TC03453

Appeal number: LON/2008/01871

PROCEDURE – Strike out application – MTIC appeal – Whether Tribunal has jurisdiction to strike out part of appellants' case – If so whether appropriate to exercise its discretion to so under rule 8(3)(c) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

FAIRFORD GROUP LIMITED PLC (in liquidation)
FAIRFORD PARTNERSHIP LIMITED (in liquidation) **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at 45 Bedford Square, London WC1 on 26 March 2014

James Pickup QC and Simon Gurney, instructed by Bark & Co for the Appellants

Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by HM Revenue and Customs ("HMRC") for a direction to strike our parts of the appellants' cases in what is commonly described as a Missing Trader Intra-Community or MTIC fraud appeal. Given the frequency in which MTIC fraud has been described it is not necessary, for the purposes of this decision, to provide yet another description or explanation but if one were required reference could be made to that adopted by Roth J at [1] – [3] of *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 (TCC).

2. I am told that this is a novel application, made in the context of there being some 250 MTIC appeals yet to come before the Tribunal which annually disposes of between 20 – 30 such appeals. This is the first time that HMRC have sought to strike out part of an appellant's case in an MTIC case and this application has been made in an attempt to ease the burden on resources, save public money and keep this type of litigation proportionate. The substantive hearing in the present case was originally listed for 25 days between 10 March to 11 April 2014 and all of HMRC's evidence had been served in readiness for those dates. However, in accordance with the direction of Judge Mosedale, released on 18 February 2014, the case was postponed due to the ill health of the appellants' witness and it has been re-listed for 25 days commencing on 12 January 2015.

3. At the conclusion of the hearing I announced that I would dismiss the application and give my reasons for doing so in writing at a later date. These are my reasons for deciding that the application should be dismissed.

4. It is accepted that in an MTIC appeal the Tribunal has to determine the following issues, identified by the Tribunal in *Blue Sphere Global v HMRC* [2008] UKVAT V20901 at [2], and approved by the Court of Appeal in *Mobilx Ltd (in Administration) v HMRC* [2010] STC 1436 ("*Mobilx*"), at [69]:

> (1) Was there a tax loss?
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> (2) If so, did this loss result from a fraudulent evasion?
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> (3) If there was a fraudulent evasion, were the appellant's transactions which were the subject of this appeal connected with that evasion? and
>
> (4) If such a connection was established, did the appellant know or should it have known that its transactions were connected with a fraudulent evasion of VAT?

5. The appellants, in the present appeal, deny that they were part of any scheme to defraud the Revenue; that they ignored any factors that indicated the existence of such a scheme; and that they knew the transactions undertaken by them were connected to any such scheme. However, they do not advance any positive case in respect of the tax loss or whether it resulted from fraudulent evasion, instead they put HMRC to proof on these matters.

6. In the circumstances HMRC have applied for a direction that the following parts of the appellants' cases be struck out on the grounds there is no reasonable prospect of these succeeding:

(1) that the alleged defaulting and hi-jacked traders did not occasion tax losses;

(2) that the said tax losses were not occasioned by fraud; and

(3) in regard to deal 2 only, that the appellants' transactions were not connected with the fraudulent evasion of VAT.

7. Mr Howard Watkinson, who appeared for HMRC, contended that the Tribunal has the jurisdiction to make such directions under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules") and that I should exercise my discretion to do so as, "it is plain on the face of the evidence" that HMRC's case, in relation to the loss, fraud and connection in deal 2 is "proven to the requisite standard" and the appellants have offered no explanation whatsoever for their stance, of exercising their prerogative to put HMRC to proof, "other than that they are entitled to dispute those issues"

8. However, Mr James Pickup QC, leading Mr Simon Gurney, for the appellants submits that rule 8(3)(c) of the Tribunal Rules does not apply in the present case as, unlike most of the cases that come before the Tribunal and as is clear from *Moblix* at [81], the burden of proof in an MTIC case falls upon HMRC. He also relies on the following comments of Judge Kempster at [7(2)] of his written directions of 24 April 2012 in relation to a another interlocutory application in the present case, that:

> "The position adopted by the appellants is these proceedings is that they put the respondents to proof of all aspects of the respondents' case. That is the prerogative of the appellants and is a legitimate position for them to take."

9. It is therefore necessary to first consider whether the Tribunal has the jurisdiction to determine the application and, if so, whether I should use my discretion and make the directions sought by HMRC.

Jurisdiction

10. Rule 8 of the Tribunal Rules provides:

> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
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> (a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

11. In this case I am asked to make a direction under rule 8(3)(c). It is clear from the use of "may" in rule 8(3), which in contrast to the use of "must" in rule 8(2), that the Tribunal has to exercise its discretion as to whether or not to direct that an appellant's case or part of it be struck out.

12. Mr Watkinson contends that the language of rule 8 of the Tribunal rules is clear and unambiguous and makes no reference to the burden of proof. He submits that the argument advanced by Mr Pickup that rule 8(3)(c) can only apply where an appellant bears the burden of proof provides an unnecessary gloss to the rule and would

ostensibly prevent the Tribunal from striking out a ground of appeal put forward by an appellant that was either beyond the jurisdiction of the Tribunal, vexatious or spurious solely because HMRC bore the burden of proof in the case. I agree. Moreover, rule 8(7), which has to be read in the context of an appellant bearing the burden of proof in most cases before the Tribunal, makes it perfectly clear that rule 8 "applies to a respondent as it applies to an appellant".

13. I therefore find that the Tribunal does have the jurisdiction to make the directions sought by HMRC and turn to whether, in the circumstances of the present case, it is appropriate to make such them.

Whether Directions Appropriate

14. In the absence of any apposite authority on rule 8(3)(c) of the Tribunal Rules and, as the rule appears to be a hybrid of Part 3.4 (strike out) and Part 24.2 (summary judgment) of the Civil Procedure Rules ("CPR"), I was referred to authorities in which those parts of the CPR, particularly Part 24.2, were considered. Although the CPR does not apply to proceedings before the Tribunal given the similarity between the overriding objective of both the Tribunal Rules and the CPR, as Morgan J noted at [38] in *Data Select v HMRC* [2012] UKUT 187 (TCC), it is appropriate to consider matters mentioned in the CPR.

15. Part 3.4 CPR, "Power to strike out a statement of case" provides:

> (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
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> (2) The court may strike out a statement of case if it appears to the court –
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> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
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> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
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> (c) that there has been a failure to comply with a rule, practice direction or court order.
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> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.
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> (4) Where –
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> (a) the court has struck out a claimant's statement of case;
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> (b) the claimant has been ordered to pay costs to the defendant; and
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> (c) before the claimant pays those costs, he starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out, the court may, on the application of the defendant stay that other claim until the costs of the first claim have been paid.

(5) Paragraph (2) does not limit any other power of the court to strike out a statement of case.

(6) If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit –

(a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order.

16. Part 24.2 CPR, "Summary Judgment", provides:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
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> (a) it considers that –
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> (i) that claimant has no real prospect of succeeding on the claim or issue; or
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> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
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> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.
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> (Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)

17. It is clear from the judgment of May LJ in *S v Gloucestershire County Council* [2001] Fam 313 that the same power to give summary judgment on part of a case on the evidence, as opposed to solely on matters of law, exists under the CPR. He said, at 342:

> "The power to strike out a statement of case under CPR r 3.4(2)(a) is where it appears to the court that it discloses no reasonable grounds for bringing the claim. The power to give summary judgment against a claimant under CPR r 24.2 is where the court considers that the claimant has no real prospect of succeeding on the claim and that there is no other reason why the case should be disposed of at a trial. These provisions mean what they say and do not require judicial interpretation. Cases of the kind now before this court, by the nature of their subject matter, require anxious scrutiny, but that does not modify the tests which the rules require. The House of Lords' decisions in *Bedfordshire* case and in *Barrett v Enfield* show that, in cases of this kind, the court will only strike out a statement of case under CPR r 3.4(2)(a) in the clearest case. That is not a modification of the test which the rule requires, but a commentary on it deriving from the nature of the subject matter and the components of a claim in negligence as they relate to the subject matter. There is no longer an embargo on the court considering evidence, but the application relates centrally to the statement of case. For a summary judgment application to succeed in a case such as these where a strike out application would not succeed, the court will first need to be satisfied that all substantial facts relevant to the allegations of negligence, which are reasonably

> capable of being before the court, are before the court; that these facts are undisputed or that there is no real prospect of successfully disputing them; and that there is no real prospect of oral evidence affecting the court's assessment of the facts. There may be cases where there are gaps in the evidence but where the court concludes, for instance from the passage of time, that there is no real prospect of the gaps being filled. (As will be seen, I consider that L's claim is such a case.) Secondly, the court will need to be satisfied that, upon these facts, there is no real prospect of the claim in negligence succeeding and that there is no other reason why the case should be disposed of at a trial. If by this process the court does so conclude and gives summary judgment, there will, in my view, have been proper judicial scrutiny of the detailed facts of the particular case such as to constitute a fair hearing in accordance with art 6 of the Convention."

18. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] All ER 513 the House of Lords gave some helpful guidance on how an application for summary judgment should be determined. Lord Hope said:

> "94. … I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
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> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.
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> 96. In *Wenlock v Moloney* [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on

affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

> "… this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Sellers LJ said, at p 1243C-D, that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed.

97. In the Court of Appeal [2000] 2 WLR 15, 86F the majority said that "this somewhat rigid position" had been modified in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, where Lord Templeman said at pp 435H-436A that if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself: see also Lord Mackay of Clashfern at p 441E-F. But they were satisfied that this case fell within the exceptional class for the same reasons as those explained in the *Williams and Humbert* case, and that Clarke J was right to embark upon the exercise. I too would not criticise the judge for undertaking the exercise. But I would also pay careful regard to what the Court of Appeal in *Wenlock v Moloney* regarded as objectionable. In *Morris v Bank of America National Trust* [2000] 1 All ER 954, 966B Morritt LJ said that *Wenlock's* case illustrated a salutary principle. He then said at p 966B-C:

> "In the *Three Rivers DC* case the Court of Appeal upheld the decision of Clarke J to strike out a complicated claim for damages for misfeasance in a public office made against the Bank of England for authorising BCCI to carry on the business of banking. In that case all the evidence then available to the plaintiff was before the court because all the facts had been investigated by Bingham LJ as he then was... Obviously the fact of a recent inquiry is a material distinction."

For reasons already explained (in section (4)), I do not think that the investigation that was conducted by Bingham LJ justifies a departure from the principle. I consider that both Clarke J and the majority in the Court of Appeal were wrong to approach this case on the basis that all

> the facts that are relevant to the claim that is being made in this case had been investigated."

19. In the present case Mr Watkinson contends that it is unreasonable for the appellants to put HMRC to proof as all of the evidence has been served and the witness statements of the various HMRC Officers will stand as their evidence in chief and, as such, it is incumbent on the appellants to consider this evidence and accept it or, if not, to state why it is disputed.

20. He submits that the Tribunal is in the position stipulated by May LJ in *S v Gloucestershire County Council* in that all of the substantial facts relating to the tax loss and fraudulent nature thereof (and in deal 2, connection) are before the Tribunal and that as the evidence of this is overwhelming there is no prospect of the appellants successfully disputing these facts or oral evidence affecting the Tribunal's assessment of them. Therefore, the appellants have no reasonable prospect of success in relation to those parts of their cases which accordingly should be struck out.

21. For the appellants, Mr Pickup submits that having seen and considered the evidence served by HMRC in relation to the loss, fraud (and connection in deal 2) these matters are still disputed. He accepted that once the evidence had been tested by cross-examination it may be the case that these elements had been proved, but that it was necessary for that evidence to be tested before such a conclusion could be drawn.

22. He referred to the decision of the Court of Appeal in *Swain v Hillman* [2001] 1 All ER 91 where Lord Woolf MR (as he then was) said, at 95:

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice."

He went on to say, at 95:

> "Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial As Mr Bidder [counsel for the defendants] put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

Such an approach was approved by the House Lords in *Three Rivers District Council v Bank of England* at [95] (see paragraph 18, above).

23. In the present case, Mr Pickup contended that HMRC's application would save no expense, will achieve no expedition (as the substantive hearing is already listed to commence in January 2015) and will not avoid the Tribunal's resources being used on a case that serves any useful purpose as the witnesses on whose evidence HMRC rely

in relation to the loss and fraud (and connection in deal 2) would be required to give evidence in any event, not only in relation to these matters but also in respect of the appellants' knowledge and means of knowledge. Mr Pickup also submits that this case does not fall within the class identified by May LJ in *S v Gloucestershire County Council* as it is not possible for the Tribunal to determine, or even ascertain, whether there is a real prospect of the facts being disputed or whether oral evidence is likely to affect the Tribunal's assessment of the facts.

24. In my judgment this case does not fall within the circumstances envisaged by May LJ in *S v Gloucestershire County Council* as it would not be possible to ascertain whether the stance taken by the appellants is unreasonable in, as Mr Watkinson submits, the "teeth of the evidence" served by HMRC and conclude that the appellants have no real prospect of challenging that evidence or of it affecting the Tribunal's assessment of the facts without a detailed examination of that evidence. Given the burden of proof is on HMRC in an MTIC appeal and that the appellants do not accept that the evidence served by HMRC establishes either a tax loss or that it resulted from fraudulent evasion and, in the case of deal 2, that the transaction which is the subject of the appeal was connected to that fraudulent evasion, it seems to me, having as I must regard to the overriding objective, that these are matters to be investigated at the substantive hearing and not are not appropriate for determination in an application such as this.

25. I therefore dismiss HMRC's application.

Permission to Appeal

26. Having announced my decision to dismiss the application at the conclusion of the hearing Mr Watkinson made an oral application for permission to appeal.

27. Although rule 39 of the Tribunal Rules requires a "written application" to be made for permission to appeal rule 7 of the Tribunal Rules provides that if a party has failed to comply with a requirement in the rules the Tribunal may take "such action as it considers just". This may include waiving the requirement (see rule 7(2)(a)).

28. In *Mobile Export/Shelford v HMRC* [2009] EWHC 797 (Ch) Sir Andrew Park said at [13]:

> "The extent to which an appellate court should interfere with an interlocutory decision of a first instance tribunal is significantly restricted. I was referred to paragraphs 11 to 14 of the judgment of Mr Justice Richards in *CCE v Gil Insurance Limited* [2000] STC 204. I will not reproduce those paragraphs in extenso here but I adopt and respectfully agree with everything that they say. I do, however, quote three sentences from paragraph 11 of the judgment.
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> > "It is not the function of this court to entertain a re-run of the arguments before the Tribunal and to reach its own decision on whether to order a strike-out or the hearing of a preliminary issue ... Not every error of law in the Tribunal's reasoning would vitiate the decision

> and justify intervention. It seems to me that in this context the court should not intervene unless the error has resulted in a decision that is plainly wrong."

Mr Justice Richards also quoted the following passage from the judgment of Lord Hope in the Court of Session in *CCE v Young* [1993] STC 394 at 397.

> "It is clear that it is not open to us to interfere with the decision which was taken by the Tribunal in this case simply because if we had been presented with the same facts we would have reached a different result. The test which we must apply is whether the tribunal exercised its discretion reasonably and in a judicial way ..."

See also Peter Smith J in *Seabrook and Smith Limited v CCE* [2004] EWHC 306 at paragraph 3."

29. Given that this is a novel application, I have to accept the possibility that I could be wrong. Therefore, having regard to the circumstances of this case, I waive the requirement for a written application and grant HMRC permission to appeal in the hope that the appeal to the Tax and Chancery Chamber of Upper Tribunal can be expedited to allow it to be decided before the substantive hearing in this matter which, as I have noted above, is already listed for 25 days commencing on 12 January 2015.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 1 April 2014