[2021] UKFTT 0442 (TC)

TC 08326A/V

Procedure – Application to bring forward date of hearing – Overriding objective of the Tribunal Procedure Rules – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2015/02184
TC/2015/05207

BETWEEN

ELBROOK (CASH AND CARRY) LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

The hearing took place on 18 November 2021. With the consent of the parties, the form of the hearing was video using the Tribunal video platform. A face to face hearing was not held because of the coronavirus restrictions in place at the time the hearing was listed.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Tim Brown, counsel, instructed by Obsidian Tax, for the Appellant

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

DECISION

INTRODUCTION

1. This is the application of the appellant, Elbrook (Cash and Carry) Limited ("Elbrook"), for a case management hearing in which the sole issue is whether the hearing of the substantive appeal in this matter, which is listed to commence on 15 November 2022 (with a 19 day time estimate), should be vacated and re-listed at an earlier date. Dates provided by Elbrook to accommodate such a hearing were 21 February to 18 March 2022, 1 June to 15 July 2022 and 29 August to 14 October 2022.

BACKGROUND

2. This matter concerns two appeals which are to be heard together. The first is against decisions of HM Revenue and Customs ("HMRC") denying Elbrook the right to deduct VAT input tax in the sum of £1,273,739.55 (the "Kittel Appeal"); and the second, which is against a decision by HMRC to revoke Elbrook's registration as a registered owner of duty suspended goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (the "WOWGR Appeal").

3. These proceedings commenced in 2015 and, following protracted correspondence between the parties and with the Tribunal and several interlocutory applications (at least two of which were appealed to the Upper Tribunal), a substantive hearing (with a time estimate of 20 days) was listed to commence on 1 September 2021. However, because of the unavailability of an essential witness for HMRC a joint application by the parties was granted and that hearing was postponed.

4. A letter from the Tribunal dated 24 August 2021 which confirmed the postponement, also requested the parties to provide their dates to avoid between 1 November 2021 and 28 February 2022 and warned that if these were not provided within ten days "the Tribunal will re-list the hearing within these dates whether or not you provide your dates to avoid."

5. Although Elbrook provided its dates to avoid during this period on 3 September 2021, HMRC, by letter of 26 August 2021 to the Tribunal and copied to Elbrook, explained that its counsel had "no availability during that period and some of our witnesses are giving evidence in other appeals already listed for hearing in the Tribunal during the proposed listing window" and requested an extension to that hearing window.

6. Therefore, on 8 September 2021, the Tribunal issued Directions under which the parties were directed to:

> "… liaise and agree two sets of alternative dates when they, counsel and witnesses **are available** for a 20 day video hearing and/or (if possible) an in person [hearing] in London as close to 1 November 2021 or as soon as possible thereafter and, not later than 14 days from the date hereof, provide these dates to the Tribunal holding them open until the Tribunal confirms the case has been listed which it will endeavour to do as soon as reasonably practicable."

7. HMRC, wrote to the Tribunal on 21 September 2021 (copying its letter to Elbrook) to explain that:

> "In accordance with the Tribunal's Directions dated 8 September 2021, HMRC have canvassed both our Counsel and our witnesses for their availability for the proposed hearing window of November 2021 and February 2022. Unfortunately, neither of our Counsel is available for a 20 day hearing in the proposed hearing window."

The letter, which noted that while Elbrook had changed counsel during the course of proceedings HMRC had not, continued by setting out the availability of its counsel and witnesses between August and December 2022.

8. In an email to the Tribunal, dated 21 September 2021 which was written in the light of HMRC's letter, Elbrook explained that it "did not envisage that the hearing would be delayed for one year" and sought a direction that the appeal be listed as soon as possible after November 2021.

9. On 23 September 2021, on my instruction, the Tribunal wrote to the parties in the following terms:

> "Judge Brooks has asked me to re-send the Tribunal's directions issued on 8 September 2021 to remind the parties that they were required to 'agree two sets of alternative dates when they, counsel and witnesses are available for a 20 day video hearing and/or (if possible) an in person [hearing] in London as close to 1 November 2021 or as soon as possible thereafter.'
>
> He has also asked me to express his disappointment that, notwithstanding it is in both parties interest for this matter to be determined without further delay, there appears to be little cooperation or progress between them. He has therefore asked me to notify the parties that, unless they, in compliance with the directions, agree mutual hearing dates and provide these to the Tribunal by 16:00 on 30 September 2021, he will consider either listing a video case management hearing at short notice or, more likely, listing the substantive hearing on dates that are convenient for the Tribunal even if this means a change of counsel is required."

10. On 30 September 2021 the parties filed the following joint statement with the Tribunal:

> "Pursuant to the Tribunal's direction dated 8 September 2021 and the subsequent letter from the Tribunal dated 23 September 2021, the Parties confirm that they have agreed that both parties, their counsel and witnesses are available for a 20-day hearing during the following periods:
>
> - 1 November to 26 November 2022
> - 15 November to 10 December 2022
>
> Instructions will be given to counsel and witnesses to keep these periods clear until a listing has been confirmed by the Tribunal.
>
> This statement is made without prejudice to the Appellant's right to object to such a listing on the grounds of delay."

In accordance with that joint statement the substantive hearing of the appeal was listed to commence on 15 November 2022. However, on 30 September 2021, Elbrook, which was not content with the appeal being listed then made the present application.

LAW

11. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

> **2. Overriding objective and parties' obligation to co-operate with the tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) 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;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

12. Although concerned with the Civil Procedure Rules, which contain a similar overriding objective to the Tribunal Procedure Rules, the question of the availability of counsel was considered by Fraser J in *Bates v Post Office Limited* [2017] EWHC 2844 QB who, having issued directions ordering a case management conference to take place before him on 19 October 2017 (almost six months from the date of the directions), observed, at [9] that:

> "The order was met with a wholly unsatisfactory response from the clerks to leading counsel for the claimants, who notified the court that the hearing that had been ordered could not be accommodated on that date, but the court would be notified of a date that could be accommodated by all counsel jointly, once their clerks had agreed this between themselves. This response was referred immediately to me, and appeared to be a clear case of the tail wagging the dog. It is notable that judicial availability, and the dates ordered …, were considered such a secondary consideration to counsels' diaries."

He continued:

> "[16] Fixing hearings in this group litigation around the diaries of busy counsel, rather than their fixing their diaries around this case, is in my judgment fundamentally the wrong approach. If the court embarks upon a course of organising hearings around counsel, more and more time will creep into the timetable of the litigation as a direct result. This applies to all hearings, but particularly to trials of substantive issues. All the parties are to be treated fairly. If a request by the defendant for delay of two to three months into 2019 is agreed by the court at this stage, there will be the risk of at least the appearance of unfairness if similar requests by the claimants' counsel are not acceded to in the future.
>
> …
>
> [19] Counsel of high repute – which in this case they are – are extremely valuable in the marketplace and have many potential clients. They all work extremely hard and it is a function of the independent Bar that they will usually have multiple cases underway simultaneously. However, such counsel will, by definition, usually have a large number of hearings in their diaries. Fitting hearings around their availability has all the disadvantages of doing an

> intricate jigsaw puzzle, with none of the fun associated with that activity. This difficulty becomes even more acute if hearings of four weeks and longer are required, which in this group litigation they will be. Whilst it may be regrettable that one party might be deprived of their counsel of choice because of listing, that is a not unusual situation. Where there is reasonable notice of a diary conflict, which there undoubtedly is in this instance, arrangements for a suitable replacement can invariably be made by the disappointed party, if a replacement is necessary.
>
> [20] The other consideration in terms of incremental delay to hearings is that this will lead to the litigation overall taking longer than it otherwise would. This will undoubtedly add to the costs. One of the favourable points from the earlier so-called Woolf Reforms identified by Jackson LJ in paragraph 1.1 of his Review of Civil Litigation Costs: Preliminary Report (May 2009) was "the case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters" (emphasis added). His report was initiated due to the mounting concerns about the cost of civil justice. If delaying hearings will lead to higher costs – and it undoubtedly will – then delaying hearings must be avoided if at all possible."

DISCUSSION AND CONCLUSION

13. Mr Brown, for Elbrook, points to the overriding objective of the Tribunal Procedure Rules to deal with cases "fairly and justly" emphasising that this includes avoiding delay. He contends that justice delayed is justice denied and says, relying on *Bates v Post Office Limited*, that the date of the hearing should not be fixed "around the diaries of busy counsel". He submits that a delay of over a year, particularly in relation to the WOWGR appeal and its effect on the ability of Elbrook to trade in duty suspended goods, because of the unavailability of HMRC's preferred counsel is unfair and prejudicial to Elbrook .

14. For HMRC, Mr Watkinson submits that the November 2022 hearing date should be kept as the alternative would be to make the parties and the Tribunal a hostage to fortune in that there were too many uncertainties were it to be vacated, eg witness and judicial availability potentially over a holiday period. He also submits that the alternative dates offered by Elbrook for a hearing were "largely illusory" and questioned what prejudice would be occasioned by a delay of four or five months from June/July 2022 to November 2022. Mr Watkinson confirmed that neither he nor Mr Joshua Carey (junior counsel also instructed by HMRC in this matter) were available for a 19 day hearing before November 2022 and that that date had been advanced not only the basis of their availability but that of witness. Additionally, he reminded me that HMRC were generally limited to instructing counsel on the Attorney-General's panel of which there were a finite number whose availability, not only for a 19 day hearing but the necessary preparation time, was unknown.

15. Having regard, as I must, to the overriding objective of the Tribunal Procedure Rules, Mr Brown is quite correct that dealing with a case "fairly and justly" includes the avoidance of delay. However, this is only "so far as compatible with proper consideration of the issues." Dealing fairly and justly also 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 ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

16. It must also be right, for the reasons outlined by Fraser J in *Bates v Post Office Limited*, that fixing hearings around the diaries of busy counsel, rather than their fixing their diaries around the case is fundamentally the wrong approach. However, the circumstances surrounding this application are quite different to those encountered by Fraser J who, as is clear from *Bates*

v Post Office Limited at [3], was considering the position at an early stage in those proceedings whereas the present case is ready for its substantive hearing and that, other than for one interlocutory matter, *Elbrook (Cash and Carry) Limited v HMRC* [2017] UKFTT 143 (TC), HMRC have instructed the same counsel throughout the proceedings.

17. Although, at this stage, the Tribunal resources, judicial availability or the availability of alternative counsel and witness for an earlier hearing are not known it would appear very unlikely that these matters could be ascertained in time to re-list the hearing in February 2022. As to vacating the November 2022 hearing and re-listing it in either June/July 2022 or September/October 2022, I am, on balance, not convinced that there is anything to be gained by vacating a hearing for which the parties, their counsel and witnesses have been notified and are available and re-listing it a matter of only, at best, four months sooner especially given the potential to coincide with holidays that may have already been booked and paid for in the hope that by then the threat of coronavirus travel restrictions would have considerably eased.

18. Additionally, while I accept that there is possible prejudice to Elbrook by a further delay in regard to the WOWGR Appeal I do not consider this to be sufficient a reason to vacate the November 2022 hearing and bring it forward by a matter of months, particularly as the WOWGR Appeal was listed for a hearing between 6 and 10 February 2017 but vacated on Elbrook's application to be re-listed to be heard contemporaneously with the Kittel Appeal (see *Elbrook (Cash and Carry) Limited v HMRC* [2017] UKFTT 143 (TC) at [3] and [4]).

19. Therefore, for the reasons above, I have come to the conclusion that application cannot succeed and the substantive hearing should not be vacated but proceed as listed to commence on 15 November 2022.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

20. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 22 NOVEMEBR 2021