Case 48
Distinctive Care Ltd

v

The Commissioners for Her Majesty's Revenue and Customs

[2019] Costs LR 999

Neutral Citation Number: [2019] EWCA Civ 1010
Court of Appeal (Civil Division)
13 June 2019

Before:
Lewison, Floyd and Rose LJJ

Keywords:
First-tier Tribunal costs, jurisdiction, unreasonableness

Headnote

On appeal the court considered the jurisdiction of the First-tier Tribunal to award costs to a party in an appeal where the opposing party had acted unreasonably in bringing, defending or conducting the proceedings.

The Upper Tribunal had upheld the decision of the First-tier Tribunal that the jurisdiction was not engaged, principally because the alleged unreasonable behaviour by HMRC comprised the issue of the appealable decision rather than conduct occurring after that decision had become the subject of proceedings before the First-tier Tribunal.

Held: Appeal dismissed. The issue of the information notice by HRMC did not amount to the bringing or conducting of proceedings for the purpose of rule 10(1)(b)

of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009. HMRC had not delayed in withdrawing the notice after they had been notified of the appeal. Any delay before being notified of the existence of the appeal did not amount to conduct by HMRC in the proceedings.

The Court of Appeal took the opportunity to address the question of whether costs incurred before the start of tribunal proceedings could be recovered as "costs of and incidental to" those proceedings where the tribunal's power under rule 10(1)(b) is exercised. It was confirmed that the power in rule 10(1)(b) to award costs may include costs incurred before the appeal was notified to the First-Tier Tribunal. However, which costs are properly recoverable would be a matter for the costs officer. It would be the nature of the work done and the scope of the ultimate appeal that determine whether those costs are incidental to the appeal.

Cases Cited

Bulkliner Intermodal Ltd v *HMRC* [2010] UKFTT 395 (TC)
Cancino v *Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC)
Catanã v *HMRC* [2012] UKUT 172 (TCC); [2012] STC 2138
Market & Opinion Research International Ltd v *HMRC* [2015] UKUT 0012 (TCC)
Marshall & Co v *HMRC* [2016] UKUT 116 (TCC)
Scott and Another (t/a Farthings Steak House) v *Macdonald (Inspector of Taxes)* [1996] STC (SCD) 381
Tarafdar v *HMRC* [2014] UKUT 0362 (TCC)
Willow Court Management Co (1985) Ltd v *Alexander and Others* [2016] UKUT 290 (LC)

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Judgment

1. **Rose LJ:** This appeal concerns the jurisdiction of the First-tier Tribunal to award costs to a party in an appeal where the opposing party has acted unreasonably in bringing, defending or conducting the proceedings. The Upper Tribunal (Judge Sinfield and Judge Poole), whose decision is reported at [2018] UKUT 155 (TCC), upheld the decision of the FTT (Judge Mosedale) reported at [2016] UKFTT 764 (TC) that the jurisdiction was not engaged in the circumstances of this case, principally because the alleged unreasonable behaviour by HMRC comprised the issue of the appealable decision rather than conduct occurring after that decision had become the subject of proceedings before the FTT. The appellant ("DCL") argues that the issue of an appealable decision by HMRC is part of the bringing of proceedings for the purposes of the costs rule. In the alternative, DCL argues that HMRC's ongoing failure to withdraw the appealable decision following the start of the FTT proceedings amounts to behaviour in the conduct of the proceedings once those proceedings are underway. There are also issues raised about whether HMRC's conduct was unreasonable in this case and whether, if the test for an award of costs is met, DCL's costs incurred before the FTT proceedings started can be recovered.

The Facts

2. On 3 March 2015, HMRC issued DCL with an information notice under para 1 of Schedule 36 to the Finance Act 2008. Paragraph 1 provides that an officer of HMRC may by notice in writing require a person to provide information or produce a document if the information or document is reasonably required for the purpose of checking the taxpayer's tax position. The documents requested by the notice concerned DCL's liability for stamp duty land tax ("SDLT") in respect of premises acquired in 2008. In January 2012 HMRC had issued a determination that DCL owed SDLT arising from that transaction and DCL had challenged that determination before the First-tier Tribunal. Those proceedings were still pending when the HMRC officer dealing with DCL's SDLT tax affairs, a Mr Kane, issued the information notice. DCL took the view that HMRC did not have power to issue an information notice under Schedule 36 relating to a

liability in respect of which HMRC had already issued a determination.

3. Paragraph 29(1) of Schedule 36 gives a right of appeal against an information notice. DCL notified an appeal against the information notice to HMRC on 25 March 2015 and then accepted HMRC's offer of an internal review. HMRC notified DCL on 26 June 2015 that the internal review had upheld the decision to issue the information notice. DCL then lodged an appeal with the First-tier Tribunal on 24 July 2015 asserting that the information notice was ultra vires. The FTT notified HMRC that the appeal had been lodged on 7 September 2015. On 22 September 2015 HMRC wrote to DCL and the FTT saying that "following the recent receipt of legal advice" they had concluded that they could not rely on the power in Schedule 36 to require the production of the documents sought. They withdrew the information notice. The FTT formally allowed DCL's appeal against the information notice by decision dated 16 November 2015.

4. HMRC's change of position arose from a failure of communication within HMRC between the Central Policy team ("CenPOL") and Mr Kane. In late 2012 Mr Kane had asked CenPOL whether HMRC had power to issue an information notice to a taxpayer even though there had already been a determination of the taxpayer's liability. Mr Kane had been told that HMRC's view was that they could. He therefore issued a number of information notices over the following years, including the notice sent to DCL and to several other taxpayers in DCL's position. What Mr Kane did not know was that before he sent the information notice to DCL in March 2015, the view of CenPOL had changed and they considered that information notices should not be sent out where there had already been a determination of liability. Mr Kane was not told about that change of stance before he sent out DCL's notice. When the FTT notified HMRC that DCL had lodged an appeal against the issue of the information notice, Mr Kane sought advice again from CenPOL. He was then told that HMRC's view of the law had changed and HMRC did not rely on the power in Schedule 36 in these circumstances. That was why HMRC did not contest the appeal.

5. On 3 December 2015, DCL applied to the FTT for an order that HMRC pay their costs of the appeal against the information notice on the grounds that HMRC had acted unreasonably. The appeal had been categorised as "basic" in accordance with rule 23 of the Tribunal

Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the FTT Rules"). Rule 10 (as amended) provides the power for the FTT to make an order for costs:

> "**10. Orders for costs**
>
> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) under s 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …"

6. That power to award costs is conferred pursuant to s 29(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") which provides:

> "29 Costs or expenses
>
> (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."

7. The broad power to award costs conferred by s 29(1) is therefore expressed to be subject to the FTT Rules. Those Rules, by rule 10, reflect the intention that the First-tier Tribunal is designed in general to be a "no costs shifting" jurisdiction, not least because many appellants are not legally represented. Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal.

8. The FTT (Judge Mosedale) dismissed DCL's application for costs on a ground concerning the content of DCL's schedule of costs which is not in issue before us. She went on, however, to consider the issues

that were subsequently argued before the Upper Tribunal and before this court. She noted that HMRC accepted that the information notice should never have been issued and she therefore proceeded on the assumption that DCL was right to say that HMRC acted unreasonably in issuing it. She did not accept, however, that HMRC had acted unreasonably in defending or conducting the proceedings, as then alleged by DCL. She rejected the argument that HMRC's omission to withdraw the information notice following the internal review was "operative" from the time DCL lodged the appeal with the FTT up to the moment HMRC actually withdrew the decision. She recognised that actually defending an untenable decision may well be or become unreasonable. HMRC had, however, acted reasonably in this case because they withdrew the information notice two weeks after they were notified of the appeal and before they had taken any steps to defend the appeal. Any unreasonableness in failing to withdraw the information notice as soon as HMRC changed their opinion was not relevant as it was not behaviour during the course of defending or conducting an appeal for the purposes of rule 10(1)(b).

9. Judge Mosedale went on to make findings as to whether the information notice and internal review decision were unreasonable, although she recorded that neither party appeared to be in a position to address her on the law relating to that issue. She concluded that HMRC's initial view that they could issue an information notice even though an assessment had already been issued was not obviously wrong. She was not satisfied that the law was so clear that it was unreasonable for HMRC to have issued the information notice when they did in any event: [60].

10. Finally, Judge Mosedale turned to the question of whether costs incurred by DCL before the notice of appeal was filed with the FTT were "costs of and incidental" to the proceedings in the FTT within the meaning of s 29 TCEA. She held that there was no reason why "incidental to" in the TCEA should be read differently from the meaning it is given elsewhere in cost legislation and rules. It extends the scope of the costs which may be awarded beyond those merely "of" the litigation but will require the costs to be of use and service in the subsequent litigation: [77]. She considered that costs incurred in dealing with a tax investigation were not incidental to the proceedings because they were incurred to bring the dispute to an end without litigation. So far as the costs of notifying the appeal to HMRC and

pursuing an internal review were concerned, she drew a distinction between the position where those steps are taken merely to fulfil a statutory pre-condition before lodging an appeal with the FTT and the position where the taxpayer then chooses to pursue the option of an internal review. In the latter case, the taxpayer's immediate purpose in notifying the appeal to HMRC was not to pursue litigation so those costs could not be said to be truly incidental to the subsequent proceedings: [82]. In the case before her, the costs of preparing the appeal to HMRC were not incidental because DCL had in fact pursued the internal review option. She was not satisfied that the costs incurred during the review process were incidental to the proceedings since she was not satisfied that any of those costs had been of use and service in the subsequent proceedings: [85].

11. On appeal, the Upper Tribunal addressed first the period during which the reasonableness of the parties' actions is to be assessed for the purposes of rule 10(1)(b). The UT said:

> "39. … we consider that in a costs application made against an appellant, the actions of that appellant (and its representative) in bringing the proceedings are to be considered; for an application made against a respondent, the actions of that respondent (and its representative) in defending the proceedings are to be considered; and in both cases their respective actions (and those of their representatives) in conducting the proceedings are to be considered. These are the relevant actions to be considered for the purposes of rule 10. It may be that some earlier actions of one party or the other might inform the FTT's assessment (for example by demonstrating bad faith), but the focus of the assessment remains on these relevant actions, not on any earlier actions."

12. The UT held that there was no warrant for extending the clear wording of rule 10(1)(b) to include an assessment of a respondent's conduct prior to commencement of proceedings before the FTT, even if that conduct effectively forces an appellant to commence proceedings which should not reasonably have been necessary. To hold otherwise would:

> "41. … as well as doing clear violence to the actual wording of rule 10(1)(b), involve the FTT in a potentially wide-ranging assessment of the reasonableness of the entirety of HMRC's conduct leading up to the

> proceedings, as well as flying in the face of authority. We do not consider that it could have been the intention of the draughtsman of the FTT Rules to require such an assessment which would, in many cases, necessitate a detailed enquiry into the factual history (quite possibly both complex and hotly disputed) of matters predating the FTT's involvement."

13. The UT then rejected what they described as DCL's subsidiary argument that HMRC acted unreasonably because they should be regarded as under a continuing obligation to withdraw the information notice such that their omission to do so once proceedings before the FTT had commenced amounted to them acting unreasonably in defending or conducting the proceedings. The UT held that where, as here, withdrawal of a decision followed promptly upon notification by the FTT of an appeal to the respondent, it was hard to conceive how prior conduct might be regarded as engaging the FTT's jurisdiction to award costs in relation to the proceedings in question: [43].

14. In considering whether HMRC's conduct had been unreasonable at any stage, the UT referred to the judgments in *Market & Opinion Research International Ltd* v *HMRC* [2015] UKUT 0012 (TCC) ("*MORI*") and *Shahjahan Tarafdar* v *HMRC* [2014] UKUT 0362 (TCC) ("*Tarafdar*"). They held that the FTT had applied the correct test in reaching the conclusion that a prompt withdrawal of the decision afforded HMRC protection against an adverse costs award: [51] and [54].

15. The UT did not fully address the question of which costs were to be regarded as "costs of and incidental to" proceedings. They expressed doubts, however, about the distinction which Judge Mosedale had drawn depending on whether the taxpayer pursued the option of an internal review. Without deciding the point, they considered the better view was that the costs of notifying an appeal to HMRC and indeed of making any further representations in the context of an internal review were not "incidental to" the proceedings before the FTT and should not therefore be recoverable in any event.

The Grounds of Appeal

16. There were four grounds of appeal ably presented to us by Mr Firth on behalf of DCL:

i) Ground 1: the UT erred in holding that HMRC's decision to issue an appealable decision was not bringing or conducting the proceedings for the purposes of rule 10(1)(b);
ii) Ground 2: The UT erred in holding that an omission to withdraw a decision that HMRC knew was wrong was not unreasonable behaviour in relation to the conduct of proceedings, once the proceedings had in fact been commenced;
iii) Ground 3: the UT erred in so far as it upheld the FTT's decision that HMRC behaved reasonably in issuing an appealable decision that they knew was wrong;
iv) Ground 4: the UT erred in failing to correct the FTT's decision that the costs of appealing to HMRC are not incidental to the subsequent FTT proceedings, if such proceedings eventuate.

17. Before considering the grounds individually it is useful to set out here the steps that precede the lodging of an appeal with the FTT challenging the issue of an information notice under para 1 of Schedule 36 to the Finance Act 2008. Simplifying slightly they are as follows:

i) The taxpayer has a right of appeal against any requirement in the information notice, provided that the information or document does not form part of the taxpayer's statutory records: para 29 in Part 5 of Schedule 36.
ii) That initial appeal must be given in writing within 30 days to the officer of HMRC by whom the information notice was given: para 32(1) in Part 5 of Schedule 36. The procedure for such an appeal to HMRC is governed by the provisions of Part 5 of the Taxes Management Act 1970 ("TMA"), as applied by para 32(6) in Part 5 of Schedule 36 to the Finance Act.
iii) Where a notice of appeal has been given to HMRC,
    (a) the appellant may notify HMRC that he requires HMRC to review the matter in question;
    (b) HMRC may notify the appellant of an offer to review the matter in question; or
    (c) the appellant may notify the appeal to the tribunal: see s 49A TMA.
iv) If the appellant notifies HMRC that he requires HMRC to conduct a review, HMRC must within 30 days notify the appellant of HMRC's view of the matter in question having reviewed that question in accordance with s 49E TMA: see s 49B TMA. If

HMRC offer a review and the appellant accepts that offer, HMRC must review the matter in question in accordance with s 49E. In either case, the nature and extent of the review "are to be such as appear appropriate to HMRC in the circumstances": see s 49E(2) TMA. The review must take account of any representations made by the appellant at any stage and the review may conclude that HMRC's view of the matter in question is to be upheld, varied, or cancelled. HMRC must notify the appellant of the conclusions of the review and their reasoning within 45 days. Following the conclusion of the review the appellant may within 30 days notify the appeal to the tribunal under s 49G: see s 49F(4).

v) Once notice of appeal has been given to HMRC, the appellant may also notify the appeal to the tribunal without requiring an internal review and without accepting any offer by HMRC of an internal review: see ss 49D and 49H. The tribunal then decides the matter in question.

vi) A person making or notifying an appeal to the FTT under any enactment must start proceedings by sending or delivering a notice of appeal to the FTT: see rule 20 of the FTT Rules. When the tribunal receives the notice of appeal it must give notice of the proceedings to the respondent: see rule 20(5). There is no time limit specified in the FTT Rules within which the tribunal must give notice of the proceedings to the respondent and, as the present case shows, it may not happen promptly.

vii) What happens next depends on whether the appeal is categorised as basic (as DCL's was) or as standard/complex: rule 23. In a basic case, the appeal will proceed directly to a hearing. If the respondent intends to contest the appeal on grounds which have not previously been communicated to the appellant, the respondent must notify the appellant of those grounds as soon as reasonably practicable: rule 24. If the case is standard or complex, the respondent must send or deliver a statement of case to the tribunal and the appellant setting out the respondent's position in relation to the case: rule 25.

Ground 1

18. Mr Firth's first argument under Ground 1 before this court is different from the case put forward in the tribunals below in that he no longer contends that HMRC acted unreasonably in defending the proceedings. He argues instead that HMRC has been unreasonable in

bringing and conducting the proceedings. His submission is that both HMRC and the appellant are responsible for "bringing" the proceedings within the meaning of rule 10(1)(b) – HMRC because they have issued the appealable decision and the appellant because it has lodged the appeal with the FTT. The existence of an appealable decision is an essential first step in the FTT's proceedings because without that step there can be no appeal. Mr Firth argues that the tribunals' approach in this case and in the earlier authorities cited creates a fundamental asymmetry according to which the taxpayer's conduct and the quality of his decision-making prior to the actual commencement of the proceedings can be relevant to the reasonableness of bringing those proceedings but the respondent's conduct only comes under scrutiny as from a later date.

19. Ingenious though this argument is, in my judgment it cannot succeed. The earliest conduct that is relevant for the purposes of rule 10(1)(b) is the bringing of the proceedings, that is the proceedings before the FTT. There is no ambiguity in the FTT Rules as to what is involved in the bringing of proceedings in this appeal; it is the sending or delivering of the notice of appeal pursuant to rule 20 of the FTT Rules. The tribunal case law supports this view. In *Catanã* v *HMRC* [2012] UKUT 172 (TCC); [2012] STC 2138 ("*Catanã*"), the FTT refused to make a costs order in the taxpayer's favour following the compromise of an appeal against his tax assessment. Mr Catanã was dissatisfied with the compromise agreement reached and the tribunal decision recording the compromise was ultimately set aside. Mr Catanã applied for his costs of the initial proceedings. Judge Bishopp described the phrase "bringing, defending or conducting the proceedings" as:

> "an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

20. Judge Bishopp also cited with approval what had been said by the FTT in *Bulkliner Intermodal Ltd* v *HMRC* [2010] UKFTT 395 (TC) ("*Bulkliner*"). In *Bulkliner*, the FTT had stated that it was not possible for a party to rely on unreasonable behaviour of the other party prior

to the commencement of the appeal. The FTT in *Bulkliner* went on: [11]:

> "That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour or actions might well inform actions taken during proceedings as it did in *Scott and Another (t/a Farthings Steak House)* v *Macdonald (Inspector of Taxes)* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

21. Judge Bishopp concluded that the FTT judge could have made a costs award in Mr Catanã's favour only if he had been satisfied that HMRC had unreasonably resisted the appeal before the FTT or conducted themselves during the course of those proceedings in an unreasonable manner: [17].

22. That paragraph from *Catanã* was cited by the UT (Judge Berner and Judge Thomas Scott) in *Marshall & Co* v *HMRC* [2016] UKUT 116 (TCC). In that case the appellant taxpayer, whose application for costs had been refused by the FTT (Judge Kempster), argued that the FTT had erred in failing to review in depth the background to the proceedings, by which they meant in particular HMRC's decision to issue the penalty under challenge. The UT in *Marshall & Co* held that Judge Kempster had correctly identified the relevance of HMRC's conduct before the commencement of proceedings. They emphasised that the issue of whether HMRC's conduct in the proceedings had been unreasonable was "effectively a value judgment": [24]. Given that there was no evidence of bad faith in the making of the assessment or the raising of the penalties, the UT held that the FTT had been right in its evaluation of HMRC's behaviour prior to the proceedings since the FTT had found on the facts that such prior behaviour had not informed actions taken during the proceedings: [28].

23. That attribution of the bringing of the proceedings to the appellant, the defending of the proceedings to the respondent and the conducting of the proceedings to both has been recognised by other tribunal Chambers applying costs rules drafted in the same terms as rule 10(1)(b). In *Cancino* v *Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC), McCloskey J, then President of the Upper Tribunal (Immigration and Asylum Chamber), sitting with Mr Clements, the then President of the First-tier Tribunal (IAC),

considered the newly introduced power in those First-tier and Upper Tribunal Chambers to make costs awards where a person has acted unreasonably in bringing, defending or conducting proceedings. They described the test to be applied in the following terms:

> "24. The scope of rule 9(2)(b) is identifiable by listing the several types of enquiry which, depending on the context, may be required of the tribunal. These are:
>
> a. Has the appellant acted unreasonably in bringing an appeal?
>
> b. Has the appellant acted unreasonably in his conduct of the appeal?
>
> c. Has the respondent acted unreasonably in defending the appeal?
>
> d. Has the respondent acted unreasonably in conducting its defence of the appeal?
>
> The rule clearly embraces the whole of the 'proceedings'. Thus the period potentially under scrutiny begins on the date when an appeal comes into existence and ends when the appeal is finally determined in the tribunal in question. It embraces all aspects of the appellant's conduct in pursuing the appeal and all aspects of the respondent's conduct in defending it. This, clearly, encompasses interlocutory applications and hearings and case management hearings."

24. In *Willow Court Management Co (1985) Ltd* v *Alexander and Others* [2016] UKUT 290 (LC) Judge Martin Rodger QC (Deputy President of the Upper Tribunal (Lands Chamber)) and Judge McGrath (President of the First-tier Tribunal (Property Chamber)) considered three appeals turning on the proper interpretation of a corresponding power in the First-tier Tribunal (Property Chamber) rules. In one of the appeals before the UT, the allegations of unreasonableness included the party's unreasonable failure to pay her service charges. The UT held that although the FTT was entitled to be critical of that failure, it was not entitled to rely on that conduct as supporting the contention that she had acted unreasonably in bringing, defending or conducting proceedings: [95]:

> "Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis. We qualify that statement in two respects. We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to

> consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct. Secondly, once unreasonable conduct has been established, and the threshold condition for making an order has been satisfied, we consider that it will be relevant in an appropriate case to consider the wider conduct of the respondent, including a course of conduct prior to the proceedings, when the tribunal considers how to exercise the discretion vested in it."

25. Drawing those tribunal decisions together, in my judgment the passage from *Catanã* and the questions posed by the UT (IAC) in *Cancino* show the correct approach to the application of rule 10(1)(b). I would sound a note of caution about the proviso discussed in *Bulkliner* and *Marshall & Co* that pre-commencement conduct may be relevant if there is bad faith. That should not be read as suggesting that there is some exception to the general principle such that if an assessment or penalty is issued in bad faith by HMRC, that can in some way bring conduct before the start of the appeal within the scope of rule 10(1)(b). There may be circumstances in which behaviour before the appeal is brought is relevant to the tribunal's assessment of the reasonableness of conduct post-commencement but an applicant cannot extend the scope of the tribunal's inquiry by alleging bad faith at an earlier stage on the part of HMRC. The parties and the tribunal must always bear in mind first that the focus should be on the standard of handling the case rather than the quality of the original decision: see *Maryan (t/a Hazeldene Catering)* v *HMRC* [2012] UKFTT 215 (TC) and secondly, that the jurisdiction to award costs is intended to be exercised in a straightforward and summary way and should not trigger a wide-ranging analysis of HMRC's conduct relating to the applicant's tax affairs.

26. Mr Firth argued that it is a mere formality that the legislation governing information notices and their review is structured so that it is the taxpayer who has to lodge the appeal rather than, for example, the appealable decision being brought before the FTT by HMRC unless the appellant accepts it. Were it not for the statutory appeal mechanism, he submitted, the issues raised by the taxpayer would be considered by the court in the context of enforcement proceedings

brought by HMRC and defended by the taxpayer. I accept that all that may be true, but rule 10(1)(b) was drafted in the knowledge that the procedure involved the steps which are in fact required. The Tax Chamber of the First-tier Tribunal is similar to most other Chambers in that appeals are brought by a citizen challenging a decision by a Government department or other emanation of the state. The wording of the rule in the Tax Chamber and in the other Chambers to which a similar rule applies excludes the reasonableness of the appealable decision from the scope of the inquiry.

27. I therefore dismiss the first ground of DCL's appeal because the issue of the information notice by HMRC does not amount to the bringing or conducting of proceedings for the purpose of rule 10(1)(b).

Ground 2

28. DCL submits that once it had lodged its appeal on 24 July 2015, any conduct on the part of HMRC after that date amounted to conduct of the proceedings for the purposes of rule 10(1)(b). Conduct can include a failure to act: see *MORI* at [23] approving the proposition adopted by the FTT in that case that "actions for the purposes of 'acting unreasonably' also include omissions". Mr Firth argued that between 24 July 2015 and 22 September 2015, HMRC unreasonably failed to withdraw the information notice because throughout that time, HMRC as a body should have realised that their policy was not to issue such notices.

29. The reasonableness or otherwise of the failure by HMRC to withdraw an appealable decision once they are notified of the appeal to the FTT has been addressed by the Upper Tribunal in a number of cases. In *Tarafdar* the taxpayer appealed against a refusal of an application for costs against HMRC. He argued that the flaw in HMRC's tax assessment had been pointed out to HMRC at an early stage but HMRC had continued to defend a hopeless action until they decided following the commencement of FTT proceedings not to defend the appeal. The UT stated at [34]:

> "a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

30. The UT also stated at [33] of *Tarafdar* that the proper enquiry is "whether HMRC had unreasonably prolonged matters once they were in the tribunal, or whether they should have withdrawn the assessment at an earlier stage". In *MORI* the UT described MORI's case as asserting that the information and explanations available to competent, trained HMRC officers at various stages of the proceedings prior to the hearing at which HMRC abandoned its defence had been sufficient to enable the officers acting reasonably to conclude that the claim ought not to be defended further: see [43]. The UT approved the statement of the FTT in that case that a failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct. The authority cited for that was *Southwest Communications Group Ltd* v *HMRC* [2012] UKFTT 701 (TC); [2013] SWTI 390. In that case the FTT (Judge Raghavan) rejected the suggestion that HMRC's failure to settle the case at the internal review stage prior to the FTT appeal being lodged could amount to HMRC unreasonably defending or conducting proceedings. Judge Raghavan said that the earliest acts he could consider, whether these were framed as HMRC continuing to defend the appeal or as an omission in not settling the case sooner, were those arising after the appeal was notified. Judge Raghavan went on at [45], however, to reject HMRC's contention:

> "that it was not until the witness statements drew together matters which it said had been presented in a 'piecemeal' fashion that HMRC was in a position to settle. While it is no doubt a welcome bonus for HMRC if the evidence the appellant chooses to rely on … draws matters together in a comprehensive and well structured way for HMRC to consider, that is not the function of witness statements. Rather it is to be assumed that HMRC will once proceedings are started review all the relevant material that has been put before it, something which it will need to do in any event to finalise a Statement of Case and List of Documents, and will make an ongoing assessment of whether a case should continue to be defended."

31. I agree with that statement although I take the reference there to "once proceedings are started" as meaning once HMRC has been notified of proceedings. It would be inconsistent with the structure of the FTT Rules to treat the conduct of the respondent prior to being notified of the appeal as conduct "in the proceedings" for the purposes of rule 10(1)(b). The FTT Rules do not require the appellant to serve the notice on the respondent and in the present case DCL did not do so. It is the tribunal itself that gives notice of the proceedings to the respondent under rule 20(5). At that point HMRC must consider their position in relation to the case in order either to notify the appellant of any new grounds under rule 24(4) or to deliver the statement of case to the tribunal and the appellant within the 60 days allowed by rule 25(1)(c). HMRC must act promptly, once notified, if it becomes clear that the appeal cannot properly be defended.

32. In the present case, DCL do not complain that HMRC delayed in withdrawing the notice after they had been notified of the appeal by the FTT. Any failure to arrive at that conclusion sooner, before being notified of the existence of the appeal, does not amount to conduct by HMRC in the proceedings. I therefore dismiss Ground 2.

Ground 3

33. In the light of my conclusions on Grounds 1 and 2, I do not need to consider whether HMRC's decision to issue the information notice was reasonable or unreasonable and who counts as "HMRC" for this purpose.

Ground 4

34. The question whether costs incurred before the start of tribunal proceedings can be recovered as "costs of and incidental to" those proceedings where the tribunal's power under rule 10(1)(b) is exercised also does not arise for decision, given my earlier conclusions. Judge Mosedale in the present case referred to a number of FTT decisions where it appears some tribunals have treated costs incurred before the start of proceedings as incidental to those proceedings and some have held that only costs incurred in bringing, defending or conducting the proceedings are recoverable. Since there appears to be some inconsistency in practice and the point is of wider significance, it is convenient for this court to consider it.

35. As Judge Mosedale noted in her decision, the phrase "costs of

and incidental to" used in s 29 of the TCEA is also used in other contexts. The wording echoes that used in s 51(1) of the Senior Courts Act 1981 that "the costs of and incidental to all proceedings" in, amongst other courts, the civil division of the Court of Appeal and the High Court, shall be in the discretion of the court. CPR 7.2(1) provides that "proceedings are started when the court issues a claim form". CPR 44.2(6)(d) provides expressly that the orders which the court may make under that rule include an order that a party must pay costs incurred before the proceedings have begun.

36. The use of the "costs of and incidental to" wording in s 29 cannot be accidental and must have been intended to mean that, subject to any relevant difference in the FTT Rules compared with the Civil Procedure Rules, the same costs are in general recoverable once rule 10(1)(b) comes into play as are recoverable on an assessment of costs following civil proceedings covered by s 51 SCA. Those costs do include some pre-action costs. In *In re Gibson's Settlement Trusts* [1981] Ch 179, Sir Robert Megarry V-C considered an appeal from the taxation of costs of an originating summons issued by trustees of a settlement trust. One issue raised was whether the taxing officer had been right to allow recovery of costs incurred before the summons was issued. The Vice-Chancellor held:

i) on an order for taxation of costs, costs that would otherwise be recoverable are not to be disallowed by reason only that they were incurred before the action was brought;
ii) where the costs order is for costs of and incidental to proceedings, the words "incidental to" extend rather than reduce the ambit of the order;
iii) it is important to identify the proceedings, in the sense not only of the correct stage of the proceedings but also by determining the nature of those proceedings: "Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate": page 186B.

37. The Vice-Chancellor cited the judgment of Lord Hanworth MR in *Pêcheries Ostendaise (Soc. Anon)* v *Merchant's Marine Insurance Co* [1928] 1 KB 750 which referred to costs for "materials ultimately proving of use and service in the action" and commented that it would be "most unfortunate if the costs of obtaining evidence while it was fresh after an accident could not be allowed, even if litigation seemed

probable, merely because no writ had then been issued": page 186D. He went on to say at page 187B–E:

> "(5) Obviously the test cannot be simply whether the materials in question proved in fact to be of use in the action, for otherwise when a case is settled before trial … it would often not be possible to say with any certainty which materials had been or would have been of use in the action. Nor would it be right to penalise the successful litigant for obtaining materials which appeared likely to be of use in the action but which, in the event, were never used because the other party did not contest the point. … Neither the fact that at the time when the costs were incurred no writ or originating summons had been issued, nor the fact that the immediate object in incurring the costs was to ascertain the prospective litigant's chances of success, will per se suffice to exclude the costs from being regarded as part of the costs of the litigation that ensues. Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes."

38. Although there is no equivalent in the FTT Rules to the express provision in CPR 44.2(6)(d), I consider that the power in rule 10(1)(b) to award costs of and incidental to the proceedings can include costs incurred before the appeal was notified to the FTT. Which costs are properly recovered is a matter for the costs officer who is experienced in these matters to decide. I would, however, say this as regards the costs incurred by the parties in steps taken before the FTT appeal is lodged. The ability of the applicant to recover the costs of notifying the appeal to HMRC does not, in my view, turn on whether the taxpayer chooses the option of internal review or decides to bring the appeal straight to the tribunal. I agree with the UT's comment that defining the scope of a possible order for costs by reference to the subjective intentions of a potential appellant at a particular stage is "hedged around with too many difficulties and uncertainties to form a reliable basis for decision": [71].

39. I also disagree with the implication of Judge Mosedale's test that the costs of the internal review itself can never be incidental to the appeal because they are incurred to bring the dispute to an end without litigation. It is the nature of the work done and the scope of the ultimate appeal that determine whether those costs are incidental to the appeal, not the subjective intention of the party when incurring

the costs. For example, materials gathered or produced for the purpose of the internal review may then be recycled in the appeal before the FTT. Those costs are clearly of and incidental to the appeal even though they were largely incurred at the earlier stage.

Conclusion

40. In the light of the reasons set out above, I would dismiss the appeal.

41. **Floyd LJ:** I agree.

42. **Lewison LJ:** I also agree.

Michael Firth (instructed by Reynolds Porter Chamberlain LLP) appeared for the appellant.

Sadiya Choudhury (instructed by the General Counsel and Solicitor to HM Revenue and Customs) appeared for the respondents.