[2016] UKUT 0519 (TCC)

Appeal number: UT/2016/0049

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

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

TGH (COMMERCIAL) LIMITED

Respondent

Tribunal: Judge Greg Sinfield

Application determined on written submissions on 14 November 2016

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DECISION

Introduction

1. This decision concerns an application by the Respondent ('TGHCL') for an order limiting its liability to pay the costs of the Appellants ('HMRC') in the event that they are successful in their appeal to this Tribunal, which is due to be heard on 20 March 2017.

2. For the reasons set out below, I have decided to refuse TGHCL's application.

Background

3. TGHCL was incorporated in 2009 and is a wholly owned subsidiary of a charity, the Great Hospital, which was established in 1149 to provide relief for the poor and needy of the City of Norwich. Pursuant to amended objects, the Great Hospital now provides affordable residential accommodation to persons in need who are over the age of 65 in the case of men and 60 in the case of women. It currently provides accommodation to more than 100 persons in buildings dating from the 15th Century to 2013. TGHCL is not a charity.

4. In 2011, TGHCL entered into a design and build contract with the Great Hospital to carry out certain works on land owned by the charity. Pursuant to that contract, TGHCL undertook, so far as material, to demolish some existing buildings and construct a workshop, garage and store and a two storey, self-contained building, known as Holme Terrace. Holme Terrace comprised eighteen self-contained flats. TGHCL treated the construction of the workshop, garage and store as zero rated. HMRC disagreed and TGHCL appealed to the First-tier Tribunal ('FTT').

5. In a decision released on 13 November 2014, [2014] UKFTT 1039, the FTT determined, as a preliminary issue, that Holme Terrace was used solely for a relevant residential purpose for the purposes of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ('VATA'). The only issue for the FTT at the subsequent hearing of the appeal with which this decision is concerned was whether the construction of the workshop, garage and store was zero rated by virtue of Note (5) to Group 5 because they were constructed at the same time and on the same site as Holme Terrace and the buildings were intended to be used together as a unit solely for a relevant residential purpose. Before the FTT, HMRC accepted that the workshop, garage and store were constructed at the same time as Holme Terrace and on the same site. The real area of dispute was whether the workshop, garage, and store were intended to be used together with Holme Terrace as a unit solely for a relevant residential purpose. HMRC submitted that the workshop, garage and store did not satisfy Note (5) because, although they were used in connection with Holme Terrace, they were not used exclusively in connection with Holme Terrace. The workshop, garage and store were also used in connection with other buildings used solely for a relevant residential purpose which were constructed at a different (earlier) time. HMRC contended that the fact that the workshop, garage, and store were used in connection with other residential buildings meant that they could not be considered to be used together with Holme Terrace as a unit solely for a relevant residential purpose. HMRC's view was that only buildings constructed at the same time and used together without any other use could be considered to be a unit.

6. The FTT, in a decision released on 1 February 2016, [2016] UKFTT 52 (TC), ('the Decision'), found that the workshop, garage and store (defined by the FTT as 'the Workshop') were used exclusively by the maintenance staff whose predominant purpose was to service and maintain the relevant residential buildings and any other activities were de minimis. The FTT also found, at [83], that:

> "There is no question that Holme Terrace and the Workshop are used together. Without the Workshop there is nowhere on site to house the necessary equipment to properly maintain the residential buildings and thereby continue to provide the safe environment for the vulnerable residents. In that sense Holme Terrace is incomplete without the Workshop."

7. The FTT concluded, in [85], that where a number of buildings are constructed at the same time and on the same site which together self-sufficiently provide relevant residential accommodation, those buildings are used together as a unit. The FTT went on to hold that the fact that those buildings also provide facilities that are of use to and support other buildings does not prevent the former being a unit as between themselves. Accordingly, the FTT held that the construction of the workshop, garage and store were zero rated and allowed TGHCL's appeal.

8. HMRC applied to the FTT for permission to appeal to the Upper Tribunal against the Decision. On 15 April 2016, the FTT granted HMRC permission to appeal. In the decision granting permission to appeal, the FTT stated:

> "3. At the time of the hearing of the appeal before the First-tier Tribunal the Applicants were ill prepared. They presented an extremely short skeleton argument and made all but no submission to the Tribunal. The Tribunal invited the representative to seek instruction in connection with a number of possible constructions of the legislation including what the application for permission calls the 'self-sufficiency' test. HMRC were unable, despite the permitted adjournment, to address the Tribunal.
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> 4. The interpretation of the relevant legislative provisions is complex and each possible and identified interpretation gives rise, in the Tribunal's view, to potentially anomalous outcomes. For that reason the Tribunal grants permission in order that the Upper Tribunal may consider the arguments set out in the application dated 23 March 2016.
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> 5. The Tribunal would however, comment to the extent that it is able, that this appeal has become necessary as a consequence of HMRC's lamentable failure to adequately represent their case before us in the first instance. The appeal before the First-tier was allocated to the standard track with the consequence that there was no order for costs. This Tribunal invites the Upper Tribunal, should it find that the Applicant be successful on appeal, to make no order for costs in its favour in recognition that, had it adequately presented its case in the first instance, this Tribunal could have considered any such argument it now seeks to present."

9. The FTT's comments above were foreshadowed by the comment in the Decision, at [56], that HMRC had served a skeleton argument but made no substantive response to the arguments presented by TGHCL on whether the buildings were intended to be used together as a unit solely for a relevant residential purpose.

Application and submissions

10. On 1 August 2016, TGHCL applied for a protective costs order ('PCO'). The Upper Tribunal asked HMRC for any representations in relation to the application within seven days. HMRC filed a response objecting to TGHCL's application on 5 August. On 10 August, I directed that TGHCL should be given an opportunity to provide any comments in reply to HMRC's response and, in view of the fact that it was the summer holiday period, allowed the company 28 days to do so. TGHCL provided its reply to HMRC's response on 7 September. On 8 September, and without being invited to respond, HMRC emailed the Tribunal stating that they intended to respond to the application (by which they must have meant the reply received the previous day) and asked for 30 days, ie until 7 October, to do so. In a subsequent email, HMRC explained that they considered it necessary to respond to TGHCL's application for a protective costs order dated 7 September (again that must have meant the reply to HMRC's response) because it made some points for the first time. Because some of the points raised in the reply were new, I directed that HMRC should be able to respond and allowed them until 7 October to do so. HMRC submitted their response on 7 October. I directed that TGHCL should have seven days to make any final representations on the contents of HMRC's second response. TGHCL made its final submissions on 13 October.

11. In my direction of 10 August and again on 7 October, I stated that I would deal with the application on the papers unless either party specifically requested that it should be the subject of a hearing. Both parties agreed that the application should be dealt with on the papers and without a hearing.

12. TGHCL's application developed in the course of the exchange of written submissions and HMRC also made an application against the possibility that their primary argument was unsuccessful. As I understand it, the final position is that TGHCL seeks a PCO to the effect that that it shall not be liable for HMRC's costs in the event that HMRC are successful in their appeal in the Upper Tribunal but that there should be no restriction on HMRC's liability to pay TGHCL's costs in the event that HMRC's appeal is dismissed. In the alternative, TGHCL asks for an order that each party's recoverable costs are capped at £15,000. HMRC oppose TGHCL's applications but, if the Upper Tribunal considers that it is appropriate to make a PCO in favour of TGHCL, HMRC ask for an order that, if HMRC are not successful in the substantive appeal, TGHCL's recoverable costs are capped at £15,000. TGHCL does not resist this application and is content for its costs to be capped at £15,000. Both parties apply for their costs in relation to the application for a PCO. TGHCL submits that, whichever party is successful, the costs recoverable in relation to the application should be limited to a maximum of £1,000.

Principles to be applied

13. It is common ground that the Upper Tribunal has jurisdiction to make a PCO (see my decision in *Drummond v HMRC* [2016] UKUT 221 (TCC) ('*Drummond 1*'). In *Drummond 1*, I concluded that the principles governing when to make a PCO set out by the Court of Appeal 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*'), as refined in subsequent cases, should also be applied in the case of applications for PCOs in appeals to the Upper Tribunal. In this case, both parties have focussed on the *Corner House* principles in their submissions. In *Drummond 1*, however, I also concluded that the

Upper Tribunal could make a costs capping order ('CCO') applying the same approach as the High Court would do under CPR 3.19 and an order limiting costs in an appeal ('CLO') applying the rules in CPR52.9A by analogy.

14. I set out the *Corner House* principles and some of the subsequent refinements to them at [28] – [30] of *Drummond 1* as follows:

> "28. At [74], Lord Phillips set out the following guidance:
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> > '74. We would therefore restate the governing principles in these terms:
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> > (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:
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> > (i) the issues raised are of general public importance;
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> > (ii) the public interest requires that those issues should be resolved;
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> > (iii) the applicant has no private interest in the outcome of the case;
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> > (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.
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> > (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.
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> > (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.'
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> 29. Having set out some examples of types of PCOs, which included an order capping the unsuccessful claimants' liability for costs if they lost, Lord Phillips observed, at [76], that there is "room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise.
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> 30. The governing principles set out in *Corner House* have been considered and refined by the Court of Appeal in subsequent cases. It is now clear that the principles in *Corner House* are guidelines which are not to be read as statutory provisions but are to be interpreted and applied flexibly (see *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436 ('*Compton'*) at [23] and *Morgan & Anor v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 (*'Hinton Organics'*) at [40]). Exceptionality is not an additional criterion to be satisfied but a prediction as to the effect of applying the principles set out in [74] of *Corner House* (see *Compton* at [24] and [83]). The general public importance and public interest requirements are a matter of evaluation for the judge but a case that will clarify the true construction of a statutory provision which applies to and potentially affects the whole population raises issues of general public importance (see *Compton* at [75] – [77]). Although private interest is a factor to be taken into

> consideration, it is not a bar to a PCO (see *Hinton Organics* at [37] - [39]). I understood HMRC to agree with the following approach to the issue of private interest, derived from [the unpublished decision of the Upper tribunal in *Ames v HMRC*]. It is inevitable that all tax appeals will have an element of private interest but it is the extent of the general public importance of the issue which must be taken into account, alongside other factors relevant to the fairness and justice of making such an order in appeal proceedings."

15. In outline, TGHCL submits that it satisfies the *Corner House* criteria. HMRC submit that TGHCL does not satisfy the *Corner House* criteria and, in particular, has failed to show that the extent of general public importance of the issue outweighs the existence of TGHCL's private interest in the outcome of the proceedings.

16. Before I discuss the detailed submissions made by the parties in relation to the application, I should state my reasons for regarding certain points as of no or only limited relevance to the application and thus not taking them into account in deciding whether to make the PCO in this case.

17. The first such point is the alleged inadequacy of HMRC's presentation of their case before and at the hearing in the FTT. TGHCL submits that HMRC failed to conduct the appeal appropriately in the FTT and relies on the comments of the FTT in the decision granting HMRC permission to appeal in support. TGHCL states that HMRC's failure to present their case properly caused TGHCL to incur further costs in relation to the appeal to the Upper Tribunal and the risk of liability for HMRC's costs if HMRC is successful in the Upper Tribunal. I can see (although I make no decision on the point) that HMRC's conduct in the FTT could be a relevant consideration if HMRC are successful in the appeal and the Upper Tribunal must consider whether and, if so, what amount TGHCL should pay in relation to HMRC's costs in the Upper Tribunal. Clearly, the FTT thought that it was relevant which is why the judge made the comments that she did in the decision granting HMRC permission to appeal. I do not consider, however, that HMRC's conduct below is a relevant factor in deciding whether to make a PCO in relation to an appeal in the Upper Tribunal. The conduct of the other party is not mentioned as a consideration in either *Corner House* or CPR 3.19 or CPR52.9A. Such conduct could, of course, be part of the "circumstances of the case" in CPR 3.19 and CPR52.9A but it is difficult to see how that conduct could be relevant to a CCO, which is designed to prevent costs in the current proceedings being disproportionately incurred, or a CLO which is also concerned with the level of the other party's costs in the appeal proceedings rather than what happened at first instance.

18. The second point is the fact that HMRC did not apply the practice, known as the 'Rees Practice', of not seeking their costs on appeal where there would be financial hardship for the taxpayer and the point at issue is one of significant interest to taxpayers as a whole. As I stated in *Drummond 1*, at [13], the Upper Tribunal has no jurisdiction in relation to whether HMRC apply the Rees Practice in a particular case. It is for HMRC, subject to any possible application for judicial review, to decide whether an appeal meets the criteria of the Rees Practice and whether to apply it. There is no reference in *Corner House* to consideration of whether any concessionary treatment has or has not been applied. In my view, that is not a relevant consideration when deciding whether to make a PCO.

19. I now turn to consider the *Corner House* criteria. The first and second of the *Corner House* criteria can be taken together. They are that the issues raised are of general public importance and the public interest requires that they should be resolved. HMRC accept that these criteria are satisfied in this case because the central issue in this appeal is the proper construction of Note (5) and any appeal concerning the proper construction of a provision of a taxing statute raises issues of general public importance that the public interest requires should be resolved. Further, HMRC state that they are concerned that the construction of Note (5) adopted by the FTT could lead to abuse by allowing a building that would not otherwise qualify for zero-rating to qualify for zero-rating simply because it was constructed at the same time as a building used for relevant residential purposes. I agree that the first and second of the *Corner House* criteria are satisfied for the reasons given by HMRC.

20. The third criterion in *Corner House* is that the applicant has no private interest in the outcome of the case. TGHCL does not accept that it has a private interest in the outcome of the appeal. TGHCL states it does not seek to recover the VAT of £60,000 from HMRC in the proceedings but resists HMRC's appeal which would have the effect of imposing the £60,000 VAT charge on the Great Hospital. It states that the decision to resist HMRC's appeal was taken with a view to protecting the interests of the current and future recipients of the Great Hospital's charity and those interests go beyond any private interest of TGHCL.

21. If it is regarded as having a private interest, TGHCL submits that the existence of a private interest is not fatal to an application for a PCO. It is a factor to be taken into account when weighing all the *Corner House* criteria in the balance. Even if it were determined that a private interest existed, that interest could not be said to outweigh the more important public interest considerations and would not be bar to the grant of a PCO. TGHCL contends that the outcome of the appeal may have implications for the Great Hospital, the present and future residents in its accommodation, other charities and the wider public. TGHCL submits that the extent of the public interest of preventing possible tax avoidance or abuse as set out in HMRC's response clearly outweighs any personal interest HMRC might ascribe to TGHCL seeking to defend the FTT decision.

22. In summary, HMRC submit that TGHCL does not strictly satisfy the third of the *Corner House* criteria and, alternatively, the extent of the general public interest in this case is not so compelling as to override the extent of TGHCL's private interest.

23. HMRC say that TGHCL plainly has a private interest in the outcome of the appeal. The VAT at stake is some £60,000 for which TGHCL is liable. HMRC contend that the fact that TGHCL is a wholly owned subsidiary of and donates its profits to the Great Hospital, a charity, does not mean that the TGHCL's interest is not a private interest. The fact that a charity also has an interest is not, of itself, a compelling reason to exempt a body from the normal cost consequences of defending an appeal: charities do not enjoy exemptions from normal cost rules.

24. HMRC submit that as a matter of strict law, the presence of a private interest in the outcome of the appeal means that the *Corner House* conditions are not satisfied: see *Goodson v HM Coroner for Bedfordshire and Luton (Protective Costs)* [2005] EWCA Civ 1172 ('*Goodson*') in which three Court of Appeal judges unanimously agreed, at

[27], that the requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms in *Corner House*.

25. HMRC contend that, if the existence of a private interest does not preclude the grant of a PCO, the extent of the public interest in this case does not outweigh TGHCL's private interest in the outcome of this appeal. HMRC accept that whenever they appeal against a decision of the FTT on a question of the proper construction of a statute, it will be because HMRC consider that the issue is of general public importance and that the public interest requires the issue to be heard. HMRC submit that the fact that an appeal meets the first two of the *Corner House* criteria cannot mean that the public interest in the appeal always outweighs whatever private interest exists. HMRC contend that the public interest in ensuring that taxpayers pay the right amount of tax is not sufficient, in itself, to outweigh the private interest of the taxpayer. HMRC state that this case is the first in which the construction of Note (5) is in issue and the issue will only ever be relevant in the context of a limited number of supplies, namely the construction of a building at the same time as a building with a "relevant residential purpose" as defined in the VATA.

26. In *Drummond 1* at [30], following the approach of Judge Berner to the issue in *Ames v HMRC*, I said:

> "… It is inevitable that all tax appeals will have an element of private interest but it is the extent of the general public importance of the issue which must be taken into account, alongside other factors relevant to the fairness and justice of making such an order in appeal proceedings."

27. I considered how the *Corner House* criteria applied to Mr Drummond's case in *Drummond v HMRC* [2016] UKUT 369 (TCC) ('*Drummond 2*'). I set out my approach to the third *Corner House* criterion at [10] and [11] of *Drummond 2* as follows:

> "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 [*Drummond 1*]. 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] EHWC 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.
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> 11. While I accept that Mr Drummond is pursuing this appeal because he has 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.

28. I adopt the same approach to the issue of private interest in this case as I adopted in *Drummond 1* and *Drummond 2*.

29. I do not accept that TGHCL has no private interest in the outcome of the appeal. TGHCL is the taxable person which made the supplies of construction services, the VAT liability of which form the subject matter of the appeal. As such, TGHCL is primarily liable for the VAT. The fact that the VAT will, presumably, be borne by the Great Hospital as the consumer does not mean that TGHCL does not have an interest in the proceedings because it has the primary liability for the tax and there may be additional liabilities to interest or penalties. I agree with HMRC that the fact that TGHCL donates all its profits to the Great Hospital does not prevent TGHCL having a private interest although it does show that the Great Hospital (and possibly others) also has an interest.

30. Although I have concluded that TGHCL has a private interest in the outcome of the appeal that does not, by itself, mean that TGHCL satisfies the third *Corner House* criterion. I must consider whether that the existence of a private interest is outweighed by the general public importance of the issue and the public interest in it being resolved. I reject HMRC's submission that I must adopt the strict approach of the Court of Appeal in *Goodson* and hold that a PCO cannot be made wherever an applicant has any private interest in the outcome of the case. The views of the Court of Appeal in *Goodson* must, in my view, give way to the subsequent observations of the Court of Appeal in *Hinton Organics* at [37] - [40] and *R (on the application of Litvinenko) v Secretary of State for the Home Department* [2013] EWHC 3135 (Admin) per Goldring LJ at [25] to [26]. Those cases show that, although private interest is a factor to be taken into consideration, it is not a bar to a PCO and a flexible approach should be applied to all aspects of the *Corner House* guidelines.

31. I consider that I must balance TGHCL's private interest in the outcome of the appeal against the importance of the issue to the general public and the public interest in it being resolved. Both parties accept that this case raises issues of general public importance and the public interest requires that those issues should be resolved because that will clarify the true construction of Note (5) to Group 5 of Schedule 8 to the VATA. The issue is whether that public importance and interest outweigh TGHCL's private interest. In my view, they do. Although HMRC have said that this is the first case to consider Note (5) and it would only apply to cases with the same or similar facts that does not mean that the issues are not significant and important. HMRC are concerned that the construction of the provision adopted by the FTT could lead to abuse by allowing the zero rating of the construction of a building that would not otherwise qualify for zero-rating. That interpretation of Note (5) would lead to a loss of tax to the

exchequer. I have not been given any estimate of the amount of tax that could potentially be lost but I observe that Note (5) does not only apply to buildings constructed by charities providing residential accommodation but to all buildings intended for use solely for a relevant residential purpose, ie by various institutions that provide accommodation. It is obvious that, while the amount at stake in this appeal is only £60,000, the costs of constructing institutional residential buildings can be significant and large amounts of tax could be involved. In conclusion, I am not satisfied that TGHCL has no private interest in the outcome of the appeal but, in my view, that private interest is outweighed by the public interest in resolving the issue of statutory construction that arises in this case.

32. The fourth of the *Corner House* criteria is that, having regard to the parties' financial resources and the potential costs, it is fair and just to make the order. This criterion requires the Tribunal to consider the financial resources of the parties and, taking account of the amount of costs that are likely to be involved, consider whether it is fair and just to make the PCO.

33. TGHCL provided its signed, audited accounts for the year ended 31 March 2015. Those accounts show that, in 2015, TGHCL had a turnover of £235,337 with an operating profit of £9,543. The same accounts show that the turnover in 2014 was £6,669,055 with an operating profit of £314,534. The accounts also show that, in each year, TGHCL paid an amount equal to its operating profit, less £100 or so, to the Great Hospital as charitable donations. TGHCL's balance sheet indicates that as at 31 March 2015 it held £156,823 cash in the bank and had total current assets of £187,097 which was matched, less £1, by the amounts falling due to creditors within one year, the largest category of which (£176,897) is unspecified group undertakings.

34. TGHCL also provided details of its accounts to 31 March 2016 which showed that its turnover for that year was £596,000 being £557,000 from construction for the Great Hospital and £39,000 from the provision of events at the premises of the Great Hospital. The total balance owing to creditors was £270,000 while, at the same time, TGHCL was owed £193,000 including £83,000 owed to it by the Great Hospital and accrued income of £104,000. On 31 March 2016, TGHCL held £32,285 cash in the bank.

35. As to the potential costs of the appeal, TGHCL states that it has not decided whether to instruct a barrister to represent it in the appeal and that the decision will largely be costs driven. It has, however, received an informal indication that counsel's fee would be in the region of £10,000 plus VAT. TGHCL's existing representative will continue to act and has estimated that his fees should not exceed £5,000 plus VAT. There is, however, no suggestion by TGHCL that it does not have sufficient resources to instruct both its existing representative and counsel if it wishes to do so. TGHCL states in its application that if the PCO is refused, and no alternative relief against incurring the HMRC's costs is available, then TGH will not be unable to afford the costs of engaging a barrister to present its case and if HMRC's costs are awarded against TGHCL then its existing representative will waive its fee.

36. HMRC have the resources of the state and I need say no more about them. HMRC estimate that their recoverable costs of the appeal are likely to be in the region of £25,000.

37. TGHCL submits that an analysis of turnover, debtors and creditors is not a credible basis for determining whether an organisation can afford further costs. I agree that simply looking at such figures does not necessarily reveal an organisation's cash position at a later point in time or ability to meet future costs. In this case, however, it seems to me that the accounts show that TGHCL has an ongoing and profitable business which should provide TGHCL with sufficient resources to meet HMRC's costs of the appeal. There is simply no evidence to show that TGHCL is unlikely to have the means to pay HMRC's costs at the level estimated by HMRC, if the Upper Tribunal decides to make an award of costs in favour of HMRC. I do not regard the fact that TGHCL makes a charitable donation equal to its annual profit to the Great Hospital affects my assessment. The fact that TGHCL does not retain its profits does not mean that it does not have the resources to meet HMRC's costs. If TGHCL is required to pay HMRC's legal costs, that will reduce the amount available to be paid to the Great Hospital just as any other expense incurred by TGHCL would do. In conclusion, I am not satisfied that, in all the circumstances, it would be fair and just to make a PCO in favour of TGHCL.

38. I have reached the conclusion that TGHCL should have sufficient resources to pay HMRC's costs, if required to do so, without considering the position of the Great Hospital which is the real beneficiary of a ruling in favour of TGHCL in this appeal. The Great Hospital is clearly an organisation with substantial resources as is clear from the accounts of TGHCL which show the amounts paid by TGHCL to the Great Hospital and owed by it to TGHCL. It seems to me that it is, as HMRC submit, appropriate to take account of the Great Hospital's means in this case because TGHCL is, in reality, engaging in the proceedings on behalf of its parent, the Great Hospital (see the comments of Waller LJ on this point in *Compton* at [27]). Taking account of the interest of the Great Hospital in this appeal and its resources, reinforces my conclusion that it would not be fair and just to make a PCO in favour of TGHCL when it should be able to afford those costs.

39. The last of the *Corner House* criteria is that the applicant will probably discontinue the proceedings if the PCO is not made and will be acting reasonably in so doing. HMRC accept that, as the respondent, TGHCL cannot discontinue the proceedings but, in this context, I take "discontinue" to mean conceding or withdrawing from the appeal. However, TGHCL has not suggested that it will concede the appeal or withdraw and take no further part in the proceedings if a PCO is not made. In the absence of any suggestion to the contrary, I am not satisfied that TGHCL will probably discontinue the proceedings if I do not make a PCO. It follows that I do not need to consider whether TGHCL would be acting reasonably in conceding or withdrawing from the appeal.

40. The Court of Appeal in *Corner House* indicated that the merits of an application for a PCO would probably be enhanced if those acting for the applicant were doing so pro bono. As I have already described, those representing TGHCL are not doing so pro bono although the existing representative has indicated that it will waive its fee if TGHCL is ordered to pay HMRC's costs. I do not regard such an indication as materially enhancing TGHCL's application.

41. Having considered each of the *Corner House* criteria individually, I now consider them together and decide the overarching question which is whether it would be fair and just, in all the circumstances, to grant the PCO. The parties agree that TGHCL satisfies the first and second of the *Corner House* criteria and I am satisfied that it meets the

third criterion. I am not satisfied, however, that TGHCL meets the fourth and fifth of the *Corner House* criteria. It seems to me that TGHCL will probably have sufficient resources to pay HMRC's estimated costs if ordered to do and the risk of having to pay them will not deter TGHCL from participating fully in the appeal. I consider that the overriding objective of the UT Rules does not require that TGHCL is insulated from the risk of having to pay HMRC's costs. In my opinion, it would not be fair and just to HMRC to prevent or limit their ability to recover their costs where the *Corner House* criteria have not been satisfied. Accordingly, I refuse to make a PCO in this appeal and leave the question of costs to the Upper Tribunal that hears the appeal.

42. As I have decided that it is not appropriate to make a PCO in TGHCL's favour in this case, I do not need to consider HMRC's application for a CCO order in favour of HMRC. I must, however, consider whether to grant TGHCL's alternative application for a CCO in one of two forms. First, TGHCL asks that HMRC's recoverable costs should be capped at the same level as its estimated costs, ie £15,000, to give TGHCL some protection in the event that HMRC's appeal is successful. Alternatively, TGHCL requests an order that each party's recoverable costs are capped at £15,000.

43. HMRC submit that TGHCL offers no basis for making its application for a CCO, it does not address the requirements in CPR 3.19, and in particular has not alleged that there is a substantial risk that, without such an order, costs will be disproportionately incurred and there is no such risk.

44. As I have determined that TGHCL should have sufficient resources to pay HMRC's costs at the level estimated, I can see no reason why it would be appropriate to cap HMRC's costs at a lower level such as the amount of £15,000 requested by TGHCL for the same reasons. Nor can I see that there is any justification for ordering that both parties' costs should be capped at that amount in the circumstances of this case. It seems to me that TGHCL has misunderstood the purpose of a CCO which can be ascertained from the conditions for making such an order which are set out in CPR 3.19(5). A CCO is not a partial or limited PCO. A CCO is intended to protect a party where there is a substantial risk that, without a CCO, the other party would incur costs disproportionately and that risk cannot be adequately controlled by effective case management or detailed assessment of costs. There is no reason to believe that, in the absence of a CCO, HMRC would incur costs disproportionately in this case or that such behaviour could not be dealt with by detailed assessment of costs after the event. Accordingly, I refuse TGHCL's application for a CCO.

Decision

45. For the reasons given above, I refuse TGHCL's application for a PCO or, alternatively, a CCO.

Costs of the application

46. In the event that TGHL's application is refused, HMRC apply for their costs of defending the application. TGHCL referred the Tribunal to paragraph 78 of *Corner House* in which states:

> "78. …… If the defendant wishes to resist the making of the PCO, or any of the sums set out in the claimant's schedule, it should set out its reasons in the acknowledgment of service filed pursuant to CPR 54.8. The claimant will of course be liable for the court fee(s) for pursuing the

> claim, and it will also be liable for the defendant's costs incurred in a successful resistance to an application for a PCO … The costs incurred in resisting a PCO should have regard to the overriding objective in the peculiar circumstances of such an application, and recoverability will depend on the normal tests of proportionality and, where appropriate, necessity. We would not normally expect a defendant to be able to demonstrate that proportionate costs exceeded £1,000. ….."

Relying on that passage, TGHCL submits that HMRC's costs relating to the PCO application should be limited to a maximum of £1,000.

47. I consider that HMRC are entitled to their costs of defending this application. Although I readily accept the principle behind the comments in [78] of *Corner House*, I consider that the expectation in 2005 that proportionate costs would not exceed £1,000 might have to be modified in 2016. HMRC have not served any schedule of costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, I direct that

> (1) Within 14 days of the date of release of this decision, HMRC shall serve a schedule of the costs of defending the application by TGHCL claimed by HMRC sufficient to allow summary assessment of such costs by the Upper Tribunal; and
>
> (2) TGHCL shall pay HMRC's costs of resisting TGHCL's application such costs to be subject to summary assessment by the Upper Tribunal if not agreed.

JUDGE GREG SINFIELD
UPPER TRIBUNAL JUDGE

RELEASE DATE: 24 November 2016