[2020] UKFTT 0055 (TC)

TC07551

"Application to reinstate withdrawn appeal under Rule 17(3). *Pierhead Purchasing Ltd v Revenue and Customs Commissioners [2014] UKUT 321 (TCC)* considered. *Dominic Chappel v The Pensions Regulator [2019] UKUT 0209 (TCC)* applied. Where the Appellant is saying that the withdrawal was made without its knowledge and consent by its duly appointed representative then the prejudice to the Appellant in not being able to have a full hearing is outweighed by the prejudice to the efficient administration of justice if parties are allowed to simply disavow the actions of a duly appointed representative. Any prejudice to the Appellant is ameliorated by the fact that it has a case against its own representative".

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04586

DECISION
ON AN APPLICATION FOR REINSTATEMENT
IN THE CASE OF

IL VICOLO LIMITED **Appellant**

-and-

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

1. This is an application for the re-instatement of an appeal which was withdrawn in the circumstances described below.

BACKGROUND

2. The relevant background is that the Appellant notified an appeal to this Tribunal on 2 June 2017 through its agent, Guner Associates. Following a period of time in which the parties unsuccessfully attempted to engage in the Respondents' Alternative Dispute Resolution process the Tribunal gave further directions. It is fair to say that the Appellant failed to comply with those directions and this resulted in, on 19 October 2018, the Tribunal issuing an unless order seeking compliance with earlier directions by 2 November 2018, failing which the appeal would be struck out. On 1 November 2018 the Appellant's agent filed and served a notice saying:

> "Having considered the information available to them in support of the appeal, and that provided by HMRC in their statement of case, the appellant hereby notifies the Tribunal that they wish to withdraw their application for their appeal to be heard before the Tribunal"

3. Acting on this notice the Tribunal wrote to all the parties, on 9 November 2018, confirming that the Appellant had withdrawn its appeal and that any further applications should be made within 28 days.

4. On 25 January 2019 the Appellant applied to have its appeal re-instated. The following details were given:

> "I would like to restate my appeal for tribunal for Il Vicolo LTD. My representative who opened the first appeal Guner Mustafa made it unaware to me that he had withdrawn from the tribunal that was originally in place. Unfortunately he has made it harder for me to restate my appeal now. He acted on his own behalf and did not receive any confirmation from me to withdraw. In these circumstances I understand that a restate is not always possible but I can only express to you that if I'd know that he had withdrawn I would have acted immediately to restate myself if I had been told. I hope that you can understand my concern and we can re-open this case. I believe it is very unfortunate to what happened to me and I wish I would have been prevented it if I'd been advised better."

5. The Respondents take no issue with the Appellant's delay in making the application to re-instate. Therefore, the only issue before me is whether or not the appeal should be re-instated.

THE LAW

6. Rule 17(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") provides that a party who has withdrawn their case may apply to the Tribunal for the case to be reinstated. An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after the date that the Tribunal received the notice.

7. No guidance is given in the Rules about how a decision to re-instate is to be reached other than the application of the overriding objective (see Rule 2(3)). The overriding objective, set out in Rule 2, provides:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

The correct approach

8. The Respondents seek to rely upon the Upper Tribunal decision in *Pierhead Purchasing Ltd v Revenue and Customs Commissioners [2014] UKUT 321 (TCC)* to argue that there is a five part criteria (derived from the criteria formerly set out in CPR 3.9) that applies to applications to re-instate in this Tribunal (the "Former North Wiltshire factors"). I do not think that this is a helpful approach for at least the following reasons:

(1) The Former North Wiltshire factors are derived from the former CPR 3.9 which has since been amended. The "new" CPR 3.9 now provides that:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

It is, accordingly, a criteria that is not only out-dated, but one which the Civil Procedure Rules Committee saw fit to change. It, therefore, has no current relevance.

(2) The "new" CPR 3.9 criteria has been distilled into the three-part Denton formula by which the courts firstly consider whether the breach is serious or significant (providing relief if neither), secondly considering the reason for the breach before lastly considering all the circumstances of the case and in particular the factors set out at CPR 3.9(1)(a) and (b) (*Denton v TH White Ltd [2014] EWCA Civ 906*). Therefore, if the Tribunal is to have a regard to any additional criteria then it should be the Denton formula.

(3) However, the Denton formula does not sit easily with an application to re-instate a case where the case has not been struck out pursuant to the Rules, but rather has been permissibly withdrawn. In these circumstances it cannot be said that there has been a breach of an order or rule. The Appellant has simply done what it was allowed to do. It must be remembered that the first part of the Denton formula requires the applicant to establish the seriousness and/or significance of the breach - this presupposes that there has been a breach. In the present case no discernible "breach" has been identified and it is only possible to identify a sanction by convoluted means. In fact, it rather appears that the application to withdraw the appeal was made to avoid breaching an "unless" order and the imposition of a sanction (namely that the appeal would be struck out). In the circumstances, it is difficult to see how the application to re-instate can be regarded as an application "for relief from sanctions".

(4) In *Pierhead* Proudman J at paragraph 24 agrees that the North Wiltshire factors are relevant to the overriding objective of fairness, but warns that "Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective".

9. Whilst I understand that many Judges in the First Tier Tribunal will routinely apply the North Wiltshire factors when considering applications to re-instate citing *Pierhead* as authority for the proposition, I must respectfully decline to adopt such an approach. *Pierhead* provides no such authority.

10. I accept that had the application to re-instate had followed on from a decision by this Tribunal to strike out the appeal under the Rules it would have no doubt been an application for relief from sanctions and the Denton formula would have been relevant. However, this I not such a case. Attempting, in my judgment, to impose either the Former North Wiltshire factors or Denton formula in the present circumstances is to attempt to put an unnecessary gloss on the overriding objective.

11. The approach that I intend to adopt is to identify the factors that tend to point towards the reinstatement of the appeal, then identify the factors that tend to point against the reinstatement of the appeal and, finally, weigh them in the balance in light of the overriding objective to deal with the case fairly and justly.

12. One factor that, in my judgment, requires particular care is the relative merit (or lack of) of the appeal itself. In my judgement the decision to reinstate or refuse to reinstate an appeal is a case management decision and that, as a result, the merits of the appeal or the Respondents

case are irrelevant- except where they disclose no reasonable prospects such that rules 8(3)(c) or 8(7) of the Rules apply. This is in line with the reasoning provided by Tribunal Judge Herrington in *Dominic Chappel v The Pensions Regulator [2019] UKUT 0209 (TCC)* at paragraphs 86-91- which reasoning I gratefully adopt.

DISCUSSION AND DECISION

13. Applying the principles I have identified earlier the following factors point towards an order that the appeal be reinstated:

(1) There is obvious prejudice to the Appellant in not being able to have its case heard at trial. This prejudice outweighs any that the Respondents face.

(2) The appeal was withdrawn without the directors of the Appellant being aware.

14. The following factors point against:

(1) There must be finality in proceedings and reinstatements work against the efficient administration of justice.

(2) The Appellant's complaint is really against its representative who wrongly withdrew the appeal. Parties (and the Tribunal) should be able to rely upon the actions of a duly appointed representative. To hold otherwise would make the process unworkable and work against the efficient administration of justice.

(3) The Appellant has, on its case, a valid claim against its representative which it can pursue.

(4) There is prejudice to the Respondents in having to meet a case that they thought had been withdrawn.

15. During the course of the hearing the parties sought to impress me with the strength of their respective cases. Based upon the principles enunciated in paragraph 12 above the relative merits of the appeal ought not to be taken into account by me unless it could be shown that the grounds of appeal or statement of case disclosed no reasonable prospect of success. The Respondents sought to show this by producing detailed witness statements (which were originally intended for the final hearing). The Appellant sought to rely upon witness statements of its own. It very quickly became clear that there was dispute as to the facts (both as to what was said during the course of a "test eat" carried out by the Respondents and what was stated on the menu) which spoke to the central issue between the parties. Resolving such a dispute between the parties is a matter for trial and not for an application for summary judgment (see *Swain v Hillman [2001] 1 All E.R. 91*). Without having these disputed factual matters resolved in their favour the Respondents are simply unable to show that the Appellant's grounds of appeal are such that they disclose no reasonable prospect of success. Therefore, I do not take into account the merits of the appeal and this is not a factor that I have regard to in my decision.

16. Taking into account all of the factors identified above at paragraphs 13-14, and weighing them in the balance in light of the overriding objective, I have concluded that the Appellant's application to reinstate its appeal should be dismissed. In doing so I do not dismiss the obvious disappointment that the Appellant's directors will no doubt feel. However, in my judgment, the prejudice to the Appellant in not being able to have a full hearing of its case is outweighed by the prejudice to the efficient administration of justice if parties were entitled at any point to disavow the actions of duly appointed representatives. The fact that the representative was on a "frolic of his own" counts against the representative, but does not count for the Appellant in the present circumstances. Any prejudice to the Appellant is emolliated by the fact that, on its case, it has a very strong argument against its former representative.

17. If either party is dissatisfied with the outcome of the application for reinstatement, they have a right to apply to the Upper Tribunal for permission to appeal the decision in this appeal. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet Appealing to the Upper Tribunal (Tax and Chancery Chamber).

18. In the event that either party wishes to appeal my decision on the basis that the approach that I have adopted at paragraphs 8-12 is wrong in law then I would give permission – but only on this point. This is because there is a dearth of reported binding decisions which deal with the principles to be applied where there is an application to reinstate an appeal following the prior voluntary withdrawal of such appeal. The criteria applied in ***Pierhead*** has been overtaken by changes to the relevant Civil Procedure Rules and it is time that the Upper Tribunal revisited this issue to provide some definitive guidance.

ASIF MALEK

TRIBUNAL JUDGE

RELEASE DATE: 29 JANUARY 2020