



TC05962

Appeal numbers: TC/2014/05870

TC/2015/00425

PROCEDURE – Costs of interlocutory proceedings – Application for Further and Better Particulars

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AWARD DRINKS LIMITED (IN LIQUIDATION) Appellant

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

**Sitting in chambers at the Royal Courts of Justice, Strand, London WC2 on 19
June 2017**

**As both parties consented and the Tribunal considered that it was able to
determine the matter without a hearing this appeal was determined on 19 June
2017 on the papers without a hearing pursuant to Rule 29 of the Tribunal
Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009**

DECISION

1. The purpose of this decision is to explain my reasons for the directions, which have been issued to the parties separately from, but at the same time as, this decision in relation to the applications of the appellant, dated 15 May 2017, for:

- (1) further and better particulars of the amended Statement of Case dated 10 May 2017; and
- (2) its costs in respect of the respondents' application to amend its Statement of Case.

And the application of the respondents, dated, 17 May 2017, for:

- (1) its costs for the hearing before Judge Dean on 3 April 2017; and
- (2) those costs wasted in preparation for the hearing of the substantive appeal listed between 8 and 12 May 2017 be reserved and determined after the conclusion of the substantive hearing.

Background

2. The appeal of Award Drinks Limited (in liquidation), against decisions of HM Revenue and Customs ("HMRC") made on 30 September 2014 and 6 January 2015 to uphold VAT assessments in the sums of £1,543,714 and £5,029,677 respectively, was listed for a substantive hearing between 8 – 12 May 2017. Notice of hearing was sent to the parties on 21 July 2016.

3. By an application, dated 9 November 2016, the appellant sought a direction that:

- (1) Either HMRC to be barred from taking any further part in proceedings on basis its defence had no reasonable prospects of success (under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009); or
- (2) HMRC be required to amend its Statement of Case, which was filed and served in July 2015, to (a) set out basis on which it is said that the appellant's supplies should be subject to UK VAT and (b) provide particulars of any allegations of fraud or other serious wrongdoing.

4. Unfortunately it took time to list the application which came on for hearing before Judge Dean on 3 April 2017. Although not recorded in Judge's Dean's decision, which was released on 19 April 2017, at the hearing Mr Geraint Jones QC, who appeared for the appellant, orally withdrew the alternative ground for the application (as a party cannot be compelled to amend its Statement of Case) and amended it to an application that HMRC provide better particulars of the Statement of Case in relation to the appellant's supplies and allegations of fraud.

5. Also, at that hearing Mr Brendan McGurk, who appeared for HMRC, made an oral application to further amend the draft amended Statement of Case (see at [32] of the Judge Dean's decision) that had been filed and served on 20 March 2017.

6. Directions, which I understand were given orally at the hearing and confirmed in writing on 6 April 2017 required:

(1) HMRC to serve on the appellant and the Tribunal a draft amended Statement of Case by 17:00 on 5 April 2017; and

(2) The appellant to provide its observations on the amended Statement of Case no later than 14 days thereafter.

7. On 7 April 2017 HMRC served its draft amended Statement of Case together with a witness statement in support of its admission.

8. Also on 7 April 2017, the appellant's solicitors wrote to the Tribunal stating that as HMRC had failed to comply with directions, which were agreed at the hearing before Judge Dean, to provide its draft amended Statement of Case by 5 April 2017 it was necessary for HMRC to make an application for relief from sanctions. The letter requested that the Tribunal confirm that unless such an application was made by HMRC, direction 2 (ie for the appellant to provide its observations on the draft amended Statement of Case) had no effect. The letter also included an application by the appellant for a direction that HMRC be restricted to its original Statement of Case.

9. On 10 April 2017, in a letter responding to that of 7 April 2017 from the appellant's solicitors, HMRC opposed the appellant's application and questioned whether Judge Dean had, in fact, directed at the hearing that the Statement of Case be amended by 5 April 2017.

10. In letters to the parties, dated 12 April 2017, the Tribunal extended the time for the appellant to respond to the draft amended Statement of Case to 21 April 2017. The Tribunal's letter stated that, "for the avoidance of doubt", although the direction was issued after time for compliance had passed the time limits were agreed at the hearing on 3 April 2017 and "it cannot be said in those circumstances that it was not properly communicated to HMRC."

11. HMRC now accept that they were to provide the draft amended Statement of Case by 5 April 2017. Mr McGurk explained that he had prepared the draft amended Statement of Case by 4 April 2017 but because he had understood that Judge Dean was to issue directions on the evening of 3 May 2017 HMRC had waited until the directions had been received before filing and serving the amended draft Statement of Case.

12. On 17 April 2017, a skeleton argument was served on behalf of the appellant in support of its opposition to HMRC's application to admit the draft amended Statement of Case and its own application to restrict HMRC to its original Statement of Case. HMRC responded to the appellant's skeleton argument by letter dated 19 April 2017.

13. Two days later, on 19 April 2017, Judge Dean released her decision dismissing the appellant's application that HMRC be barred from taking any further part in the proceedings. However, as clear from [33] of her decision Judge Dean did not consider whether to grant permission to HMRC to amend its Statement of Case or admit the draft amended Statement of Case.

14. Although the appellant had sought a hearing to determine the applications it had made on 7 April 2017 (see paragraph 8, above) in advance of the substantive hearing, it was not possible for this to be listed at such short notice. Therefore, on 27 April 2017, I directed that the following applications be listed for hearing at 10:30 on 8 May 2017 to be followed by the appellant's substantive appeal:

- (1) The respondents' application to amend their Statement of Case;
- (2) The appellant's application, dated 7 April 2017, that the respondents be restricted to participating in the proceedings in the basis of their original Statement of Case; and

I also directed that an application by the appellant, dated 19 April 2017, to amend paragraph [31] of Judge Dean's decision under the 'slip rule' (rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009) should also be considered before the substantive hearing commenced. However, this issue was not considered and has subsequently been determined by Judge Dean.

15. The entire first day of the hearing, 8 May 2017, was taken up with submissions on the respondents' application to amend the Statement of Case, whether an application for relief from sanctions was necessary (as the draft amended Statement of Case had not been filed and served in accordance with Judge Dean's directions) and the appellant's application to restrict HMRC to its original Statement of Case. In view of the detailed submissions and as I was sitting with a Tribunal Member (Mrs Janet Wilkins) with whom it was necessary to discuss any decision, the hearing was adjourned until the afternoon of 9 May 2017 when it was intended to give an oral decision on the applications.

16. However, around lunchtime on 9 May 2017 further correspondence was received from the parties comprising an email from Mr Jones referring to observation of Moses LJ on burden of proof in *Mobilx Limited and others v HMRC* [2010] STC 1436 at [81] and a letter from HMRC containing submissions in response to the appellant's *Mobilx* point. The letter also unequivocally stated that there was no allegation of fraud against the appellant and listed further amendments to the draft amended Statement of Case that HMRC sought to have admitted.

17. Following further submissions by the parties, which took up the afternoon of 9 May 2017, an oral decision was given the following morning, 10 May 2017. As it was abundantly clear that there was insufficient time for the substantive hearing to be completed within the time allocated the following directions were made:

- (1) The draft amended Statement of Case be admitted.
- (2) The hearing be adjourned.

- (3) A case management hearing (with a time estimate of 1 day) be listed in London on 31 July 2017.
- (4) The substantive hearing be re-listed (with a time estimate of 7 days) in London between 20 and 28 November 2017.
- (5) Any application by the appellant for further and better particulars of the amended Statement of Case shall be made by 17 May 2017.
- (6) The response to any application made under direction 5, above, shall be made by 31 May 2017.
- (7) Any application for costs shall be made by 17 May 2017.
- (8) The response to any application made under direction 7, above, shall be made by 31 May 2017.
- (9) The Tribunal shall determine any applications made under directions 5 and 7, above, on the papers.
- (10) Either party may apply at any time for these Directions to be amended, suspended or set aside, or for further directions.

18. The Tribunal subsequently received the applications from the parties to which paragraph 1, above, refers.

19. I shall first consider the costs applications before briefly explaining why I have directed HMRC to provide further and better particulars of its amended Statement of Case.

Costs

20. As this appeal has been allocated to the “complex” category and the appellant has not opted out of the costs regime, under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, it is subject to the full cost-shifting regime subject to the discretion of the Tribunal. Although the Tribunal is not subject to the Civil Procedure Rules (“CPR”) these do, as the Upper Tribunal recognised albeit in a different context, in *HMRC v Fairford Group* [2014] UKUT 329 at [41], provide helpful guidance to the approach to be adopted in applications such as the present. Indeed, both parties in their submissions in support of their respective cost applications cite CPR provisions.

21. The general rule, and starting point, on costs is contained in Part 44 of the CPR. Part 44.2(2) provides:

If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

22. However, the commentary in the White Books in relation to amendments to a Statement of Case states, at 17.3.10:

“Applicants who obtain permission to amend are often ordered to pay the other parties’ costs of and caused by the application (*Taylor v Burton* [2014] EWCA Civ 21; and as to the meaning of “cost of and caused by”, see Practice Direction 44, para.4.2 (44PD.4). However, parties ought to consent to amendments they cannot reasonably oppose because, if they do not, they may be penalised in costs. In *La Chemise Lacoste SA v Sketchers USA Ltd* [2006] EWHC 3642 (Ch), C sought D’s consent to amendments to the particulars of claim; when D made half-hearted attempts to resist by making proposals to deal with the matter in another way. C successfully applied for permission to amend and was awarded the costs of the application against D.”

23. Although in the present case the respondents were successful in their application to admit the amended Statement of Case (which meant that the appellant failed in its application to restrict the respondents to their original Statement of Case) the appellant seeks its costs for the amendment in accordance with the guidance in the White Book.

24. However, as the Tribunal recognised in its decision of 10 May 2017, the application to amend the Statement of Case arose as a direct result of the appellant’s application for a direction that HMRC be directed to do so (albeit that that application was orally amended at the hearing before Judge Dean on 3 April 2017). The Tribunal also found that the amended Statement of Case, in particular the additional amendments made by HMRC’s letter of 9 May 2017 which confirmed in clear and unequivocal terms that there was no allegation of fraud against the appellant, rather than representing a fundamental shift HMRC’s position clarified it.

25. In the circumstances, and in view of the criticism by Jackson LJ in *Fox v Foundation Piling Limited* [2011] EWCA Civ 790 at [62] of the “unwelcome tendency by first instance courts and, dare I say it this Court as well, to depart from the starting point set out in rule 44.3(2)(a) [CPR] too far and too often, I dismiss the appellant’s application for its costs in relation to the amendment of HMRC’s Statement of Case.

26. Turning to the Respondents’ cost application, I see no reason to depart from the general rule in relation to the hearing before Judge Dean and have directed that the appellant pay the respondents costs of and incidental to that hearing with such costs to be assessed if not agreed.

27. I have also directed the issue of the respondents’ costs in relation to the preparation for the hearing of the substantive appeal listed between 8 and 12 May 2017 be reserved and determined after the conclusion of the substantive hearing.

Further and Better Particulars

28. The directions issued on 10 May 2017 (see paragraph 17, above) required any response to an application for further and better particulars was to be made by 31 May 2017. However, although the respondents’ cost application refers to the appellant’s further and better particulars application it does not specifically raise any objection to it.

29. At the hearing on 10 May 2017, after hearing submissions from Mr Jones, I indicated that I was minded to allow the application. In the absence of any further reason not to do so I have directed that the respondents provide the further and better particulars sought within 28 days of the date of the directions.

Appeal Rights

30. 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 JUNE 2017