[2017] UKFTT 465 (TC)

TC05928

Appeal numbers: TC/2016/01479
TC/2016/04318
TC/2016/04317

PROCEDURE – Application to strike out part of Appellant's case – Abuse of process – Whether reasonable prospects of success – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at George House, 126 George Street, Edinburgh on 22 March 2017 with further written submission from the respondents on 18 April 2017 and 24 May 2017 and the appellant on 10 May 2017.

Mr Michael Upton, Advocate, instructed by Russel & Aitkin Solicitors, for the Appellant

Ms Harry Jones of HM Revenue and Customs, for the Respondents

DECISION

1. In *Spring Capital Limited v HMRC* [2015] 66 (TC), a decision released on 10 February 2015, Judge Guy Brannan considered whether Spring Capital Limited (the "Company") was entitled intangibles relief for amortisation of goodwill in respect of accounting periods ended 9 March 2005 to (and including) 30 April 2009. The argument advanced on behalf of the Company was that the goodwill had been acquired at market value following what was described as a "tripartite agreement" under which the trade of Spring Salmon and Seafood Limited ("SSS"), which it argued was not a "related party" to the Company, was initially transferred to Messrs Roderick and Stuart Thomas who subsequently transferred it to the Company. However, this was rejected by Judge Brannan, at [226] of his decision, as "simply an invention" having found (at [126]) that between September 2004 and February 2005 there had been a "gradual migration" of the trade from SSS to the Company.

2. In its appeals against closure notices issue in respect of accounting periods ended 30 April 2010, 2011 and 2012 respectively (under references TC/2016/01479, TC/2016/04317 and TC/2016/4318), the Company, which now accepts that it and SSS are "related" parties, contends that it is entitled to intangibles relief on the amortisation of goodwill it acquired from a "related party", SSS, which, under paragraph 92 of schedule 29 to the Finance Act 2002, is treated as having been acquired at market value (the "paragraph 92 argument").

3. Although it is accepted that the Company did not raise the paragraph 92 argument it now seeks to advance, HM Revenue and Customs ("HMRC") say that as it had the opportunity to do so before Judge Brannan, it could and should have done so then and contend that it would be an abuse of process if the Company was permitted to advance the paragraph 92 argument in relation to its 2010, 2011 and 2012 appeals. HMRC have therefore applied to strike out that part of those appeals to which the paragraph 92 argument relates.

4. In support of the application Ms Harry Jones, for HMRC, relies on the decision of the Tribunal in *Foneshops Limited v HMRC* [2015] UKFTT 410 (TC) in which Judge Mosedale observed:

> "30. HMRC relied on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 for a statement of what abuse of process was:
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> > "… [abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" page 536 C per Lord Diplock.
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> 31. The statement in *Hunter* is very general and there might be room for doubt whether it extends to the circumstances in this case.

> However, the authorities of *Littlewoods* at §250 and *SCF Finance Co Ltd v Masri [*1987] 1 QB 1028 are more specific. Abuse of process appears to be very like issue estoppel save perhaps for flexibility where there are special circumstances:
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> > "a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal…..
> >
> > …it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…" page 1049 C-F, per Ralph Gibson LJ delivering the unanimous judgment of the Court of Appeal, also citing Lord Kilbrandon in the Privy Council that abuse of process
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> > "is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."
>
> And unlike issue estoppel, abuse of process applies to tax cases. So I find that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances"

5. In relation to whether an abuse of process arises where, as in the present case it is contended that an argument or claim "should" have been made in earlier proceedings between the same parties, Henderson J (as he then was) in *Littlewoods Retail Limited and Others v HMRC* [2014] EWHC 868 (Ch) said, at [243]:

> "I come finally to the question whether the Revenue should be prevented from re-litigating the underlying tax issue on the ground of abuse of process. It was common ground that this question falls to be answered with primary reference to the well-known principles stated by Lord Bingham, after a review of the authorities, in *Johnson v Gore Wood & Co (a firm*) [2001] 1 All ER 481 at 498–499, [2002] 2 AC 1 at 31:
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> > '*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings

> if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not … While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.'"

6. In *Hackett v HMRC* [2016] UKFTT 781 (TC) ("*Hackett*"), a case that was not brought to my attention by either party, Judge Berner noted, at [38], that:

> "With respect to the judge in *Foneshops*, I do not consider that to be a correct description of the relevant principle. The judge does not appear to have had *Johnson v Gore Wood & Co* cited to her, but it is clear from the speech of Lord Bingham in that case that one does not start with the premise that the fact that issues could have been litigated in earlier proceedings means that to litigate them in the proceedings in question is an abuse of process, and only excluded from that conclusion if there are special circumstances. What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the circumstances a party's conduct is an abuse. Although that will often give the same result as asking whether the conduct is an abuse and then, if it is, asking whether the abuse is excused or justified by special circumstances, it will not invariably do so, and it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case."

7. Mr Michael Upton, who appears for the Company, emphasised the high threshold necessary to establish an abuse of process. Not only is this apparent from

the observation of Lord Bingham in *Johnson v Gore Wood & Co* (cited by Henderson J in *Littlewoods*, see above) but also the comment of Lord Diplock in *Hunter*, to which Judge Mosedale referred in *Foneshops*, that abuse of process:

> "… concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it."

8. Mr Upton also took me to a passage of the decision of the Court of Appeal in *SCF Finance & Co Ltd v Masri (no 3)* [1987] QB 1028, also cited by Judge Mosedale in *Foneshops*, which referred, at 1049, to the decision of the Privy Council in *Yat Tung Investments Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 where Lord Kilbrandon had warned that:

> "… the shutting out of a 'subject of litigation' [was] a power that no court should exercise but after a scrupulous examination of all the circumstances."

9. In addition, Mr Upton, while accepting that the Tribunal has a UK wide jurisdiction made the point, especially as the hearing was in Edinburgh, that there was no Scottish authority to support the proposition that an attempt to relitigate an issue is an abuse of process. He also explained that the paragraph 92 argument had not been raised before Judge Brannan as the Company had been represented by its director, Mr Roderick Thomas, who was not legally qualified and who did not realise that it was possible to raise an alternative argument that appeared to contradict his primary position.

10. A further argument in support of the Company's position advanced by Mr Upton was that it was entitled to rely on an undertaking (to which [129] of Judge Brannan's decision refers) given by HMRC in proceedings before the Court of Session in relation to the restoration of SSS to the Register of Companies (the "undertaking argument"). The undertaking argument relies on the decision, released on 5 July 2016, of the Upper Tribunal (Lord Glennie) in *Spring Salmon & Seafood Limited v HMRC* [2016] UKUT 313 (TCC).

11. In the absence of any directions for the parties to produce skeleton arguments for the strike out application, the undertaking argument had not been raised before the hearing. I therefore directed that HMRC be allowed time to make submissions on the undertaking argument, for the Company respond and HMRC to reply to any response received.

12. In accordance with those directions, the parties filed and served their written submissions with HMRC contending that, in essence, like the paragraph 92 argument, the undertaking argument was an abuse of process because it was an attempt to raise a matter dealt with by Judge Brannan and in any event as the undertaking did not confer any rights on the Company it should be struck out.

13. In the recent decision of the Upper Tribunal in *Anthony Badaloo trading as Church Hill Finance v The Financial Conduct Authority* [2017] UKUT 158 (TCC) Judge Berner observed, at [34], that:

> "…an abuse of process ground is more properly to be treated as a sub-set of the power of the Tribunal to strike out all or part of the proceedings where there is no reasonable prospect of success. To the extent that a challenge would be excluded as an abuse of process, that challenge will no longer be available to the applicant. If that is the only material challenge, the consequence will be that the reference will have no reasonable prospect of success, and may be struck out. If there are other, non-abusive, grounds which cannot themselves be regarded as providing no reasonable prospect of success, then the reference may continue, shorn only of the abusive ground."

14. Under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may strike out the whole or part of the proceedings if it "considers that there is no reasonable prospect of the appellant's case, or part of it succeeding." Although neither party referred me to the decision of the Upper Tribunal (Simon J, as he then was, and Judge Bishopp) in *Fairford Group Ltd and another v HMRC* [2015] STC 156, I do not consider its approach to a strike out application under rule 8(3)(c) to be controversial where it said, at [41]:

> "In our judgment an application to strike out in the FTT [First-tier Tribunal] under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* (see above) Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all."

15. It is therefore necessary to consider whether, as HMRC contend, it would be an abuse of process for the Company to raise either paragraph 92 and/or the undertaking argument.

16. In doing so, adopting the approach of Judge Berner in *Hackett*, taking into account all the facts and circumstances of the case, in particular,

(1) that neither the paragraph 92 nor the undertaking argument has been previously considered by the Tribunal;

(2) that it was clearly not possible for Judge Brannan to have regard to the views expressed by Lord Glennie in *Spring Salmon & Seafood Limited*, almost 18 months after his decision was released;

(3) that Mr Thomas did not realise that he could argue in the alternative; and

(4) as Lord Bingham observed in *Johnson v Gore Wood & Co*, in the passage cited by Henderson J in *Littlewoods* (see paragraph 5, above), just because a matter could have been raised in earlier proceedings it does not follow that it should have been so as to render the raising of it in later proceedings necessarily abusive,

I have come to conclusion that the Company is not misusing or abusing the process of the Tribunal by seeking to advance the paragraph 92 argument and/or the undertaking argument.

17. It therefore follows that HMRC's strike out application cannot succeed and is accordingly dismissed.

18. Following the hearing in Edinburgh in March there have been several further applications in relation to this appeal. I have not considered these as, I understand, that the Tribunal is to list a case management hearing for this purpose following which directions shall be issued for the further progress of these appeals.

19. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 5 June 2017