TC06850

Appeal number: TC/2015/03016

Procedure – application for stay of proceedings and application to strike the appeal out in part – full findings of fact and reasons for granting the stay and refusing the strike out application – HMRC v RBS Deutschland Holdings GmbH, HMRC v Fairford Group plc and Three Rivers District Council (No 3) applied

FIRST-TIER TRIBUNAL

TAX CHAMBER

BRIT COLLEGE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in Chambers on 4 December 2018

Decided on the basis of written submissions received from Noel Tyler of VATAngles Consultancy Limited for the Appellant and Caroline Sinclair, office of the General Counsel and Solicitor to HMR Revenue and Customs, for the Respondents

DECISION

Introduction

1. These proceedings are chiefly concerned with the issue of whether the appellant was at the material times a college of a university in accordance with Note (1) to Group 6 of Schedule 9, Value Added Tax Act 1994 ("VATA94"), though a further point in issue is whether the UK legislation correctly implements the EU Directive.

2. The appellant's grounds of appeal were amended to remove one ground of appeal following the decision of the Court of Appeal in *SAE Education Limited v Revenue & Customs Commissioners* [2017] EWCA Civ 1116 ("*SAE*").

3. Permission to appeal the decision of the Court of Appeal in *SAE* to the Supreme Court was subsequently granted. As a result, the appellant in these proceedings applied on 7 August 2018 for permission to amend its grounds of appeal to re-introduce the ground which had earlier been dropped.

4. At the same time, the appellant applied for these proceedings to be stayed pending the outcome of the Supreme Court hearing in *SAE*, which at that time was known to be listed for 30 October 2018.

5. In response, HMRC applied on 24 August 2018 for a Direction that part of the appellant's case should be struck out, and resisted the application for a stay.

6. Following further correspondence as set out below in more detail, on 25 October 2018 I made a Direction which granted the stay and refused HMRC's application for the partial striking out of the appeal. I also made Directions for the future conduct of the appeal following the issue of the Supreme Court's decision in *SAE*.

7. By email dated 31 October 2018, HMRC requested full findings of fact and reasons for the decisions embodied in my Directions dated 25 October 2018. This document sets out those findings and reasons.

The Facts

8. This appeal was commenced by notice of appeal received at the Tribunal on 5 May 2015. The basis of HMRC's decision to assess was supposedly set out in an email, in which it had been stated that "[g]enerally, commercial providers of higher education such as your organisation are not regarded as eligible bodies"; *SAE* was cited as a case in which the issue had been addressed. The grounds of appeal were that "[t]he decision-making officer has based his decision on the fact that the Appellant is a commercial business (i.e. profit-making) and has not considered the manor *[sic]* in which it trades, or the close links with universities."

9. After HMRC had sought to stay proceedings behind another case *Finance & Business Training Limited v HMRC* under reference A3/2014/0428 (which application was resisted by the appellant), that case was decided by the Court of Appeal (under reference [2016] EWCA Civ 7) on 19 January 2016 and accordingly the application for a stay became otiose and HMRC were required to deliver their statement of case, which they did on 31 March 2016.

10. The Tribunal issued standard case management directions on 15 April 2016 to progress the matter to a hearing. Compliance was initially satisfactory, but the appellant was late in serving its witness evidence, as a result of which the appeal was apparently ready for listing only in September 2016. The appellant applied for a stay in November 2016 for the appeal to be considered through ADR, to which HMRC consented and the appeal was accepted into ADR as a result of which matters before the Tribunal came to a halt until 27 July 2017, when HMRC delivered an amended statement of case. In this document, they argued that "HMRC find support for the decision in the Court of Appeal case of *FBT*, the judgment of which is binding, whereas the First-tier Tribunal decision in *SAE* is not". They also argued that the present appeal could be distinguished from *SAE* on factual grounds.

11. The Tribunal issued new case management directions on 10 August 2017, but shortly afterwards it appears the appellant's then representative went into liquidation, which caused a hiatus. The current representative was appointed in November 2017 and there followed a period of delay for familiarisation with the case and taking instructions.

12. On 2 January 2018 the new representative submitted an application to amend the grounds of appeal, in which it was stated that the Court of Appeal's judgment in *SAE* "made it unlikely that the grounds of appeal entered by the College's previous representatives on its behalf would have a realistic chance of success." Here, it was referring to "other grounds of appeal" which had previously been raised.

13. HMRC sought a stay until 10 May 2018 in order to consult their policy division on the proposed revised grounds of appeal and to "decide on the litigation approach". The Tribunal granted this stay in the absence of any objection from the appellant.

14. On 6 March 2018, a new litigator at HMRC took over the case, and sought Directions to require the appellant to confirm whether its original grounds of appeal were withdrawn, and to provide further and better particulars of its proposed amended grounds of appeal. No response was received from the appellant's representative to these proposed Directions and HMRC chased in June 2018. On 6 July 2018, the Tribunal issued a letter on the instructions of Judge Morgan, approving HMRC's application but with revised compliance dates, such that the appellant was required to comply by 31 July 2018. This letter appears to have crossed with a chasing email from HMRC on the same date.

15. On 2 August 2018, no response having been received from the appellant's representative to the renewed application, HMRC applied for Directions that the appellant should respond to their original application within 14 days or risk being struck out.

16. On 9 August 2018 the Tribunal received from the appellant's representative a letter dated 7 August 2018 in which it sought to "reinstate" one of the original grounds in the light of the fact that permission to appeal the decision of the Court of Appeal in *SAE* to the Supreme Court had been granted, and the hearing was expected to take place on 30 October 2018. It sought a stay of these proceedings until 28 days after the issue of the decision of the Supreme Court. It was submitted that "[s]hould SAE's appeal be allowed by the Supreme Court then, it is respectfully submitted, such a decision would be likely to have a significant impact on the appeal in the matter of Brit College."

17. On 10 August 2018, HMRC submitted an application which effectively replaced and renewed, in large part, their previous application dated 2 August 2018 on the basis that the appellant's application dated 7 August 2018 did not comply, to any substantial extent, with the Directions which HMRC had previously sought.

18. On 14 August 2018 the Tribunal received a further letter from the appellant's representative dated 13 August 2018 which responded in more detail to HMRC's 10 August 2018 application.

19. By way of response, HMRC submitted a further application dated 24 August 2018, in which they sought:

> (1) to oppose the application for a stay pending the issue of the Supreme Court's decision in *SAE, and*
>
> (2) to strike out "the part of BC's case that '*it is a college of a university and, as such, is an eligible body within Note 1(b) [group 6 schedule 9 VATA]*' on the basis that there is no reasonable prospect of it succeeding.

This application also included their response to the stay application. It, along with the appellant's earlier application dated 7 August 2018, are the subject matter of these findings of fact and reasons.

20. The Tribunal requested HMRC's representations on the appellant's application dated 7 August, by letter dated 10 September 2018. HMRC responded on 11 September 2018, saying that their further application dated 24 August 2018 had been their response.

21. The file was referred to Judge Kempster, who gave instructions that the Tribunal should send a further letter to the appellant's representative, asking for their confirmation as to whether they wished to persist with the stay application in the light of HMRC's response. This letter was sent on 9 October 2018 by email, and on the same day the appellant's representative replied by email to confirm that the stay was still being sought. In the same letter, it was noted that the hearing date before the Supreme Court was now imminent, so the stay was likely to have "little practical effect on the date of any listing."

22. Following receipt of this response, the file was referred to me and after considering the position I issued the Directions dated 25 October 2018.

The Law

23. As HMRC observed in their application dated 24 August 2018, the most commonly formulated test for directing a contested stay in proceedings (or the Scots Law equivalent of a "sist") is set out in the decision of the Inner House of the Court of Session in *Commissioners for Her Majesty's Revenue and Customs v RBS Deutschland Holdings GmbH* [2006] CSIH 10 at [22]:

> *"a tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so."*

24. HMRC's objection to the stay was closely bound up with their second application, for the appellant's appeal based on its supposed status as "a college of a university" to be struck out as having no reasonable prospects of success. Of necessity, if this part of the appellant's case was as weak as HMRC claim it to be (irrespective of the Supreme Court's decision in *SAE*), there would be no merit in a stay.

25. Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009 provides, so far as relevant, as follows:

> *"(3) The Tribunal may strike out the whole or a part of the proceedings if—*
> *(a) …;*
> *(b) …; or*
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."*

26. There is some authority on the interpretation and application of this provision. The most convenient recent summary was given by the Upper Tribunal in *HMRC v Fairford Group plc (in liquidation)* [2014] UKUT 0329 (TCC) at [41]:

> *"In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see* Swain v Hillman *[2001] 2 All ER 91 and* Three Rivers *(see above) Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see* ED & F Man Liquid Products v Patel *[2003] EWCA Civ 472 . The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in* Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all."*

27. In addition, it must be remembered that Procedure Rule 8(3)(c) confers a discretion, not a requirement, on the Tribunal to strike out an appeal (or part of it) in the appropriate circumstances. Like other discretionary jurisdictions, it is to be exercised "judicially" and, of course, in the light of the overriding objective set out in Rule 2 to "deal with cases fairly and justly". As part of the exercise of such discretion, a tribunal must consider all the circumstances of the case and effectively carry out a balancing exercise to weigh those factors militating in favour of striking out against those militating against it.

28. The question then arises: how far should the tribunal go in investigating the detail of an appeal with a view to exercising its discretion to strike it out – whether partially or in its entirety? The full text of what Lord Hope had this to say on that point (on the parallel CPR provisions) in *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16 at [94] and [95] was as follows:

> *"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?*
>
> *'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 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.'*

Discussion and decision

29. In the present case, HMRC's written submissions included a summary of what they regard as the inadequate evidence of the appellant being a college of a university. It seemed to me, however, that the adequacy or otherwise of that evidence was dependent upon the legal test to be applied, a matter on which the judgment of the Supreme Court in *SAE* was likely to be of material assistance.

30. Furthermore, whatever the outcome of HMRC's strike out application, it would not dispose of the appeal entirely; there would still remain an appeal to be heard, albeit potentially only on the remaining grounds.

31. I did not (and do not) consider it would be appropriate to make a decision whether to strike out the relevant part of the appeal without affording both parties the opportunity to develop their arguments in an oral hearing, possibly adducing witness and documentary evidence. By the time I was making my Directions dated 25 October 2018, it would already have been impossible for the Tribunal to list such a hearing until some time in early 2019, and whether or not HMRC succeeded in that hearing, there would still need to have been a further hearing to dispose of the remaining grounds of appeal – which of necessity would have to be delayed until the strike out application had been heard and decided, thus resulting in a more costly and protracted process before final resolution of the appeal could be achieved. This brings sharply to mind the warning of Lord Hope in *Three Rivers (No 3)* against conducting a "mini trial", especially in a situation where a further hearing would be necessary in any event.

32. Added to that the fact that the decision of the Supreme Court in *SAE* could be expected to be issued within a few weeks, it seemed to me that the circumstances pointed overwhelmingly to the conclusion that (a) a short delay pending the release of the Supreme Court's judgment and (b) dealing with all the issues under appeal in a single hearing would best meet the overriding obligation in Rule 2.

33. For these reasons, I decided to grant the appellant's application for a stay, refuse HMRC's application for partial strike out of the appeal and give directions designed to move the whole dispute as rapidly as possible to a final hearing once the judgment of the Supreme Court in *SAE* had been delivered. My decision was embodied in the Directions which were issued on my instructions on 25 October 2018, which remain in full force and effect.

34. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 07 DECEMBER 2018