



CA/2013/0003

**IN THE FIRST TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

His Honour Judge Gerald
24th December 2013

MOUNTSTAR (PTC) LIMITED

Appellant

-and-

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

DECISION

Permission to appeal is refused.

REASONS

Introduction

1. On 17th October 2013 the Tribunal dismissed Mountstar's 31st May 2013 application to review and quash the 12th April 2013 decision of the Commission to open an inquiry into the registered charity known as The Cup Trust and appealed against the appointment of the Interim Manager made on 26th April 2013.
2. On 14th November 2013 Mountstar applied for permission to appeal the Tribunal's dismissal of the appeal against the appointment of the Interim Manager. Mountstar does not seek permission to appeal the dismissal of the appeal against the opening of the inquiry. Neither does it seek suspension of the decision to dismiss the appointment the Interim Manager pending the appeal.
3. The application for permission to appeal to the Upper Tribunal (Tax and Chancery Chamber) is under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules" or "Rule").
4. By Rule 42(5) the applicant for permission to appeal to the Upper Tribunal must identify the alleged error or errors of law in the decision and state the result the party making the

application is seeking. Where the substance of the appeal is that the Tribunal made findings of fact which no reasonable tribunal properly directed in law could have made, the following citation from the judgment of Lord Justice Evans in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 is material:

“It follows, in my judgement, that for a question of law to arise in the circumstances, the appellant must first identify the finding challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunals’ conclusion was against the weight of the evidence and was therefore wrong”.

5. Those strictures apply here because, whilst the grounds of appeal set out in the six page Grounds of Appeal dated 14th November 2013 are characterised as errors of law, they are overwhelmingly concerned with the correctness of the judgement and findings of fact of the Tribunal on the evidence before it. The relief being sought is the quashing of the decision of the Tribunal and for the Upper Tribunal to substitute its own decision or remit to the Tribunal to decide as properly directed in law. Unless indicated to the contrary references to paragraph numbers are to those in the Grounds of Appeal.
6. On receiving an application for permission to appeal, the Tribunal must under Rule 43 consider whether to undertake a review of its decision pursuant to Rule 44. The Tribunal may review its original decision if it is satisfied there has been an error or errors of law. I will therefore consider whether the Grounds of Appeal identify what may be described as “errors of law” in the Tribunal’s decision and whether such can be described as significant in the context of the Decision as a whole.

Errors of law, and review

A central point

7. The central (and unchallenged) findings of fact are that Mountstar failed to make enquiries of and in relation to the Scheme which an ordinary prudent man of business would have made when (acting by Mr Mehigan and Mr Stones) it adopted the Scheme in January 2010 and considering its revival in June 2010 and when (acting solely by Mr Jenner) it considered HMRC’s requisitioning of information in late 2012 and early 2013.
8. Without those central factual findings being challenged at any of those three points in time the other challenges even if well founded (which for reasons give below are not), it can not be said that the ultimate decision of the Tribunal erred in law in allowing the continued appointment of the Interim Manager or was otherwise erroneous.
9. Those findings alone, together with the high level of parliamentary and public scrutiny and the need to increase and maintain public trust and confidence in the charity sector as a whole and their and specifically The Cup Trust’s and its charity trustee Mountstar’s accountability to donors, beneficiaries and the general public are sufficient to justify the continued appointment of the Interim Manager.

10. Further, even without those (unchallenged) findings, the highly unusual nature of the Scheme, its adoption and the continued role and involvement of Mr Jenner were together with the other factors referred to in the last paragraph sufficient to justify the continued appointment of the Interim Manager as stated in paragraph 244 of the Decision.
11. Thus, if (which is not the case) there had been any errors in law of any significance or materiality such as to cause the Tribunal to review its decision it would nonetheless have affirmed its Decision for that reason.

Ground 1 – failures to respond to HMRC and signing blank cheques insufficient to justify continued appointment of Interim Manager

12. Whether it was disproportionate to allow the continued appointment of the Interim Manager on grounds relating to the signed blank cheques and failure to respond to HMRC's enquiries is a question of judgment and discretion to be exercised in the context of the circumstances of the case.
13. Notwithstanding that Mountstar had responded to HMRC *just* before the appointment of the Interim Manager, it can not be said that the Tribunal erred in finding that the anterior failure to respond since September 2012 or so was sufficient to warrant the continued appointment of the Interim Manager. Without derogating from the totality of the material factors set out in paragraphs 206 to 216 of the Decision, the failure of Mountstar to review its continued participation in the Scheme *and* the continued need to consider issues of disclosure of material to and handling the claims to HMRC in the future (neither of which are challenged in the Grounds of Appeal) were sufficient particularly where on the evidence before the Tribunal the only remaining active Mountstar director was and is the conflicted Mr Jenner.
14. Likewise the signing of the blank cheques particularly where the only evidence relating to their signing was from Mr Jenner whose oral evidence and explanation of their signing was found to be unreliable and on the evidence before the Tribunal he was and is the only remaining active Mountstar director. See paragraphs 222 to 227 of the Decision.

Grounds 2 to 5 – conflicts of interest against the weight of the evidence

15. The essence of this aspect of the grounds of appeal is that the Tribunal erred in law in finding that there had been divers conflicts of interest and breaches of Mountstar's own conflicts policy because (a) it did not accept the unchallenged evidence of Mr Jenner that there were no conflicts or breaches of Mountstar's conflicts policy, (b) there was no evidence to support its findings and (c) the Tribunal failed to take into account various aspects of evidence.
16. Whether there is or are conflicts of interest is essentially a question of fact although questions of law do arise. With regard to the specific paragraphs of the Decision referred to in the Grounds of Appeal:-
 - (a) There are or can be no challenges to the general observations on conflicts of interest in paragraphs 142 to 147 of the Decision much of which adopted the submissions of Mountstar's counsel.

- (b) The Tribunal was entitled to make its general findings as to the nature of the conflicts of interest set out in paragraphs 148 to 158 of the Decision on the evidence before it.
 - (c) The findings at paragraphs 159 to 186 of the Decision relate to the enquiries and steps which Mountstar (mostly absent Mr Jenner as director) should have but failed to make and take as an ordinary prudent man of business, *not* that Mr Jenner participated in those decisions and was so conflicted.
 - (d) The Tribunal was entitled to make the observations concerning the receipt of and entitlement to receive fees it made in paragraphs 187 to 191 of the Decision but those *observations* were immaterial to its decision as therein stated.
17. Further, the central or underlying thrust of the Tribunal's findings (which it was entitled to make having seen him in the witness box) was that Mr Jenner did not understand, and was incapable of understanding, the nature and operation of conflict of interest generally or within Mountstar's adopted conflicts policy; and that there was no evidence that Mountstar (acting by Mr Mehigan and Mr Stones) had ever properly enquired of or probed Mr Jenner's various interests in the various entities involved and the Scheme as a whole. See in particular paragraphs 217 to 221 of the Decision.

Grounds 2, 3 and 6 – provision of inaccurate and misleading information to Commission

18. The essence of this aspect of the grounds of appeal is that the Tribunal erred in law in finding that Mountstar had provided inaccurate and misleading information to the Commission for various reasons because it was unsupported by or contrary to the evidence.
19. The Tribunal was entitled to make the findings it did in paragraphs 192 to 205 of the Decision on the basis of the evidence before it, much of which was unchallenged or provided by and based on inferences drawn from the evidence, from which it was self-evident that the information contained in the 26th October 2011 letter was inaccurate and misleading particularly when construed in the context of the broad nature of the questions posed by the Commission's 19th September 2011 letter.

Ground 7 – conflation of duties

20. Contrary to what is alleged, the Tribunal was mindful of the different duties owed by a corporate charity trustee and the directors of that corporation and preferred the submissions of Mountstar's counsel to those of the commission's: see paragraphs 142 to 147 of the Decision.

Ground 8 – Charities owe different duties to HMRC

21. Contrary to what is alleged in respect of paragraphs 150 to 152 of the Decision, the kernel of the Tribunal's decision is that whereas an "ordinary" taxpayer does not need to act as an ordinary prudent man of business when dealing with HMRC a charity trustee must do so. The fact of that duty being enhanced by the special privileges enjoyed by a charity is not an error of law.

Ground 9 – drawing of adverse inferences

22. Contrary to what is alleged in respect of paragraph 231 of the Decision, that paragraph *per se* draws no adverse inferences against Mountstar for its failure to call Mr Stones or Mr Mehigan, the only surviving and apparently (subject to what is said in the Decision) independent director of Mountstar. Further, the central allegations relating to the conduct of Mountstar were presaged in the Commission's various decisions which were the subject of the appeals by Mountstar to the Tribunal.

Ground 10 – characterisation of the Scheme as one which “might not be lawful”

23. The Tribunal does not characterise the Scheme as something which is *per se* unlawful. The Tribunal so characterises the concerns of an ordinary prudence man of business if he were to adopt the position that he knew that no “donations” had in substance been made and adopt the position he knew none had been made in any normal sense of the word.

Ground 11 – failure to consider Mountstar’s “offer” to appoint new directors and independent law firm

24. The facts and circumstances set out in the Decision made it unrealistic and unnecessary for the Tribunal to consider Mountstar's “offer” to appoint new directors and commission an independent inquiry of its own. Further, there was no evidence that Mountstar had appointed any new directors by the time of the hearing. And given the findings relating to Mr Jenner including that “all roads lead to Mr Jenner” and his constitutional inability to properly distinguish between various different duties it would have been inappropriate for Mountstar to remain in charge of the Charity pending completion of the statutory inquiry.

Right to renew application

25. Mountstar has has the right to renew its application for permission to appeal to the Upper Tribunal (Tax and Chancery Chamber) directly, within a month of the date on which this decision is sent to it.
26. Any such application should be sent to The Upper Tribunal Office, Tax and Chancery Chamber, 45 Bedford Square, London WC1B 3DN. Further information about appealing to the Upper Tribunal can be found at <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/tax-and-chancery-upper-tribunal/appeals.htm>.