[2016] UKFTT 0390 (TC)

TC05144

Appeal number: TC/2011/03021

PROCEDURE–COSTS - application made out of time-whether appropriate to extend time in all the circumstances-no-application not admitted

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN COZENS **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Application decided on the basis of written submissions

DECISION

Introduction

1. This decision relates to the application of the Appellant for an order that HMRC pay the Appellant's costs relating to the hearing of a preliminary issue in respect of this appeal. As a result of the preliminary issue being decided in favour of the Appellant his appeal was allowed.

2. I do not intend to set out in detail in this decision the underlying facts relating to the substantive appeal or the basis of the decision to allow the appeal. This decision should therefore be read in conjunction in the substantive decision in respect of the appeal which is reported at [2015] UKFTT 0482 (TC). Words and phrases defined in the substantive decision bear the same meanings in this decision.

3. In summary, the Appellant appealed against a notification given to him of joint and several liability for an assessment raised by the Respondents on 17 December 2010 for Excise Duty in the sum of £6,128,138.68. It was alleged that the Appellant had been involved in the movement of goods which were the subject of an irregular scheme to import loads of duty suspended alcohol into the UK. On 21 December 2010 the Respondents obtained a worldwide freezing order against the Appellant in support of a claim made by the Respondents in the High Court against the Appellant for the Excise Duty which was the subject of the Assessment.

4. Between 22 and 24 June 2015 the Tribunal heard a preliminary issue as to whether the Assessment was made out of time. The Appellant contended that the Assessment had been made after the end of the period of one year beginning with the date on which evidence of facts, sufficient in the opinion of the Respondents to justify the making of the Assessment came to their knowledge and thus was made outside the time limit prescribed by s 12 (4) FA 1994.

5. The Excise Duty sought to be recovered by the Assessment had been calculated by reference to a large number of loads of alcohol which had entered into the United Kingdom at different times during the period from 1 October 2008 and 30 September 2009 but did not specify the specific excise duty point which arose in relation to each load. Officer Grimshaw, the Respondents' assessing officer, had provided a witness statement explaining why, at the time she prepared her statement, she believed that sufficient evidence to justify the making of the assessment were not known to the Respondents before 12 January 2010 at the earliest, that being the date that Officer Grimshaw believed was when the relevant AADs relating to all the assessed loads were received by the Respondents from the French authorities. Evidence to the same effect had been given by another officer, Officer Duxbury, in the High Court Proceedings.

6. Officer Grimshaw's original evidence was incorrect. She realised this to be the case following the filing of the skeleton argument of the Appellant's counsel, Mr Akin, in relation to the hearing of the preliminary issue. Consequently, on the first day

of the hearing the Respondents filed a schedule showing that in total 11 AADs had in fact been received by the Respondents some time before 12 January 2010 with the consequence that the Assessment in relation to a number of these loads was made out of time.

7. The Tribunal found that the Assessment was a global assessment and did not comprise a series of separate assessments in relation to each assessed load. It found that the Assessment was for an indivisible single event, namely a global assessment made in respect of the period during which the Scheme was believed to be carried on. Consequently, the Tribunal concluded that the whole Assessment was out of time and invalid because it included assessments for excise duty points in respect of which evidence of facts sufficient to justify such assessments had come to the knowledge of the Respondents more than one year before the Assessment was made. The preliminary issue was therefore decided in favour of the Appellant as a consequence of which his appeal against the Assessment was allowed.

8. The Appellant seeks the costs which he has incurred in respect of the appeal, more particularly in relation to the hearing of the preliminary issue. Although the Appellant was represented by counsel on a pro bono basis the Appellant's solicitors represented him on a conditional fee basis in relation to the hearing of the preliminary issue. The amount claimed is £34,168.42. The Respondents resist the application, first on the basis that it was made out of time and secondly on various substantive grounds.

9. In their last representations on the substantive grounds, as set out in their letter of 25 May 2016, the Respondents requested that there should be an oral hearing of the application because of the nature of the arguments that the Respondents now wished to raise on the substantive grounds. As I have decided not to admit the application out of time for the reasons set out below, there is no need to consider the Respondents' substantive grounds of objection to the application and accordingly I have proceeded to make this decision on the papers.

Extension of time

10. Pursuant to Rule 10 (4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), the Appellant's application for costs should have been made no later than 28 days after the date on which the Tribunal sent it the decision notice regarding the substantive decision. However, the application was made nearly 6 months later on 17 March 2016. It was therefore approximately 5 months out of time. Accordingly, I may not admit the application unless I extend time. The Respondents have opposed the granting of an extension in this case.

Facts relating to the delay

11. It would appear that one of the reasons for the delay was that the Appellant's solicitors waited to see whether there would be any appeal against the decision on the preliminary issue. I was told that the Respondents did not confirm to the Appellant's solicitors whether or not they would be making an application for permission to appeal. Accordingly, I was told that on 9 December 2015, after the time limit for the

lodging of an application for permission to appeal had expired and in the absence of any indication from the Respondents as to their position in relation to their claims against the Appellant, the Appellant's solicitors wrote to the Respondents' solicitors in relation to the High Court Proceedings to deal with the lifting of the worldwide freezing order which, in the light of the findings of this Tribunal and the fact that the evidence placed before the High Court had not been entirely correct, clearly needed to be lifted.

12. On 8 January 2016, after exchanges of correspondence, the Respondents agreed to an order whereby they would pay the Appellant's costs of and occasioned by the High Court Proceedings (to be assessed if not agreed), and to take certain other, related, steps in relation to the discharge of the worldwide freezing order.

13. On 4 February 2016 the Appellant's solicitors wrote to the Respondents addressing for the first time the question of the costs of the proceedings before this Tribunal. The letter stated that having now agreed an order in relation to the High Court Proceedings they now needed to agree an order as to the issue of costs of the appeal in this Tribunal. The letter stated that it was considered that the Appellant should be entitled to recover his costs (other than those of counsel who acted on a pro bono basis) in the usual way.

14. This letter also referred to the fact that the Tribunal had made a direction in July 2015 (that is after the hearing of the preliminary issue) that the appeal had been categorised as a "complex case". That direction was made very much later than it should have been, the Tribunal's rules providing that a case should be allocated to a category as soon as possible after the appeal is registered but the necessary direction had been overlooked. It was made following a request from the Respondents in June 2015 for a copy of the direction allocating the case as complex, which prompted the Tribunal to make the direction it did in July 2015. The Appellant did not give notice opting out of costs shifting under the Tribunal's rules. The letter of 4 February 2016 enclosed a consent order for approval which provided for the Respondents to pay the Appellant's costs of and occasioned by the appeal, with the costs to be assessed between the parties if not agreed. In my view it was therefore clear that the Appellant's solicitors assumed that, in common with the High Court Proceedings, that costs shifting would apply in relation to this appeal.

15. On 16 February 2016 the Respondents declined to consent to the order on the basis that no application for costs had been filed with the Tribunal in time. They specifically drew attention to the provisions of Rule 10 (4) of the Rules. The Respondents also referred to the indication in the Appellant's solicitors' letter that the matter of costs in this appeal could not be dealt with until the issue of the costs in the High Court Proceedings had been settled, stating that was neither correct nor a valid reason to delay making a claim.

16. After further correspondence on the issue as to whether the costs in relation to the High Court Proceedings should be paid on an indemnity basis, on 26 February 2016 the Respondents' solicitors confirmed that the Respondents would agree to pay those costs on the indemnity basis.

On 17 March 2016 the Appellant's solicitors made its application for costs to the Tribunal. They acknowledged that they did not seek a costs order within the time limit prescribed by the Tribunal's rules but asked for an extension of time. Notwithstanding the general costs shifting power, the Appellant's solicitors put their case for costs on the basis of HMRC having acted unreasonably in the bringing and conducting of the proceedings.

Relevant Law relating to extensions of time

17. In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well. That debate was initiated by changes to the Civil Procedure Rules (CPR) in 2013. Although those rules do not apply directly to the tribunals, the impact of judgments of the courts in that regard, such as *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 and *Denton v TH White Ltd* (and related appeals) [2014] EWCA Civ 906, have been considered by the Upper Tribunal first in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and, post-*Denton*, in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC).

18. Prior to the introduction of a new CPR 3.9 in 2013, which was designed to ensure that time limits and similar requirements were enforced more strictly in the courts, the practice of this Tribunal and the Upper Tribunal had been to follow the approach described by Morgan J, sitting in the Upper Tribunal, in *Data Select Limited v Revenue and Customs Commissioners* [2012] STC 2195, a case concerning whether a late appeal in relation to VAT could be made to this Tribunal. Morgan J described the approach in the following way:

> "[34]... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.
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> …
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> [37] in my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3. 9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G (6) of the VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerned an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening

> matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

19. The reference by Morgan J to CPR r 3. 9 was to the version of the rule as in force prior to 2013. In *Leeds City Council* the Upper Tribunal recognised that the changes to CPR r 3.9, which specifically required the court, in considering all the circumstances of the case, to consider the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts, as recognised in *Mitchell* and *Durrant*. However, the Upper Tribunal (taking a different view from that taken by that tribunal in *McCarthy & Stone*) held that until a change was made to the relevant tribunal rules which reflected the terms of the new CPR 3 r. 9, the prevailing practice in relation to extensions of time (that is the approach set out in *Data Select*) should continue to apply.

20. This difference of view was resolved by the Court of Appeal in *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121. The Senior President of Tribunals said at [37] of his judgment:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it."

21. The Court of Appeal therefore held that with the tax tribunal rules being silent on the question, it was appropriate that the tribunal accord the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders significant weight as part of its consideration of the overriding objective set out in Rule 2 of the Tribunal Rules, which in this case requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time.

22. The Court of Appeal specifically declined to analyse the decision in *Data Select*, which in *BPP* the Upper Tribunal had relied on in making its decision. The Court did, however, observe that the question in *Data Select* was the principle to be applied to an application to extend time when there had been no history of non-compliance, that also being the situation in this case. The Court also observed that the approach of Morgan J in Data Select had been to apply the provisions of CPR r 3. 9 as then in force by analogy, which is the approach that the Court of Appeal in *BPP* found to be appropriate.

23. In this case the submissions of both parties are made on the basis that in effect I should now, in the light of *BPP*, simply apply by analogy the new provisions of CPR r 3. 9, as interpreted in *Mitchell* and *Denton* when applying the overriding objective in considering whether to extend time. I observe at this point that in their submissions the Respondents emphasised the approach set out in *Mitchell* without making reference to the restatement of the approach in the three stage test that the Court of Appeal laid down in *Denton*. In my view, as submitted by the Appellant, my starting point when applying CPR r 3.9 by analogy should be the restated approach set out in *Denton.*

24. CPR r 3. 9 now provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rules, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders.
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> (2) An application for relief must be supported by evidence."

25. It was common ground that the Appellant's application to extend time should be treated as an application for relief from sanctions.

26. In *Denton*, the Court of Appeal laid down the following three-stage test at [24] of its judgment:

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. 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" which engages rule 3. 9 (1). 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 including [the matters set out in sub- paragraphs (a) and (b) of rule 3. 9 (1)]" …"

27. It is important to note that the application of this test does not require the matters set out in sub-paragraphs (a) and (b) of CPR r 3. 9 (1) to be given "paramount importance", as was stated in *Mitchell*, over other relevant factors. In clarifying the position at [32] of its judgment in *Denton*, the Court of Appeal said that although these matters may not be of paramount importance, they were of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. The Respondents in their submissions referred to the need for the Tribunal to take a "strict approach" to non-compliance and therefore all the circumstances of the case do not carry equal weight and greater

weight must be given to the need for litigation to be conducted efficiently and the need to enforce compliance with the rules. I would not put this particular gloss on what the Court of Appeal said in *Denton* but in examining all the circumstances of the case I must, as the Court of Appeal said at [34] of *Denton*, 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." This clearly indicates that whilst I must take a stricter approach than might have been the case before the new rule was implemented, it is still the case that a consideration of all of the circumstances may lead to the conclusion that relief should be granted. As the Court of Appeal said at [35] of *Denton*, the more serious or significant the breach (as assessed at stage one) the less likely it is that relief will be granted unless there is a good reason for it (as ascertained at stage two). Nevertheless, the Court also said at [31] that even if there is a serious or significant breach and no good reason for it, the application for relief from sanctions will not automatically fail, but in those circumstances, when considering all the circumstances at stage three particular weight must be given to the matters specifically referred to in CPR r 3. 9 (1).

28. So where does this leave the earlier guidance in *Data Select*? Aside from the need to give "particular weight" to the matters specifically referred to in CPR r 3.9 (1), it seems to me that the approach set out in *Denton* is no different in principle to that set out in *Data Select*. The seriousness and *si*gnificance of the relevant failure has always been a factor of relevance in the Tribunal's determination and is reflected in the reference in *Data Select* to the purpose of the time limit and the length of the delay before relief was sought. The reason for the delay is a common factor in both *Denton* and *Data Select*; at [30] of *Denton* the Court of Appeal made it clear that the question to be posed at the second stage is whether there is a good or bad reason for the failure to comply with the time limit. The need to evaluate all the circumstances of the case so as to enable the Tribunal to deal with the matter justly as required by the overriding objective is clearly a factor common to both approaches.

29. I shall therefore make my decision by reference to the three stage approach laid down in *Denton*, taking account as one of the relevant circumstances the consequences for either party of a decision to allow or not to allow an extension of time, as provided for in the guidance given in *Data Select*.

Discussion

30. A delay of over five months in making an application that should have been made within 28 days from the date of the decision cannot be described as anything but serious. The Appellant accepts that to be the case. However, in my view the delay was of limited significance, as that term was used in *Denton,* in that it is of limited significance in the context of the efficient conduct of the appeal in this case. I take that view because it seems to me that a delay in making an application for a costs order is quite different to a delay, for example, in filing a notice of appeal or an application for permission to appeal where granting the application to extend time will confer upon the tribunal a substantive jurisdiction it would not otherwise have, leaving the respondent substantial work to be done, a prospect it might otherwise have thought it would not have to face. In this case, the parties were still in discussion on

the question of costs in the context of the High Court Proceedings only a short time before the costs application to this Tribunal was finally made and in the light of that, the extra work required on the part of the Respondents to deal with the application was of no great significance. Bearing in mind the allocation of this appeal to the complex category the Respondents must also have anticipated that it would be faced with an application for costs as a result of the Appellant being successful in his appeal, as it was in relation to the High Court Proceedings.

31. The Appellant's solicitors have candidly admitted that the reason for the delay was due to error on their part. It seems to me that they made two serious and elementary errors. First, they assumed that they could wait and see whether the Respondents would appeal against the decision on the preliminary issue before submitting an application for costs. Secondly, they assumed that they could wait until they had settled the consequential matters relating to the High Court Proceedings, namely the discharge of the worldwide freezing order and the costs of those proceedings before turning their attention to the question of the costs of this appeal. Their explanation as to why they proceeded on the basis of these two assumptions is quite extraordinary. They said that they were unaware of Rule 10 (4) of the Rules which requires an application for costs to be made no later than 28 days after the release of a decision which disposes of all issues in the proceedings and assumed that the Tribunal would list a hearing to deal with consequential matters in accordance with High Court practice. In other words, the solicitors did not think to familiarise themselves with the Rules. Although such ignorance might be forgiven on the part of an unrepresented appellant it seems inexplicable on the part of a firm which holds itself out as having expertise in matters coming before this Tribunal.

32. The solicitors seek to justify their position by saying that the Respondents should have acted on their own volition and informed them as to whether they were going to appeal or not, bearing in mind their duties to the High Court to seek a lifting of the freezing order in the light of it having been obtained on the basis of evidence turn out to be incorrect. Even if the criticism of the Respondents is justified, which would be the case had they delayed taking the initiative with regard to the High Court Proceedings after the period for making an application for permission to appeal had expired, the question of an appeal is entirely separate from the question as to whether costs in relation to the proceedings should be applied for. The time limit for applying for a costs order and for making an application for permission to appeal are quite separate and the policy of the Rules is clearly that they do not go hand-in-hand. Had the Appellant's solicitors taken the trouble to read the Rules that would have been clearly apparent to them.

33. It is therefore absolutely clear that there was no good reason for the long delay. The position was compounded by the fact that the delay continued even after the Respondents drew the solicitors' attention to the existence of Rule 10 (4) in their letter of 16 February 2016, referred to at [14] above. It was over a month later, on 17 March 2016, before the solicitors made their application for costs to this Tribunal and no explanation is given for this further delay.

34. I turn therefore to the other circumstances of the case.

35. On the question of prejudice to the parties, aside from having to pay a sum in respect of costs that would otherwise not be the case because of the expiration of the time limit, it seems to me that the prejudice to the Respondents is relatively slight. They were still dealing with costs issues a relatively short time before the application was finally made and therefore matters would not have gone stale. Little further work would be necessary in terms of resisting the application bearing in mind that the application of the general cost shifting provisions of the Rules consequent upon the appeal having been allocated as complex would make it difficult for the Respondents to resist the application in principle. There may have been some further work in agreeing the amount of the costs concerned, which might have resulted in a detailed assessment before a costs judge if agreement could not have been reached, but again in view of the relatively short hearing it is unlikely that work would be substantial.

36. As far as prejudice to the Appellant personally is concerned, in practice he is unlikely to suffer prejudice if the application is not admitted. He had instructed his solicitors on a contingency fee basis which meant that they would only have been paid had his appeal been unsuccessful. He would expect, the case having been allocated as complex, that if he was successful the costs that he would otherwise have had to pay to his solicitors would have been recovered from the Respondents. He would reasonably have expected his solicitors to have been aware of the relevant Rules and the basis on which costs could be applied for. He is now in a position where he may, under the terms of his contingency fee arrangements (which I have not seen) be liable to meet his solicitors' costs. However, the solicitors have admitted that they were in error in not making an application to have costs awarded against the Respondents in time. In those circumstances it seems unlikely that they could legitimately ask the Appellant to pay the costs concerned. Had the application for a costs order to this Tribunal been made in time, bearing in mind the cost shifting provisions of the Rules that applied, then the Appellant would have had his liability to meet his solicitors costs discharged by recovery of the same from the Respondents. He has lost that opportunity as a result of his solicitors' failings.

37. I have reached the conclusion that in the circumstances of such a lengthy delay in making the application with no good reason, that application being further delayed even after the solicitors became aware of the time limit and, in the circumstances, it being unlikely that there will be any prejudice to the Appellant, it would not be in the interests of justice to admit the application for costs out of time. This is so even in the absence of serious prejudice to the Respondents were the application to be admitted. I must at this stage take into account the need to give particular weight to the failure to comply with the time limit in the Rules and in my view this adds a further significant factor to the seriousness of the delay and the lack of a good reason for it. It is also the case that the delay has been caused due to the failings of the solicitors of a party to the proceedings. Whilst in other circumstances it might be unjust to visit a solicitor's failings upon his client, that is not the position here because the client is unlikely to be prejudiced as a result of those failings.

Conclusion

38. Therefore, in my view the circumstances are such that I should not grant the extension of time sought and I conclude that it is in the interests of justice not to do so. Accordingly, I refuse to extend time and admit the application. Consequently, I do not need to consider the merits of the application.

39. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 3 JUNE 2016