[2021] UKFTT 112 (TC)

TC08093

PROCEDURE – application for reinstatement of appeal following striking out for breach of an unless direction – Martland v HM Revenue & Customs and Chappell v The Pensions Regulator applied – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/09365

BETWEEN

JAYFEX LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

The application was dealt with on paper with the agreement of the parties taking into account the Appellant's application dated 14 January 2021 to reinstate the appeal, the Respondents' objection thereto dated 21 January 2021, the Appellant's submissions dated 4 and 16 February 2021 and witness statements of Mr Jason Alexander on behalf of the Appellant also dated 4 and 16 February 2021

REASONS

Background

1. On 17 November 2020 the Tribunal directed that unless the Appellant by no later than 5pm on 24 November 2020 provide the information that had previously been directed to be provided by 1 October 2020, then the appeal would be struck out automatically without further reference to the parties ("the Unless Direction").

2. The Appellant did not provide the required information until 7.45pm on 25 November 2020. The appeal was therefore automatically struck out. The fact that it had been struck out was confirmed to the parties in a letter from the Tribunal dated 17 December 2020 and the Appellant made an application dated 14 January 2021 to reinstate the appeal.

3. Whilst the Appellant failed to comply with the Unless Direction, it did send the information required very soon after the date for compliance. Indeed, it was just over a day late. In considering whether the appeal should be reinstated, the Respondents invite me to take into account the procedural history of the appeal which I set out in detail below.

4. The appeal itself was first lodged with the Tribunal on 19 December 2017. It is an appeal against an assessment to stamp duty land tax ("SDLT") in the sum of £345,000 ("the Assessment"). In fact, HMRC have since accepted that the Assessment is overstated and should be reduced to £92,000 because an incorrect rate applicable to high value residential transactions was used. The Assessment was a discovery assessment dated 13 November 2015. It arises out of the transfer of a property from Atol Developments Limited ("Atol") to the Appellant on 26 September 2013. The Appellant contends that at the time of that transfer Atol was a 100% subsidiary of the Appellant and as such no SDLT was payable because it was entitled to group relief pursuant to Schedule 7 Finance Act 2003. The issues which arise on the appeal may be summarised as follows:

(1) Were HMRC entitled to make a discovery assessment? The Appellant puts forward no positive case that HMRC were not entitled to make a discovery assessment. However, HMRC acknowledge in their statement of case that they have a burden of establishing that the Assessment was a valid discovery assessment.

(2) Whether Atol was a 75% subsidiary of the Appellant at the time of the transfer. The burden of establishing that fact lies with the Appellant.

5. It can be seen that the issues are relatively straightforward. The principal issue concerns who held the shares in Atol on 26 September 2013. HMRC say that Companies House information indicates that on that date 50% of the shares in Atol were held by Mr Jason Alexander and 50% were held by Mr Francis Moran. It has become apparent during the appeal that the Appellant contends that Mr Moran's shares in Atol were purchased by Mr Sunil Mehta prior to 26 September 2013 and then

transferred by him to the Appellant also before that date. It also contends that Mr Alexander's shares in Atol were transferred to the Appellant prior to 26 September 2013.

Procedural History

6. In this section I set out the procedural history of the appeal, focussing on aspects relied on by the Respondents in their objection to the Application. In setting out the procedural history and in this decision generally it is important to acknowledge that the Appellant has not had the benefit of professional representation. The matter has been dealt with by Mr Alexander, who is a director of the Appellant.

7. As mentioned above, the appeal was lodged with the Tribunal on 19 December 2017. Shortly after it was lodged, HMRC stated in correspondence that they would revise the Assessment to £92,000 as indicated above and the appeal was stayed until 4 July 2018 with a view to settlement discussions taking place. There was no settlement and on 4 July 2018 HMRC served their statement of case inviting the Tribunal to vary the amount of the Assessment. At the same time HMRC applied for further information from the Appellant, in particular a full explanation with supporting documents setting out why the Appellant contended that group relief was available.

8. A direction requiring the Appellant to provide the further information was issued by the Tribunal on 9 August 2018. The time for compliance was 8 September 2018. There was no compliance with the direction and HMRC applied to the Tribunal for an unless direction. On 3 November 2018 the Tribunal wrote to the Appellant asking for a response to the application. The Tribunal made a further request for a response on 4 December 2018. On 8 December 2018 the Appellant applied for an extension of time until 6 January 2019. Mr Alexander stated that this application was made on 8 November 2018 but no application of that date appears on the Tribunal file. I infer that the Appellant is referring to the application dated 8 December 2018. In any event, the extension of time was granted.

9. There was no response from the Appellant on or before 6 January 2019, however on 19 January 2019 the Appellant provided the Respondents with a witness statement from Mr Sunil Mehta. No supporting documentary evidence showing any transfer of shares was provided. However, in a letter to the Tribunal dated 5 February 2019 HMRC indicated, generously in my view that they were prepared to treat that as compliance with the direction and asked the Tribunal to provide further directions to progress the appeal.

10. Tribunal Judge Poole issued directions on 6 February 2019. It seems that Judge Poole had not seen HMRC's letter. In any event, it is clear that the Judge was not satisfied with the material provided by the Appellant in response to the previous direction and he made an unless direction requiring a full explanation from the Appellant as to how it satisfied the requirements for group relief, together with supporting documentary evidence. The date for compliance was 6 March 2019 and in default of compliance the appeal would be struck out. The recital to Judge Poole's direction read as follows:

> This matter has been referred to me as a result of difficulties in progressing the appeal.

> It is apparent that the Appellant is not devoting sufficient effort to complying with the Tribunal's requirements. As things currently stand, HMRC have indicated that they have sufficient information to reduce their assessment to £92,000 from £345,000, but no evidence has been supplied by the Appellant to support its contention that it is entitled to relief from SDLT on the basis of the transaction qualifying under Part 1 of Schedule 7 Finance Act 2003. This has wasted immense amounts of both the Tribunal's and HMRC's time. I am not prepared to allow this to continue.
>
> The Appellant must provide a clear statement of the basis upon which it believes it qualifies for the relevant relief, and copies of the documents which provide the evidence to support that basis. If it fails to do so, then no more of the Tribunal's or HMRC's time should be wasted on dealing with this appeal, which will accordingly be struck out so that HMRC can enforce immediate payment of the £92,000 claimed.

11. On 1 March 2019 the Appellant served a statement of case, the previous witness statement from Mr Mehta and a new witness statement from Mr Alexander. No supporting documentation in relation to the alleged share transfers was provided.

12. On 22 March 2019, HMRC served a supplementary statement of case pointing out the absence of any supporting documentation, and also reserving their position as to whether, even if share transfers had taken place as alleged by the Appellant, group relief could be restricted by virtue of paragraph 2 Schedule 7 FA 2003.

13. On the same date the Appellant wrote to HMRC, with a copy to the Tribunal, asking for guidance as to what evidence would be sufficient to establish the share transfers. HMRC replied to the effect that they could not advise the Appellant on what evidence would be required, but that they would expect to see stock transfer forms. HMRC said that they would review the case in the light of any evidence provided by the Appellant.

14. On 4 April 2019 Judge Poole gave standard directions to progress the appeal, including directions for lists of documents by 10 May 2019 and witness statements by 7 June 2019. It was anticipated that the appeal would be listed for hearing in the period 19 August 2019 to 15 November 2019.

15. The Appellant failed to serve its list of documents and on 22 May 2019 the Tribunal wrote to the Appellant pointing this out and requiring it to be served immediately. On 29 May 2019 the Appellant wrote to HMRC saying that it wished to rely on the witness statements and associated documents previously provided as well as two stock transfer forms dated 20 September 2013 which it had located, transferring shares from Mr Mehta and Mr Alexander to the Appellant. HMRC requested copies of the stock transfer forms.

16. On 6 June 2019 the Appellant emailed HMRC to say that the stock transfer forms would be provided that day. In fact, no documents were provided and on 19 June 2019 I issued a direction that unless the Appellant provided copies of the documents it was relying on within 7 days the Appellant would not be able to rely on those documents save with permission of the Tribunal.

17. The documents were not provided by the Appellant within the 7 day period, although they were provided on 3 July 2019. On receipt, HMRC informed the Appellant

that pursuant to the terms of the direction, the Appellant was not able to rely on the documents without permission from the Tribunal. Mr Alexander then emailed the Tribunal on 4 July 2019 seeking permission to rely on the stock transfer forms. He explained that Mr Mehta was an airline pilot and had been out of the country and unable to send the document to Mr Alexander prior to 3 July 2019.

18. I gave the Appellant permission to rely on the documents by direction dated 25 July 2019. In some respects this was quite generous given previous delays and non-compliance by the Appellant, and given that the Appellant had said on 29 May 2019 that the documents had been located.

19. By 6 August 2019, the parties had complied with the directions for lists of documents, witness statements and listing information. On that date HMRC applied for permission to rely on a further supplementary statement of case. It addressed the stock transfer forms and also raised a new argument signalled in the previous supplementary statement of case that group relief would not be available because of paragraph 2(4A) Schedule 7 Finance Act 2003. HMRC contend that even if Atol was a 75% subsidiary of the Appellant, the transfer of the property to the Appellant was not effected for bona fide commercial reasons or formed part of arrangements one of the main purposes of which was the avoidance of tax. The Appellant objected to the further supplementary statement of case but on 22 August 2019 the Tribunal gave permission for the Respondents to rely on it.

20. On 12 September 2019 the Tribunal notified the parties that the hearing would take place on 29 November 2019. In the event, the hearing was postponed by the Tribunal on the basis that Mr Alexander was unavailable because he was required to attend a separate county court hearing on the same day. The hearing was then relisted for 23 April 2020, but that was postponed because of the coronavirus pandemic.

21. On 17 September 2020 the Tribunal wrote to the parties directing them to provide information with a view to the appeal being listed as a video hearing ("the September Letter"). The information to be provided included representations as to the form of hearing, practical information seeking to ascertain the ability of each party to attend a video hearing and dates to avoid for the hearing. The September Letter was sent as an attachment to an email to both parties and required a response within 14 days.

22. HMRC immediately applied by email of the same date for an extension of time to 8 October 2020 to provide the information because their witness was on leave and would need to be consulted in order to provide the listing information. The first paragraph of that application read as follows:

> I refer to the Tribunal's correspondence received today about the above appeal. The Tribunal has directed that HMRC provide representations within 14 days, about the possibility of conducting the hearing via video.

23. The Appellant emailed the Tribunal on 17 September 2020 to consent to that extension. HMRC provided their listing information on 8 October 2020 but there was no response from the Appellant. The Tribunal chased a response from the Appellant on 15 October 2020 by email, which also attached a copy of the September Letter. The

Appellant was given until 22 October 2020 to provide the listing information. Still there was no response.

24. On 10 November 2020, HMRC wrote to the Tribunal and asked that the appeal be listed for a video hearing despite the absence of a response from the Appellant. The Appellant emailed the Tribunal immediately afterwards stating that it had been operating under covid lockdown restrictions and inviting the Tribunal to set a date in January 2021, after 10 January 2021. There was no response to the other requests for information in the September Letter, which the Tribunal required before it could list a video hearing.

25. On 17 November 2020, I issued the Unless Direction referred to above. An accompanying letter made clear that the information was required, that the fact the Appellant was represented by a lay person provided no excuse for the failure to provide the information and that if the information was not provided within 7 days then the appeal would be struck out.

26. On the same date, Mr Alexander emailed the Tribunal to say that he did not have a copy of the "relevant letter" to comply with the direction. This was a reference to the September Letter, which had been emailed to the Appellant twice previously. A copy of the September Letter was re-sent to the Appellant by email on 20 November 2020.

27. The Appellant failed to comply with the Unless Direction by 5pm on 24 November 2020 which caused the appeal to be automatically struck out. Mr Alexander emailed the Tribunal on 25 November 2020 at 7.45pm providing the information required by the Tribunal. The email stated as follows:

> Please see our response, apologies but we have just received the email from our spam filter.

28. On 3 December 2020 HMRC contacted the Tribunal seeking to establish whether the Appellant had complied with the Unless Direction, and pointing out that in the event of late compliance the appeal would have been automatically struck out. On the same date, the Appellant emailed the Tribunal to say that it was going to hand the matter to professional representatives as it did not have sufficient knowledge of procedure. The Appellant also noted, appearing to infer delay on the part of the Tribunal, that the Tribunal had not copied the September Letter to the Appellant until 20 November 2020. Clearly there was no such delay.

29. On 17 December 2020 the Tribunal confirmed to the parties that the appeal had been automatically struck out following non-compliance with the Unless Direction. On the same date the Appellant emailed the Tribunal noting that:

(1) it intended to appeal the decision to strike out the appeal;

(2) its agent would do so, as Mr Alexander was a lay person

(3) the direction had been sent to a solicitor who had not worked for the Appellant for over 3 years.

30. By this stage, Mr Alexander states that he realised the Appellant could not handle its case unrepresented, hence the reference to an agent. On the last point, it is fair to say

that most of the Tribunal's correspondence to the Appellant during the appeal has been formally addressed to a named individual who its appears was a solicitor who had ceased to act for the Appellant in 2018. However, the address was the Appellant's registered office and the correspondence was actually sent to an email address which Mr Alexander used for corresponding with the Tribunal. There is no question therefore that all material correspondence was properly addressed to the Appellant and ought to have come to Mr Alexander's attention.

The application for reinstatement and HMRC's objection

31. The Appellant applied for the appeal to be reinstated on 14 January 2020 ("the Application"). The Application was made on behalf of the Appellant by a professional representative, Tax Resolute Limited.

32. The Appellant's case as set out in the Application may be summarised as follows:

(1) On the same date that the Unless Direction was made, the Appellant asked the Tribunal to provide a copy of the September Letter. The Appellant was making an effort to comply with the Unless Direction.

(2) The Appellant did not receive the September Letter until 25 November 2020 because the copy went into its spam email folder. As soon as Mr Alexander found the September Letter the required information was provided to the Tribunal. This was an inadvertent administrative failure on the part of the Appellant.

(3) The delay in complying with the direction was not serious and significant. Reference is made to *Romasave (Property Services) Limited v HM Revenue & Customs* [2015] UKUT 0254 (TCC) where a delay of over 3 months was considered to be serious and significant.

(4) HMRC would not be prejudiced by reinstatement of the appeal as the hearing had not been listed. The Appellant has now engaged a professional representative which will allow the appeal to proceed more smoothly and efficiently.

(5) The Appellant will suffer prejudice if the appeal is not reinstated. The Appellant will have to pay an assessment of some £92,000 which would amount to a windfall to HMRC.

(6) It would not be fair and just for the appeal to remain struck out as the consequence of a minor delay.

33. The Application seemed to suggest that I should take into account the underlying merits of the Appellant's case on the appeal. In doing so, it relied on principles described in *Martland v HM Revenue & Customs* [2018] UKUT 0178 (TCC) in the context of permission to make a late appeal. Those principles were applied by the FTT in *Nowroozi v HM Revenue & Customs* [2019] UKFTT 533 (TC) in the context of a striking out following non-compliance with a direction.

34. The grounds on which HMRC object to the Application and their submissions may be summarised as follows:

(1) The applicable test is the 3-stage test described by the Upper Tribunal in *Martland*, involving consideration of whether the breach was serious and significant, the reasons for the breach and all the circumstances of the case.

(2) The breach was serious and significant, in that there was a failure to comply with the direction contained in the September Letter, the Tribunal's letter dated 15 October 2020 and the Unless Direction. The Unless Direction provided for automatic striking out in the event of non-compliance. The failure to comply should also be viewed in the context of failures to comply with directions throughout the proceedings.

(3) The reasons given for non-compliance are inadequate and raise a number of questions. Firstly, whether on receipt of the Unless Direction Mr Alexander checked his email inbox to locate the September Letter. If he had done, there is no reason he would not have found it. Secondly, the Appellant has not provided any evidence that when the September Letter was resent by the Tribunal on 20 November 2020 that it went to the Appellant's spam folder. Thirdly, knowing of the Unless Direction and the significance of non-compliance the Appellant made no attempt to check the position between sending its request for a copy of the September Letter on 17 November 2020 and the expiry of the time for compliance on 24 November 2020. In particular, it appears to have made no check of its spam folder, it did not contact the Tribunal and it did not contact HMRC.

(4) In looking at the circumstances of the case, consideration should be given to the following matters:

(a) the importance of complying with time limits;

(b) the need for litigation to be conducted efficiently and at proportionate cost;

(c) The Appellant's conduct of the appeal has been prejudicial to the Tribunal's administration and other appellants, and HMRC have already devoted disproportionate resources to the appeal as a result of the Appellant's conduct.

(d) Whilst the Appellant has now appointed a representative, future conduct of the appeal will depend on proper co-operation of the Appellant.

(e) HMRC also complain that the Appellant failed to respond to a reasonable request for a full copy of the Appellant's email to the Tribunal dated 25 November 2020.

(5) Whilst the Appellant would suffer prejudice if the appeal is not reinstated, it was not appropriate to conduct a detailed evaluation of the merits. If the merits are considered then the Appellant's case is weak. There is no evidence that shares in Atol were transferred to the Appellant in accordance with the provisions of the Companies Act 2006. Even if the shares were transferred, group relief would not be available as a result of paragraph 2(4A) Schedule 7 Finance Act 2003.

35. HMRC recognise that if the appeal is not reinstated then the Assessment will stand in its original form, namely in the sum of £345,000. However, they state that they will only seek to collect £92,000 of that sum.

36. By way of reply to HMRC's objection, the Appellant relies upon written submissions dated 4 and 16 February 2021 and witness statements of Mr Alexander of the same dates.

37. Mr Alexander's evidence on behalf of the Appellant may be summarised as follows:

(1) The Appellant is a small organisation with no employed staff and one unpaid director who also works elsewhere.

(2) It has been compliant and responded to directions of the Tribunal, but in 2020 there were issues due to the impact of the covid-19 pandemic. It says that there was a reasonable excuse for the breach.

(3) The Appellant's former solicitor was suffering from mental health issues. The appeal was therefore not given the attention it ought to have been in the period between April 2018 and September 2018. Mr Alexander was unaware of this until September 2018 and on 14 September 2018 he confirmed to HMRC that the Appellant's grounds of appeal were that at the time of the transaction Atol was a wholly owned subsidiary of the Appellant which he said was verified by the Appellant's solicitor at the time of the transaction. As such the Appellant contended that there was no liability to SDLT. At this stage however, Mr Alexander says that he had little or no information as to progress in the appeal.

(4) The Appellant could not provide a full explanation setting out why it contended that group relief was available with supporting documents by the extended time limit of 6 January 2019 because Mr Mehta was not employed by the Appellant. He was an airline pilot and frequently out of the country. It was also the Christmas period.

(5) In May 2019 he confirmed that he would provide the stock transfer forms. However, he had to locate relevant files which were more than 5 years old and had been dealt with by the solicitor. The files were not in a logical order and had no indexing. In the end, he says the stock transfer forms were not in the files and that it was not until 3 July 2019 that the stock transfer forms were located. They were then immediately provided to the Tribunal.

(6) He did not receive the September Letter. He also says that he consented to HMRC's application for an extension of time to comply with the September Letter "in order to facilitate the proceedings".

(7) He did not receive the attachment sent with the Tribunal's email dated 17 November 2020.

(8) Mr Alexander identifies that the Tribunal re-sent the September Letter to him on 20 November 2020, which was a Friday. He found the Tribunal's email in his spam folder on Wednesday 25 November 2020 and immediately sent a response. He states that he had no intention to delay or obstruct the Tribunal proceedings.

38. The Appellant suggests that HMRC are seeking to have the appeal struck out "on a technicality" because they are not confident about the merits of their case.

Discussion

39. The Appellant invites me to deal with this application taking into account the approach described in *Pierhead Purchasing Limited v HM Revenue & Customs [2014] UKUT 321 (TCC)*. That was a decision of Proudman J sitting in the Upper Tribunal and concerned an application by an appellant for reinstatement following the withdrawal of an appeal pursuant to Rule 17.

40. The present appeal was struck out pursuant to Tribunal Rule 8(1). In so far as relevant, Rule 8 provides as follows:

> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
> …
>
> (5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
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> (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

41. No issue arises in relation to the timing of the Application, which was made within 28 days of the Tribunal sending notification that the appeal had been struck out.

42. In the context of reinstatement following breach of an unless order the applicable principles have be authoritatively stated by the Upper Tribunal in *Chappell v The Pensions Regulator* [2019] UKUT 209. The principles described in that case by Upper Tribunal Judge Herrington were based on the 3-stage approach to relief from sanctions set out in *Denton and others v TH White Limited* [2014] EWCA Civ 906 at [24]:

> A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'.

43. This approach was summarised in the context of tax appeals by the Upper Tribunal in *Martland*, a case concerning permission to bring a late appeal where the breach was delay in notifying the appeal. The third stage was described as follows:

> 44. ...
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> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
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> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory

> time limits to be respected ... The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

44. In the context of relief from sanctions for breach of an unless order, Judge Herrington in *Chappell* held that the tribunal should take no account of the strength of a party's case unless it was unanswerable in the sense that the party would be entitled to summary judgement. Neither party has suggested that is the position in the present appeal and therefore I shall not consider the merits of either party's case.

45. In the light of these authorities I shall consider the Application and the various matters relied on by the parties under the following headings:

(1) The seriousness and significance of the breach which led to the striking out.

(2) The reasons for the breach.

(3) All the circumstances of the case.

The seriousness and significance of the breach

46. I must first consider whether breach of the Unless Direction is serious or significant. This question arises separately from the reasons for the breach.

47. The Appellant invites me to find that being just over one day late in complying with the Unless Direction does not amount to a serious or significant breach. However, that assumes I should ignore at this stage the previous breach in failing to comply with the directions in the September Letter which led to the Unless Direction. The point was considered by the Court of Appeal in *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] EWCA Civ 153 (cited in *Chappell*) where the defendant filed a pre-trial checklist and listing questionnaire ("the PTC") two days after the time for compliance in an unless order. The sanction for breach was that the defence was struck out which resulted in the claimant entering judgment in default of defence.

48. The question of whether the defendant should be relieved from the sanction fell to be answered by reference to the 3-stage approach in *Denton*. The first stage was whether the breach was serious or significant. The Court of Appeal held that the breach was serious and significant. In doing so, Jackson LJ said as follows:

> 34. The central issue which has emerged in relation to stage 1 is this. Should the court look at the breach of the unless order in isolation, namely filing the PTC two days late? Or should the court also take into account that the defendant had had three months in which to comply with the 8th November order and was 18 days late under the terms of that order.
>
> 35. Judge Harris appears to have taken the former view in paragraph 14 of his judgment. McGowan J took the latter view in paragraph 18 (i) of her judgment.
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> 36. In relation to this issue, the crucial passage in the authorities is paragraph 27 of *Denton*. In that paragraph the Master of the Rolls and Vos LJ ("the majority") said:
>
> > 'The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an

> assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.'

37. In my view the reference in the first sentence of that paragraph to "unrelated failures" is a reference to earlier breaches of rules or orders which the applicant has committed during the course of the litigation. At stage 1 it is not legitimate to say "this breach is trivial but, set against X's history of failures and delays, this breach is the last straw. It becomes a serious matter." At stage 1 the court must ignore X's historic breaches and assess the breach in respect of which X is seeking relief.

38. An "unless" order, however, does not stand on its own. The court usually only makes an unless order against a party which is already in breach. The unless order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an unless order in isolation. A party who fails to comply with an unless order is normally in breach of an original order or rule as well as the unless order.

39. In order to assess the seriousness and significance of a breach of an unless order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.

40. In my view the phrase "the very breach" in paragraph 27 of *Denton*, when applied to an unless order, means this: the failure to carry out the obligation which was (a) imposed by the original order or rule and (b) extended by the unless order.

41. The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the Draconian sanction of strike out).

42. On the other hand, as Mr Weston rightly says, not every breach of an unless order is serious or significant. In *Utilise* the claimant was just 45 minutes late in complying with an unless order. He filed his budget by 4.45 p.m., rather than 4 p.m. when it was due. The Court of Appeal held that a delay of only 45 minutes in compliance was "trivial". The court also noted that, contrary to the district judge's view, there was no underlying breach of the rules onto which the unless order was attached.

49. In the present case, the Appellant was directed on 17 September 2020 to provide listing information within 14 days, that is by 1 October 2020. This may be viewed as having been extended to 8 October 2020, although strictly the extension only applied to HMRC's compliance. There is no reason the Appellant should not have provided its listing information by 8 October 2020. It failed to do so and the Tribunal chased a response on 15 October 2020, giving the Appellant until 22 October 2020 to provide the listing information. The Appellant failed again to comply and the Unless Direction

was released on 17 November 2020. By that time, the Appellant had had some 2 months to provide the listing information, and it had failed to comply even with the benefit of two extensions of time. The Appellant then failed to comply with the Unless Direction.

50. I am more than satisfied on these facts that the Appellant's breach is both serious and significant.

Reasons for the breach

51. I must now consider the reasons for the Appellant's breach.

52. The Court of Appeal in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 gave some examples at [41] of what might amount to a good reason:

> 41. …The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason.

53. The passage is not intended to be exhaustive of what might amount to a good reason and each case must be considered on its own facts.

54. In the present case the Appellant put forward various reasons for failing to comply with the Unless Direction which may be summarised as follows:

(1) The September Letter was addressed to its former solicitor.

(2) Mr Alexander is a lay person and did not understand Tribunal procedure. The previous solicitor had health problems and had ceased representing the Appellant.

(3) Mr Alexander says that he did not receive the September Letter. The copy of the September Letter re-sent by the Tribunal on 20 November 2020 went to a spam folder and Mr Alexander did not realise this until 25 November 2020. The breach was an inadvertent administrative failure and there was no intention to delay or obstruct the Tribunal proceedings

(4) There were disruptions to Mr Alexander's working arrangements due to the Covid-19 pandemic.

55. I accept that the Appellant was represented by Mr Alexander who may be viewed for these purposes as a lay person. The involvement of the Appellant's former solicitor had terminated in mid-2018, well before the breaches of the directions in the September Letter and the Unless Direction. Further, the requirement to provide listing information was not in any sense onerous. It simply required the Appellant to provide representations as to the form of hearing, practical information relevant to the parties' abilities to attend a video hearing and dates to avoid for the hearing. The relevant breach

for this purpose is the failure to comply with the directions given in the September Letter and the Unless Direction.

56. The fact the September Letter was addressed to the former solicitor is neither here nor there. It was emailed to the correct email address and ought to have come to the attention of Mr Alexander. Mr Alexander has offered no explanation as to why the email attaching the September Letter did not come to his attention. I infer that for some reason he overlooked it. In any event, he was plainly aware that HMRC had received correspondence from the Tribunal asking for representations as to a video hearing and he consented to their application for an extension of time. He ought to have considered why he was not being asked for the Appellant's representations. A moment's thought would have led him to consider that the Tribunal would also have written to the Appellant seeking its representations about a video hearing.

57. Mr Alexander makes no mention of whether he received the Tribunal letter sent by email on 15 October 2020. The Tribunal was chasing compliance with the September Letter and had enclosed a further copy of the September Letter. Again, there is no reason Mr Alexander would not have received that letter as it was sent to the appropriate email address. I must again infer that the letter was received but for some reason overlooked by Mr Alexander.

58. Mr Alexander states that he did not receive the attachment to the Tribunal's email sent on 17 November 2020. He must be mistaken in that evidence. Mr Alexander certainly received the email and the Unless Direction. It was the Unless Direction which prompted him to ask for a copy of the September Letter. I assume he was intending to refer again to the September Letter. I also infer that Mr Alexander received the letter dated 17 November 2020 which accompanied the Unless Direction and was sent as an attachment to the same email.

59. The Appellant relies on disruptions to Mr Alexander's working arrangements due to the covid-19 pandemic. No particulars of specific disruptions are given, and I am not satisfied on the material provided that any such disruptions provide a reason for the breach.

60. Mr Alexander did request a copy of the September Letter on 17 November 2020. It was sent to him by email on 20 November 2020 but was apparently received into his spam folder. He was aware that the deadline for compliance with the Unless Direction was 5pm on 24 November 2020 but he made no further attempt to contact the Tribunal prior to the expiry of that deadline.

61. Mr Alexander states that he did not deliberately ignore the September Letter or the Unless Direction. On balance, I am prepared to accept that is the case. However, it is clear to me that the Appellant did not devote sufficient care and attention to compliance with the directions in the September Letter and the Unless Direction. The Appellant has no good reason for breaching those directions.

All the circumstances

62. I must now consider whether to reinstate the appeal taking into account the seriousness and significance of the breach, the reasons for the breach and all the

circumstances of the case. In doing so I have considered all the material and submissions provided by the parties in relation to the Application. I also take into account and give particular weight to the importance of litigation being conducted efficiently and at proportionate cost and for Tribunal directions to be respected.

63. In that regard, I acknowledge that tribunals generally encourage flexibility and less formality in proceedings and also that Mr Alexander is a lay person. However, it is clear from the Court of Appeal decision in *BPP Holdings v HM Revenue & Customs* [2016] EWCA Civ 121, in a passage which was implicitly endorsed on appeal to the Supreme Court that the approach to compliance is no more relaxed in tribunals than it is in the court. The position was described as follows by Ryder LJ:

> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.
>
> 39. I found the approach of HMRC to compliance to be disturbing. At times it came close to arguing that HMRC, as a State agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour. I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders…

64. At this stage I must take into account the Appellant's previous conduct of the appeal, and the prejudice to the parties depending on whether the appeal is reinstated or not.

65. This is the third unless direction made in these proceedings as a result of the Appellant's failure to comply with directions. On the two previous occasions that an unless direction was made in February 2019 and June 2019 there was non-compliance, although in each case the sanction was not strictly applied. In the first instance because HMRC were prepared to accept the material provided as amounting to compliance and in the second case because in the circumstances I was prepared to give relief from the sanction. It is intolerable that the Appellant continued in the same vein and failed to comply with the directions contained in the September Letter.

66. The Appellant's failures do not simply relate to the unless directions referred to above. There have been numerous failures to comply with straightforward directions and to respond to correspondence from the Tribunal chasing compliance as outlined above.

67. The Appellant's conduct has caused prejudice to HMRC and to the administration of justice. It has resulted in the need to allocate disproportionate resources to this appeal both by HMRC and by the Tribunal. The same point was made by Judge Poole in his direction back in February 2019. The Appellant was warned in no uncertain terms that

it was not devoting sufficient effort to complying with the Tribunal's requirements. The Appellant failed to heed that warning.

68. I put into the balance against all of this the prejudice the Appellant will suffer if it loses the opportunity to challenge the Assessment on its merits. It will be left with a liability to SDLT of £92,000, taking into account that HMRC have said that they will not enforce the balance of the Assessment.

69. I also take into account the fact that the Appellant's breaches have not been deliberate, in the sense that it has not made a conscious decision to breach the Tribunal's directions. Overall however, there has been a pattern of conduct on the part of the Appellant through Mr Alexander which can only be described as demonstrating a careless disregard for the Tribunal's directions and correspondence throughout the proceedings.

Conclusion

70. Taking into account all the circumstances, I am satisfied that the balance falls strongly against reinstating this appeal. It would not be fair or just to HMRC, or in the interests of justice generally to do so. The Application is therefore refused.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2021