the Respondents rejecting two admissible offers to settle and (separately) one admissible proposal to consider mediation.

Serious allegations of impropriety

7. I do not consider that the argument of the Respondents that the Appellant had failed to disclose material facts in relation to the Settlement Agreement amounted to a serious allegation of impropriety in this case. In different circumstances I can well see that such a submission would carry with it allegations of dishonesty, but the arguments in this case were concerned with the relevance of the material, and not with any deliberate withholding of information that was known to be relevant. The circumstances of the Respondents' arguments in this respect are not such as to take this case out of the norm.

8. Nor do I consider that a representation to the Upper Tribunal and this Tribunal at the directions hearing on 16 November 2010 that material new facts had been discovered carried with it any allegation of serious impropriety that would take this case out of the norm. The same goes, in my view, for any possible insinuation concerning the conduct of Herbert Smith LLP such as is alleged to have been made in the Respondents' consolidated statement of case served on 23 July 2010: to the extent that the statement refers to non-disclosure in Herbert Smith's letter of 17 October 2005, that again was concerned with relevance. There was, in my view, no suggestion of improper conduct on the part of Herbert Smith.

Thin and far-fetched arguments

9. The Appellant submits that, in his view, all the Respondents' arguments in the appeal were misguided and doomed to fail, but that several of the Respondents' contentions crossed into the territory of "thin" and "far-fetched" assertion.

10. A number of the Respondents' contentions are criticised in this way. It is true that the Tribunal rejected the argument that it was an essential feature of interest that it accrues by reference to time that has elapsed, and that the rate of interest has to be determined not by reference to the principal amount of the loan outstanding but by the net present value of the principal amount outstanding, and did so in dismissive terms. But in making a costs direction the Tribunal must consider all the circumstances, and not just particular arguments that the Tribunal found it easy to reject.

11. A similar observation may be made in relation to the rejection by the Tribunal of the argument that the Respondents had relied on the continued existence of the security over the 2002 and 2003 Notes. In this respect the Tribunal considered the evidence and came to the considered view that reliance could not be inferred. The same applies to the way in which the Tribunal determined the proper construction of clause 6 of the Settlement Agreement.

12. I do not consider that the comments of a judge at a directions hearing concerning an argument which a party wishes to put in the substantive case can necessarily have any material bearing on the question of the quality of that argument. Save in the clearest of cases, into which category I do not place the question whether clause 6 of the Settlement Agreement was an *ultra vires* forward tax agreement, any such comments would have been made without the benefit of full argument. The Tribunal, having heard full argument, referred to the compromise of an existing claim

as being "clearly within the powers of HMRC", but that was not the end of the matter. It also had to be held that this applied in a case where the compromise was effected by being expressed in terms of notional payments (or receipts) in future years.

13. Taking the Respondents' case as a whole, rather than "cherry-picking" certain aspects of it, I do not consider that overall it can be characterised as "thin" or "far-fetched" so as to merit an award of indemnity costs. This is, in my view, just a case where one party's arguments have been rejected and the other party has been successful (see *Reid Minty (a firm) v Taylor* [2000] EWCA Civ 1723 at [32]). It is not a case out of the norm in that respect.

Dilatory behaviour, changes to pleadings and other unreasonable and/or inappropriate behaviour

14. The Appellant cites a catalogue of what are submitted to have been in essence examples of the unreasonable conduct of the Respondents. As the Appellant admits, elements of this conduct pertain, most directly, to the corresponding (and stayed) judicial review proceedings.

15. The Appellant says that such conduct is nevertheless relevant since the judicial review and the appeal were fundamentally linked. He submits, citing *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm) per Tomlinson J at [25], that the Tribunal should have regard to all the circumstances of the case.

16. I agree with the Appellant in this respect. Although the Respondents submitted that the events in question took place prior to the appeal being notified to the Tribunal, it does not follow, as the Respondents argued, that consideration of those events is outside the Tribunal's jurisdiction. Unlike the position for a case outside the Complex category, where costs directions are confined, leaving aside wasted costs, to cases of unreasonable conduct related to the proceedings themselves, in a Complex case the Tribunal has a general discretion as to costs, and in the context of an application for indemnity costs may, indeed must, consider all the relevant circumstances, which can include the reasonableness of conduct before the commencement of the appeal proceedings themselves (see *National Westminster Bank PLC v Rabobank Nederland* [2007] EWHC 1742, per Sir Anthony Colman at [28]).

17. I do not intend to recite the full panoply of the allegations made in this respect by the Appellant. All are disputed by the Respondents. I need only say that, even if they could all be established, I do not consider that individually or collectively, and taking account of all the circumstances, they amount to conduct that is unreasonable to a high degree so as to take this case out of the norm and to justify the penal nature of an indemnity costs order (see *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, per Simon Brown LJ at [12]).

18. A consistent theme of the Appellant's submissions is that he was put to additional cost as a result of the conduct of the Respondents. That is of course a relevant factor to take into account. However, I do not consider that the mere fact that

additional costs are alleged to have been incurred as a consequence of a party's conduct can be decisive. Arguments of this nature will of course be appropriately addressed to the issue of proportionality and reasonableness on a detailed assessment. They are not of themselves justification for imposing the consequences of an indemnity costs order on a party.

Expert evidence

19. The Appellant makes a number of criticisms of the evidence of the expert witness instructed by the Respondents. Although the Tribunal placed little weight on that evidence, and rejected parts of it, I do not consider that the reliance by the Respondents on that evidence can be criticised. In particular, I do not accept the conclusion drawn by the Appellant from the Tribunal's decision that it was improper, unreasonable or negligent for the Respondents to have instructed the expert. The employment of the expert, and the reliance on his evidence, did not take this case out of the norm.

20. Nor do I consider that the application by the Respondents during the hearing to exclude two passages of the amended report of the Appellant's expert can be described as vexatious, disproportionate or unreasonable. It was a perfectly normal incident of a contested hearing, and was dealt with as such by the Tribunal. The fact that certain observations in another case may have been made by another First-tier Tribunal does not render such an application as hopeless or inappropriate.

Rejection of admissible offers to settle

21. Following enquiries by the Appellant as to the possibility of a settlement, the Respondents made a settlement offer (on a without prejudice basis, save as to costs) in a letter dated 9 March 2011. On the same basis, the Appellant made a counter offer on 11 March 2011, which the Respondents did not accept.

22. On 30 July 2012 the Appellant made a further offer. This was after the hearing, but before the decision was released. The Respondents rejected the offer on 3 August 2012. Shortly beforehand, but also after the hearing and before the decision, the Appellant approached the Respondents to explore whether mediation could assist in disposing of the appeal. This proposal was rejected by the Respondents.

23. Special considerations apply in the courts to offers to settle. The relevant rule is that in CPR 36.14, which relevantly provides that where judgment against a defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer, then the court will, unless it considers it unjust to do so, order that the claimant is entitled to his costs on an indemnity basis from the date of expiry of the relevant period. The relevant period is the period specified in the Part 36 offer, or if the offer is made otherwise than not less than 21 days before trial, the period up to the end of the trial or such other period as the court has determined.

24. The Civil Procedure Rules do not apply to the Tribunal. They may, in certain instances be instructive (see, in a costs context, *Marks and Spencer Plc v Revenue and*

Customs Commissioners [2010] UKUT 296 (TCC), per Warren J at [22]). But that does depend on the context. I do not consider that the rules for indemnity costs in CPR 36.14 can be relevant to the exercise of the Tribunal's discretion in the context of a tax appeal. It is not possible to have regard to CPR 36.14 outside its own particular context, which is a comprehensive code for settlement offers under Part 36. The Tribunal has no such code in its own rules, and it is not possible to read across any particular element of Part 36 in considering the question of indemnity costs in the Tribunal. This case was a statutory appeal, where the Appellant was appealing against closure notice amendments to his self assessments and discovery assessments. The appeal was brought by the Appellant, but in that context it seems to me unrealistic in any event to characterise the Appellant as a "claimant" within the meaning of Part 36, or the Respondents as the "defendant".

25. On that basis, I decline to exercise my discretion by any analogy to the position on a Part 36 offer. Nor, in all the circumstances of this case, do I consider that the failure of the Respondents to accept offers of settlement made by the Appellant, or proposals for mediation, was unreasonable so as to justify an indemnity costs order.

Conclusion on indemnity costs issue

26. For the reasons I have given, I conclude that this is not a case where it would be appropriate, or in the interests of justice, to award costs on an indemnity basis. In my judgment, fairness is satisfied in this case by an order that the Respondents pay the Appellant's costs of, and incidental to, this appeal (apart from this application) on the standard basis.

Payment on account of costs

27. The Appellant has applied for a substantial payment on account of costs prior to detailed assessment. In this connection, and contrary to a submission made by the Respondents, I agree with the Appellant that, to the extent the Tribunal has jurisdiction to make such a direction, it will not be precluded from doing so by having already directed detailed assessment. As [308] of the Tribunal's decision makes clear, no direction for costs has been made. The Tribunal merely indicated that, as any direction as to costs would be for detailed assessment, it would not be necessary for a schedule of costs to accompany the application (as would otherwise have been required by rule 10(3)(b) of the Tribunal Rules).

28. The Appellant says that the Tribunal continues to have jurisdiction to make a direction for an interim payment on account of costs. However, the authorities on which the Appellant relies to establish the principle that the receiving party is entitled to something by way of costs and that he should be paid it without delay, namely *Beach v Smirnov* [2007] EWHC 3499 (QBD) following *Mars UK Ltd v Teknowledge Ltd* [1999] 2 Costs LR 44, are cases on the application of CPR 44.3(8), which contains the following specific provision:

> "Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

29. There is no corresponding provision in the Tribunal Rules. The question, therefore, is whether a similar power can be inferred in the Tribunal, either by rule 10 of the Tribunal Rules, or by some other provision.

30. In the context of an order for costs by the Tribunal, it is clear that the CPR is applicable only after an application has been made in respect of an order for detailed assessment in accordance with rule 10(7). However, in construing rule 10, as with any of the Tribunal Rules, the Tribunal must seek to give effect to the overriding objective of enabling the Tribunal to deal with cases fairly and justly (rule 2(3)). Applying that principle of construction, therefore, in my judgment the power of the Tribunal to make an order in respect of costs expressed in rule 10(1) should be construed widely so as to encompass the power to order the payment of an amount in respect of costs on account. That this accords with the Tribunal's own overriding objective is apparent from the explanation by Jacobs J in *Mars* of the fundamental principle behind the ordering of an interim payment of costs (at pp 46-47):

> "Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount."

31. The basis upon which an interim payment order may be made will necessarily be rough and ready, as the court or tribunal will not have the benefit of the costs schedules that will be prepared for the purpose of a detailed assessment. What the Appellant has produced is a summary of costs over the five year period from 17 August 2007 up to and including 17 August 2012. The total, which includes the fees of Herbert Smith, Malcolm Gammie QC, Professor Dent (the Appellant's expert) and the Briars Group (the Appellant's accountant and tax adviser), amounts, inclusive of VAT, to £1,224,011.21. The application is for an interim payment of £750,000 representing approximately 60% of the costs incurred by the Appellant, which is accordingly at the top end of what might be termed a usual interim payment order.

32. Against this, the Respondents say that the Respondents consider that a significant proportion of the Appellant's costs were either unreasonably or disproportionately incurred. They assert that those costs will be significantly reduced on detailed assessment. They submit that without a detailed breakdown of the Appellant's costs it is not possible to determine a reasonable amount, and that accordingly it is premature for the Appellant to be requesting a payment on account of such a substantial proportion of the overall sum.

33. I do not consider that the application is premature. It is necessarily made at an early stage. To decide otherwise would defeat the very objective of the award of an

interim payment. The Appellant has won, and has an order for costs. There is, as I understand it, to be no appeal by the Respondents. The Appellant should not unreasonably be kept from his money. As Jacobs J made clear in *Mars*, the fact that time might be needed to work out the total amount is not a good reason for depriving a party of that to which he is entitled.

34. Having considered the matter therefore, I have concluded that a reasonable amount that should be paid to the Appellant as an interim payment on account of costs is £650,000. This, it seems to me, provides a reasonable margin for possible reduction on assessment, whilst in the meantime doing justice to the successful Appellant.

Interest

35. The position of the Respondents is that the Tribunal has no power to award interest on costs orders. They cite in support of this submission *Nader (trading as Try Us) v Customs and Excise Commissioners* [1993] STC 806 (CA) and *Tel-ka Talk v Revenue and Customs Commissioners (Law Society Intervening)* [2010] EWHC 90175 (Costs).

36. As the Appellant rightly points out, in each of those cases (*Nader* concerned a litigant in person, and *Tel-ka Talk* related to conditional fee arrangements), the applicable law was that in the Value Added Tax Tribunals Rules 1986, under rule 29(5) of which costs awards were recoverable as civil debts and not as judgment debts. It was in those circumstances that the VAT Tribunal had no jurisdiction to award interest on costs.

37. The position of this Tribunal is different. Under s 27 of the Tribunals, Courts and Enforcement Act 2007 a sum payable in pursuance of a decision of this Tribunal is recoverable as if it were payable under an order of the High Court or a county court. In the case of the High Court such amounts would be judgment debts within s 17 of the Judgments Act 1838, carrying interest at 8%, which absent any other order of the court runs from the date on which judgment is given (see CPR 40.8). For the county courts, the same result is obtained under regs 2 and 5 of the County Courts (Interest on Judgment Debts) Order 1991. Reg 2(2) makes it clear that this operates in respect of costs orders notwithstanding that the amount of such costs will normally be determined at a later date.

38. In my judgment, therefore, interest is payable on an award of costs by the Tribunal, and it is ordinarily payable from the date of the Tribunal's decision on the basis of which the award of costs is made. There is no need for the Tribunal to make any order that interest be paid; the relevant statutory provisions simply apply to that effect. For the period after judgment the rate is fixed; there can be no adjustment where the order is for a sterling amount. The courts do not have any such power: see *Thomas v Bunn* [1991] 1 AC 362 (HL).

39. What the Appellant seeks, however, is an order for interest to run, at 3% over base rate, from a period prior to the Tribunal's decision, namely from the dates on which the Appellant has from time to time paid the costs incurred.

40. In respect of the period for which interest should run, there is no specific rule in the Tribunal Rules corresponding to that in CPR 44.3(6)(g), which allows a costs order of the court to include an order that interest be paid from or until a certain date, including a date before judgment. I have considered whether rule 10 may be construed to allow the Tribunal to make such an order. Consistently with what I have decided in relation to interim payments of costs, I also consider that, in the interests of fairness and justice, rule 10 should be construed so as to permit the Tribunal to award interest on costs from a date before the relevant decision. Rule 10 (1) provides that the Tribunal may "make an order *in respect of* costs" (my emphasis). If rule 10 were narrowly construed so as to exclude a power to order interest from an earlier date, that could operate unfairly, particularly where the Tribunal itself makes a summary assessment, and accordingly makes the only decision as to costs.

41. Although in my judgment the Tribunal does have such jurisdiction, there remains the question whether I should exercise it in this case. Unlike the question of an interim payment, where time is of the essence if the interests of fairness and justice are to be served, the question of the date from which interest should run, and the appropriate rate in such a case, is not one that requires immediate resolution. That is a matter that can be considered by the High Court as part of its detailed assessment. A costs judge of the High Court has discretion under CPR 44.3(6)(g) to consider the dates on which costs have been incurred, and to reach a conclusion which fits the justice of the circumstances of the particular case (see *Powell v Herefordshire Health Authority* [2002] EWCA 1786).

42. In my judgment the issue of whether interest should run from a date earlier than the decision, and if so the appropriate rate of interest to be applied, are matters that are more conveniently to be addressed by the costs judge. That judge will have the benefit of detailed information on which to base a decision in that respect, which I do not. For that reason I decline to make an order for interest to be paid earlier than the decision in the terms proposed by the Appellant.

Order

43. On the basis of the conclusions I have reached, I make the following order in respect of costs:

(1) The Respondents shall pay the Appellant's costs of, and incidental to, the appeal (excluding costs of this application) such costs to be assessed by a Costs Judge of the High Court on the standard basis if not agreed.

(2) The Respondents pay the Appellant £650,000 on account of the costs referred to in (1) above within 28 days of the date of release of this Order.

(3) If the amount of the interim payment made under (2) above exceeds the costs as assessed or agreed in accordance with (1) above, the Appellant shall

within 28 days of the assessment or agreement repay to the Respondents an amount equal to the difference between the interim payment and the assessed/agreed amount (and in such a case such allowance for interest may be made as the Costs Judge considers just).

Application for permission to appeal

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 22 October 2012