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Case No. CO/3626/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Date: Friday, 13th October 2017

Before:

MR JUSTICE HOLMAN

B E T W E E N :

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THE QUEEN ON THE APPLICATION OF
SEABROOK WAREHOUSING LIMITED

Claimants

- and -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

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MR A WEBSTER QC and MR M FIRTH (instructed by Morrisons Solicitors) appeared on behalf of the claimants.

MR B HAYHURST (instructed by Her Majesty's Revenue and Customs) appeared on behalf of the defendants.

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J U D G M E N T (as approved by the judge)

MR JUSTICE HOLMAN:

1 These are applications for permission to apply for judicial review and for interim relief by way of an injunction. They were directed to be listed for oral hearing by the single judge who first considered them on paper. As a result, I have had the benefit today of sustained, albeit necessarily brief, argument by Mr Alistair Webster QC, well supported by Mr Michael Firth, on behalf of the claimants, and Mr Ben Hayhurst on behalf of the defendants. I have been particularly grateful to all counsel – well supported, I am sure, by their legal teams – for the cogency and expertise of their arguments today. As so often, the quality of the argument has not made the task of the judge any easier, for it serves only to highlight the weight of the conflicting considerations in this particular case.

2 It is clear that in general terms the case occupies the same legal and factual territory as, and raises similar issues to those raised in, the case of *HT & Co (Drinks) Ltd v the Commissioners for HM Revenue and Customs* [2015] EWHC 659 (Admin), in which Cobb J handed down a written judgment on 12 March 2015. In that case also, he was considering an application for permission to apply for judicial review and a linked application for interim relief. On that occasion he reserved his judgment, and about a week later handed down a magisterial judgment which had obviously taken considerable preparation. I myself cannot indulge in that expansiveness in this case. Today is the last day of my current sitting in the Administrative Court. The time, as I speak, is 4.20 pm. On Monday I start with a very full list and the demanding work of the Family Division. So I must necessarily give a short ex tempore judgment today.

3 The essential factual context is as follows. The claimants are, and remain, authorised warehousekeepers for the purposes of, and pursuant to, the Warehousekeepers and Owners of Warehoused Goods Regulations 1999. They have indeed been so authorised ever since 1999, some 18 years. Later, they became also duty representatives within the meaning of, and for the purpose of, those regulations.

4 In October 2014, the defendants, HMRC, published a document called Excise Notice 196 pursuant to those regulations. In general terms, the effect of EN 196 was to impose upon warehousekeepers who were duty representatives a condition of due diligence. This required them, amongst other matters, to carry out what are known as FITTED checks. FITTED apparently stands for the Financial health of the company you intend trading with; the Identity of the business you intend trading with; the Terms of any contracts, payment and credit agreements; Transport details of the movement of the goods involved, whether or not you are directly involved in this; Existence/provenance of goods – where goods are said to be duty paid you should normally seek sufficient detail to satisfy yourself of the status of the goods; and the Deal, understanding the nature of the transaction itself.

5 As I understand it, a considerable body of warehousekeepers who are duty representatives have accepted, and purport to comply with, the clearly onerous duties and obligations which EN 196 and the requirement of FITTED checks impose upon them. These claimants, however, took the view, really from the outset, which they continue to maintain, that the requirements of EN 196 shift unlawfully and unfairly onto the warehousekeeper duties of making checks which should properly be the responsibility of HMRC themselves. This clearly led to a prolonged period of dialogue between these particular warehousekeepers and HMRC. As I understand it, there were a number of meetings; there has been a great deal of correspondence; but neither appears to have shown much willingness to shift their ground.

6 Matters came to a head during 2017. On 6 March 2017, HMRC wrote what is headed as a "Minded to revoke letter". This document now begins at bundle 1, tab 4, p.78 and itself extends to about 12 pages. In it, HMRC set out with some degree of detail and particularity why they considered, as indeed they still do consider, that the claimants are not a fit and proper company to continue to be approved as a duty representative. It is to be noted that at para.9 of that document, now bundle p.80, HMRC clearly state that:

> "It is also evident that SWL [the claimants] is failing to adhere to its **own** internal Due Diligence Policy document. In this regard, HMRC have noted in particular that..." [emphasis in the original document]

and their contentions are then set out. So, pausing there, Mr Hayhurst is at pains to stress today that the reason why HMRC did ultimately revoke the duty representative approval was not limited to the dispute between the claimants and HMRC as to whether or not the claimants should be put under the duties imposed by the document EN 196. It was also because, in the opinion of HMRC, they were not even reliably applying and adhering to their own internal due diligence policy.

7 The claimants replied to that "minded to revoke" letter by a reply dated 20 March 2017. That document is now at bundle 1, tab 4, p.314 and extends to almost 50 pages. It certainly does engage in detail and with particularity with what was said in the "minded to revoke" letter, and for the limited purposes of today Mr Webster particularly focused on para.56 of that letter, now at bundle p.328. HMRC had said that in relation to certain seizures there had been a loss to the Revenue of excise duty of £347,521. At para.56 of their letter, the claimants explained that that was a loss that had occurred further downstream (my word, not theirs) of a series of movements of the goods concerned. In effect, the position of the claimants is that they cannot reasonably be required to apply due diligence as to the manner in which dutiable goods may be dealt with after leaving their own warehouse.

8 That letter, as I say, was dated 20 March 2017. HMRC did not reply to it until their letter of 20 June 2017. In that letter, they say on the first page, now bundle 1, tab 3, p.41:

> "A response to the minded letter was received from SWL representative 20 March 2017. This was a lengthy letter consisting of 48 pages, plus annexes, which the Commissioners have considered very carefully; this has, of necessity, taken time.
>
> We have taken account of your representations, but the Commissioners' concerns as to the quality of your due diligence on your duty representative customers remain."

I must, certainly for the purposes of today, accept that what the writer of that letter wrote on 20 June 2017 was in good faith and true, namely that in the period between 20 March and 20 June the Commissioners had considered very carefully the lengthy response of the claimants to the "minded to revoke" letter.

9 The decision of the Commissioners as announced in that letter of 20 June 2017 was that:

> "The Commissioners have maintained their position and conclude that you are not a fit and proper person to hold this registration."

As a result of that, the registration was revoked, although as I understand it a run off period of a small number of weeks was allowed to enable the goods then warehoused with the claimants to be dealt with in an orderly way.

10 There are attached to the letter of 20 June 2017 two annexes. The first, annex A, deals in some detail with the numbered paragraphs in the claimants' own letter under reply of 20 March 2017. With regard to para.56, to which Mr Webster made particular reference today, the Commissioners said, now at bundle p.43(c):

> "The Commissioners accept the point that the tax losses HMRC make reference to in the 'minded to' letter, do not relate to SWL as the loss took place after SWL had handled the goods and delivered them to [another warehousekeeper], and that there is no database to consult in relation to tax loss letters. The point the Commissioners are demonstrating here is that SWL's poor due diligence can lead to tax losses and that SWL allowed those goods into the country and for the onward movement from the warehouse to happen. Had SWL undertaken meaningful due diligence then the goods would never have been allowed into the supply chain."

It does seem to me that those observations by HMRC may raise as many questions as they answer, and this issue as to the duty upon the claimants in relation to future dealings with goods which have passed through their warehouse may require more thorough consideration at a later stage.

11 The claimants took two steps in reaction to the revocation of their duty representative registration. They commenced the present claim for judicial review; and they commenced a statutory appeal to the First-tier Tax Tribunal pursuant to the provisions of section 16 of the Finance Act 1994. As I understand it, the claimants have recently proposed, or sought that their statutory appeal to the First-tier Tax Tribunal should be stayed pending the outcome of their claim for judicial review.

12 Logically, the first matter which I have to consider today is whether or not to grant permission to apply for judicial review. If I do grant that permission, then the proceedings for judicial review will subsist and continue, and the court will clearly have a power to make orders for interim relief, including the granting of an injunction, within that judicial review. If I refuse permission to apply for judicial review, then the claim for judicial review as such would necessarily come to an end. That would not, however, exhaust the power of the High Court to grant an injunction. It is very well established that the High Court may grant injunctions and other orders in support of lower courts and other statutory tribunals. Indeed, at para.81 of the very recent decision of the Court of Appeal in *ABC Ltd v The Commissioners for HM Revenue and Customs* [2017] EWCA Civ 956, that is made very clear. At para. 81, that court said:

> "Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be."

It thus follows that even if I refuse permission to apply for judicial review, the High Court (in practice myself, today) will have to consider whether or not to exercise its power to make such an ancillary injunction.

13 The claimants very strongly submit that in a whole range of ways the relevant regulations and also the publication EN 196 are unlawful. They say that they offend EU law. They say that they are discriminatory against foreign owners of dutiable goods. They say that they are disproportionate to any legitimate purpose. By their claim for judicial review they seek

a range of declarations which are set out in paras.(iii) to (vii) of the section "remedies sought" at the very outset of their statement of facts and grounds in support of this claim for judicial review. They seek also the interim injunction and that the decision of HMRC be quashed.

14 Mr Webster has rightly said that the statutory First-tier Tax Tribunal is not itself empowered to make declaratory orders. The extent of the power of the tribunal under section 16(4) of the 1994 Act is confined to a power to direct that the decision in question is to cease to have effect, and certain consequential powers. The only express basis within section 16(4) upon which the First-tier Tax Tribunal can exercise those powers is if they are satisfied that the Commissioners "could not reasonably have arrived" at the decision in point. So Mr Webster submits that there is no power in the tribunal to make any of the declarations that the claimants seek, and, further, that the only trigger to the exercise of any power is that the decision is one that HMRC could not reasonably have arrived at. He therefore submits that it is much more appropriate, and in his submission necessary, that these issues between these parties should be resolved by proceedings in judicial review in which this court can, if it thinks fit, make declarations.

15 On behalf of HMRC, Mr Hayhurst has expressly said, and conceded that all the issues that the claimants raised as to the lawfulness of the underlying regulations and/or the document EN 196 can properly be considered and ruled upon by the First-tier Tax Tribunal. He accepts that that tribunal does not have a power to make declarations as such, but he also concedes that as necessary steps in their reasoning they can adjudicate upon all the matters that the claimants wish to raise as to the lawfulness of this whole scheme.

16 In para.15 of the "Claimants' skeleton argument for permission hearing (13 October 2017)", Mr Webster and Mr Firth nevertheless put the following rhetorical question:

> "Put another way, the jurisdiction of the FTT assumes the lawfulness of the duty representative regime. What decision could the FTT reach, in accordance with its

> jurisdiction, if it considered and accepted that the whole regime was unlawful? A declaration that HMRC's decision to withdraw registration was unreasonable would be obviously unsuitable."

17 With respect to Mr Webster and Mr Firth, I do not find the answer to their rhetorical question a difficult one. It seems to me that, empowered by the concession of Mr Hayhurst, if the FTT consider and accept that the whole regime is unlawful, they will be well able boldly to say so. It is true that they could not make a formal declaration, but a holding to that effect by a specialist tribunal of this kind would (subject to any onwards appeal) be very far-reaching.

18 Mr Webster makes a separate point that a statutory power based on being satisfied that HMRC "could not reasonably have been arrived at" the decision is not wide enough, or may not be wide enough, to empower the First-tier Tax Tribunal to investigate and rule upon the underlying lawfulness of the scheme and regime itself. I cannot accept that submission. If it be right, as the claimants argue, that the material parts of these regulations and/or the document EN 196 are unlawful, then it could not be reasonable of HMRC to take action pursuant to a regulation or document which is itself unlawful. So it seems to me, as Mr Hayhurst has conceded, that it will be well within the power of the tribunal to consider all the arguments which the claimants wish to develop as to the underlying lawfulness of the scheme and the regulations, as well as also, of course, to deal with the fact-specific issues in this case.

19 In *HT*, to which I have referred, Cobb J said at para.39:

> "There is a degree of overlap between the two jurisdictions given the common focus on the 'reasonableness' of the decision-making; in the area of the 'overlap' the jurisdiction of the FTT must prevail, for where a statutory scheme of this kind exists it would normally be wrong for the High Court to permit challenges on the same ground to proceed by way of judicial review."

20 I respectfully agree with what Cobb J said there; and, for similar reasons as he deployed in that case, I have come to the conclusion that I should refuse permission to apply for judicial review in this case. I wish to stress that I do not refuse permission because of any view one way or another as to the arguability of the claimants' case. I am quite willing to assume, for the purposes of this hearing and my decision today, that all or at any rate significant parts of the claimants' case as developed in their statement of facts and grounds are reasonably arguable. But it does seem to me, as it seemed to Cobb J, that there is obvious overlap between the jurisdiction of the specialist tribunal and the powers which have been entrusted to it by Parliament by the Finance Act 1994, and the scope of the present judicial review. This court should not, without good reason, stray into areas which Parliament has carved out to be resolved within the tribunal system. It does not seem to me that there is any good reason in this case for it to do so. So I refuse permission to apply for judicial review.

21 As I explained earlier, that decision is not, however, conclusive of the claim for interim relief, albeit that that claim might have to be recast with procedural adjustments into a freestanding set of proceedings.

22 In order to give context to the claim for interim relief, it is, I think, important to stress (although it emerges from the facts that I have already briefly summarised) that this decision by HMRC was not a sudden one. As I have said, there had already been clear communication between the parties for an appreciable period of time which came to a head with the "minded to revoke" letter of 6 March 2017. That letter clearly warned the claimants of the then state of mind of HMRC and their then provisional view that the claimants were not fit and proper people to remain registered as duty representatives. It set out their reasons with some detail and particularity, and it gave to the claimants a fair and ample opportunity to respond. The claimants did indeed respond in great detail by their letter of 20 March 2017. As I have said, HMRC then took three months, as they assert, very carefully to consider that letter before giving their final reasoned decision on 20 June 2017

to revoke the registration. So there has been no evident unfairness in the history here, in that HMRC gave due notice; they gave their reasons; they gave an opportunity to the claimants to respond; and they carefully considered that response.

23 In deciding whether or not to grant interim relief, it seems to me that I should be guided by the most recent decision in this particular territory, namely that of the Court of Appeal in *ABC Ltd*. At para.81, Burnett LJ, with whom the other members of the court agreed, said:

> "In my opinion, a statutory appeal against a refusal of approval which is unable to provide a remedy before an appellant has been forced out of business, rendering the appeal entirely academic … is capable of giving rise to a violation of Article 6 which the High Court would be entitled to prevent by the grant of appropriate injunctive relief under section 37 of the 1981 Act. To that extent, the exceptions enumerated [in an earlier case] can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be."

Pausing there, Mr Hayhurst emphasises the words "to a high degree of probability" where they appear within that quote. At para.84, Burnett LJ said:

> "In cases of this sort, the hierarchy of a claimant's attempts to safeguard its position pending appeal [viz the statutory appeal to the First-tier Tax Tribunal] should be:
>
> (i) seek temporary approval from HMRC...;
>
> (ii) seek expedition from the First-tier Tax Tribunal;
>
> (iii) consider an application for an injunction in the High Court."

24 So far as the present case is concerned, the claimants did seek temporary approval or temporary registration from HMRC, but they have refused to give it. So far as I am aware, the claimants have not currently taken any steps to seek expedition from the First-tier Tax Tribunal, and indeed at this moment (although that may now rapidly change) their stated position has been to seek a stay of that appeal.

25 So far as an application for an injunction in the High Court is concerned, Burnett LJ continued at para.85 as follows:

> "A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. ..."

Pausing there, the reference to an appeal being "ineffective" is clearly a reference back to para.81 and the appeal being rendered entirely academic because, before it could be heard, the appellant has been forced out of business. Continuing with para.85:

> "It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. ... Whilst the jurisdiction exists to grant interim relief in this way, its use is likely to be sparing because steps (i) and (ii) identified above should provide practical relief in cases which justify it and the circumstances in which it would be appropriate for injunctive relief to issue will be rare."

26 As well as the observations in that judgment, I bear in mind in a general way as part of the background to my decision that Parliament clearly could have conferred upon the First-tier Tax Tribunal, via section 16 of the Finance Act or some other route, a power to grant interim relief of the kind sought here, and it chose not to do so.

27 It seems to me that I must first consider whether or not these claimants have provided sufficiently independent and compelling evidence that the appeal would be ineffective if I do not grant the requested injunction. I must also perform some balancing exercise between the consequences for the claimants if an injunction is not granted, and the potential consequences from the point of view of the defendants if one is.

28 This case ultimately concerns the risk of loss to the Revenue of excise duty. Patently, at an interim stage, one could not contemplate serious damage to a functioning company, let alone

its being forced out of business, if the loss to the Revenue in point was merely a small number of thousands of pounds.

29 In support of their application today, the claimants rely on evidence that they had earlier filed, but most specifically on a report dated 12 October 2017 by Michael Watts, FCCA, of Haslers Corporate Finance LLP. That report is dated 12 October 2017, which is yesterday, and Mr Hayhurst has complained about its very late delivery, the more so as para.1.1 of the report describes that it was in fact originally prepared in July 2017 and that it may require updates which it has not received. So I suppose the thrust of Mr Hayhurst's complaint is that the claimants have effectively been sitting on this report for two to three months and produced it, like a rabbit from a hat, only the day before this hearing.

30 Whilst I have some sympathy with that submission and the complaint of HMRC, the only consequence if I were to refuse to consider this report today might be an adjournment and more legal costs. So I have been willing to consider this report today, and indeed I invited Mr Hayhurst to tackle it head-on, notwithstanding the shortness of notice.

31 The overall conclusions of the report are summarised in para.7 and in particular at paras 7.6 to 7.9. Mr Watts says:

> "7.6. If the duty rep decision is not restored then it will lead to overall group losses, as Seabrook Warehousing Ltd [the claimant] is the major contributor to the group and this will lead to a breach of banking covenants for the group.
>
> 7.7 A breach of covenants is likely to lead to the group being put into administration and substantial job losses or alternatively the group being required to repay all borrowings.
>
> 7.8 I do not believe the parent company of Seabrook Warehousing Ltd could seek alternative funding in the event of a demand for repayment from the bank, whilst the appeal is outstanding.
>
> 7.9 In my opinion this would lead to the group being forced into an insolvency process."

32 One needs, however, to delve further into the report. First, I note that Haslers Corporate Finance LLP are themselves the auditors to this group, and Mr Hayhurst questions whether a firm which is already retained as auditors properly has that degree of independence which Burnett LJ was contemplating in para.85 of his judgment in *ABC*. I pass over that, however, and consider the report on its terms.

33 It does suffer the weakness that it only describes the position as at July 2017 and, frankly, is not up to date. At para.3.15 of the report, it is clearly spelled out that the holding company owes to the claimants, in round terms, £6.2 million, although Mr Watts comments:

> "It was clear that although the holding company could potentially support the business in returning funds owed to the company, it would not make business sense to fund a loss-making company, with no clear end in sight."

It seems to me that decisions with regards to "business sense" are quintessentially matters for the claimants, and maybe the holding company and the group as a whole, to decide for themselves.

34 The proposition in para.3.15 is that, subject to business sense, the holding company "could potentially support the business in returning funds". That is qualified by para.3.16 where Mr Watts says:

> "It should be noted that the holding company does not have liquid funds to pay this amount back to Seabrook Warehousing Ltd."

But one learns further on in the report, from appendix 3 and a heading "overheads", and within that a heading "management charges", that at the moment the claimants pay management charges to the holding company at the rate of £75,000 per month, plus VAT. Ignoring for a moment the VAT, that is payments at the rate of nearly £1 million per annum by the claimants to the holding company, which itself owes to the claimants £6.2 million. So even if the holding company lacks the liquidity currently to pay £6.2 million to the

claimants, the question certainly arises whether or not the claimants should be paying at the rate of £75,000 per month back to a holding company which owes to them so much more.

35 The report sets out at para.4 certain forecasts on the basis of the company not having its duty representative registration, or regaining it. One sees from the table there that in the actual year to 31 July 2016 (I observe that no figures are given for the year to July 2017) the total sales of the company were, in round figures, £17.3 million. That effectively was their turnover, and upon that there was a bottom-line earnings before interest, taxation, depreciation and amortisation of, in round figures, £815,000. The forecasts for the year to 31 May 2018 indicate that if duty representative registration is restored the company might achieve sales (ie turnover) in round figures of £15.7 million, upon which they may expect to make an EBITDA of about £233,000. If, however, the registration is not restored then their sales are forecast at just over £14 million with a bottom-line loss of about £470,000. So that table gives some indication of the scale of the issues in this case. A forecast loss of £470,000 could, of course, be completely eliminated if the company paid less back in holding charges to its holding company which already owes to it £6.2 million.

36 Further, the difference between the forecast turnover in the year to 31 May 2018 of about £14 million and the actual turnover in the year to 31 July 2016 of £17.3 million is about £3.3 million. So although there is clearly a considerable loss to this company from the current revocation of its registration, it is still able to engage in very considerable trade. In fact, the loss on those figures is of the order of just under 20 per cent of turnover. The report makes plain that there could be redundancies. It contemplates redundancies by September 2017. That month has now passed, but nothing is said as to whether any redundancies have in fact taken place.

37 Despite the prognostications by Mr Watts in the report, I am not myself satisfied that this report really amounts to the kind of "compelling evidence" that the Court of Appeal contemplated in *ABC* that is required before an injunction is made in circumstances such as

this. But even if I am wrong about that, I would still have to perform some balance. The HMRC have clearly set out in their letters to the claimants, which currently effectively stand as their evidence in this case, that there has already been very considerable loss of duty to the Revenue from goods which have been warehoused with these claimants. I am unclear as to the full extent of that loss, but it certainly is said to be at least, in round terms, £347,000. The HMRC say that during 2016 there were 59 seizures by them of goods warehoused with these claimants, which, they say, is a very high number compared with warehouses generally.

38 The HMRC have their duties ultimately to taxpayers generally. It seems to me that they have given very considerable consideration to the facts and circumstances of these particular claimants. They did not act precipitously but with considerable due warning, and even if (which I do not) I felt that there was sufficiently compelling evidence of grave harm to the claimants, I would not be minded to grant an injunction in view of the equally serious potential loss to the Revenue in these circumstances.

39 So for those reasons, as well as refusing the application for permission to apply for judicial review, I refuse the application for an interim injunction in this case.

Will you be able, gentlemen, to draw up a short order that deals with that and lodge it with the associate early next week?

MR WEBSTER: Yes.

MR JUSTICE HOLMAN: Thank you.

MR HAYHURST: My Lord, I make an application for costs summary assessment.

MR JUSTICE HOLMAN: I think there is a document which I did see but I'm not sure that I can quickly put my hands on it. Do you have another copy?

MR HAYHURST: You had part 1 of the costs schedule; this is part 2, with the costs up to date.

MR JUSTICE HOLMAN: When was this delivered to the other side?

MR HAYHURST: This morning.

MR JUSTICE HOLMAN: Is that sufficiently in compliance with the rules? I thought a clear 24 hours has to elapse? Anyway, let me have a look. You are saying this is the entire bottom-line costs of HMRC in dealing with this entire claim for judicial review; is that right?

MR HAYHURST: No, that's part 2; part 1 has already been lodged with the court and the claimant.

MR JUSTICE HOLMAN: I see. What is this one dealing with?

MR HAYHURST: The period since the grounds of defence were served, and today.

MR JUSTICE HOLMAN: What were the costs prior to that?

MR HAYHURST: £8,937.

MR JUSTICE HOLMAN: So that's the costs of the Inland Revenue up to and including what step?

MR HAYHURST: The grounds of defence.

MR JUSTICE HOLMAN: That includes the grounds of defence.

MR HAYHURST: That includes the grounds of defence, and then on top that the document that I have just handed now, of which I think the total is £16,000 or thereabouts.

MR JUSTICE HOLMAN: This is just what I am asking you: what is the bottom-line figure to the HMRC from the inception of this claim for judicial review to the conclusion of today?

MR HAYHURST: Approximately £24,000.

MR JUSTICE HOLMAN: Is it 16 plus 8-9, or is that inclusive?

MR HAYHURST: Yes, it's 16 plus the 8.

MR JUSTICE HOLMAN: Are you sure?

MR HAYHURST: Yes.

MR JUSTICE HOLMAN: I mean, I've got higher up on the page "8902", which is very close to your 8-9, so is that not added in to this total? (Pause). Isn't that already here?

MR HAYHURST: No. My Lord, I'm looking at the first schedule now.

MR JUSTICE HOLMAN: I can't find the first schedule at the moment.

MR HAYHURST: The first schedule, the figure is £8,937.60 and the document you've got I think there is a different figure in it.

MR JUSTICE HOLMAN: All right, so it is just coincidentally around about 8.

MR HAYHURST: It is coincidentally.

MR JUSTICE HOLMAN: So it is £8,937 plus £16,525.

MR HAYHURST: Yes.

MR JUSTICE HOLMAN: Which is £25,462, I think.

Right, well there are two issues: one is the principle and the other is the quantification. So what do you say about the principle, Mr Webster? I am very, very sorry. I realise it's a bad outcome for your client and I'm sorry about that, but judges in the end have to make decisions, and I have made it, though I have a lot of sympathy with your clients. That's the decision; what do you say about the claim for costs?

MR WEBSTER: Will you excuse me? (Pause). These issues on my Lord's ruling will have to be dealt with by the FTT----

MR JUSTICE HOLMAN: They will.

MR WEBSTER: -- and therefore there is a considerable amount of cross-preparation, as it were, that can be deployed in any event in the FTT. So whilst in principle an order for costs should follow, my Lord ought to consider whether firstly it should be scaled back because it is going to be used in the proceedings that you deem the appropriate ones; and I say in any event in terms of quantum, for a one-day hearing----

MR JUSTICE HOLMAN: It's not just for the one-day hearing.

MR WEBSTER: One day, plus the preparation. But £16,000, et cetera, for the overall figure does seem rather steep.

MR JUSTICE HOLMAN: Well, I'm afraid this is what happens, isn't it, once people resort to litigation. The costs clock starts ticking very, very rapidly. I mean, the biggest single item on this is work done on documents. Does this include work done by you, Mr Hayhurst?

MR HAYHURST: I'm sure it will. Counsel's fees are there at the bottom, 4137.

MR JUSTICE HOLMAN: That's the brief fee. Where is Miss Natasha Barnes?

MR HAYHURST: She's another counsel that assisted.

MR JUSTICE HOLMAN: She's not here.

MR HAYHURST: Not here. Can I make the point that there will be no costs in the FTT because it's not been deemed a complex case, as I understand it. So there will be no chance for HMRC to recover costs within the FTT procedure.

MR JUSTICE HOLMAN: It's not a category of case in which -- even if you are triumphant on every aspect of the case, you could get your costs from them?

MR HAYHURST: In what is categorised as a complex case, where the appellant and the FTT has not opted out, in that circumstance costs shifting depending on (inaudible). But we're not in the complex category and so in this case there will be no costs provision in the FTT.

MR JUSTICE HOLMAN: I think the alternative, Mr Webster has effectively agreed that in principle he can't resist the application for costs. He makes the point there may be overlap, he raises an eyebrow at the scale of this. It is now 5.30 pm. I'm not sure that I really have sufficient material fully to assess these costs, and I can say that you are to have your costs, to be the subject of detailed assessment if not agreed, and I think the solicitors can go away and work out, if they possibly can, what offset should be made and agreed upon.

So my ruling is that the claimants are to pay the costs of HMRC of and incidental to the claim for judicial review, including this hearing, to be the subject of detailed assessment if not agreed.

MR WEBSTER: Yes.

MR JUSTICE HOLMAN: Can that be woven in also?

MR HAYHURST: Yes.

MR JUSTICE HOLMAN: Very well.

MR JUSTICE HOLMAN: Is it anticipated that anybody will order a transcript? The only reason I ask the question is, if a transcript is going to be ordered and I have to approve it I shall retain the documents in order to correct quotations and the like.

MR HAYHURST: We will be requesting a transcript.

MR JUSTICE HOLMAN: All right, then I will retain the documents.

Mr Webster, inevitably in a situation like this, I'm afraid, one side is successful and the other is unsuccessful. I appreciate that it's a bad outcome for your clients and the gentleman with you. I'm sorry about that. Judges in the end have to hear both sides and have to come to a decision and I have come to a decision. So I'm sorry, but that is the decision.

All right, well thank you all very much indeed for your patience throughout a very long day. Thank you.

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This transcript has been approved by the Judge (subject to Judge's approval)