

Analysis

Sharing bundle preparation costs

SPEED READ Orders for the sharing of bundle preparation costs, where one party is responsible for their preparation, will be 'orders for costs' and generally outside the tribunal's jurisdiction. Pending the Supreme Court's reconsideration of this approach in *Eclipse 35*, litigants can avoid paying for excessive document requests from the other party by ensuring shared document preparation by agreement or tribunal order.



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In *Eclipse Film Partners No. 35 LLP v HMRC* [2014] EWCA Civ 184 (*Eclipse 35*), the Court of Appeal decided that when one party is responsible for preparing the hearing bundles, an order requiring the other party to contribute to the costs of bundle preparation is not an order within the scope of rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules, SI 2009/273, but an 'order for costs' pursuant to rule 10. Therefore, ordinarily, the First-tier Tribunal (FTT) has no jurisdiction to make it. In circumstances such as those in *Eclipse 35*, this may be particularly costly to litigants. The Supreme Court has granted permission to appeal. In the meantime, litigants will need practical guidance on how to deal with this issue.

The rules

There are three circumstances in which the FTT can make an order for costs:

- if a wasted costs order is made;
- if a party has acted unreasonably; or
- if the hearing is a complex appeal and the appellant has not requested that the proceedings be excluded from such liability (see rule 10 (1)).

Eclipse 35

Background: *Eclipse 35* was a complex appeal and the appellant requested the costs exclusion. The only means by which an order for costs could be made was in the first two circumstances set out above.

In March 2011, a case management order was made in which the appellant was ordered, by agreement, to prepare all the bundles for the substantive hearing. The cost of this preparation rested on the appellant. It later became apparent that HMRC was requesting the inclusion of a substantial (and in the appellant's view, excessive) number of documents.

In total, 736 lever arch files of documents were required for the substantive hearing, at a total cost of over £200,000, in circumstances where most were requested by HMRC. As a result, in June 2011, the appellant made an application for the costs of producing the bundles to be shared. The argument for the sharing of these costs, which the FTT accepted,

was that such an order would not be an order for costs under rule 10 and could be made pursuant to the FTT's case management powers under rule 5.

After the substantive hearing, HMRC successfully applied to the Upper Tribunal to set aside the costs sharing decision, on the basis that it was in fact an order for costs and this decision was upheld by the Court of Appeal.

The effect of the decision: As matters stand, there is no jurisdiction for the FTT to make a freestanding order requiring the sharing of bundle preparation costs, except in complex cases where costs sharing has not been excluded, and in circumstances where wasted costs can be sought or costs can be pursued for unreasonable conduct.

It follows that this approach applies to any case management order requiring costs to be shared, unless there is joint preparation. In these cases, costs sharing would automatically follow pursuant to rule 5.

This may seem harsh, particularly in these circumstances, where the case is complex and the non-paying party has required the inclusion of a substantial body of documents after the paying party has agreed to prepare all the bundles. Nonetheless, pending the appeal, there are practical means by which parties can protect themselves from incurring the full burden of such costs.

Action points

Firstly, if it is clear from the outset that a party is seeking to include an excessive number of documents, it can be agreed that each party provides its own documents, or that each provides its own bundles in respect of documentation considered unnecessary or excessive by the other party. If agreement cannot be reached, an application can be made to the FTT for the preparation of the bundles to be shared.

Secondly, if one party has already agreed to bear the burden of providing the bundles, that party can apply to amend the initial case management order, so that the non-paying party is required to provide the extra documents upon which it relies. Pursuant to rule 5, both of these approaches would result in each party bearing the costs of the documents or bundles that it has prepared.

Thirdly, it may be possible for the parties to agree, by consent order (or otherwise), that one party prepares all the bundles and both share the cost. It is unclear whether such an order (or its enforcement) would be considered an order for costs, but given its dependence on agreement, arguably it would not be seen to undermine the policy behind rule 10.

Finally, in an appropriate case, the threat of a wasted costs order or a costs order for unreasonable conduct, made in advance of the preparation of the bundles, may be sufficient to encourage the non-paying party to reconsider the inclusion of many of its documents.

If one or more of these approaches is taken, litigants will hopefully be able to avoid the substantial burden of having to bear the full preparation costs when found in situations similar to that of the appellant in *Eclipse 35*. ■

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Cases: *Eclipse Film Partners v HMRC* (4.3.14)

Back to basics: *Costs in the tribunal* (Liesl Fichardt, 30.5.13)