Neutral Citation: [2024] UKFTT 00809 (TC)

Case Number: TC09283

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Paper

Appeal reference: TC/2023/11009

*COSTS – application for unreasonable costs and wasted costs – alleged unwarranted strike out application of appeal – conduct unreasonable – application allowed*

**Determined on:** 3 September 2024
**Judgment date:** 5 September 2024

**Before**

**TRIBUNAL JUDGE AMANDA BROWN KC**

**Between**

**PROEZA SOLUVEL UNIPESSOAL LDA**

**Appellant**

**and**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**The Tribunal determined an application for costs on 3 September 2024 without a hearing under the provisions of rule 29 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 the parties having consented to the application being determined without a hearing.**

## DECISION

### INTRODUCTION

1. This is an application by Proeza Soluvel Unipessoal Lda (**Appellant**) for and award of costs under the provisions of either rule 10(1)(a) or 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 (**FTT Rules**). The claim is made in the sum of £387 and the Appellant invites the amount to be summarily assessed. Director of Border Revenue (**DBR**) object to the application.

### RELEVANT RULES ON WASTED/UNREASONABLE COSTS

2. Section 29 Tribunal Courts and Enforcement Act 2007 provides that the award of costs of and incidental to all proceedings in the Tribunal shall be at the discretion of the Tribunal and subject to the FTT Rules.

3. Rule 10 FTT Rules provides that the Tribunal may only make an order for costs in certain limited cases including: a) wasted costs; b) unreasonable costs and c) in a case allocated to the complex track and in respect of which the appellant has not opted out of the costs' regime. This is not an appeal allocated to the complex category.

4. The approach to be adopted in determining whether a wasted or unreasonable costs order should be awarded is essentially the same, the difference between the two orders is who is to pay the costs. In the case of a wasted costs order it is the representative and in the case of unreasonable costs it is the litigating party. Where the representative and the party are the same organisation there is thus no difference. In the present case any wasted costs order would be made against the Home Office Legal team (which represented DBR in these proceedings) and any unreasonable costs order would be made against DBR. However, as both are part of the Home Office there is no material difference

5. Considering the case law regarding awards of unreasonable costs it is established:

(1) Costs may be awarded under rule 10(1)(a) or (b) in respect of improper conduct, unreasonable conduct, and negligence (see *Cancino v Secretary of State for the Home Dept* [2015] UKFTT 59 (IAC) applying the provisions of the CPR and case law arising)

(2) The meaning of each of those types of conduct has been articulated by the High Court in *Ridehalgh v Horsefield* [1994] Ch 205 and may be summarised as:

(a) Improper conduct – that which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. Significant breach of a substantial duty imposed by a relevant code of professional conduct. Improper according to the consensus of professional (including judicial) opinion

(b) Unreasonable conduct – that which is vexatious, designed to harass the other side rather than advance the resolution of the dispute. Does not include conduct leading to 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.

(c) Negligence - failure to act with the competence reasonably to be expected of ordinary members of the profession.

(3) When considering entitlement to costs the conduct need not be wholly unreasonable and a single act or omission may be sufficient but there is a range of reasonable conduct (see *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC)

(4) It is the handling of the proceedings which is relevant (see *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010 (***Distinctive Care***)).

6. The test for whether indemnity costs are payable requires that the underlying conduct must be unreasonable to a high degree and "out of the norm" (see *Excelsior Commercial & Industrial Holdings Ltd v Sailsbury Hammer Aspden & Johnson* [2002] EWCA 879 as applied in a Tribunal context in *Ad Hoc Property Management Ltd v HMRC* [2019] UKFTT 315).

7. A claim to costs must be made, in writing (rule 10(3)(a)); may be made at any time but no later than 28 days after of the final determination of the appeal (rule 10(4)) and must be accompanied by a summary schedule of costs (rule 10(3)(b).

8. The relevance of and what constitutes a valid schedule of costs was considered in *Distinctive Care* at the Upper Tribunal level in which the Upper Tribunal determined that the role of the schedule of costs is to provide the Tribunal with sufficient detail to allow for summary assessment and to allow the paying party to make representations on the reasonableness of the claim. The Upper Tribunal lists the requirements for a valid schedule:

> "69. We consider the FTT was correct to indicate that the name of each fee earner should be stated, along with the hourly rate for that fee earner and a sufficient statement of the level of experience and expertise of that fee earner to enable the FTT to form a view of the appropriateness of the hourly rate claimed and to assess whether it was reasonable for the relevant work to have been done by a fee earner of that standing. The fee earner's professional qualification or other status should be identified (e.g. paralegal, trainee solicitor, solicitor, chartered tax adviser, accountancy qualification) and approximate length of experience in that role. The geographical location of the fee earner will also usually be relevant – it is well established that appropriate hourly rates vary by location. Clearly, the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each occasion. Any disbursements claimed must also be clearly identified, giving the amount of the cost incurred, what it was incurred on and how that expenditure relates to the proceedings. The schedule should also make clear the extent to which any VAT charged is recoverable as input tax by the claiming party, so that it should not properly be recoverable from the paying party. …."

9. In my own decision in *Harris v HMRC* [2022] UKFTT 447 (TC) I consider the role of summary assessment and the requirements for a compliant schedule. I note in that judgment that under the CPR a summary schedule is required to include an indemnity statement (though that is not expressly referred to in *Distinctive Care)*. I also consider the case law arising under the CPR and in *Distinctive Care* as to the consequence of defects in the schedule of costs. In essence it is a matter of discretion, the sanction ranging from no award being granted (in consequence of a failure to comply with the requirements of rule 10(3)(b)) through ordering that the costs be granted but subject to detailed assessment (with the associated cost and administrative delay) to permitting rectification of the schedule.

**BACKGROUND LEADING TO THE CLAIM FOR COSTS**

10. The claim arises in the context of an ongoing, but stayed, appeal. The appeal was bought against DBR's decision dated 15 September 2023 to restore excise goods seized at Holyhead Freight Control on 4 March 2023 for a fee of £58,848.76.

11. By application dated 22 December 2023 DBR applied for the appeal to be struck out pursuant to rule 8(2) FTT Rules on grounds that the Tribunal had no jurisdiction in relation to

the appeal. It was said that the appeal represented an unlawful and impermissible challenge to the legality of the seizure of the goods which may only be made by way of condemnation proceedings before the Magistrates Court brought by way of an application made within 30 days of seizure.

12. It was asserted in the application that the goods were not subject to condemnation proceedings and, in accordance with the Court of Appeal judgment *HMRC v Jones and Jons* [2011] EWCA Civ 824, this Tribunal had no jurisdiction to consider the terms on which restoration was made as, in DBR's view, the appeal was a collateral attack on the legality of seizure.

13. However, at the time of the application condemnation proceedings had been validly commenced in respect of the goods. On 21 March 2023 an in time notice in writing was given by a third party with an interest in the goods and vehicles seized with the goods contesting the legality of seizure. In response, DBR had ordered proceedings for the condemnation of the goods. Notice of the proceedings was given by Llandudno Magistrates Court on 14 September 2023 with a hearing fixed for 13 December 2023.

14. On 31 March 2023 it appears that the Appellant also gave notice that it wished to challenge the legality of seizure on grounds that it had taken all necessary step in respect of the movement of the goods and that any error indicating otherwise was a system fault. The Appellant requested that condemnation proceedings be commenced. On the papers before me it is not clear why that correspondence was not actioned but in the end it does not matter as condemnation proceedings were commenced as set out in paragraph 13 above and as accepted in *HMCE v Air Canada* [1991] 2 QB 446 such proceedings are in respect of the seized goods in rem affecting the rights the owners of the goods.

15. On 29 December 2023 at 17:28 the Appellant's representative wrote to J Miller and J Ali at DBR:

> "Please note that Border Force are aware that notice to challenge seizure was sent within the time limits, that Border Force should have caused a summons to be issued in relation to Proeza but failed to, that the magistrates have added Proeza to the proceedings and that at all times condemnation proceedings existed in relation to these goods in any event such that there was no deemed forfeiture. I would ask that HMRC withdraw this application by 5 January 2024 or I will prepare a reply to the Tribunal and seek an order for wasted costs for having to deal with deliberately or recklessly misleading submissions to the Tribunal."

16. By reference to DBR's objection, that email was said to have been received after close of business on the Friday before the new year break. The "to" recipient was on leave until 8 January 2024.

17. DBR did not respond to that email on or before 5 January 2024.

18. On 8 January 2024 the Appellant lodged a formal objection to the strike out application and the present costs claim made on an indemnity basis. The costs claim identifies that costs were incurred by the Appellant in respect of the time spent by Tristan Thornton of TT Tax at a rate of £215 per hour in 6 minute units: 2 units for the email of 29 December 2023 and 12 units for the drafting and submission of the notice of objection and application. The application also noted that Mr Thornton is a tax consultant working in tax since 2008 as a non-practicing barrister.

19. DBR responded to the formal objection and costs claim withdrawing the strike out application and objecting to the costs claim. The response 8 January 2024 was the first day,

due to leave commitments, on which a response was possible. It was also stated that no out of office notification was sent for IT security reasons.

**FINDINGS OF FACT**

20. Having considered the correspondence available to me I find the following facts:

(1) DBR should have been aware from 21 March 2023 that the Appellant had an interest in the relevant excise goods and challenged the legality of seizure as correspondence was said to have been sent on that date.

(2) Even if that correspondence was not received it is clear that the Appellant's request for proceedings to be commenced was known by Border Force no later than 23 June 2023 as it is referred to in correspondence from that date.

(3) The Appellant was joined as a claimant in the condemnation proceedings on 13 December 2023.

(4) Border Force, DBR and the solicitor acting on DBR's behalf are all part of the Home Office which had knowledge that condemnation proceedings had been commenced in respect of the seizure of the relevant goods.

(5) Mr Miller did used out of office for external recipients as evidenced by the out of office received by Mr Thornton indicating that Mr Miller would return from his Christmas break on 27 December 2023 but does not appear to have set out of office when away over new year.

(6) There is no evidence that the J Ali was away from the office and I infer they were in and received but did not action the email dated 29 December 2023.

(7) The time given to withdraw the strike out application was 7 days albeit that one of those days was a bank holiday.

(8) There can be no basis, never mind a reasonable one, on which DBR can assert that the application to strike out was soundly based or was simply mistaken, though I accept that Mr Miller may not personally have known or been told that the proceedings had commenced.

(9) The claim for costs was made in writing on 8 January 2024 whilst proceedings are ongoing.

(10) The claim identified the time spent, tasks undertaken, qualifications and experience of the fee earner; it is accompanied by an email indicating that Mr Thornton's practice is based in London. There is no indication as to whether VAT was charged and if so whether it is recoverable and no indemnity statement.

**SUBMISSIONS**

21. The Appellant contends that the application for strike out was made knowing that condemnation proceedings had been brought in respect of the goods by the third party and that the Appellant was one of the owners of the goods with an interest in those proceedings. Accordingly, DBR and Mr Miller acted in a way which was improper, unreasonable and/or negligent. Reference is made to the correspondence in 2023 regarding the Appellant's written request for proceedings to be commenced and subsequent correspondence with Border Force regarding seizure, including the Appellant's active participation in those proceedings. The Appellant highlights that no out of office message was received from either recipient of the email of 29 December 2024 despite having received an out of office in response to a previous email stating that Mr Miller was returning to the office on 27

December 2023. The Appellant contends that its application is entirely reasonable in the context of the application for strike out subsequently withdrawn by DBR.

22. DBR's objection (as set out in correspondence dated 8 January 2024: a letter sent at 14:00 and an email at15:29) is that the lawyer making the application for strike out had no knowledge of the condemnation proceedings; it is emphasised that the claimant in those proceedings was not, as initiated, the Appellant and that neither the reviewing officer nor the lawyer had been made aware that the Appellant had been joined as a claimant. It is claimed that the Appellant sent an arbitrary and unrealistic deadline for withdrawal of the strike out application and made no attempt to follow up on the request prior to incurring the costs of preparing and lodging a formal objection and costs claim. The claim to costs was therefore considered to be "unreasonable", premature and unjustified".

**DISCUSSION**

23. A claim for costs under either rule 10(1)(a) or (b) arises where there has been unreasonable conduct in respect of the proceedings. As is apparent from my factual findings DBR had been aware since at least 2023 that the goods which were the subject of the appealed decision had been the subject of condemnation proceedings and were not therefore forfeit. As the proceedings are in rem it does not matter that the Appellant was not originally a claimant the goods would not be deemed forfeit until the conclusion of the condemnation proceedings. That is a matter which was known to the Home Office and one which should have been communicated to Mr Miller (and/or the reviewing officer instructing him). The application for strike out was therefore entirely unwarranted.

24. I take the view that what led to the application being made was an unfortunate but nevertheless unreasonable failure in communications between various parts of the Home Office generally and within the legal department/team of the Home Office in particular. I do not accept that there was any malfeasance on the part of Mr Miller when he made the application.

25. The application was withdrawn on 8 January 2024, 3 days after the expiry of the time frame set by Mr Thornton for its withdrawal. This was so despite my finding that the email of 29 December 2023 was received by two members of the legal team neither of whom communicated with Mr Thornton prior to 5 January 2024 either by way of an out of office reply or otherwise. I have inferred that J Ali was in the office (as nothing has been said by DBR to the contrary) and that Mr Miller forgot to set his out of office. I therefore consider that the failure to communicate at all prior to 8 January 2024 was also unreasonable conduct in light of the nature of the strike out application.

26. I do not consider that the claim is premature, it relates to a discrete issue arising in the proceedings, the need to object to an unwarranted strike out application. Neither to I consider it to be unreasonable or unjustified. DBR made the application without adequate communications in place to be aware that it was unwarranted. Mr Thornton gave DBR 7 days in which to respond and they did not respond. An email from J Ali explaining that Mr Miller was away and that it would be considered/investigated on his return would have avoided an objection being prepared. J Ali may not have known that Mr Miller had not set his out of office, but they does not make the conduct of the department any more excusable.

27. There is therefore conduct on the part of DBR which I consider renders them liable to pay the reasonable costs of the Appellant in connection with the making of the strike out application. I do not consider that the unreasonable conduct is to a high degree or out of the norm and consider that the costs must be assessed on the standard basis.

28. I then turn to consider the adequacy of the schedule of costs and the reasonableness of the claim itself. The claim was made in time and in writing. It provides most but not all of the information required for a summary schedule of costs. It is not therefore strictly compliant with rule 10(3)(b). However, there is sufficient information both to enable me to assess the reasonableness of the claim in principle and for DBR to have challenged its quantum.

29. DBR have not raised any particular objections to the detail of the claim. I have considered the length and terms of the email of 29 December 2023, the notice of objection and costs claim and subsequent email and consider the time spent on their preparation to be reasonable. Mr Thornton's rates too are reasonable given his experience, particular specialism and expertise and the location of his practice.

30. I therefore consider it reasonable and in accordance with the overriding objective to award the Appellant costs in the sum of £367 but on condition that no later than 7 days from the date of release of this judgment the Appellant 1) confirms either that Mr Thornton is not registered for VAT or that VAT is fully recoverable and has not been included in the claim for costs; and 2) provides an indemnity statement in relation to the claim.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

31. 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.

**AMANDA BROWN KC**
**TRIBUNAL JUDGE**

**Release date: 05th SEPTEMBER 2024**