Neutral Citation: [2023] UKFTT 00654 (TC)

Case Number: TC08875

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2018/01723

PROCEDURE – Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – No appeal in lead case – related case appellant contends its case is distinguishable on facts – Application under rule 18(4) that lead case decision does not apply and is not binding to parties in its appeal – Application dismissed

Heard on: 18 July 2023
Judgment date: 7 July 2023

Before

TRIBUNAL JUDGE BROOKS

Between

MULLER DAIRY (UK) LIMITED

Applicant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Applicant: Kevin Prosser KC instructed by RPC

For the Respondents: Christopher Stone instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. Where there are two or more cases before the Tribunal which give rise to "common or related issues of fact of law" the Tribunal may make a direction, under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, specifying one of the cases as a "lead case" and stay the other "related cases" behind it. If such a direction is made, the decision of the Tribunal in the lead case will bind the related cases stayed behind it in relation to the common or related issues. However, an appellant in case stayed behind the lead case may make an application to Tribunal, under rule 18(4), for a direction that it is not bound by the decision in the lead case.

2. Muller Dairy (UK) Limited ("Muller") has made such an application and seeks a direction under rule 18(4) that the decision of the Tribunal in the lead case of *Jones Bros Ruthin (Civil Engineering) Co Ltd and Another v HMRC* [2022] UKFTT 26 (TC) ("*Jones Bros*") does not apply to, and is not binding, on the parties in its appeal which was stayed under rule 18 as a related case. It contends that the facts of its appeal are relevantly distinguishable from the facts of *Jones Bros*, the lead case.

Background

3. On 25 June 2018 Judge Dean heard an application for a direction under rule 18 made by 56 appellants, represented by the same solicitors, that had used a marketed scheme called a "Growth Securities Ownership Plan" ("GSOP"). The scheme utilised purported contracts for differences ("CFD") and was designed to reward employees, directors and/or shareholders with payouts on instruments said to be "employment related securities" which fell within Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Three other appellants, including Muller, which had also used the GSOP scheme and which were represented by different solicitors were invited to participate in that hearing and make representations.

4. Although two of these appellants did attend with one, Merchant Place Corporate Finance Limited ("Merchant Place"), contending that its appeal was distinguishable on the basis that there were genuine commercial reasons for its use of the scheme and that its facts differed from those in the other appeals, Muller did not appear and was not represented at that hearing.

5. In her decision, released on 30 July 2018, Judge Dean directed that the appeals of Jones Bros Ruthin (Civil Engineering) Co Limited and Britannia Hotels Limited be designated as lead cases with all other appeals stayed behind them as related cases (see *Jones Bros Ruthin (Civil Engineering) Co Ltd and Others v HMRC* [2018] UKFTT 500 (TC)). The factual differences which Merchant Place had contended distinguished its appeal were not in Judge Dean's view "sufficient to outweigh" the benefit of a rule 18 direction (see at [50]).

6. At [36] she had rejected:

> "… HMRC's submission that nuanced differences of fact, such as the implementation of the schemes, potentially leading to Rule 18(4) applications is a reason not to make a Rule 18 Direction; such potential exists in the making of any Rule 18 Direction. In my view it is not appropriate to speculate as to what action Appellants may or may not choose to take in relation to their appeals. It is the Appellants who seek this Direction and it is the decision on the common issues that is binding; if Appellants subsequently seek to argue they should not be bound by the decision on related issues the Tribunal will decide the application on the merits. For those reasons I agree with and adopt the words of Judge Mosedale in 288 Group at [41]:

> 'The difficulties which are likely to arise are where the parties dispute whether the facts in the related cases are sufficiently similar such that the decision on law in the lead case actually applies and binds the related case. Nevertheless, it seems to me that even this is a fairly weak objection in that Tribunals and courts regularly have to decide whether a case is distinguishable on the facts in order to decide whether the decision on the law by a superior court is binding.'"

7. Although, as Judge Dean recorded at [51], no representations were made on behalf of Muller, she was "satisfied" that there were sufficient common issues in Muller's appeal such that it should be stayed as a related case pending the decisions in the lead cases.

8. The decision of the Tribunal (Judge Dean and Ms Stott) in *Jones Bros* was released on 20 January 2022. The Tribunal sent a copy of that decision to Muller on 20 April 2022. On 17 May 2022, Muller made its application for a direction that the decision on *Jones Bros* does not apply and is not binding on the parties to its appeal.

JONES BROS

9. At [39] of *Jones Bros* the Tribunal set out the following common issues of fact and law to be determined:

> "(i) Whether the payments of money made by each relevant company to each relevant employee were taxable as earnings irrespective of the resolution of issues (ii) to (v).
>
> (ii) Whether the arrangements gave rise to a "contract for differences or a contract similar to a contract for differences" within s 420(1)(g) and (4) ITEPA and therefore a "security" and an "employment related security" for the purposes of Part 7 ITEPA;
>
> (iii) Whether the arrangements gave rise to a "restricted security" or "a restricted interest in securities" for the purposes of Part 7 Chapter 2 ITEPA;
>
> (iv) Whether s 447 ITEPA (charge on other chargeable benefits from securities) applied to the payment received by the employee;
>
> (v) Whether (a) the employee's rights under the arrangements were, and/or (b) the payment received was, earnings of the employee, chargeable under s 62 ITEPA or Part 3 Chapter 10 ITEPA (taxable benefits: residual liability to charge)."

10. However, as the Tribunal noted, at [41], not all of the issues were "pursued or challenged in any meaningful sense". In fact the case primarily concerned the earnings issue and whether the arrangements were CFD with the "principal issue" being whether the arrangements are securities as rights under CFD or contracts similar to CFD pursuant to s 420(1)(g) or s 420(4) ITEPA (see [363] of *Jones Bros*).

11. In so far as applicable s 420 ITEPA provides:

> **420 Meaning of *"securities"* etc**
>
> (1) Subject to subsections (5) and (6), for the purposes of this Chapter and Chapters 2 to 5 the following are "securities"—
>
> …
>
> (g) rights under contracts for differences or contracts similar to contracts for differences (other than contracts of insurance),
>
> …

(4) For the purposes of subsection (1)(g) a contract similar to a contract for differences is a contract—

(a) which is not a contract for differences, but

(b) the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property or an index or other factor designated in the contract.

12. Having set out the applicable legislation, including s 420 ITEPA, the Tribunal noted:

> "363. The principle issue in these appeals is whether the arrangements in point fall within part 7 and whether the arrangements as rights under contracts for differences or contracts similar to contracts for differences pursuant to s 420(1)(g) or s 420(4).
>
> 364. We consider that the legislation indicates that a contract for differences (or similar) is a commercial concept by the reference in s 420(4)(b) to profit and loss and must be construed as requiring a commercial or business purpose. It is also clear from *UBS* that the contracts must be considered in the real world. We take the view that the scope of the provisions does not extend to commercially irrelevant features, the only purpose of which is to bring the arrangements within the legislation to obtain the tax benefit."

It continued:

> 365. The Appellants rely on the fact that there is no express requirement within the statutory provisions for the presence of the characteristics identified by Ms Mayr. However, we take the view that this is not the correct approach. Whilst we accept Mr Prosser's submission that the legislation extends beyond a "typical" contract for differences and it would not be appropriate to set out an exhaustive list of features required in order for a contract to constitute a contract for differences or similar, we take the view that the nature and terms of a contract must be considered and the absence or inclusion of certain features, whether typical or not, may inform a conclusion although is unlikely to be determinative. Our approach is to consider whether the contracts have the fundamental and sufficient features to bring them within the notion of contracts for differences.
>
> 366. We have therefore approach the issue on the basis that the term "contract for differences or similar" should bear a commercial meaning. …"

13. A "crucial feature" identified by the Tribunal at [383], which "determines" the nature of an instrument as a CFD:

> "... is exposure to the underlying asset or metric and the profit or loss must be determined by reference to fluctuations in the asset."

However, it found that the contracts used by both appellants in *Jones Bros* lacked that "fundamental feature" such that "they do not fall within the scope of the legislation."

14. Having considered the structure of the particular arrangements concerned in *Jones Bros*, the Tribunal concluded, at [417], in relation to whether the arrangements concerned gave rise to a CFD or a contract similar to a CFD:

> "… that in both cases the arrangements lacked the essential character of exposure to movement in the underlying metric and the contracts were inconsistent with the fundamental concept of a contract for differences. The underlying reference asset reaching the hurdle in each case was a condition precedent to payment, but the amount of payment was not dependent on the level the asset reached. We are satisfied that it was not the purpose of the

> parties to secure a profit or avoid a loss by reference to fluctuations in the value or price of an index or other factor designated in the contract. We conclude that on an unblinkered view of the facts, it cannot be said that the parties were, in any real commercial sense, speculating on fluctuations in circumstances where it was highly likely that the hurdles would be reached. The downsides had no commercial or business purpose and were included solely to achieve the tax benefit. The arrangements were, in our judgment, preordained in that there was no realistic possibility that the payments would not be made. Reaching the hurdle cannot be said to be an 'upside win' as the relevant provisions envisage. We hold that, viewed realistically, the arrangements cannot be characterised as contracts for differences or similar."

15. In relation to the earnings issue, the Tribunal distinguished *Abbot v Philbin* [1961] AC 352 and *UBS AG v HMRC, DB Group Services (UK) Ltd v HMRC* [2016] UKSC 13 concluding, at [433], that the appellants in *Jones Bros* were not cases in which the employees received contractual rights to earning and the payments could be said to be the rights and not the earnings whereas:

> "… [t]here was a distinction in *Abbott v Philbin* and *UBS* between the securities received at the outset, which had a value, and the payments subsequently received in the capacity of holders of the securities, the source of which was not employment. In these [the *Jones Bros*] appeals, the creation of the contracts formed part of the arrangements under which the rights were created to bring the scheme within the legislation. We consider the correct approach is to look at the substance of the contracts and not their form; the precise legal nature of the rights under the contracts does not alter the character of the payments made and received by the employees as earnings when viewed in the context of the totality of the arrangements."

MULLER

16. The following summary of the background facts of Muller's appeal, taken from the documents provided, is to put the application and my decision in context. Nothing that I say below (although I do not understand it to be disputed) should be taken as a finding of fact for the purposes of any further hearing of this matter.

17. Muller implemented the GSOP tax avoidance scheme in respect of only one employee – its CEO, Mr Ronald Kers.

18. Mr Kers had been appointed CEO of Muller under an employment contract signed in October 2011 which had effect from "1 May 2012 or sooner". His principal remuneration was by way of a basic six figure salary; a discretionary bonus of up to £200,000 pa; and a non-discretionary:

> "…long-term bonus/profit participation ("Long Term Bonus") in the amount of 3% of the amount by which the enterprise value (defined as being EBITDA times 10 (with this multiple of 10 to be fixed for the duration of this contract)) of Muller UK (as defined in clause 1) increases over successive periods of three financial years."

19. Shortly after Mr Kers appointment, Mazars were engaged by Muller to provide advice on the tax implications on the creation by Muller of "an employee incentive plan". Mazars advised Muller that the use of a CFD was a "planning idea" which had been disclosed to HMRC under DOTAS and that any "tax planning involving disclosure under DOTAS should be regarded as aggressive".

20. On 16 October 2012 an agreement was entered into between Mr Kers and Muller described as "Confirmation in Relation to Contract for Differences" (the "Contract").

21. Muller accepts that its appeal is a 'bonus replacement' case and that the (HMRC say purported) CFD was entered into as a substitute for the contractual right that Mr Kers had to a Long Term Bonus. It also accepts that it was advised that replacing the contractual entitlement with the CFD would result in the payment not being subject to income tax or NICs; and, further, that in order to qualify as a CFD, the contract had to provide for a possible downside payment from Mr Kers to Muller.

RULE 18

22. Rule 18 provides as follows:

> **Lead cases**
>
> **18**.—(1) This rule applies if—
>
> (a) two or more cases have been started before the Tribunal;
>
> (b) in each such case the Tribunal has not made a decision disposing of the proceedings; and
>
> (c) the cases give rise to common or related issues of fact or law.
>
> (2) The Tribunal may give a direction—
>
> (a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and
>
> (b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) ("the related cases").
>
> (3) When the Tribunal makes a decision in respect of the common or related issues—
>
> (a) the Tribunal must send a copy of that decision to each party in each of the related cases; and
>
> (b) subject to paragraph (4), that decision shall be binding on each of those parties.
>
> (4) Within 28 days after the date that the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, that case.
>
> (5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.
>
> (6) …

23. As Judge Berner observed, at [19], in *General Healthcare Group Ltd v HMRC* [2014] UKFTT 353 (TC) ("*GHG*"), the decision in the lead case is only binding, under rule 18(3)(b), on the related case "in respect of the common or related issues".

24. In relation to an application under rule 18(4), Judge Berner said, at [18]:

> "In my judgment, a direction under rule 18(4) should be made only in circumstances where the binding effect on a party would create an injustice that cannot be avoided by any other procedural means which preserves the integrity of the lead case process. On making a lead case direction the Tribunal must be satisfied that the cases give rise to common or related issues of fact and law. This case itself is a good example, in fact, of the care that should be taken before an appeal is designated as a related case under a rule 18 direction. A lead case direction is not one that is made lightly, nor should it routinely be capable of being cast aside."

25. In *GHG*, unlike the present case, the common or related issues subject to the rule 18 direction were confined to issues of law. In its application for a direction under rule 18(4), GHG, in addition to arguing that the Tribunal in the lead case had made an error of law, contended that its case was factually different from that of the lead case. At [26] Judge Berner set out the course he proposed to adopt in that case:

> "Directions will be given for a hearing to determine the appropriate resolution of GHG's case under rule 18(5), which will include the exchange of evidence relevant to the case put by GHG that its appeal should be allowed, on its own facts, notwithstanding the binding effect of the determination in *Nuffield* [the lead case] on the common or related issues of law as directed by the Tribunal under rule 18."

26. It is common ground that effect of a rule 18(4) direction in the present case would be that each and all of the common or related issues of fact or law would fall to be decided *de novo* at a completely fresh hearing and it would be open to Muller to argue all issues. This would result in a substantial hearing on all issues of fact and law potentially raising the possibility of an identical issue (eg an issue of law such as statutory interpretation) being decided differently.

DISCUSSION AND CONCLUSION

27. Mr Kevin Prosser KC, for Muller, contends that the arrangements entered into between Muller and its CEO, Mr Kers, had real commercial objectives and are materially distinguishable for those in *Jones Bros*. It is clear, he says, from the terms of the Contract that the amounts payable were determined by reference to fluctuations in the underlying asset or metric. Mr Prosser also referred to evidence that could be given at a subsequent hearing by Mr Ker and Mr Major Rana, Tax director of Muller, to establish that there were commercial reasons for entering into the Contract. As such, he submits the rule 18(4) application should be allowed.

28. For HMRC, Mr Christopher Stone submits that the Tribunal was aware when making its decision to apply the rule 18 procedure in *Jones Bros* that the implementation of the scheme was not identical in each case but was satisfied that the issues identified were common issues of mixed fact and law.

29. Although he accepts that the findings of fact in *Jones Bros* are not relevant to Muller and that a further hearing might be necessary, particularly in regard to the commercial purpose issue, he submits that rather than allow Muller's application I should adopt the approach of Judge Berner in *GHG* and make a direction under rule 18(5) to enable Muller to lead evidence to establish its appeal should be allowed on its facts notwithstanding the binding effect of the determination of *Jones Bros* on the related issues of law. This he says would have the advantage of not only preserving the rule 18 process but would also be consistent with the overriding objective of rule 2 of the Procedure Rules to deal with cases fairly and justly, in particular dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties.

30. Mr Prosser, however, contends that even if such an approach were to be adopted it would not necessarily have the benefit that Mr Stones contends. He says that this is because it is not always clear from the decision in *Jones Bros* what is a proposition of law and how it should be applied. By way of example, he referred to [364] of *Jones Bros*, where the Tribunal considered that the legislation indicates that a CFD must be construed as "requiring a commercial or business purpose" and asked, rhetorically, whether this referred to the contract itself or whether there has to be commercial or business reasons for entering into the contract.

As such he contends that rule 2 would be best served by a direction under rule 18(4) and Muller's appeal starting afresh.

31. Although I appreciate Mr Prosser's concerns, it is clear from *GHG* that, in determining an application under rule 18(4), the starting point is to preserve the integrity of the lead case process. Also a direction under rule 18(4) should only be made in circumstances where the binding effect on a party would create an injustice that cannot be avoided by any other procedural means.

32. Such an injustice would be created in the present case if Muller, which has not contended that there was an error of law in *Jones Bros*, was able to distinguish its appeal on the facts but was prevented from doing so because it was bound by *Jones Bros*. It is therefore necessary to ask whether that injustice can be avoided by any other procedural means whilst preserving the integrity of lead case procedure. In my judgment it can by way of a direction, as in *GHG*, under rule 18(5). As such, I do not consider it appropriate to make a direction under rule 18(4).

33. I therefore dismiss Muller's application under rule 18(4) but make the following directions under rule 18(5):

(1) There be a hearing for the purpose of the Tribunal giving directions under rule 18(5) providing for the disposal if this appeal.

(2) The parties shall liaise and use their best endeavours to agree case management directions for the further progress of this appeal (which shall include the exchange of evidence relevant to the case put by Muller that its appeal should be allowed, on its own facts, notwithstanding the binding effect of the determination in *Jones Bros* on the common or related issues of law) and not later than 56 days from the date hereof shall **either** provide to the Tribunal their agreed proposed directions **or** in the absence of agreement each party's own proposed directions.

34. I have allowed 56 days for the provision of proposed directions (as opposed to the usual 28 days) to take account of the summer holiday period and to avoid the potential difficulties that might otherwise arise, due to unavailability etc, during this time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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: 07th JULY 2023