Costs of application for permission to appeal – whether Upper Tribunal has power to award costs of application to First-tier Tribunal – No

[2015] UKUT 705 (TCC)

Appeal numbers FTC/35/2013 and FTC/57/2013

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S

REVENUE AND CUSTOMS

Appellants

- and –

ASIANA LIMITED

Respondent

Tribunal: **Mr Justice Warren, Chamber President**

Application dealt with on paper on 16 February 2015

On the Appellants' application for costs IT IS ORDERED that the Respondent do pay to the Appellants in respect of their costs of the appeal and cross-appeal summarily assessed at £12,186 to be paid within 28 days of the release of this order and decision

REASONS

1. HRMC now seek the costs of their successful appeal. Asiana has not made any submission either about the principle or the quantum. HMRC's seek all of their costs including the costs of applying to the First-tier Tribunal for permission to appeal (which was refused).
2. Costs are dealt with under section 29 Tribunals, Courts and Enforcement Act 2007 ("**TCEA**") **and**, in the Upper Tribunal, by the Upper Tribunal Rules (SI 2008/2698)("**the UT Rules**").
3. So far as material, section 29 provides:

> "(1) The costs of and incidental to —
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

4. The relevant Rule is Rule 10 of UT Rules which provides that the Upper Tribunal may not make a costs order on an appeal from another tribunal except on an appeal from the Tax Chamber.
5. HMRC rely on section 29 TCEA and on Rule 10 of the UT Rules, drawing attention (i) to the fact that section 29 gives power to the Upper Tribunal award costs of and incidental to all proceedings in the Upper Tribunal and (ii) to the fact that, under Rule 21, an appellant must apply to the First-tier Tribunal for

permission to appeal before he is able to apply to the Upper Tribunal for such permissions. They submit that it must follow that the costs of the application to the First-tier Tribunal for permission to appeal are a necessary step to pursuing an appeal and are therefore "incidental" to the proceedings in the Upper Tribunal.

6. In support of their contention, HMRC have referred me to the decision of Judge Bishopp in *Softhouse Consulting Ltd* PTA/333/2013 released on 19 February 2014. He decided that the Upper Tribunal has power to award the costs of an application for permission to appeal: such costs fall within section 29(1) Tribunals, Courts and Enforcement Act 2007 as "costs of and incidental" to proceedings and also fall within Rule 10 of the UT Rules as "costs… in proceedings …. on appeal…".

7. I see no reason to doubt his conclusion or his reasoning in relation to the costs incurred in relation to an application for permission to appeal (including both the paper and oral stages) made to the Upper Tribunal. In particular, an application for permission to appeal to the Upper Tribunal is clearly made in proceedings in the Upper Tribunal within the meaning of section 29(1)(b). Where permission is granted pursuant to the application, this because either the application constitutes, of itself, "proceedings" or it is part of, or incidental to, some wider "proceedings" namely the appeal. If permission is not granted, the application nonetheless constitutes "proceedings" and there is, in principle, power to make an award of costs (*eg* in favour of the potential respondent who has reasonably attended an oral hearing to resist the application for permission).

8. The important paragraphs of Judge Bishopp's decision are, for present purposes, paragraphs 10 and 11 which I now set out:

"10. On one view, there is no appeal before the Upper Tribunal until one of two events occurs. The first is the lodging with the Upper Tribunal of notice of appeal by an appellant who has been granted permission to appeal by the First-tier Tribunal. The second is when an appellant, refused permission by the First-tier Tribunal, has secured it in the Upper Tribunal; as rule 22(2)(b) indicates, unless there is a direction otherwise, the application for permission stands as the notice of appeal. On this, narrower, view the Upper Tribunal has the jurisdiction to make a costs direction in respect of the entire period from lodging of the notice of appeal in the first case, but only from the grant of permission in the second since, until that moment, there is no appeal and, correspondingly, no "proceedings … on appeal". If that were the correct view there would be no jurisdiction to make a direction in respect of the costs of an application for permission, either to an appellant granted permission who goes on to win the substantive appeal, or to a respondent in respect of an unsuccessful application.

11. That outcome would deprive the ultimately successful appellant of the right to recover a significant part of the costs incurred in vindicating his position. In the case of an appeal categorised in the First-tier Tribunal as Complex, when costs normally follow the event, such an appellant would be able to recover his costs before the First-tier Tribunal (assuming reversal by the Upper Tribunal of an adverse costs direction made by the First-tier Tribunal) and his costs between securing permission and determination of his appeal by the Upper Tribunal. Can it have been the intention of the Tribunal Procedure Committee, which has responsibility for the rules, that such an appellant must, in all circumstances, bear his own costs of obtaining permission, whether from the First-tier Tribunal or the Upper Tribunal? In my judgment it would be remarkable if that had been the intention. In a full costs-shifting regime the norm would be that the successful party should recover all of the costs reasonably incurred, and one would expect to see an express limitation had the committee thought that some part of those costs should be excluded. In addition, in s 29 one finds the phrase "costs of and incidental to". The phrase is not repeated in rule 10, but there is nothing which suggests that the Committee meant to restrict the scope of the rule to cover "costs of" an appeal, but not "costs of and incidental to" the appeal. Secondary legislation should, of course, be read consistently with the primary legislation pursuant to which it was made (in this case the enabling power is s 22 of the 2007 Act) and in the absence of any limitation on the scope of the costs which may be awarded I am satisfied that the power conferred by rule 10 extends to costs of and incidental to an appeal. In my view the securing of permission to appeal is without question incidental to the appeal itself, and in the case of an appellant a wider interpretation is necessary. Thus a successful appellant should normally be awarded his costs of the application as well as those of the resulting appeal.

9. Judge Bishopp's reasoning in those paragraphs was directed primarily at the costs incurred in relation to the paper and oral stages of the application to the Upper Tribunal. However, those paragraphs might be read as suggesting that the Upper

Tribunal has power in a case before it (including a case where all the Upper Tribunal has is an application for permission to appeal which is refused) to make an award of costs incurred on the application for permission to appeal to the First-tier Tribunal. I do not think that his decision should be read that way. If he had been intending to decide that point, I am sure he would have made it clear that that was what he was doing.

10. His concern was to avoid a construction of the procedural rules which would, in all cases, prevent any order for costs being made, whether by the First-tier Tribunal or by the Upper Tribunal, in cases where a costs-shifting regime applies. It seems to me that all he was saying was that it would be surprising if neither the Upper Tribunal nor the First-tier Tribunal could ever make an order for the costs incurred in seeking permission to appeal; he was not saying that the intention was that, in all circumstances where an application for permission to appeal has come before the Upper Tribunal, it should have power to make a costs order in relation to the application for permission made in the First-tier Tribunal.

11. I do not, therefore, consider that *Softhouse* provides support for HMRC's argument. In my judgment, the costs incurred in seeking permission to appeal from the First-tier Tribunal cannot (other than in the exercise of its powers under section 12 TCEA which is not relevant for present purposes) be made the subject of an order by the Upper Tribunal. This is the result which, in my view, the structure of section 29 demands. Thus section 29(1) draws a distinction between (a) proceedings in the First-tier Tribunal and (b) proceedings in the Upper Tribunal. It provides that the costs of and incidental to all such proceedings shall be in the discretion of the Tribunal in which the proceedings take place. An application for permission to appeal made to the First-tier Tribunal clearly falls

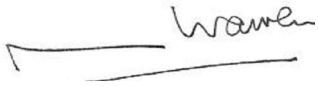
within section 29(1)(a) as "proceedings in the First-tier Tribunal" and equally clearly does not fall within section 29(1)(b) as "proceedings in the Upper Tribunal". The costs of such an application are therefore in the discretion of the First-tier Tribunal as the tribunal in which the proceedings take place, although there will be power to make such an order only in a Complex case where the taxpayer has not opted out of the costs-shifting regime which would otherwise apply. They cannot, at the same time, be in the discretion of the Upper Tribunal.

12. HMRC's argument is that the costs of the application for permission to appeal to the First-tier Tribunal are incidental to the proceedings in the Upper Tribunal. They can perhaps find some support for that from the penultimate sentence of paragraph 11 of Judge Bishopp's decision in *Softhouse*. However, I do not accept that argument and do not find what Judge Bishopp said (which in its context is correct) as supportive of it. In a general sense, I accept that an application for permission to appeal can be seen as incidental to the appeal; and similarly that an application for permission to appeal in the First-tier Tribunal is incidental to (because it is a necessary pre-condition for) the making of an application for permission to appeal to the Upper Tribunal. It is, however, impossible in my judgment to apply a generalised approach such as that in the light of the structure of section 29(1) which I have already explained. In particular, the costs incurred in an application to the First-tier Tribunal for permission to appeal cannot be seen as "costs of and incidental" to any proceedings in the Upper Tribunal.

13. Accordingly, in the present case, HMRC are entitled to recover, by way of an order from the Upper Tribunal, their costs of the proceedings in the Upper Tribunal but not their costs of dealing with the application for permission to appeal made to the First-tier Tribunal. Those latter costs can only be dealt with by

the First-tier Tribunal, and then only if the case was categorised as Complex and if Asiana did not opt out of the costs shifting regime.

14. HMRCs' claim is for £14,074. Of that, £1,888 is attributable to the application to the First-tier Tribunal. I assess costs in the sum of £12,186, being the difference between those two figures. Payment should be made within 28 days from the date of the Release of this decision or in accordance with any agreement between the parties.



Mr Justice Warren

Chamber President

Release date: 18 February 2015