[2018] UKFTT 758 (TC)

TC06891

FIRST-TIER TRIBUNAL

TAX CHAMBER

Appeal numbers: LON/07/8081 (1)
LON/07/8089 (2)

Procedure – application to strike out on the basis that "no reasonable prospect of success" – extent to which findings of fact in separate appeal arising from same events should be determinative of appeal of different parties altogether – application dismissed

MARK WILD (t/a Mark Wild Haulage) (1)
ANDREW HOWARD PARNHAM (t/a AH Parnham Transport) (2) **Appellants**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at Taylor House, Rosebery Avenue, London on 17 October 2018

The Appellants did not attend and were not represented, however written submissions dated 9 October 2018 were received from their representative ALM Consultants Limited

Christie Monaghan, counsel, of the Solicitor's Office of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 17 October 2018 I heard an application to strike out the appellants' appeals, essentially on two bases:

> (1) the appellants had failed to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the appeals fairly and justly; and
>
> (2) the findings of fact made in the Upper Tribunal's decision in *HMRC v SDM European Transport Limited* [2015] UKUT 625 (TCC) as to the conduct of the appellants meant that the appeals had no reasonable prospects of success in any event.

2. Following the hearing, on 29 October 2018 I issued a summary decision which dismissed HMRC's application and gave consequential Directions to bring the appeals to a hearing.

3. On 13 November 2018, HMRC requested full written findings and reasons for the decision. This document contains those findings and reasons.

The facts

4. These appeals have a long history. They were originally notified to the VAT and Duties Tribunal (the predecessor of this Tribunal) on 3 August 2007, the notice of appeal forms being dated 30 July 2007. The appeals both related to assessments to Excise Duty in respect of "duty suspended" movements of alcoholic drinks for which the two appellants had been the truck drivers; in each case, the relevant loads had been carried on the instructions of SDM European Transport Limited ("SDM"), apparently on a subcontract basis. The first appellant ("Mr Wild") had been assessed for £1,302,036 and the second appellant ("Mr Parnham") had been assessed for £484,206. The assessments were appealed on the basis that the relevant loads (14 in the case of Mr Wild and five[1] in the case of Mr Parnham) had indeed been received at the destination warehouse, belonging to the Aldi store chain, in Belgium.

5. HMRC had also raised assessments totalling £6,306,137 against SDM, in its capacity as guarantor in respect of the loads carried by Mr Wild and Mr Parnham and a number of other haulage operators; the total of movements involved was 65. It was agreed that the appeals of Mr Wild and Mr Parnham should be stayed pending the outcome of the appeal by SDM against the assessments notified to it.

6. The appeal of SDM was only finally resolved in late 2015, when the decision of the Upper Tribunal in *HMRC v SDM European Transport Limited* [2015] UKUT 625 (TCC) was published on 19 November 2015. There was a subsequent challenge, seeking to set aside that decision on the basis that the purported casting vote that decided it was invalid, but that challenge failed on 25 April 2016, see *HMRC v SDM European Transport Limited* [2016] UKUT 0201 (TCC).

7. By the time the appeal came before the Upper Tribunal in June 2015, it had already been allowed by the First-tier Tribunal ("FTT") once (see [2011] UKFTT 211 (TC)), that decision had been overturned by the Upper Tribunal (see [2013] UKUT 0251 (TCC)) and the proceedings had been remitted to the FTT which once again had allowed the appeal (see [2014]

[1] HMRC's application stated the number was six; the original FTT decision records, at [9], that it was five.

UKFTT 829 (TC)). The Upper Tribunal then allowed HMRC's appeal and re-made the FTT's decision, dismissing the original appeal of SDM.

8. The evidence relied on throughout this process was that which was put before the FTT at the first hearing (which took place in September-October 2010). That included a large volume of documentation, a written witness statement from Mr Wild and oral testimony (tested in cross-examination) from Mr Parnham. In addition, the FTT at the second hearing took account of some further external evidence (chiefly journey times derived from Google Maps) without the parties objecting.

9. The issue before the FTT was whether SDM should be liable in its capacity as guarantor for payment of unpaid Excise Duty. If unpaid UK Excise Duty were found to exist in relation to any of the loads, then SDM would be strictly liable for it. The question was whether any liability to UK Excise Duty had arisen. In a situation where the goods had admittedly been fraudulently diverted at some point, the issue was whether that diversion had taken place in a manner which triggered a liability to UK Excise Duty. As the FTT saw it, this in turn depended on whether the loads had been diverted before or after delivery to the Aldi warehouse in Belgium; if diverted before delivery, then a liability to UK Excise Duty would arise but if diverted after delivery, then any irregularity must have occurred outside the UK and accordingly no liability to UK Excise Duty would arise: see Regulations 3 and 4 of The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001.

10. The FTT decided that as it accepted from the evidence before it that the goods had been duly delivered to the Aldi warehouse in Belgium, there was no UK Excise Duty liability. HMRC appealed to the Upper Tribunal on four grounds, all of which were rejected save one, namely that:

> "The FTT failed to give any or any adequate reasons for its conclusion that each of the ten allegedly impossible journeys resulted in delivery of the consignments of spirits to Aldi."

11. By way of explanation, the Upper Tribunal was here considering the fact that the FTT had found the relevant ten journeys from the ferry port to the Aldi depot to be "impossible" in the times which had supposedly been taken, but had nonetheless accepted the evidence of the drivers in question that the journeys had indeed been completed in the stated times; the Upper Tribunal was not saying that this was an inherently impermissible finding (indeed, it gave a number of indications as to ways in which the conflict might be capable of resolution), the error of law made by the FTT was in failing to provide reasons why it accepted the drivers' evidence in the face of the apparent "impossibility" which it had identified. Of the ten journeys, one (number 24) was driven by Mr Wild and one (number 37) by Mr Parnham. Six of the remaining seven were driven by a Mr Blunsden and the last was driven by a Mr Francis.

12. The Upper Tribunal therefore remitted the appeal to the FTT "to determine the issue afresh in relation to the allegedly impossible journeys and to consider what effect its conclusion has on the evidence in relation to the other deliveries." In doing so, it said this (at [62] to [64]):

> "62. As to Mr Wild, we note that only one (movement 24) out of 14 movements was alleged to be impossible and appeared to be so on the evidence available but the difficulty is that the evidence could not be tested either way. Mr Parnham's journey (movement 37), at 9 hours for the round trip, was also apparently impossible. It was not possible for us to review the

> evidence of the timing of Mr Francis's journey in movement 44 and the FTT did not make any specific finding as to the timings of the journey.
>
> 63. If evidence established that it was impossible for a driver to make a particular journey which the driver testified he had made then it would be impossible to accept that driver's evidence in relation to that journey. Further, the existence of evidence that showed that a particular journey was impossible would call into question the truthfulness of that driver's evidence in relation to other journeys. If one driver's evidence could be shown to be unreliable then that would also cast doubt on the evidence of the other drivers that they had made similar journeys.
>
> 64. It seems to us therefore that the resolution of the issue of the "impossible" journeys was critical to the FTT's conclusion. If they were indeed impossible, the FTT could not properly have come to the conclusion on the evidence before it that those deliveries had been made to Aldi and without further reasons it would not be possible to accept the evidence of the drivers involved in relation to other movements."

13. The matter came back to the FTT, which (at [30]) observed that the previous FTT decision (at [467]) had only held one journey (29, by Mr Blunsden) to be actually impossible. It analysed all the other impugned journeys, and decided they were in fact possible; in the final result it therefore accepted that all the journeys were possible, except journey 29. This single exception did not however undermine the FTT's original finding that all the other journeys had, on a balance of probabilities, resulted in delivery to Aldi.

14. HMRC were not satisfied with this outcome, and appealed once more to the Upper Tribunal, comprising a panel of Judge Colin Bishopp and Judge Jonathan Cannan. They were able to persuade Judge Bishopp that the FTT in the second decision had approached its task inappropriately; in effect it had accepted the original FTT's assessment of the evidence from the drivers (that they had indeed made the journeys to Aldi) except in relation to the one journey where it had had accepted the FTT's definitive finding that the claimed journey was impossible. In addition, the FTT had not carried out the task assigned to it by the direction of the Upper Tribunal which remitted the case back to the FTT for rehearing: it had been required to assess the impossibility of the journeys by reference to the descriptions of them "in the evidence of the drivers", and the FTT had assumed systematic speeding (whilst still well within the normal cruising speed of the vehicles in question) which had not been admitted by any of the drivers who gave evidence at the original FTT hearing. He criticised the FTT for failing to address the central question: "not whether the journeys were possible… but whether SDM has shown that the goods were delivered."

15. Having decided that the FTT had made an error of law for these two reasons, Judge Bishopp then went about remaking the FTT's decision (as the parties had requested). He effectively did so by applying a test of whether the journeys in question were "realistically" possible, rather than "possible only if one assumes that the drivers persistently disregarded the law and had the good fortune never to encounter any delay". He went on to apply his own formulation of what was "realistically" possible to the various journeys, finding that the vast majority of the disputed journeys (including the two made by Mr Wild and Mr Parnham) were not realistically possible, and accordingly that in view of the wider circumstances, none of the supposed deliveries to Aldi had actually been made.

16. Judge Cannan approached things somewhat differently. He took the view that the terms of the direction to the FTT from the first Upper Tribunal hearing had required the FTT to assess

whether the disputed journeys were "reasonably possible"; once it had reached a view on that point, it would be in a position to decide whether, on a balance of probabilities, the journeys had in fact taken place. These he referred to as "stage 1" and "stage 2" respectively of the enquiry dictated by the Upper Tribunal's directions to the FTT. He considered that the FTT had carried out the exercise required at stage 1 by assessing whether the disputed journeys had been reasonably possible in the way in which the FTT had actually approached that task. As to stage 2 (whether the journeys had, on a balance of probabilities, actually taken place), Judge Cannan felt it was not possible to reach a view without hearing evidence from the drivers; his specific concern was that in the circumstances the drivers were effectively being accused of lying and they were accordingly entitled to have any "forensic analysis of journey times" put to them so that they could at least have the opportunity of explaining in detail how each journey was possible. This had not happened.

17. By Judge Bishopp's casting vote, the appeal was decided in HMRC's favour on the basis summarised above.

HMRC's application

18. HMRC argue that these appeals have no reasonable prospects of success. This is because Judge Bishopp in the second Upper Tribunal decision summarised SDM's appeal as follows:

> "the only real issue was whether the goods had arrived at their stated destinations and had been discharged from the movements, or they had not."

19. As the Upper Tribunal had decided, by Judge Bishopp's casting vote, that the goods had not arrived, that was determinative of the only real issue in these appeals.

20. There was also a secondary application for the appeals to be struck out, based on the appellants' failure to confirm whether they wished to continue with their appeals.

Discussion and decision

Striking out for failure to co-operate with the Tribunal

21. I can dispose of the secondary application quite briefly. I do not consider the grounds for it to have been made out, for the following reasons. Whilst the appellants have, through their representative, declined to abandon their appeals until HMRC's position was made clear to them, they have continued to engage with the Tribunal and have not been warned by the Tribunal that their appeals would be struck out unless they complied with some specific requirement of the Tribunal. It could fairly be said that HMRC's position was only made clear in their applications dated 24 September 2018, to which the appellants' representative responded on 9 October 2018. Thus, whilst I considered it appropriate to make a direction, on an "unless" basis, requiring the appellants to confirm within 14 days whether they wished to continue with their respective appeals, I consider any request at that stage for the appeals to be struck out on the grounds argued by HMRC to be premature.

22. I note that following the issue of that direction (which was appended to my original summary decision), confirmation has been received from Mr Parnham that he does wish to continue with his appeal. Unfortunately, his adviser has suffered a stroke and been diagnosed with cancer, and Mr Parnham has undergone recent back surgery, as a result of which he has applied for an extension of time to comply with the other directions issued with my summary decision; Mr Wild has also contacted the Tribunal to say that he had instructed the same

representative to continue with his appeal, and he has also applied for an extension of time as a result. I have granted an extension of time by a separate direction.

Striking out on grounds of no reasonable prospect of success

23. As to HMRC's main application, it is clear that HMRC put their case in these appeals on the basis that the appellants were complicit in the fraudulent diversion of the relevant loads. It is a well-established principle (as Judge Cannan observed in his dissenting judgment in the 2015 UT decision at [265]) that "it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it" (see Henderson J in *Ingenious Games LLP v HMRC* [2015] UKUT 0105 (TCC) at [65]). Judge Bishopp considered this requirement had been satisfied because:

> "It was… put to those of the drivers who gave evidence, in cross-examination, that some of their journeys were impossible and that the goods were not delivered to the Aldi warehouse. I have concluded that the combination of assessments based on complicity in the diversions and the cross-examinations put the drivers sufficiently on notice of what was being said against them, and that they had an adequate opportunity of dealing with it. In addition, the issue in this appeal is not whether the drivers were party to a conspiracy, but whether SDM has discharged the burden of showing that the goods were delivered… It should also be remembered that SDM invited us to remake the decision without hearing the drivers again."

24. It can readily be seen that the qualifications which Judge Bishopp made were dependent upon two extra factors which are highly relevant to the present appeals, namely:

(1) The core issue in the present appeals (unlike in *SDM*, as Judge Bishopp put it) is whether the appellants were party to a conspiracy; and

(2) The Tribunal had been asked by SDM to remake the decision without hearing the drivers again (whereas the appellants in these appeals have not indicated they are content to proceed on the same basis).

25. In addition, Judge Bishopp's statement that "the combination of assessments based on complicity in the diversions and the cross-examinations put the drivers sufficiently on notice of what was being said against them, and that they had an adequate opportunity of dealing with it" clearly cannot apply in relation to Mr Wild, as he did not attend the hearing and was not cross-examined.

26. 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 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."

27. There is some authority on the interpretation and application of Rule 8(3)(c). 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."

28. The findings of fact made by the casting vote of Judge Bishopp in the Upper Tribunal in the context of SDM's appeal (without actually seeing the witnesses give evidence) cannot in my view be regarded as determinative for the purposes of these appeals, to which the "normal rule" should apply so that the appellants should be given the opportunity of answering the specific allegations of dishonesty which HMRC are levelling against them as a core part of their case. HMRC cited no authority in their application to support the proposition that the findings of fact made in one appeal should be determinative of the appeal of an entirely different party, still less in a situation where the findings of fact were made in such unsatisfactory circumstances and qualified in such a way as is outlined above.

29. For the above reasons, I refused HMRC's application to strike out the appeals.

Right to apply for permission to appeal

30. 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: 19 December 2018