[2018] UKFTT 0073 (TC)

TC06338

Appeal number: TC/2015/01987

MONEY LAUNDERING REGULATIONS – penalties on High Value Dealer for breaches of four regulations – HMRC case withdrawn after evidence given – application for costs.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELLIOTT KNIGHT LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
NICHOLAS DEE

Sitting in public at Taylor House, London EC1 on 6 and 7 November 2017, with representations on costs made on 27 November and 7 December 2017

Geraint Jones QC, instructed by Rainer Hughes, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was a somewhat strange hearing. It was listed for two days as an appeal by Elliott Knight Ltd ("the appellant") against a penalty of £25,000 imposed on it by the Respondents ("HMRC") for alleged breaches of four regulations in the Money Laundering Regulations 2007 (SI 2007/2157) ("MLR").

2. The morning of the first day was taken up by an application by the appellant to postpone the hearing. We dismissed the application and HMRC opened their case in the afternoon. Mr Jones objected to the evidence of a police officer as inadmissible, whereupon Ms Vicary said that she did not propose to call the officer or put her witness statement in evidence.

3. Mr Jones then objected to the evidence of Mr Gerarde Nixon, an officer of HMRC, on the grounds of relevance and opinion. We decided that the final paragraph of the statement was relevant and that we would admit the statement but would give no weight to any of the preceding paragraphs.

4. We then had the evidence of Ms Dunsmore, the officer of HMRC who had conduct of the investigation. Her witness statement stood as her evidence, and she was cross-examined extensively on it by Mr Jones. After completion of his cross-examination on the morning of the second day, and a brief re-examination by Ms Vicary, Ms Vicary asked for a short adjournment.

5. On resumption Ms Vicary said HMRC was withdrawing its case, and so the appeal succeeded. Mr Jones then applied for his costs on the grounds that HMRC had been unreasonable in bringing, defending or conducting the proceedings. We informed Ms Vicary that HMRC, as the potential paying party, had the right to make representations and we made directions accordingly, permitting Mr Jones to comment on those representations.

6. Mr Jones also asked for a decision with full findings and reasons, which he said he wanted for the purposes of other proceedings between his client and HMRC. This then is that full decision.

Basic facts

7. By way of background we set out here certain facts which are not in dispute.

8. The appellant was incorporated on 7 July 2011. At the relevant times Mr Omar Khalid was the sole director and sole shareholder.

9. On 1 August 2012 the appellant registered with HMRC under the MLR as a high value dealer ("HVD"). An HVD is a business which accepts cash payments equivalent to €15,000 or more in exchange for goods.

10. The appellant's business which led to such receipts is wholesaler of alcohol products which it conducted from buildings in Barking, East London.

11. The MLR as they apply to an HVD put a number of obligations on business with respect to the prevention of money laundering. We go into these obligations in more depth later.

12. HMRC is the "supervisory authority" charged with supervising compliance by HVDs with their obligations under the MLR.

13. On 19 March 2014 HMRC, in the persons of Ms Dunsmore and Mr Bruce, visited the appellant's premises to carry out an inspection of its records.

14. On 1 April 2014 by letter HMRC requested further information from the appellant. None was provided.

15. Following a reminder telephone call on 9 May, on 28 July 2014 a "pre-penalty" letter was issued by HMRC to the appellant.

16. On 19 November 2014 a Penalty Notice was issued by HMRC. The Notice informed the appellant that a penalty of £25,000 had been imposed and set out the reasons for imposing it.

17. £25,000 represented 10% of the gross annual profit of the appellant for 2013.

18. In a letter of 27 January 2015 an officer of HMRC other than Ms Dunsmore gave the conclusions of their review of the decision to impose the penalty and upheld it.

19. The appellant appealed to the Tribunal on 23 February 2015.

Law

20. In the Discussion section we set out and deal with seriatim the four regulations which the appellant is accused of breaching, together with regulations which affect those four.

21. Regulation 42 MLR permits the imposition of a penalty by HMRC on an HVD if the person concerned "fails to comply with any requirement in regulation 7(1), (2) or (3), 8(1) or (3), …. 14(1) ….20(1), (4) or (5) ..", those four regulations being the relevant ones in this case.

Discussion

22. Mr Jones' cross-examination of Ms Dunsmore was mostly concerned with the report Ms Dunsmore had made of her inspection of the records and her meeting with Mr Khalid, as the controlling mind of the appellant. He asked her how what she had described as being the case constituted a breach of each of the regulations in question.

23. The report that Ms Dunsmore compiled showed under the heading "Summary, Comments and Considerations for next event":

> "This is the first inspection [visit] to Elliot Knight Ltd since registration in. [sic] Whilst Mr Khalid had some CDD [Customer Due Diligence] and Record Keeping documents in place, they were not fully in

> accordance with MLR 2007, and is currently significantly non-compliant. Mr Khalid has no documentary evidence of his policy and procedures and lack the necessary controls and behaviours. He has failed to put in place full and appropriate measures/processes to mitigate the obvious risks within his business. This has resulted in failure to [comply with] Regulations 7, 8, 14 and 20. Mr Khalid did show some willingness to comply however overall I have my doubts. There are concerns on the overall credibility of the business; when Officer Bruce questioned Mr Khalid on the commercial viability of the business he appeared to acknowledge and understand however he believes there is still a market for this.
>
> …. To date no further communications or documents has [sic] been received. In my mind that lack of correspondence/communications from Mr Khalid adds to and supports my concerns for [sic] non compliancy [sic] to [sic] MLR2007/credibility of the business."

24. In this section we set out for each regulation the text of that regulation and associated regulations; HMRC's contentions in their skeleton argument; some of what Mr Jones asked her and what her replies were.

Regulation 7

25. Regulation 7 MLR is headed "Application of customer due diligence measures" and relevant says

> "(1) Subject to regulations 9, 10, 12, 13, 14, 16(4) and 17, a relevant person must apply customer due diligence measures when he—
>
> (a) establishes a business relationship;
>
> (b) carries out an occasional transaction;
>
> (c) suspects money laundering or terrorist financing;
>
> (d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.
>
> (2) Subject to regulation 16(4), a relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis.
>
> (3) A relevant person must—
>
> (a) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and
>
> (b) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.
>
> …"

26. "Customer due diligence measures" in regulation 7 is defined in regulation 5 to mean

"(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;

(b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and

(c) obtaining information on the purpose and intended nature of the business relationship."

27. Regulation 9, to which regulation 7 is subject, deals with when verification measures must be carried out

"(1) This regulation applies in respect of the duty under regulation 7(1)(a) and (b) to apply the customer due diligence measures referred to in regulation 5(a) and (b).

(2) Subject to paragraphs (3) to (5) and regulation 10, a relevant person must verify the identity of the customer (and any beneficial owner) before the establishment of a business relationship or the carrying out of an occasional transaction.

(3) Such verification may be completed during the establishment of a business relationship if—

(a) this is necessary not to interrupt the normal conduct of business; and

(b) there is little risk of money laundering or terrorist financing occurring,

provided that the verification is completed as soon as practicable after contact is first established.

…"

28. None of the other regulations referred to in regulation 7(1) is relevant to this case, except regulation 14 which the appellant is also accused of breaching and is dealt with below.

29. Ms Vicary's skeleton notes that during Ms Dunsmore's visit on 19 March 2014 the appellant failed to produce *any* [her emphasis] policies in respect of the required risk assessment and customer due diligence.

30. The skeleton referred to "specific examples" of failures under regulation 7 in relation to each of the appellants 4 regular customers.

31. These included for company A

(1) accepting a passport photo which was unclear without recording any visual checks

(2) failure to keep a record of due diligence checks eg to show whether the appellant had seen the original passport

(3) inadequate electronic checks on a company, with no verification of director's details

32. For company B

(1) failure to verify details of the customer, as three documents on file had three different addresses

(2) a bank statement on file had no address

(3) there was no record of where the documents were obtained

33. For Company C

(1) failure to verify the presenting customer's full name, residential address and date of birth

(2) no record to show that a Lithuanian ID card was genuine.

(3) failure to keep a record of due diligence checks eg to show whether the appellant had seen the ID card

(4) failure to verify business address of the customers concerned. A translated copy of an entry in the Lithuanian register of companies failed to state the business address. Other documentation was in Lithuanian and untranslated, and the appellant had taken no steps to enable him to be satisfied that those documents were evidence of the business address.

34. For Company D

(1) failure to verify the presenting customer's full name, residential address and date of birth. A certified copy of an Indian passport was in the file, but the photograph was obscured and there is no record of visual checks.

(2) failure to keep a record of due diligence checks eg to show whether the appellant had seen the original passport

(3) failure to verify the business address. Although a printout from vatcheck.eu appears on file it did not give proof of the customer's address.

35. In response to Mr Jones' questions Ms Dunsmore said, among other things, that she had taken into account that this was a small business with only four customers, and that due diligence had to be proportionate.

36. She now understood that there was no requirement for the business' risk assessment and due diligence policies to be written down, and she accepted that there was no requirement for the due diligence documents to be in English.

37. She agreed with Mr Jones that her report did not demonstrate any breaches of Regulation 7.

Regulation 8

38. Regulation 8 MLR is headed "Ongoing verification" and says

> "(1) A relevant person must conduct ongoing monitoring of a business relationship.
>
> (2) "Ongoing monitoring" of a business relationship means—
>
> (a) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile; and
>
> (b) keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.
>
> (3) Regulation 7(3) applies to the duty to conduct ongoing monitoring under paragraph (1) as it applies to customer due diligence measures."

39. The alleged breaches here are sustained failure to comply with regulation 7, and in particular, the appellant failed

> (1) to carry out any risk assessment to determine the appropriate monitoring system to be implemented and to implement any system
>
> (2) to scrutinise transactions including the source of funds throughout the course of the relationship
>
> (3) to keep documents, data and information obtained up to date and to keep relevant documents to demonstrate to HMRC the extent of the measures carried out.

40. In response to Mr Jones' questions Ms Dunsmore admitted there was no fixed time after which the due diligence records should be re-examined, and that it was up to the trader's judgment. She agreed that ongoing monitoring included meeting all the customers, and that there was a strong element of trust in the relationship which the appellant was entitled to take into account.

41. Ms Dunsmore agreed with Mr Jones that her report did not demonstrate any breaches of Regulation 8.

Regulation 14

42. Regulation 14 is headed "Enhanced customer due diligence and ongoing monitoring" and relevantly says

> "(1) A relevant person must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring—
>
> (a) in accordance with paragraphs (2) to (4);
>
> (b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.
>
> (2) Where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to

compensate for the higher risk, for example, by applying one or more of the following measures—

(a) ensuring that the customer's identity is established by additional documents, data or information;

(b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution which is subject to the money laundering directive;

(c) ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution.

…"

43. Regulation 14(3) applies only to credit institutions, while regulation 14(4) does potentially apply to the appellant. It deals with proposed dealings with "politically exposed persons" and was agreed to be not relevant in this case.

44. It is HMRC's case that, given the breaches of regulations 7 and 8, it was clear that there must be a breach at the enhanced level.

45. After a brief exchange with Mr Jones, Ms Dunsmore agreed that her report did not demonstrate any breaches of Regulation 14.

Regulation 20

46. This regulation is headed "Policies and procedures" and relevantly says

"(1) A relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to—

(a) customer due diligence measures and ongoing monitoring;

(b) reporting;

(c) record-keeping;

(d) internal control;

(e) risk assessment and management;

(f) the monitoring and management of compliance with, and the internal communication of, such policies and procedures,

in order to prevent activities related to money laundering and terrorist financing.

(2) The policies and procedures referred to in paragraph (1) include policies and procedures—

(a) which provide for the identification and scrutiny of—

(i) complex or unusually large transactions;

(ii) unusual patterns of transactions which have no apparent economic or visible lawful purpose; and

(iii) any other activity which the relevant person regards as particularly likely by its nature to be related to money laundering or terrorist financing;

(b) which specify the taking of additional measures, where appropriate, to prevent the use for money laundering or terrorist financing of products and transactions which might favour anonymity;

(c) to determine whether a customer is a politically exposed person;

(d) under which—

(i) an individual in the relevant person's organisation is a nominated officer under Part 7 of the Proceeds of Crime Act 2002(a) and Part 3 of the Terrorism Act 2000(b);

(ii) anyone in the organisation to whom information or other matter comes in the course of the business as a result of which he knows or suspects or has reasonable grounds for knowing or suspecting that a person is engaged in money laundering or terrorist financing is required to comply with Part 7 of the Proceeds of Crime Act 2002 or, as the case may be, Part 3 of the Terrorism Act 2000; and

(iii) where a disclosure is made to the nominated officer, he must consider it in the light of any relevant information which is available to the relevant person and determine whether it gives rise to knowledge or suspicion or reasonable grounds for knowledge or suspicion that a person is engaged in money laundering or terrorist financing.

…

(6) In this regulation—

"politically exposed person" has the same meaning as in regulation 14(4);

…"

47. Mr Jones asked Ms Dunmore in what respect the appellant's policies and procedures were inadequate. She identified the untranslated foreign language documents.

48. Mr Jones then took Ms Dunsmore through each of the sub-paragraphs and lower level paragraphs in paragraphs (1) and (2) of regulation 20. Ms Dunsmore agreed that her report did not demonstrate any breaches of any of these items in Regulation 20.

49. Mr Jones concluded his cross-examination by asking Ms Dunsmore again whether she considered there were any breaches of each of the regulations in question. She replied no.

Decision on appeal

50. The appeal is allowed.

Costs

51. Immediately after we announced our decision, Mr Jones submitted that we should direct that the appellant's costs should be paid by HMRC.

52. He argued that HMRC's conduct in bringing, defending or conducting the proceedings had been unreasonable (so as to allow the Tribunal to make an order for costs) and that the Tribunal should exercise its discretion to do so.

53. He said that what HMRC had not done and what they ought to have done before the hearing was to carry out a detailed analysis of the basis of the penalties both as to the facts and more importantly to the law as it applied to the facts. HMRC had been preoccupied with the question of a documentary trail for everything.

54. The appellant subsequently provided a detailed schedule of its costs totalling £48,153.

55. The provisions in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L.1)) ("the Rules") relating to costs are in Rule 10. The directly relevant parts are

> "(1) The Tribunal may only make an order in respect of costs …—
>
> …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …
>
> …
>
> (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.
>
> …
>
> (5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—
>
> (a) giving that person an opportunity to make representations;
>
> …
>
> …"

56. In accordance with Rule 10(5)(a) of the Rules we gave HMRC the opportunity to make representations, which they duly took. The appellant commented briefly on those when submitting its cost schedule.

57. HMRC say that

(1) the burden is on the person making the application (from which proposition there was no dissent by the appellant) and that it has fallen far short of discharging that burden.

(2) the appellant had not particularised its complaint about HMRC's conduct.

58. HMRC referred to *Tarafdar v HMRC* [2014] UKUT 362 (TCC) (Judges Roger Berner and Judith Powell) ("*Tarafdar*") which set out three questions which a tribunal faced with an application such as this following the withdrawal of an appeal should pose itself

(1) what was the reason for the withdrawal

(2) having regard to that reason, could that party have withdrawn at an earlier stage?

(3) was it unreasonable for that party not to have withdrawn at an earlier stage?

59. As to question 1, HMRC say the reason for the withdrawal was that during the course of the cross-examination of Ms Dunsmore, the decision-making officer, she was, over the course of two days, persuaded to agree with Mr Jones that her decision was flawed and should not stand.

60. We add here that Ms Dunsmore was not in the witness box for two whole days. She was in it at the end of the first day and at the beginning of the second day, for substantially less than three hours altogether.

61. As to question 2 HMRC submit that the criticism of the decision was raised for the first time during the cross-examination. The criticism had not appeared in the grounds of the appeal, which lacked any particularity, or in the evidence of Mr Khalid.

62. Thus before the cross-examination HMRC were unable to know the substance of the appeal that was being brought. They could not then have withdrawn at an earlier stage.

63. As to question 3, it follows from what is said in reply to question 2 that the answer is no.

64. HMRC also refer to *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander (and other cases)* [2016] UKUT 290 (LC) ("*Willow Court*"), a decision of Martin Rodger QC (Deputy Chamber President, Lands Chamber) and Siobhan McGrath (Chamber President, First-tier Tribunal (Property Chamber)). This decision, which is binding on us, discusses the equivalent to Rule 10(1)(b) of the Rules in the Property Chamber Rules of the First-tier Tribunal, Rule 13(1)(b).

65. In that decision, the Upper Tribunal considered that the guidance of the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 ("*Ridehalgh*") as to the meaning of "unreasonably" applied to the Upper Tribunal. In that case Sir Thomas Bingham MR said

> '"Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

66. The Upper Tribunal noted that in *Ridehalgh* the term "unreasonable" was in a tripartite expression "improper, unreasonable and negligent" and that that context had to be borne in mind. It then decided at [24] that the fact that "unreasonably" appears in the Tribunal Rules on its own makes no difference and that the *Ridehalgh* meaning applies in the First-tier.

> " … We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?"

and at [26]

> "We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. …"

67. HMRC also refer to the fact that even if conduct is found to be unreasonable, the Tribunal is entitled to exercise its discretion and is not compelled to award costs. On this they also cite *Willow Court* at [27] to [29] as to the approach to be adopted by a Tribunal when dealing with an application under Rule 10(1)(b) or its equivalents

> "The element of discretion in rule 13(1)(b)
>
> 27 When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal *may* make an order in respect of costs *only* ... *if* a person has acted unreasonably...." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been

established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28 At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

29 Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3 , which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal." It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct."

68. We have also added [30] which we consider important

"30 At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases."

69. In reply the appellant agrees that the tripartite test in *Tarafdar* is applicable. It points out that HMRC is effectively blaming the appellant for its own shortcomings. Instead it needed to analyse its own case and assess its merit and to critically examine whether it contained various lacunae that were exposed in cross-examination.

70. No reasonable explanation, the appellant says, for HMRC's failure to analyse its own case is advanced.

71. We now turn to the three *Tarafdar* questions.

72. What was the reason for the withdrawal? We agree with HMRC that the reason for the withdrawal was the admissions made by Ms Dunsmore. We should say that we reject any insinuation that the cross-examination by Mr Jones was in any way oppressive. It was simply extremely effective. But we do not think we could say that every officer of HMRC faced with this line of questioning would do as Ms Dunsmore did. We do not think it could be said that the withdrawal would inevitably have happened as a result of a lack of analysis of the type Mr Jones suggests was the proximate cause. It is at least indicative that the reason for the withdrawal was as HMRC said it was that neither member of the Tribunal "saw it coming" as a result of our pre-reading and hearing Ms Vicary's opening.

73. That being so the answer to the second *Tarafdar* question is – no. We do not agree with Mr Jones that HMRC was blaming the appellant for their own shortcomings. We agree with HMRC that it could not discern from the grounds of appeal what the appellant's specific complaints were with the reasons HMRC gave for imposing the penalties. Faced with such limited and unspecific grounds of appeal they cannot blamed for pursuing the case. They could in theory have withdrawn at an earlier stage, in the way any party to litigation might withdraw, but they had no reason to do so.

74. It follows that the answer to the third question must also be no.

75. We have come to this decision without seeking to determine whether *Willow Court* sets a higher barrier than *Tarafdar*. If it does then it follows that since the *Tarafdar* barrier was not reached neither could a higher one be.

76. We therefore dismiss the application.

77. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 FEBRUARY 2018