



Appeal number: UT/2014/0057

PROCEDURE - COSTS - application by Appellant for protective costs order or costs capping order - application refused

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

BETWEEN

ROBERT DRUMMOND

Appellant

- and -

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

Tribunal: Judge Greg Sinfeld

Application determined on written submissions on 4 August 2016

DECISION

Introduction

1. This decision concerns an application by the Appellant ('Mr Drummond') for an order limiting his liability for costs in the event that his appeal to this Tribunal, which has yet to be heard, is unsuccessful. It follows on from my decision, [2016] UKUT 221 (TCC ('the set aside decision'), granting an application by the Respondents ('HMRC') to set aside a Protective Costs Order ('PCO') in favour of Mr Drummond. I had made the PCO under the impression (erroneous, as it turned out) that HMRC did not object to Mr Drummond's application.

2. The factual background to Mr Drummond's appeal and the application is set out in [3] to [15] of the set aside decision. In the set aside decision, I concluded that the Upper Tribunal ('UT') has jurisdiction to make a PCO and other prospective orders in relation to costs. I also decided that, in the circumstances of this case, Mr Drummond should be allowed to make another application for protection from costs if, having read the set aside decision, he wished to do so and, if he did, that HMRC should be able to make submissions in response. I set out, at [42] to [45] of the set aside decision, what I considered to be the relevant issues that should be addressed in an application for a PCO, Costs Capping Order ('CCO') under CPR 3.19 and an order under CPR52.9A limiting costs in an appeal ('ACO') and submissions in response.

The application

3. Having applied for, and been granted, an extension of time, Mr Drummond made an application, dated 20 June 2016, for a PCO to the effect that he will not be liable to pay HMRC's costs of the proceedings in the UT in the event that his appeal is dismissed but that, if his appeal is allowed, he may recover his reasonable costs. In the alternative, Mr Drummond asked for an order that he should be able to recover his reasonable costs if he succeeded in his appeal but that his liability to pay HMRC's costs should be subject to a fixed maximum of £1,035. Mr Drummond considers that the figure of £1,035 is appropriate because it is the amount of costs which the court may award under CPR 45.37 as the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track for an amount claimed of less than £15,000 and the amount of VAT at stake in this appeal is £14,240.79. As a further alternative, Mr Drummond asked for an order in the same terms as the PCO that had been set aside, namely that there would be no order as to costs in any event save where a party or its representative has acted unreasonably within rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('UT Rules'). As a further and final alternative, Mr Drummond asked for a CCO capping the recoverable costs of the successful party, whether Mr Drummond or HMRC, at the amount of £1,035. On 27 June, HMRC served their submissions in response to Mr Drummond's application.

Submissions and discussion

4. Mr Drummond submits that he satisfies the criteria in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600 ('*Corner House*'). Those criteria are set out in the judgment of Lord Phillips at [74] as follows:

“(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- (i) the issues raised are of general public importance;
- (ii) the public interest requires that those issues should be resolved;
- (iii) the applicant has no private interest in the outcome of the case;
- (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
- (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”

5. HMRC submit that Mr Drummond does not satisfy the *Corner House* criteria.

6. In relation to the first two criteria, Mr Drummond contends that the issue in the appeal is of general public importance and the public interest requires that it is resolved. The issue raised in this appeal is whether a condition attached to the grant of planning permission for a dwelling that prohibits the separate use or disposal of the dwelling is capable of excluding a building from being a ‘building designed as a dwelling’ for VAT purposes where the condition is subsequently removed on the ground that it was always invalid or unenforceable. In support of this submission, Mr Drummond points out that a large number of planning applications are made and permissions granted each year and it is inconceivable that all of the conditions imposed in relation to such permissions are robust, appropriate and relevant. Mr Drummond states that the volume of planning permissions granted shows that the issue of whether a condition of planning consent that is subsequently removed on grounds of invalidity is to be treated as never having been imposed is one of the general public importance and not only of significance to Mr Drummond or a handful of cases like his.

7. HMRC contend that the issues raised by Mr Drummond’s appeal are not of general public importance and the public interest does not require that they be resolved. They submit that the number of planning applications received each year is not an appropriate yardstick. HMRC accept that any decision on the functioning of the VAT regime has the potential to affect other taxable persons but submit that the issue raised by this appeal is only likely to be relevant to a small number of cases and the public interest does not require the issue to be resolved.

8. I agree with HMRC that the volume of applications and consents for planning permission does not indicate that the issue raised in this appeal is one of general public importance. It is obvious that the issue does not arise in every case in which a person applies for planning permission and, further, cannot arise in every case in which planning permission is granted but only in those cases in which the permission is

subject to a condition that disqualifies the building from being ‘designed as a dwelling’ for VAT purposes. That does not, however, necessarily mean that the issue is not of general public importance. As HMRC acknowledge, the proper functioning of the VAT system is, itself, a matter of general public importance if the issue has the potential to affect other taxable persons.

9. I consider that an appropriate measure of whether the issue in this case is one of general public importance that the public interest requires should be resolved is the number of cases in which this issue has arisen or is likely to arise. I do not have any evidence or information about the number of cases in which for VAT purposes, has arisen in the past or might arise in the future. I have no reason to believe that this issue is unique to Mr Drummond but I am not aware of any other cases in the First-tier Tribunal where this issue has arisen. In my view, this issue is only likely to arise in cases with identical or very similar facts to those in this appeal. I do not consider that issues that arise only in highly fact specific cases are likely to be of general public importance or that the public interest requires that those issues should be resolved. Accordingly, I have concluded that the issue raised in Mr Drummond’s appeal is a not matter of general public importance and it is not in the public interest that it should be resolved. Accordingly, Mr Drummond has not satisfied the first two of the *Corner House* criteria.

10. In relation to the criterion that the applicant must not have any private interest in the outcome of the appeal, Mr Drummond adopts the comments in [30] of the set aside decision. Although private interest is a factor to be taken into consideration, it is not a bar to a PCO (see *Morgan & Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [37] - [39]). The question of private interest must be viewed in the context of the general public importance of the issue (see the comments of Walker LJ in *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436 at [23] and the passage from *Wilkinson v Kitzinger* [2006] EHC 835 (Fam), [2006] 2 FCR 537, [2006] 2 FLR 397 (Fam) quoted therein). All tax appeals will have an element of private interest. If the test is applied inflexibly then no case where a person’s tax liability was in issue would ever satisfy this criterion. I understood HMRC to agree with this approach to the private interest criterion but to contend that this appeal is pursued solely for Mr Drummond’s private interest and any public interest does not begin to displace Mr Drummond’s private interest. Mr Drummond contends that his private interest is outweighed by the general public importance of the issue and public interest.

11. While I accept that Mr Drummond is pursuing this appeal because he as a personal interest in recovering the VAT that he incurred on the construction of his dwelling, I do not consider that the existence of a private interest is sufficient in itself to preclude the grant of a PCO in a case where there is a matter of general public importance that it is in the public interest to resolve. I consider that the level of private interest, ie the potential financial gain, should be viewed in the context of the other criteria and the overriding objective, as set out in rule 2(1) of the UT Rules, of applying those rules to enable the Tribunal to deal with cases fairly and justly. As I have decided that Mr Drummond’s case does not raise a matter of general public importance, it follows that I do not accept that such considerations outweigh his private interest. Further, I do not consider that the overriding objective of the UT Rules compels me to disregard his private interest in the outcome of this appeal for reasons which I explained below.

12. In relation to the fourth of the *Corner House* criteria, Mr Drummond has not provided full details of his financial resources. He states in his written submission that he has created several small limited companies and owns his own house free of any mortgage but without providing any values for those assets. Mr Drummond suggests that these assets should be ignored because they are no more than many might own and the companies might be said to have no value without his special skills. Mr Drummond has provided his tax return for 2014-15 which shows proceeds from disposals of properties of £455,000. I reject Mr Drummond's submission that his home and shares in the companies should be ignored. There is no reason why assets should be disregarded because they are less than some others might have accumulated. It is clear that he owns his home which is unencumbered by a mortgage. The house could, therefore, be used as security for a loan to fund the costs of the proceedings. That may not be necessary as it is also clear from his tax return that Mr Drummond had substantial property assets, in addition to his home and the companies, which he liquidated in 2015. Mr Drummond provides no explanation of what happened to the £455,000 sale proceeds. In the absence of any evidence to the contrary, I conclude that Mr Drummond's assets, excluding his home and the companies, include cash or property to the value of £455,000.

13. It is relevant when assessing Mr Drummond's financial resources to consider them in the context of the level of costs which he might be required to pay. In this case, HMRC estimate their costs of the appeal proceedings before the UT (excluding the costs of responding to this application) as £10,000 excluding VAT. Although HMRC's costs are more than two thirds of the amount at stake in this appeal, that is not relevant when considering whether to grant a PCO. It is for Mr Drummond to decide whether he is willing to risk incurring those costs in order to have the chance of obtaining the VAT refund of just over £14,000. I conclude that Mr Drummond is able to finance his own costs in this appeal and, if required to do so, would be able to meet HMRCs' reasonable costs of the proceedings. Accordingly, Mr Drummond does not satisfy this criterion for the grant of a PCO, CCO or ACO.

14. As to the final *Corner House* criterion, Mr Drummond states that he will discontinue the proceedings if a PCO or similar order is not granted. He states that he is not prepared to risk unquantifiable costs being awarded against him if his appeal is not allowed. I note that Mr Drummond referred to the costs as being 'unquantifiable' and declared that he would discontinue these proceedings unless he was protected from liability to pay them before he had seen HMRC's estimate of their costs. Those costs are estimated to be £10,000 excluding VAT. Even if they cannot be precisely quantified in advance, any award of costs would be subject to assessment by this Tribunal or a Costs Judge which should ensure that only costs reasonably incurred are payable. It is for Mr Drummond to weigh up the risk against the potential reward. Although I accept that it is his decision and he is concerned about 'unquantifiable costs', I do not regard it as probable that Mr Drummond will discontinue the proceedings if I refuse to grant a PCO or similar order. Even if I were to conclude that Mr Drummond would discontinue the proceedings if I refuse to grant his application, I would not regard that as reasonable given HMRC's estimate of their likely costs and the level of resources at his disposal. Accordingly, Mr Drummond does not satisfy this criterion for the grant of a PCO, CCO or ACO.

15. Taking all the criteria together and bearing in mind the overriding objective, as set out in rule 2(1) of the UT Rules, of dealing with cases fairly and justly, I consider that Mr Drummond's application for a PCO or similar order should be refused. Mr Drummond has chosen to appeal to the UT and such an appeal carries with it the risk of an order that the unsuccessful party pays the successful party's costs. Such a costs shifting regime is not inconsistent with the overriding objective which requires fairness and justice for both parties. There is nothing unfair or unjust in this case about refusing to protect Mr Drummond from being exposed to the risk of costs when, as I have found, he is able to pay them.

Decision

16. For the reasons given above, I refuse Mr Drummond's application for a PCO or similar anticipatory costs order. As Mr Drummond has indicated that, in the event that his application is refused, he will withdraw his appeal, I direct that he must inform the UT in writing, with a copy to HMRC, whether he intends to continue with the appeal or withdraw it (which requires the consent of the UT under rule 17 of the UT Rules) within 14 days of the date of release of this decision.

**JUDGE GREG SINFIELD
UPPER TRIBUNAL JUDGE**

RELEASE DATE: 5 August 2016