Appeal Court Ref 2019/0610

IN THE COURT OF APPEAL CIVIL DIVISION
ON APPEAL FROM THE HIGH COURT, BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)

B E T W E E N:

JOLYON TOBY DENNIS MAUGHAM QC

Claimant/Appellant

-and-

UBER LONDON LIMITED

Defendant/Respondent

STATEMENT OF REASONS WHY PTA SHOULD BE REFUSED

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1. This document sets out the Respondent's reasons why PTA should be refused. In summary, the decision of the Judge refusing a PCO involved the exercise of his discretion on well settled principles. The appeal does not have a reasonable prospect of success and there are no other compelling reasons for granting permission.

Ground 1

2. *Eweida* is clear and binding authority for the principle that a PCO cannot be made in private litigation: see the judgment of Lloyd LJ at [38] with whom Maurice Kay and Moses LJJ agreed:

> "In my judgment, the court cannot make a PCO in this case. This is not public law litigation, but a private claim by a single employee against her employer. A PCO cannot be made in private litigation".

3. This statement of principle was made following a detailed consideration of the PCO caselaw, including *Corner House*: see [15]-[29]. The Appellant cannot say that the judgment in *Eweida* was given *per incuriam*, nor can he point to any conflicting Court of Appeal decision, nor any inconsistent decision of the Supreme Court. In other words, none of the exceptions to the rule in *Young v Bristol Aeroplane Ltd* [1944] KB 718 applies in this case.

4. The Appellant is also wrong to assert that Lloyd LJ gave no reasons as to why a PCO cannot be made in a private law claim. On the contrary, at [15] *et seq*, Lloyd LJ explained the

general principles which gave rise to that conclusion, based on authority and the principled distinction between public and private law litigation. At [22], Lloyd LJ said that the approach in *Corner House* of limiting PCOs to public law litigation had itself been based on the Court of Appeal's review of the cases and in particular the basic principle of costs following the event in *McDonald v Horn* [1995] ICR 685.

5. Indeed, there is not a single case in which any Court or Tribunal has ever made a PCO in private litigation: i.e. litigation asserting a private law cause of action, brought against a party which is not a public authority, and involving neither the High Court's supervisory jurisdiction, nor any alternative statutory remedy to JR (such as a statutory appeal in the tax tribunal).

6. The Appellant is also wrong to argue that this case is not private litigation. As the Judge rightly held at [49], "the only cause of action that Mr Maugham asserts is a private law entitlement to the provision of a VAT invoice, a claim that he says he can pursue against a private person, namely Uber." The Appellant has no answer to this.

7. Finally under Ground 1, the Appellant fails to address the fact that since *Corner House* was decided, legislation has been enacted putting PCOs on a statutory footing: see ss.88-89 of the Criminal Justice and Courts Act 2015; CPR 46.16-46.19, and the specific regime for Aarhus Convention claims under CPR 45.41(2)(a); and see the summary in the Judgment below at §25.2 and 25.3. It would be very surprising if Parliament and the Civil Procedure Rules Committee, having made these detailed rules for PCOs, which are limited to JR and Aarhus Convention claims, nonetheless envisaged there being room for the exercise of discretion to make PCOs entirely outside such cases.

Ground 2

8. Even if a PCO could properly be made in a private law claim, the Judge's approach to the exercise of his discretion in applying the *Corner House* principles, was unimpeachable. Each of the Appellant's main points are addressed in turn below.

9. First, the issue of whether HMRC should issue the Respondent ("**ULL**") with a "protective" VAT assessment is not an issue of general public importance. The Judge's reasoning at [57] *et seq* was correct. Indeed, the logic of the Appellant's case is that whenever someone disagrees with HMRC's treatment of a large taxpayer, he can challenge that (at no costs risk to himself) by asserting it is a matter of general public importance. That cannot be right.

10. The Appellant also has no answer to the point made by ULL and recorded by the Judge at [65], that the proper procedure prescribed by Parliament for the VAT status of ULL's

supplies to be determined, is by ULL being able to challenge any VAT assessment in the Tax Tribunal. It is not by a private law action brought by the Appellant seeking a VAT invoice.

11. The Judge was also correct to hold at [70] to [72] that if the Appellant's real complaint is against HMRC, then he should bring a JR claim against them. The Appellant has asserted in his various witness statements in this litigation that HMRC have acted outrageously and inexplicably in not issuing protective VAT assessments against ULL. In the Appellant's Skeleton, he asserts at §3(ii)(b) and §37 that a JR claim would nonetheless be "impossible" and that no arguable case for permission could be advanced. In that context, it is regrettable that the Appellant has failed to bring to the Court's attention the fact that on 6 March 2019 (i.e. 12 days before the Notice of Appeal was issued herein), the Appellant through Irwin Mitchell solicitors, wrote a detailed Judicial Review PAP letter to HMRC, giving notification of an intended claim challenging HMRC's "ongoing failure to raise assessments in respect of Uber", which the Appellant asserts is unlawful on several grounds, including allegations of misdirection as to the nature of HMRC's statutory powers, having regard to irrelevant factors, failure to follow published policy; and *Wednesbury* irrationality.

12. Finally, none of the other alleged errors by the Judge in the exercise of his discretion raise any arguable points. In particular, the Judge was right to take into account the fact that the Appellant's claim has been crowd funded by the black cab trade: see [77] to [87].

Challenge to Judge's Summary Assessment

13. There is no arguable error here. The high costs of this PCO application were generated by the large volume of evidence served by the Appellant (including three witness statements plus lengthy exhibits); his reliance on 39 authorities; the multiple Skeleton Arguments filed; the fact that the hearing had to be adjourned twice by reason of the Appellant's conduct of the case; etc. The Appellant also fails to mention that his own statement of costs filed for the Summary Assessment was for £72,499.50 - i.e. almost 5 times the amount which he says ULL should now recover. And that is notwithstanding that his legal team were working on very discounted rates (his estimate of the discount was 75%). Further, the total number of hours spent by ULL's solicitors on documents and attendances was lower than that spent by the Appellant's solicitors.

14. For these reasons, the Court is invited to refuse PTA.

SAM GRODZINSKI QC

2 April 2019