PROCEDURE – failure to comply with unless order to which it had consented albeit unless order in terms some of which were impossible to comply with – breach of spirit of unless order – breaches of earlier orders – appeal should not be reinstated

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07122

Appeal number: TC/2012/00975

BETWEEN

SECOND MEZZANINE FILM FUND LLP **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 7 March 2019

Mr R Roberts, for the Appellant

Mr B Elliot, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 28 April 2005, HMRC opened an enquiry into the appellant's return for YE 5 April 2004, which had claimed a very large relief for loss. HMRC asked the appellant to provide documents to support the claim. Some were provided, but HMRC considered them insufficient and issued an information notice on 24 June 2005. More information was provided in two batches in 2006 but HMRC maintained that it was insufficient.

2. On 7 February 2008, the General Commissioners ordered HMRC to close the enquiry within 3 months. HMRC still asked the appellant for further documents but none were provided. On 7 May 2008, HMRC closed the enquiry reducing the claim from £16,480,698 to nil. Nine days later the appellant lodged an appeal with HMRC.

3. Further documents were provided to HMRC by the appellant in 2009 and 2010. HMRC upheld their closure notice on review and on 21 December 2011 the appellant lodged an appeal with the tribunal.

4. On 12 December 2012, HMRC requested the appellant provide the documents set out on a list. The appellant provided HMRC with some of the documents on the list, but far from all, and on 30 July 2014, HMRC applied to the Tribunal for a disclosure order.

The Tribunal's first Order

5. On 16 December 2014, following a contested hearing in which the appellant accepted that the documents were relevant, the Tribunal ordered the appellant to:

(1) disclose the documents on the List; or

(2) confirm that the document(s) were not in its possession or control and state whether or not the appellant believed the document(s) to exist

The appellant was given 56 days to comply.

6. Two boxes of documents were provided by the appellant to HMRC on 20 February 2015 in response to the order. HMRC notified the appellant and Tribunal that they considered the appellant to be in breach of the order; on 9 March 2015 a further box of documents was provided.

The Tribunal's second Order

7. On 12 March 2015, following an application from HMRC, the Tribunal issued an order that if HMRC extracted from the list a shorter list of documents with respect to which HMRC believed the appellant had not complied with the earlier order; the appellant then had 14 days to state whether or not it believed that the documents on this shorter list ('the List') existed. And this Order was stated to supersede the earlier order.

8. The appellant applied (one month after the due date for compliance) for an extension of time to comply and on 28 July 2015 returned the List, annotated with comments. After being given some 3 months to consider the appellant's response, HMRC indicated that they did not accept the appellant has fully complied. The appellant failed to respond for some time; after HMRC applied for an unless order, on 11 January 2016 the appellant replied to state all the documents on the list were believed to exist and be within its control.

The Tribunal's third Order

9. HMRC complained that the appellant had failed to disclose the documents. A contested hearing was listed for hearing on 21 July 2016, but the parties then agreed the form of the

Tribunal's order, which was that unless within 14 days the appellant complied with the Order, its appeal would be struck out. The Order (of 29/7/16) required the appellant to:

(1) Provide a copy of the document on the List if it was in the appellant's possession or control or

(2) Confirm that the document was not in the appellant's possession or control.

The order defined 'control' as having the meaning given in CPR 31.8. The Appellant was ordered to pay HMRC's costs.

10. On 11 August 2016, HMRC accepted that the appellant purported to comply with the unless order. Nevertheless, as the appellant did not copy in the Tribunal, the Tribunal remained unaware of this and consequently it issued a letter notifying the appellant that the appeal has been automatically struck out for non-compliance. The appellant objected on the basis that it had attempted to comply with the unless order. HMRC's view was that the appellant, while it had purported to comply, had not complied in full and so the appellant was properly struck out.

11. After a postponement of a hearing called to consider the matter, it came on before me on 7 March 2019.

ISSUES FOR THIS HEARING:

12. The parties were agreed that the issues for this hearing were:

(1) Was the appeal struck out for non-compliance?

(2) If so, should it be reinstated?

(3) If it was not struck out, or was reinstated, should it nevertheless be struck out for failure to comply with the unless order of 29 July 2016 and/or because the appellant's failures were such that the appeal could not be dealt with fairly and justly?

13. The parties were agreed that, fundamentally, the question was whether the appellant's non-compliance was such that the appeal should be (if not already) struck out.

HMRC's case

14. HMRC's case is that HMRC has been seeking a list of documents since 2012, and while some of them have been provided, the majority have not; and this is despite the appellant's admittance that they are relevant, they exist and that they control them.

15. They also say that the appellant's compliance has been slow, patchy and reluctant throughout the appeal such that it is now 16 years since the events at issue and 7 years since the disclosure request that is still outstanding was made.

The appellant's case

16. The appellant's case was that it has done what it could to comply but could not produce copies of documents it did not have.

17. The appellant's position was that most of the documents requested (business plan etc) probably existed but it was unable to produce them due to an unfortunate fire at the offices of its file consultant a few years after its claim for relief and because other papers were lost in the transfer of papers from one firm of solicitors to another. It thinks HMRC has had sufficient disclosure in order to produce a statement of case and the appeal should now be progressed by HMRC being ordered to do so.

The evidence

18. The evidence was given in a witness statement by Officer Scholey. Mr Roberts accepted his evidence, and in particular his schedule of the List setting out what had been provided and showing that most items had not been. He was not cross examined. I accept the evidence.

WAS THE APPEAL AUTOMATICALLY STRUCK OUT?

19. The terms of the 29 July 2016 order, which was made by consent, were as follows:

> Unless within 14 days of the date of this order the Appellant in relation to each document specified or described in the tables at Appendix 1 to the Respondent's application dated 15 December 2015 either:
>
> (1) provides a copy of such document to the Respondent if it is in the Appellant's possession or control (where the term 'control' has the same meaning as in CPR 31.8) or
>
> (2) confirms that the document is not in the Appellant's possession or control (where 'control' has the same meaning as in CPR 31.8)
>
> then the appellant's appeal be struck out without further order of the Tribunal.

20. I find that this Order was of the kind permitted by Rule 8(1) of the Tribunal Procedure (First Tier Tribunal) Tax Chamber Rules 2009. This is quite clear as it states that if there is non-compliance, the appeal 'be' struck out 'without further order'. In other words, if there was non-compliance, the appeal would be automatically struck out.

21. The appendix comprised a list of documents (or type of documents) comprising 102 items.

22. The appellant's (purported) compliance was by letter dated 11 August 2016 sent to the respondents but not copied to the Tribunal. Some documents were annexed to it.

23. I find that the letter did not meet the terms of the unless order. The unless order required the appellant, in respect of every document on the list, either (1) to produce the document or (2) state that it was not in the appellant's possession or control within the meaning of CPR 31.8. Save in respect of a few documents, the reply did not do this.

24. The letter chose to answer a different question rather than engage with the terms of the unless order (to which the appellant had consented). It stated the author's view that the documents requested would fall into 1 of 4 categories, being

(a) Documents held by the appellant

(b) Documents held by HMRC

(c) Documents held by third parties

(d) Documents already disclosed.

But it did not even identify which of its self-stated categories the author considered each of the documents on the List fell into.

The form of the unless order

25. The appellant complained that the unless order required it to provide copies of documents even if it no longer had physical possession or the right to physical possession. It complained that it could not produce copies of documents it did not physically possess even if technically they were in its 'possession or control' within the meaning of CPR 31.8.

26. I agree that the unless order appeared to ask for the impossible. The point is that, while CPR 31.8 requires disclosure of documents which are or have been in the appellant's physical

possession or of which it does or did have the right to take a copy, the obligation to disclose is only an obligation to state whether or not the document existed. The FTT's unless order conflated the duty to disclose with the duty to provide copies.

27. That is not a complete answer to the appellant's non-compliance. Firstly, the appellant consented to the unless order in those terms despite, it appears to me, being quite well aware of the meaning of CPR 31.8 as that had been referred to in earlier unless orders.

28. Secondly, it did not raise with the Tribunal any difficulties it had in complying.

29. Thirdly, it not only failed to provide a copy of the documents, it failed to *disclose* the documents either. In other words, it did not state, as it had been asked since 2014 to state, whether or not the individual documents existed. While its letter of 11 August recognised that some document might exist, or might have existed but later have been destroyed, it made no attempt to address HMRC's schedule and state in respect of each individual request whether the document existed, had existed and whether the appellant could deliver a copy.

30. It was in breach of the unless order, even if read as an order merely to disclose rather than provide copies. So the next question is whether the appeal should be reinstated.

THE LAW

31. As Mr Elliot pointed out, the Court of Appeal has given guidance to courts and tribunals on the exercise of its discretion to give relief from sanctions. In *Denton and others v TH White Ltd and another* [2014] EWCA Civ 906 the Court said

> [24] … A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" …. If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application …..
>
> The first stage
>
> ….
>
> [26] …. we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. ….
>
> [27] The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. …
>
> [28] If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.
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> The second stage
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> …. The court should consider why the failure or default occurred….
>
> The third stage

> [31] …. in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.
>
> …
>
> [34] Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.
>
> … The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
>
> But it is always necessary to have regard to all the circumstances of the case….

DECISION

Stage 1: Was the breach serious or significant?

32. I have accepted that, read literally, the Unless Order required the appellant to do the impossible which was to provide copies of documents it may not possess. A failure to do something that is impossible is not a breach that ought normally incur sanctions.

33. However, it is clear that the appellant was in breach of the spirit of the order as well. While the appellant may not have been able to provide a copy of every document in its possession or control as defined by CPR 31.8, it was able to disclose it (in the sense of state whether or not it existed). It had been clear for years (at least 4 years at the time of the default) that HMRC wanted to know whether the particular documents specified on the List existed and whether they had ever existed; HMRC also wanted copies of those in existence. The appellant's reply was vague and in particular failed to address HMRC's List item by item.

34. I recognise that earlier, in January 2016, the appellant had said that it considered all the documents had existed at one point, nevertheless it had consented to the further unless order in July 2016 which required a line by line response, and it then chose not to provide such a response. Moreover, its current view on the existence of the documents is less definite: its current view is that most of the documents probably existed at one point.

35. I consider the breach to be serious. It was prejudicial as HMRC's concern was with whether the arrangements were commercial; the answer to that depended not only on what the documents said, but whether the individual documents had ever existed. For instance, if there was no business plan, that might indicate that the arrangements were not commercial. Leaving HMRC in the dark as to whether individual documents had ever existed was prejudicial.

36. It was also extremely prejudicial because the appellant's continued failure to fully address its disclosure obligation was causing the appeal to drag on for years. The claim was made for YE 2004, and the appellant's disclosure failures meant that by 2019 the appeal had still not had a statement of case served.

37. Moreover, its failure occurred after years of chasing by HMRC and in spite of earlier Orders by the Tribunal.

Stage 2: why did the default occur?

38. Despite having Mr Roberts in front of me, who dealt with the compliance, I was left uncertain as to clear why the default occurred.

39. Mr Roberts' case was that the appellant had done its best to comply, but could not actually comply with the terms of an order which required it to do the impossible. It could not produce copies of documents which were not actually and currently in its possession or control (within the colloquial meaning of the words). Moreover, contrary to what was said in January 2016, he indicated that the appellant did not actually know what existed and what did not. It believed the documents to justify the tax claim would have existed. But it did not have any more documents than it had handed to HMRC. He said the appellant had not kept a record of the documents it had handed to HMRC back in 2005; as mentioned above, documents had been lost in a fire and (possibly) when its solicitors had passed on files to the new solicitors. It could not say what had existed.

40. His position was that the appellant had done its best to comply and could do no more.

41. I was left in the dark as to why the appellant had not chosen to give a line by line response as the Unless Order had requested and why it had not cooperated with earlier disclosure orders.

Stage 3: all the circumstances of the case

Prior defaults?

42. I think it is relevant that the appellant's default was the final one in a series of defaults on disclosure. It was clear from the form of the second Order that the Tribunal considered that the appellant was in breach of the First Order; it was clear from the form of the Third Order that the Tribunal considered that the appellant had breached the second Order. All the orders required (in effect) the appellant to disclose the same documents.

The length of time the appeal has been outstanding

43. The matter the subject of the appeal has been outstanding so long it is in danger of bringing the administration of justice into disrepute, although I accept that some of the recent delay (particularly the last 18 months) was due to the parties' attempt to negotiate a settlement. Nevertheless, the enquiry into the tax claim began 14 years ago; the appeal was lodged in 2011, but 8 years later it has still not reached the stage of HMRC being ordered to produce its statement of case.

44. And it seems to me that the responsibility for the delay lies with the appellant. The appellant knew from the start in 2005 that HMRC wanted the documents which related to the claim. It chose not to disclose them; the General Commissioners ordered HMRC to close the enquiry without them. That led to the Tribunal's decision to order disclosure before ordering HMRC to produce its statement of case. Yet for 7 years the appellant has provided piecemeal and incomplete disclosure: despite many opportunities it has never addressed, as it has been ordered to do, a line by line response on whether or not the listed documents exist or ever existed.

Compliance

45. And the appellant has still not complied with the Unless Order. My understanding of its position was that it should not be ordered to do so: its position was that the appeal should go ahead on the basis of what has been disclosed and on the footing that the appellant's position is that at least some of the documents existed, but it was not offering to state which had existed and which had never existed. Mr Roberts' position appeared to be that the appellant was unable to so do but he also appeared to wish the Tribunal to assume that many of the documents must have existed.

Prejudice to HMRC arising from the non compliance

46. I considered that HMRC were prejudiced by the appellant's non-compliance.

47. There was prejudice to HMRC in the 7 years it had taken the appellant to deal with its disclosure request. Justice was very much delayed and time and money spent on chasing compliance.

48. Even now the appellant had not, and would not, and (it said) could not, state exactly which documents existed or had existed. It appeared to want the Tribunal to assume that at least some of the documents must have existed. Mr Roberts suggested the Tribunal could infer they must have existed because similar documents existed in 'sister' schemes.

49. I consider that proceeding on this basis would make it very difficult for HMRC to defend the case: it needed to know exactly which documents the appellant considered existed and why in order to prepare its statement of case. If the appellant accepted some documents did not exist, that may well be relevant to HMRC's concerns that the arrangements were not commercial.

50. Moreover, without the documents, even if the appellant could prove that some or all of them more likely than not had existed, without them they were unlikely to be able to prove the terms of them. That would make the appellant's case weak and HMRC were prejudiced by preparing for an appeal that had low chance of success.

What prospect of success does the appeal have?

51. A strike out would bring the appeal to an end; but that only prejudiced the appellant to the extent that it had a real prospect of success in the appeal. It accepted that it was not able to produce many of the documents requested and that its failure to do so weakened its case.

Importance of compliance

52. The appellant is really asking me to allow the appeal to proceed despite its failure, over 7 years, in large part to comply with the Tribunal's directions for disclosure. I agree with HMRC that over the 7 years since disclosure was first requested in 2012, the appellant has not displayed much regard for the need to comply with the spirit and effect of Tribunal directions.

53. It should have known when it agreed to the unless order that if it failed to comply it would be struck out. It failed to comply with the spirit of that order, even though it was not in position to provide copies of what it did not have: it has still not complied with the spirit of the order.

54. While I understand its current position is that it does not know which of the requested documents ever existed, and this might explain its reluctance over many years to address HMRC's list on a line by line basis, as it was directed to do, this does not excuse its failure to address the list on a line by line basis.

Prejudice to appellant from appeal coming to an end

55. The appeal concerns a very substantial claim for tax relief and, if the appeal remains struck out, that tax claim would fail. The consequences of being struck out to the appellant is therefore very serious.

DECISION

56. While I recognise the importance of the appeal to the appellant, I consider that the appellant is largely responsible, through incomplete compliance, for this appeal dragging on for years. While I accept it cannot produce what it does not in practice possess or control, its attitude to disclosure has been piecemeal, delayed and incomplete as explained above. While it may not be able to provide any more copy documents than it has already, it could have provided copies of what it had many years ago rather than disclose them in a piecemeal fashion

over years; it could have identified in 2012 when the list was first produced by HMRC which documents it considered no longer existed but which had existed once.

57. Moreover, while I do not go so far as to say that the appeal has no reasonable prospect of success, it does appear that the appellant cannot evidence the terms of many of the documents (such as business plans) which the Tribunal ordered it to disclose; the terms of the documents are important to the appeal and therefore it must follow that the appellant's chances of success are weak. Moreover, it is not just that the appellant cannot evidence the terms of the documents: the appellant's case appears to be that it could not comply with the Tribunal's orders to disclose because it did not actually know which of the 102 documents had ever existed: on that basis its case had to be very weak indeed.

58. Taking into account in addition that the appellant has not given what I consider to be a satisfactory explanation for its incomplete, slow and piecemeal compliance over many years, and the importance of the Tribunal requiring compliance with its directions, I do not consider that the appeal should be reinstated. While the appeal is very important to the appellant, it has had many missed opportunities to cooperate with the Tribunal and brought the strike out on itself.

59. I REFUSE the application to reinstate the appeal and it remains STRUCK OUT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 29 APRIL 2019