Neutral Citation Number: [2018] EWHC 3637 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/12/2018

Before :

MR JUSTICE MARTIN SPENCER

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Between :

Q LTD	**Applicant**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr Michael Firth (instructed by **Morrisons Solicitors LLP**) for the **Applicant**
Mr Ben Hayhurst (instructed by **HMRC Solicitor's Office**) for the **Respondents**

Hearing dates: 27 December 2018

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Judgment Approved

MR JUSTICE MARTIN SPENCER :

1. By this application the Applicant seeks two orders. First, an anonymity order that it be referred to as "Q Ltd" and second, an injunction suspending the effect of a revocation of its licence for the warehousing of duty suspended goods pending a full application for a full injunction pending in turn an appeal to the FTT.

2. The position is that until the 18 December the Applicant was an Authorised Warehousekeeper and part of its privilege of being a Warehousekeeper was that it was able to warehouse duty suspended goods, namely goods on which full excise duty had not been paid. That is a privilege because the payment of duty on such goods can amount to many millions of pounds. Thus, to be an authorised warehouseman is attractive for customers who wish to warehouse goods where the duty has been suspended.

3. The privilege is confined to those who are considered by HMRC as a fit and proper person. There is clearly a history to this matter that it has not been possible in the time available to go into. But in August 2018 HMRC issued what is known as a "minded to revoke" letter indicating that it was considering revocation of the Applicant's licence.

4. On 12 September the Applicant's solicitors stated that:

> "Given the significance to our Client of such a decision by HMRC and in order to avoid an immediate application for Judicial Review, please will you provide us with an undertaking to give us 7 clear days notice that HMRC are going to issue a decision to revoke."

5. In response, HMRC on the 17 September 2018 said:

> "Practical considerations will be taken into account when a decision is reached on your client's approvals. In ordinary circumstance where revocation is the next step, then there would normally be a 3 month notice period for the excise warehouse approval, please see paragraph 4.13 of Excise Notice 196.
>
> I am fully cognisant of the potential impact on your client's business and whatever the next course of action is, would be looking to engage in a meaningful dialogue regarding practicalities going forward."

6. I understand there was then an exchange of some detailed correspondence in relation to the merits or otherwise of the intended revocation but eventually the decision was reached by HMRC to revoke the authorisation on the 17 December 2018.

7. Although initially the effect was immediate in that the Applicant would not be able to accept any duty suspended goods, HMRC relented to a certain extent in that the period before the suspension took place was extended to 2 January 2019.

8. Although an application was made to the Administrative Court and there was a hearing before Lang J on 20 December, it seems clear to me that the application to the Administrative Court was the wrong way to go initially because this is an application for a free-standing injunction and not an application on the back of a judicial review. Therefore the correct procedure has been to make this application in the QBD.

9. Initially the application was made to me as the out-of-hours Judge but I indicated that it would be more appropriate to have a hearing by telephone on 27 December 2018 and that is the hearing which has just taken place.

10. In relation to the obtaining of an injunction the leading case is *ABC Ltd and another v. HMRC* [2017] EWCA Civ 956 ("*ABC Ltd*") where the court at paragraph 84 onwards set out the test for the granting of an injunction to safeguard a company's position pending an appeal to the FTT. At paragraphs 84 -87 the court said:

> *"84. In cases of this sort, the hierarchy of a claimant's attempts to safeguard its position pending appeal should be:*
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> *i) Seek temporary approval from HMRC under section 88C of the 1979 Act;*
> *ii) Seek expedition from the F-tT;*
> *iii) Consider an application for an injunction in the High Court.*
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> *85. A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. Equally, material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the F-tT. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the F-tT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the F-tT and the reasons why those attempts failed. Whilst the jurisdiction exists to grant interim relief in this way, its use is likely to be sparing because steps (i) and (ii) identified above should provide practical relief in cases which justify it and the circumstances in which it would be appropriate for injunctive relief to issue will be rare.*
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> *The judgments below*
> *86. In the ABC Ltd case William Davis J considered himself bound by CC & C to refuse injunctive relief even if the claimants could show that the appeal would be rendered "nugatory". However, at paragraph 48 he concluded that the evidence did not suggest that was inevitable. The evidence demonstrated that there was a prospect that the appeal would be rendered nugatory, no more. In the X Ltd and Y Ltd case, Andrew Baker J dealt with the strength of the evidence relating to the business prospects of the claimants in paragraphs 39 and 40. He was unpersuaded by the assertions that they would not survive the appeal process. In those circumstances, even if either judge had considered a free-standing injunction by reference to rights guaranteed by article 6 ECHR, it would have been refused.*
>
> ***Result***
> *87. I would quash the decisions of HMRC by which they concluded that they had no power to grant temporary approval to the claimants to trade in wholesale alcohol pending appeal and remit the question for reconsideration. I would maintain the interim relief currently in place pending reconsideration. "*

11. At this stage Mr Firth who represents the Applicant acknowledges that the evidence is not available to satisfy the stringent test laid down by the Court of Appeal in *ABC Ltd* for the obtaining of an injunction pending appeal to the FTT. He says, and his client submits, that some little time is needed in order for the evidence to be put together. Thus the Court of Appeal said that statements as to the dire consequences of the interim period between the withdrawal of the approval and the hearing before the FTT

would need to be supported by documentary financial evidence and a statement from an independent professional doing more than just reformulating the client's opinion. That is especially true of a situation where HMRC are concerned to protect both themselves and the country from fraud which is rife in this area and can cost the exchequer many millions of pounds. Thus, the test when the matter comes for the full inter-partes hearing is not the usual *American Cyanamid* balance of convenience test (*American Cyanamid Co v. Ethicon Ltd* [1975] A.C. 396) but the more stringent test in *ABC Ltd*.

12. That does not, however, answer the question of what the test is when the Court is faced with an initial application by a company which wishes to preserve its position until it can put together the evidence it requires to satisfy the test in *ABC Ltd*. On behalf of the Applicant, Mr Firth submits that that is the test in the *American Cyanamid* case: whether there is a serious issue to be tried, whether there is an adequate remedy in damages for the person seeking the injunction if no injunction is granted, and the balance of convenience.

13. Mr Firth asserts that there is a serious issue to be tried. He further asserts that with the potential damage to his client's reputation and the effect of the *Factortame* decision (*R v. Secretary of State for Transport ex p Factortame Ltd (No.2)* [1991] 1 AC 603) - whereby there is no automatic right to damages for an administrative decision of this kind – there is no guarantee that damages would be an adequate remedy and in fact they would not. Finally, he asserts that the balance of convenience lies in making an injunction because of the financial and reputational effect of having to tell customers from today that the Applicant cannot warehouse duty suspended goods as from 2 January 2019 because of the revocation of its approval.

14. I am therefore asked to make an injunction to preserve the status quo until the Court is in a position to decide whether an *ABC* injunction, if I may call it that, should or should not be granted.

15. For HMRC Mr Hayhurst disputes the applicability of the *American Cyanamid* test even at this preliminary stage. In any event, he says that the evidence at this stage is insufficient for the court to be satisfied, even on a preliminary basis, that the effect of the suspension of the approval as from 2 January would have the consequences asserted by the Applicant until the full application for an injunction (at the end of January).

16. He refers me to the passages in the Judgment of Underhill LJ in *CC&C Ltd v HMRC* [2014] EWCA Civ 1653; [2015] 1 WLR 4043, and the reference to the fact that by its scheme for approval, although Parliament laid down an appellate procedure to the FTT, it did not grant the FTT power to make suspensory orders pending the outcome of an appeal. In particular his remarks at paragraph 42.

> "42.The absence of any power under the statute to suspend the effect of a relevant decision pending appeal may be capable of operating harshly in the case of decisions to revoke the registration of registered excise dealers and shippers, but it is not incomprehensible. The statute describes the right to trade in duty-suspended goods as a "privilege", and the nature of the business is such that it is a privilege that should only be accorded to those whom HMRC believe they can trust. There would be an obvious awkwardness in the Tribunal, or indeed the Court, being able to require HMRC to continue, for an indefinite period pending the outcome of an

> appeal, to confer that privilege on traders who they have ceased to believe are fit and proper persons. Parliament could reasonably have regarded the loss of registration pending an appeal as simply a risk of the business which traders must accept."

17. Furthermore, given that the applicant has known since 29 August that HMRC was minded to revoke the Applicant's licence, a sensible company in the position of the Applicant would have started the process of putting evidence in place in anticipation of a decision to revoke being made. He says it is surprising, to say the least, that the Applicant is in the position of having to put together this evidence at short notice.

18. For the applicant, Mr Firth submitted that there is no evidence of urgency on the part of HMRC because they pushed back the date of their decision several times and furthermore that there have been no seizures since July 2018. Mr Hayhurst replied to say that whilst seizures are a positive indicator of fraud, the converse is not true in that lack of seizures does not mean that there is no fraud going on. He explained the system known as the EMCS system to move duty suspended goods around the EU and the way in which inward diversion fraud works whereby even if a seizure is made and the paperwork is blown when that seizure is made, it may well be only after mirror loads have already got through the customs barrier with corresponding loss of revenue of many hundreds of thousands of pounds. He submits that seizures are not the only reason for the decision to revoke and was not the only decision in this case. In his submission, the balance of convenience does not fall on the side of making the injunction, even if that is the correct test.

19. In my judgment, at this preliminary stage where a company wishes, genuinely, to put together the evidence required for an injunction hearing, the *American Cyanamid* test is the right one to be applied. I emphasise that this is merely a holding exercise for a relatively short period until the Court is in a position to make a decision on the much more stringent test laid down in the *ABC Ltd* case.

20. Furthermore, on the evidence I have seen and on the basis of the submissions that I have heard, the Applicant does intend to make such an application, that this is not just prevarication, or to buy more time; and there is a real risk that if the injunction is not granted there will be a real risk of damage from which it would not recover.

21. The period of such injunction must necessarily be a short one - merely enough for the Applicant to put together the evidence required. Although on the evidence I have seen it seems that the Applicant will struggle to fulfil the *ABC* test, I am nevertheless prepared to grant an injunction for a short period to allow the Applicant to at least attempt to put together the evidence to satisfy that test. The evidence must be served by 14 January 2019 and I order there must be a full hearing in the week commencing 21 January 2019 for the Court to consider whether there should be an injunction pending the appeal to be considered by the FTT. I therefore do grant the injunction on that basis.

22. Costs are reserved to the hearing in the week commencing 21 January 2019.