[2019] UKFTT 0336 (TC)

TC07164

Appeal number: TC/2018/02121

PROCEDURE – application for costs against person who is an individual – whether that person acted unreasonably – yes – whether costs incurred as a result of that person acting unreasonably – yes – whether evidence that the individual had the means to meet an award of costs – no – costs awarded but order not to be enforced without permission of Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL WHEELER **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the application for costs on 20 May 2019 without a hearing under the provisions of Rule 29(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Procedure Rules"), having first read the HMRC's application for costs dated 17 September 2018 (with enclosures), HMRC's further submissions dated 12 April 2019, the Appellant's letter dated 12 April 2019 (with enclosures), the Appellant's undated letter received on 25 April 2019, and the Tribunal file.

DECISION

Introduction

1. The application before me is the Respondents' application, dated 17 September 2018, that the Appellant pay the costs incurred by the Respondents in defending an appeal brought by the Appellant.

2. The Respondents' application was made following the decision by the First-tier Tribunal (Judge Richard Thomas and Mr Derek Robertson), issued (as a summary decision) on 20 August 2018, that the Appellant was liable to pay £4,800 in penalties for non-compliance with an information Notice issued under Schedule 36 to the Finance Act 2008.

Background to this application and the history of this appeal

3. It will be necessary to go into the background to this appeal in some detail. The relevant events begin on 30 November 2016. On that date, an officer of HMRC issued an information Notice to the Appellant. That Notice was issued under Schedule 36 to the Finance Act 2008, and it required the Appellant to provide certain information and documents to the Respondents no later than 9 January 2017. The Appellant neither complied with the Notice nor appealed against it.

The £300 penalty

4. The Appellant had been warned that failure to comply with the information Notice could result in the imposition of a penalty in the sum of £300 and, on 20 January 2017, an officer of HMRC issued a penalty of £300 to the Appellant. The Appellant was also warned that further penalties of up to £60 per day could be imposed if he continued not to provide the material required under the Notice.

5. On 13 February 2017, the Appellant appealed to HMRC against the penalty of 3300. HMRC rejected this appeal. On 7 March 2017, the Appellant sought a review of this decision. By letter dated 27 April 2017, HMRC upheld the decision to impose a penalty. On 21 May 2017, the Appellant appealed to the First-tier Tribunal. The Appellant's grounds of appeal to the First-tier Tribunal were:

> The information asked for by HMRC has either been answered or they are personal and not relevant to HMRC or are over 6 years old and not in my possession or memory. I have always maintained that if HMRC can show that I owe any tax I would pay it.

6. The Appellant's appeal was heard by the Tribunal sitting in Hull on 3 October 2017. The Appellant did not appear and was not represented. The Tribunal was satisfied that the Appellant had been correctly notified of the hearing, and that it was in the interests of justice that the hearing should proceed in the Appellant's absence.

7. In a full decision issued on 9 October 2017 (reported at [2017] UKFTT 0743 (TC)), the First-tier Tribunal (Judge Dr Christopher Staker) addressed all of the Appellant's grounds of appeal.

8. In response to the first sentence of the Appellant's grounds, the First-tier Tribunal noted that the Appellant had not appealed against the information Notice, and that it was not open to the Appellant, in an appeal against a penalty, to challenge the necessity of what had been required under a Notice. The First-tier Tribunal had heard evidence from the officer who issued the Notice, and in the decision Judge Staker noted he was satisfied that (even if the Appellant had been able to challenge the validity of the Notice) the information required under the Notice issued to the Appellant was required for the purposes of checking the Appellant's tax position.

9. In response to the Appellant's contention that some of the information required had been provided, Judge Staker noted that partial compliance was insufficient. The First-tier Tribunal also noted that, in any event, the Appellant had not specified what he considered he had provided. Judge Staker went on to state that the Appellant was still required to respond to the information Notice.

10. In response to the Appellant's contention that some information was personal, Judge Staker reiterated that he was satisfied from the evidence before him that the information sought was reasonably required for the purposes of checking the Appellant's tax position. In response to the Appellant's contention that the information required was not in his possession or memory, the First-tier Tribunal noted that this was not established as the Appellant had not attended to give evidence. Judge Staker additionally doubted that could be the case for all the information required under the Notice, citing the example of the names and ages of the Appellant's children as information which the Appellant was highly likely to recall.

11. The First-tier Tribunal then dealt with the Appellant's argument that some of the information required was more than six years old. Judge Staker noted that there was nothing in Schedule 36 which prevented the Respondents from requiring information which was more than six years old. Finally, Judge Staker responded to the Appellant's contention that he would pay tax if it was shown that he owed it, noting that the purpose of an information notice was "to assist HMRC to ascertain whether or not there is any tax owing". Judge Staker made it clear that it was not necessary for the Respondents to establish that tax was owed before issuing an information Notice.

12. Judge Staker concluded that the Appellant had not demonstrated a reasonable excuse for his failure to comply with the Notice. Therefore, the Appellant's appeal was dismissed.

13. The Appellant sought permission to appeal to the Upper Tribunal against the decision of Judge Staker. On 12 December 2017, Judge Staker refused permission to appeal on the basis that the Appellant had not identified any error of law in the decision. The Appellant then sought permission directly from the Upper Tribunal. In a decision issued on 11 January 2018, the Upper Tribunal refused permission to appeal. The Upper Tribunal (Judge Roger Berner) noted that the Appellant had raised the new argument that he was entitled under the European Convention on Human

Rights ("ECHR") to remain silent. The Upper Tribunal dismissed the Appellant's application, holding that the new argument was "unarguable".

The daily penalties

14. Meanwhile, on 20 June 2017, the Respondents had issued further penalties to the Appellant. These penalties were calculated as £10 per day for 160 days of non-compliance. On 10 July 2017, the Appellant appealed to HMRC against these penalties, totalling £1,600, on the basis that he had been penalised twice for the same offence.

15. On 13 February 2018, the Respondents issued a review decision, upholding the imposition of daily penalties. On 13 March 2018, the Appellant appealed again to the First-tier Tribunal. The Appellant's grounds of appeal were:

> My grounds for appealing are, I had no taxable income for the period HMRC are asking for information, any income I had were non taxable, i.e. sale of main home.
>
> If HMRC think I owe any income tax they should send me an assessment.
>
> I am entitled to a private life, if I had no declarable income HMRC are invading my private life.

16. The Appellant's appeal was acknowledged by the Tribunal in a letter dated 12 April 2018. In this letter the Appellant was informed that the appeal would proceed straight to a hearing and that he would be notified as soon as the hearing was arranged. The Appellant was told to send a copy of the documents he wanted to rely upon to HMRC and to "bring the documents with you to the hearing". The Appellant was also told "you should also bring with you to the hearing any person you want to say something to the tribunal in support of your case".

17. On 22 May 2018, the Tribunal wrote again to the Appellant to notify him that his appeal had been listed for hearing in York on 10 August 2018. That letter informed the Appellant:

> Please make sure you arrive half an hour before the hearing.
>
> If you do not attend, the Tribunal may decide the matter in your absence.
>
> Enclosed is a map of the venue and what you can expect to happen at a hearing.

18. The Appellant again did not appear at the hearing of his appeal, and was not represented. Again, the First-tier Tribunal (Judge Richard Thomas and Mr Derek Robertson) were satisfied that the Appellant had been properly notified of the hearing, and decided it was in the interests of justice that the hearing should proceed in the Appellant's absence.

19. On 20 August 2018, the First-tier Tribunal issued a summary decision. In that decision, the Tribunal considered the Appellant's grounds of appeal and dismissed them. The Tribunal concluded that the first two grounds were essentially a challenge

to the validity of the information Notice and that the Appellant could not challenge the validity of the Notice in an appeal against a penalty. The First-tier Tribunal held that the Appellant's argument, based on the ECHR, that he had a right to a private life had been held by the Upper Tribunal to be unarguable. The Tribunal concluded that the Appellant had failed to comply with the information Notice, and that he did not have a reasonable excuse for his failure. The Tribunal decided that it would exercise its discretion to vary the penalties and decided to increase the penalties from £10 per day to £30 per day. That resulted in penalties of £4,800 being confirmed.

20. On 17 September 2018, the Respondents asked for a full decision to be issued. On 3 October 2018, the First-tier Tribunal issued a full decision to the parties. This was re-issued to the parties with a minor amendment on 12 October 2018 (reported at [2018] UKFTT 0572 (TC)).

21. On 27 November 2018, the Appellant applied to the First-tier Tribunal for permission to appeal against the decision of Judge Thomas and Mr Robertson. On 12 December 2018, Judge Thomas refused permission on the basis that the Appellant had not shown there was an arguable error of law in the decision.

The costs application

22. As noted above, on 17 September 2018, the Respondents made an application for an order for costs in the sum of £4,695.15.

23. The basis of the Respondents' application is that the Appellant's conduct was unreasonable in that he had appealed but then not made any reasonable effort to support his position in that appeal. The Respondents assert that the grounds given by the Appellant in his second appeal were already addressed by the first decision of the First-tier Tribunal, and that the Appellant had been:

> … entirely unreasonable in bringing or defending his appeal as he should have known from the start that his case was hopeless as he did not bring any new arguments or testimony to the proceedings either orally or in writing.
>
> …
>
> In failing to provide any significantly new grounds for appeal against the daily penalties and in failing once again to attend the hearing on Friday 10 August 2018 without good reason, the Respondents submit that the Appellant's conduct should be regarded as unreasonable for the purpose of Rule 10(1)(a) and (b) of the Tribunal Rules.

24. On 28 November 2018, the Tribunal forwarded a copy of this application to the Appellant and asked him to make any representations within 14 days. On 11 December 2018, the Tribunal chased the Appellant for a response. At that stage there was no response from the Appellant with respect to the basis on which the Respondents sought their costs or whether he had acted unreasonably.

25. On 18 January 2019, the Respondents enquired with the Tribunal as to progress on their application. The Tribunal then listed the Respondents' application for a hearing on paper in March 2019. For reasons which will become clear (see below),

by letter dated 26 March 2019, the Tribunal drew the parties' attention to Rule 10(5)(b) and requested both parties:

> … to make such submissions (supported by relevant evidence) as they consider appropriate as to the Appellant's financial means.

26. Both parties responded to that Tribunal letter. By a letter dated 12 April 2019, the Respondents made the point that they had limited information as to the Appellant's means due to his failure to comply with the information Notice which had been served. The Respondents noted that the Appellant was an employee of the Rowan Pub Company Limited (a company of which he had been a director until 2014), with a salary of about £8,000 p.a. and that the Appellant had not filed a tax return since 2001. The Respondents asserted that the Appellant's lifestyle could not be supported by this employment income alone. The officer asserted that the Appellant had part-funded the purchase of a house in the Caribbean in 2006 for $770,000, held in the name of his partner, and that historically he had regularly paid large credit card bills which exceeded his apparent income. The Respondents did not attach any evidence to support their assertions.

27. The Appellant's reply to the Tribunal was also dated 12 April 2019. The Appellant's reply in full was as follows:

> I would like to make a representation regarding the costs made against me by HMRC. I have enclosed a wage slip which is my only income £162 a week.

28. This brief response was supported by a pay slip showing a weekly salary of £166, and also a P60 substitute for 2018/19 which showed the Appellant's income from that employment was £8,125.79.

29. On 25 April 2019, the Tribunal received a further letter from the Appellant (apparently in response to the Tribunal's letter of 28 November 2019 but possibly in addition to the Appellant's earlier letter of 12 April 2019). In that letter the Appellant stated:

> I would like to make a few submissions.
>
> 1. I have always maintained to the best of my knowledge I have no taxable income to declare for the years in question.
>
> 2. The money I have lived on for the years in question has been from the sale of my main home which I am not required to declare.
>
> 3. I have made representations to every Tribunal in this case, I didn't understand that I had to attend, for this I apologise.
>
> The Appellant would remind the Tribunal of the suggestions of Judge Thomas at paragraph 28 sitting in York county court on 10 August 2018,
>
> We suggested to HMRC that the time seemed to be coming when they should take the appellant at his word (see §20(2)) [and assess him].

> HMRC have never indicated what I owe or what I owe it for this has gone on for 2 ½ years I really think it's time for them to explain what this is all about and assess me.
>
> 4. My income is £166 a week. I have no property or any other assets. Could I suggest HMRC check this for the Tribunal and could they also raise their assessments.
>
> 5. I do claim that I have insufficient funds or means to pay the costs.

30. Looking at the Appellant's point 4, it is clear, and must also be clear to the Appellant, that his failure to comply with the information Notice, or to provide HMRC with answers to their enquiries, makes it impossible for HMRC to corroborate his income, or the statement that he owns no property or other assets.

31. The Appellant's other points are considered below.

Discussion and decision

32. In considering this application, I start by considering the extent of the Tribunal's power to award costs and then move on to consider each aspect of the application made by the Respondents.

The Tribunal's power to award costs

33. The First-tier Tribunal, as a statutory body, only has the power granted to it by statute. The Tribunal's power to award costs is given by Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). Those powers are set out in Rule 10 of the Tribunal Procedure Rules. The relevant parts of Section 29 and Rule 10 are set out as annexes to this decision.

The basis of the Respondents' application

34. The Respondents' application is said to be brought under Rule 10(1)(a) and also under Rule 10(1)(b). I consider each part separately.

35. Rule 10(1)(a) relates to applications for wasted costs brought under Sub-section 29(4) TCEA 2007. As explained by Subsection 29(5) TCEA 2007, wasted costs are costs incurred due to the improper, unreasonable or negligent act or omission of a party's representative. In this case the Appellant did not have a representative, and the Respondents have made clear that their application is against the Appellant (and not anyone else). As there is no representative against whom an order could be made under Rule 10(1)(a), the Respondents' application under Rule 10(1)(a) is dismissed.

36. Rule 10(1)(b) allows the Tribunal to make an order for costs only if it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings before the Tribunal.

37. The Respondents' application is made only in respect of the second appeal. In the second appeal the Respondents were the party defending the proceedings, so the application under Rule 10(1)(b) can be only on the basis that the Appellant acted

unreasonably in bringing or conducting the second appeal. Therefore, it is necessary for me to consider whether the Appellant acted unreasonably either in bringing and/or in conducting the second appeal.

Did the Appellant act unreasonably in bringing the second appeal?

38. The Respondents submit that the Appellant acted unreasonably in bringing his second appeal, and refer to *Catana v HMRC* [2012] UKUT 172. In *Catana*, the Upper Tribunal accepted that the phrase "bringing, defending or conducting the proceedings" was

> … an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed…

39. The Appellant has not commented upon whether he acted reasonably in bringing the second appeal.

40. The Appellant's second appeal was filed in March 2018. By this time the Appellant had lost the first appeal and he had failed to obtain permission to the Upper Tribunal. All of the arguments he had made before the First-tier Tribunal had been dismissed, and the fresh argument raised before the Upper Tribunal about the right to remain silent had been described as "unarguable". In his decision, released shortly after the first hearing, Judge Staker explained why certain arguments were not open to the Appellant in an appeal against penalties issued for failure to comply with an information Notice.

41. Although the Respondents describe the Appellant's grounds of appeal for his second appeal as being the same as for his first appeal, I consider that in bringing his second appeal the Appellant relied on arguments which were slightly different to those raised in his first appeal. In his first appeal, the Appellant focussed upon what he perceived to be defects in the information requested. In seeking permission to appeal against the first Tribunal decision, the Appellant asserted he had a right to remain silent. In his second appeal, the Appellant focussed upon what he asserted was his lack of taxable income and asserted that the information Notice invaded his right to a private life. The only point of overlap is that in both appeals the Appellant has argued that it is for HMRC to show that he owes tax, and (by implication) that it was not for him to provide the information required under the information Notice.

42. Although there are those minor differences in the grounds of appeal provided for the first and second appeals, nevertheless, I consider it should have been clear to the Appellant that the grounds he raised in his second appeal were doomed to failure because (as with his first appeal) his grounds of appeal did not relate to the penalties which he was appealing against. Instead, the arguments related to the legitimacy of the information Notice. As the Appellant must have known from Judge Staker's decision, it was not open to him to raise those arguments on an appeal against penalties for failure to comply with an information Notice. Those arguments could be raised only in an appeal against the Notice itself.

43. In the circumstances, I conclude that the Appellant did act unreasonably in bringing the second appeal on the basis of arguments which engaged with the

legitimacy of the information Notice rather than with whether there was a reasonable excuse for his failure to comply with the Notice.

Did the Appellant act unreasonably in his conduct of the second appeal?

44. Next, I consider whether the Appellant acted unreasonably in his conduct of the second appeal. Under this heading the Respondents refer to *NM Consultants (Logistics) Limited* [2018] UKFTT 0144.

45. In *NM Consultants*, the First-Tier Tribunal made an order for costs against the company on the basis that it had acted unreasonably in it conduct of the proceedings. In *NM Consultants*, the company had consistently failed to engage with the Tribunal, had been struck out for failure to respond, and the company's director had chosen to go on holiday in the week in which the hearing (of the company's application for reinstatement) was listed.

46. As the Appellant's second appeal was categorised as basic, the only steps expected of the Appellant were that he provide to the Respondents a copy of any documents he wished to rely on (and there might not be any documents), and that he attend the hearing of his second appeal. In the letter received by the Tribunal on 25 April 2019, the Appellant explained that he did not realise he had to attend the hearing.

47. It is not a requirement that appellants attend Tribunal hearings. A small proportion of appellants do not attend the hearing of their appeal (for a variety of reasons, such as ill health or mistake as to the date, or due to concern about what to expect). However, by not attending the hearing, appellants lose their opportunity to make their case and it is less likely that they will be successful. The Appellant had not attended the first appeal hearing, and had seen his appeal dismissed.

48. Given the information provided to the Appellant by the Tribunal about his second appeal (such as a venue map, and when to attend), and given the comments by Judge Staker in the first decision, I am satisfied the Appellant could not reasonably have understood anything other than that he was expected to attend the hearing of his second appeal. The Appellant has stated that he had provided representations but I do not accept, in the light of the outcome of the first appeal, that the Appellant could reasonably have considered that his grounds of appeal were sufficient as representations (and no other representations were made prior to the August 2018 hearing). The second Tribunal panel were satisfied that the Appellant had deliberately chosen not to attend the hearing. Given the Appellant's explanation for his absence, I consider that the Appellant had concluded that hearing attendance was not compulsory, and (in agreement with the second Tribunal panel) I conclude that the Appellant chose not to attend the hearing.

49. A conscious decision not to attend an appeal hearing is not, in itself, unreasonable. Clearly if an appellant has concluded that it is inevitable that his arguments will fail then the correct approach is for that appellant to withdraw, informing the other party and the Tribunal as soon as possible so no further costs are incurred. However, there are sometimes cases where that conclusion is not reached until very shortly before the hearing. In such cases it may difficult for an appellant to

make contact with the other party or the Tribunal in time for the hearing to be cancelled. However, that cannot have been the situation here because, by making an application to the First-tier Tribunal and then to the Upper Tribunal for permission to appeal, the Appellant made it clear that he did not accept that his arguments were bound to fail, and he did not wish to withdraw.

50. It also cannot have been the case that the Appellant considered his written arguments so convincing that it was not necessary for him to attend for his second appeal to be allowed. It is possible that the Appellant might have held that opinion during his first appeal, but losing that first appeal would have made it clear to him that his second appeal (on similar grounds, and similarly not addressing the penalties which were under appeal) was also likely to be lost if he did not attend to make oral representations.

51. Therefore, I conclude that the Appellant chose not to attend the second appeal despite wishing to continue with his arguments, and despite the fact that he knew, or should have known, that it was very likely that he would lose at first instance if he did not attend to make submissions about his case. In the circumstances, I conclude that the Appellant's failure to attend the hearing of the second appeal was unreasonable.

Were the Respondents' costs incurred due to the Appellant's unreasonable behaviour?

52. I have considered whether the costs incurred by the Respondents in defending the second appeal were incurred as a result of the Appellant's unreasonable behaviour.

53. I have concluded that in this case, the Respondents incurred the costs of defending the second appeal because the Appellant acted unreasonably in bringing an appeal he knew, or should have known, was doomed to failure. I consider that all of the costs incurred by the Respondents in preparing for the appeal, in attending the hearing and in making their costs application were incurred as a result of the Appellant's unreasonably bringing the second appeal.

54. Although it is not necessary for the purposes of this application, I have also considered whether the Respondents incurred costs because of the Appellant's unreasonable conduct of the second appeal, i.e. in not attending the hearing. I have concluded that the Respondents would have defended the second appeal, and attended the second hearing whether or not the Appellant attended. Although neither party is obliged to attend, I consider that the Respondents inevitably would attend any hearing (such as a penalty appeal) where they initially bore the onus of proof. Therefore, if the Appellant's only unreasonable behaviour had been his conduct in not attending the hearing, I would have concluded that the Respondents did not incur any additional costs as a result of the Appellant's unreasonable behaviour.

Should a costs order be made?

55. The Tribunal Rules make clear that no costs order can be made against an individual without giving that person the opportunity to make representations, and without considering his financial means.

56. The Appellant was given the opportunity to make submissions in the Tribunal's letter of 28 November 2018. This opportunity was taken up when the Appellant sent the letter received by the Tribunal on 25 April 2019.

The Appellant's financial position

57. Rule 10(5)(b) requires the Tribunal to consider an individual's means if that individual is a person against whom an order for costs is sought. This does not appear to have been a point previously considered in any reported decision of the Tribunal.

58. As noted above, there was initially no evidence as to the Appellant's means, and this prompted the Tribunal request for submissions. Both parties responded to that request.

59. Looking first at the Respondents' submissions of 12 April 2019, I have some sympathy with the Respondents' broad point that they have limited information about the Appellant's means because he will not comply with the information Notice served upon him. In this regard I note that the second Tribunal panel noted (at paragraph 28) that the Respondents were able to issue further daily penalties of up to £60 per day if the Appellant continued not to provide the information required under the Notice.

60. However, the Respondents clearly have some information about the Appellant's means as they were able to make some assertions about the Appellant, albeit predominantly concerning the historical position. These assertions were not supported by evidence.

61. Looking at the Appellant's submissions, he asserted that his only income is £166 each week. The Appellant supported his assertion about his level of income with evidence consisting of a weekly payslip and a P60 equivalent for 2018/19.

62. In deciding whether to make an order for costs, I also bear in mind that due to his failure to comply with the information Notice, the Appellant has already had penalties totalling £5,100 confirmed. Those penalties amount to more than half of the Appellant's annual income from his employment with the Rowan Pub Company. If the Appellant has no means other than his employment, and no other source of income, it is difficult to see how he will pay the Respondents the penalties which the Tribunal has confirmed. If the Appellant has no other income and no assets then those penalties are sufficient for the Respondents to make the Appellant bankrupt.

63. Section 29 and Rule 10 give the Tribunal a wide discretion in respect of the form of the order it can make in respect of costs.

64. I am satisfied that the Appellant acted unreasonably in bringing the second appeal and in his conduct of that second appeal. I am satisfied that the Appellant's unreasonable bringing of the second appeal has caused the Respondents to incur the costs claimed in the schedule to their application. I consider it appropriate that some form of order for costs is made against the Appellant.

65. However, on the evidence before me, I am not satisfied that the Appellant currently has the means to pay an order for costs in the sum of £4,695.15. Therefore,

I do not consider it would be appropriate, at this stage, for a costs order in that amount to be enforced.

66. Given those conclusions, I have decided to make an order that the Appellant pays the Respondents costs of £4,695.15 but that this order cannot be enforced without the express permission of this Tribunal, to be sought on application (supported by evidence). The effect of such an order is that, if the Respondents have evidence which they consider sufficient to establish that the Appellant has the means to pay costs of £4,695.15 (for example, by the confirmation of discovery assessments) then they may apply to the Tribunal for permission to enforce the costs order. There is no time limit for the Respondents to make such an application. If any such application is made, the Appellant will have the opportunity to respond. Unless the Tribunal grants permission, the order for costs cannot be enforced.

67. I recognise that orders of this type can be unsatisfactory for both parties: for the Respondents because they have the order they sought, but cannot enforce it without permission; and for the Appellant because he has the threat of the costs order being enforced at a later date. It seems to me that that is an unfortunate consequence of the stalemate the parties appear to be in. I do not consider it to be the Respondents' fault that the Appellant has failed to comply with the information Notice served on him. However, as the Respondents have further information powers, it would appear to be time either that these were used, or action taken on the information already available.

Conclusion

68. For the reasons set out above, this application is allowed. I agree that the Appellant acted unreasonably and, if he were demonstrated to be a man of means, it would be appropriate for him to pay the Respondents' costs in the sum of £4,695.15. However, as there is no evidence that the Appellant has the means to pay £4,695.15, the order for costs shall not be enforced except with the permission of this Tribunal, obtained upon application.

69. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 29 MAY 2019

Relevant parts of Section 29 of the Tribunals, Courts and Enforcement Act 2007

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

Relevant parts of Rule 10 of the Tribunal Procedure Rules

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under Section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; . . .

…

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) …

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment

of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

(b) …

(c) …

(7A) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

(8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings;