



[2022] UKFTT 00122

**TC 08453**

*PROCEDURE – application for retrospective extension of time to submit statement of case - Martland considered - length of delay serious and significant – delay caused by administrative error – prejudice to appellant and respondents considered –application refused - whether respondents should be barred from taking further part in proceedings – whether appeal should be allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2016/03289**

**BETWEEN**

**CAROLINE SWEBY**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**The Tribunal determined the application in Chambers on 22 March 2022 without a hearing, having considered the written representations from Mr Paul Marks, Review Officer and Litigator of HMRC’s Solicitor’s Office and Legal Services, on behalf of the Respondents and from the Appellant, Ms Caroline Sweby**

## DECISION

### INTRODUCTION

1. This decision concerns an application by the Respondents ('HMRC') under rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') for a retrospective extension of time to provide their statement of case. HMRC served their application, with the statement of case attached, on the First-tier Tribunal ('FTT') and on Ms Sweby's representative, Mr Gary Brothers of Independent Tax, on 1 December 2021. The statement of case had been due to be filed on 16 September 2018. It was therefore three years two months and 15 days late.

2. The Appellant, Ms Sweby, opposed the application and applied for an order under rule 8(3)(b) of the FTT Rules barring HMRC from taking further part in the proceedings on the ground that HMRC had failed to co-operate with the FTT to such an extent that it could not deal with the proceedings fairly and justly.

3. The parties' submissions are summarised and discussed below. For reasons set out below, I have decided that HMRC's application for an extension of time should be refused and, as a consequence, Ms Sweby's appeal must be allowed.

### FACTUAL AND PROCEDURAL BACKGROUND

4. Ms Sweby appealed to the FTT on 9 June 2016. Her appeal was categorised under rule 23 of the FTT Rules as a standard case. Rule 26(1)(b) of the FTT Rules provides that a respondent must send or deliver a statement of case to the FTT and the appellant within 60 days of the FTT sending the notice of appeal to the respondent.

5. On 25 August 2016, HMRC applied to the FTT for a direction that the time to deliver their statement of case be extended until 60 days after the release of a decisions in the appeals of Ernest Thomson (TC/2010/07791), Richard Mungavin (TC/2010/03538) and Terence Worsfold (TC/2010/04081) which were due to be heard together the following year. The only ground for the application was that the Thomson, Mungavin and Worsfold appeals concerned a similar scheme and claims for losses to Ms Sweby's scheme and claim. The FTT granted the application on 10 October 2016.

6. On 16 July 2018, the FTT issued its decision in *Thomson, Mungavin and Worsfold v HMRC* [2018] UKFTT 396 (TC) ('*Thomson, Mungavin and Worsfold*') dismissing the appellants' appeals. It followed that, absent any further extension, HMRC were required to send or deliver their statement of case to the FTT and Ms Sweby by no later than Monday 16 September 2018 (as the actual due date fell on a weekend – see rule 12(2) FTT Rules).

7. Three further appeals by Rodney Sherrington (TC/2009/10952), Paul Waite (TC/2009/10957) and John Metcalfe (TC/2010/03799) which dealt with similar schemes were listed to be heard by the FTT in October 2018.

8. HMRC say that they had intended to apply for a further extension of time to serve their statement of case in Ms Sweby's appeal until after the decision in the Sherrington, Waite and Metcalfe appeals was released. However, no such application was made due to a clerical oversight and a change in the HMRC Litigator.

9. The decision in *Sherrington, Waite and Metcalfe v HMRC* [2020] UKFTT 128 (TC) ("*Sherrington, Waite and Metcalfe*") dismissing the appeals was released in March 2020.

10. Unlike *Thomson, Mungavin and Worsfold* and *Sherrington, Waite and Metcalfe*, Ms Sweby's appeal included a challenge to the discovery aspect rather than the tax loss due to the scheme usage. The validity of the discovery was an issue in the appeals of Anthony Outram and Ross Outram (TC/2015/03404 and 03405). Accordingly, while HMRC entered into

discussions with a view to settlement of other appeals, which did not raise the discovery issue, there were no such discussions with Ms Swabey or her representative Mr Brothers.

11. The Outrams' appeals were heard on 4 and 5 March 2021 and the decision in *Outram and Outram v HMRC* [2021] UKFTT 126 (TC) ('*Outram*') dismissing the appeals was issued on 27 April.

12. After the release of *Outram* and following consideration of the Supreme Court's decision in *Raymond Tooth v HMRC* [2021] UKSC 17, HMRC contacted Ms Sweby's representative, Mr Brothers, to discuss settling the appeal on 7 July. Mr Brothers replied on 8 July that the relevant time limit for filing the statement of case in this matter had expired in 2018 and Ms Sweby had assumed that the appeal had been abandoned.

13. On 1 December, HMRC served their application for an extension of time to serve their statement of case, with the statement of case attached, on the FTT and on Mr Brothers.

14. As they had not received any objection to their application of 1 December from Mr Brothers, HMRC served their list of documents on the FTT and Mr Brothers on 21 January 2022.

15. Unfortunately, HMRC's email of 21 January crossed in the FTT's system with the FTT's email of 26 January which granted HMRC's application of 1 December unless Ms Sweby objected within 14 days, ie by 9 February, and staying all matters until 10 February.

16. On 9 February, Ms Sweby served an objection to HMRC's application for an extension of time. The objection was not copied to HMRC. In the objection, Ms Sweby applied for HMRC to be barred from taking any further part in the proceedings under rule 8(3)(b) of the FTT Rules on the ground that the Tribunal could not deal with the matter fairly or justly given the significant passage of time since the year under appeal.

17. On 21 February, the FTT sent a copy of Ms Sweby's objection to HMRC and asked them to provide any submissions in response within 14 days. The FTT's letter specifically asked that HMRC's submissions should address the criteria for relief from sanctions in *Martland v HMRC* [2018] UKUT 178 (TCC) ('*Martland*') which had not been referred to in their original application.

18. On 8 March, HMRC provided further submissions to the FTT.

#### LEGISLATION

19. Rule 2 of the FTT Rules provides

“(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

...

(e) avoiding delay, so far as compatible with proper consideration of the issues.

- (3) The Tribunal must seek to give effect to the overriding objective when it—
  - (a) exercises any power under these Rules; or
  - (b) interprets any rule or practice direction.
- (4) Parties must—
  - (a) help the Tribunal to further the overriding objective; and
  - (b) co-operate with the Tribunal generally.”

20. Rule 5 of the FTT Rules, as material, provides

- “(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
  - (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;...”

21. Rule 8 of the FTT Rules, as material, provides

- “(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.
- ...
- (3) The Tribunal may strike out the whole or a part of the proceedings if—
  - (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
  - (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
  - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
- (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
- ...
- (7) This rule applies to a respondent as it applies to an appellant except that—
  - (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
  - (b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.”

22. Rule 20(4) of the FTT Rules provides:

“(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.”

23. Rule 25 of the FTT Rules deals with the Respondents’ statement of case. So far as relevant to this matter, rule 25 provides:

“(1) A respondent must send or deliver a statement of case to the Tribunal, the appellants and any other respondent so that it is received—

...

(c) in a Standard or Complex case other than an MP expenses case, within 60 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference.

...

(4) If a respondent provides a statement of case to the Tribunal later than the time required by paragraph (1) or by any extension allowed under rule 5(3)(a) (power to extend time), the statement of case must include a request for an extension of time and the reason why the statement of case was not provided in time.”

## DISCUSSION

24. The first issue which I must decide is whether I should extend the time limit for HMRC to file their statement of case. The Upper Tribunal has given guidance on the correct test to be applied when considering an application for permission to make a late appeal in *Martland* at [23] – [47], the essence of which is summarised at [44] and [45]:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT ‘is unlikely to need to spend much time on the second and third stages’ – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(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.

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 ...”

25. In giving its binding guidance in *Martland*, the Upper Tribunal was itself drawing on the decision of the Supreme Court in *BPP Holdings Ltd v HMRC* [2017] UKSC 55 (‘*BPP*’) which endorsed guidance given by the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) to the effect that tribunals should not apply a more relaxed approach to compliance with rules, directions and orders than the courts that are subject to CPR.

26. In their written submissions in response, HMRC stated that *Martland* concerned an application to file a notice of appeal out of time under rule 20(4) of the FTT Rules 2009 whereas their application in this case was governed by rule 25(4) and the differences between the two rules are material. Rule 20(4) provides that, where it is provided late, the notice of appeal must include a request for permission to make a late appeal and the reason why the notice of appeal was not provided in time. Rule 20(4)(b) specifically provides that, unless the FTT gives such permission, the FTT must not admit the appeal. HMRC contrasted that with rule 25(4) which simply states that, where a statement of case is provided late, it must include a request for an extension of time and the reason why it was not provided in time.

27. HMRC submitted that the absence of any equivalent to rule 20(4)(b) in rule 25 is significant. They contended that the default position where an appellant provides a notice of appeal out of time is that the appeal must not be admitted unless the FTT grants permission for a late appeal. HMRC argued that in the case of a late statement of case, however, the position is that the time must be extended if the statement of case contains an application for an extension and a reason for the delay. HMRC’s submissions also implied that the *Martland* approach was not appropriate for a request for an extension of time under rule 25(4) of the FTT Rules.

28. I reject HMRC’s submissions on rule 25(4) and the inapplicability of *Martland*. I agree that where a notice of appeal is submitted late the default position is that it should not be admitted unless, applying *Martland*, the FTT grants permission. The different wording of rule 25(4) does not lead to the conclusion that a statement of case served late must be accepted if the respondent (usually, but not always, HMRC) asks for an extension and gives some reason, however unsatisfactory, for the delay. HMRC’s reading of rule 25(4) would make the time limits in rule 25(1) for providing a statement of case otiose.

29. In relation to the applicability of *Martland*, it is clear from *BPP*, which concerned whether HMRC should be barred from taking further part in the proceedings for failing to comply with an order for disclosure, that the guidance in *Martland* applies to applications for relief from sanctions for failure to comply with rules, directions and orders generally and is not limited to applications to make a late appeal. That was confirmed by the Upper Tribunal in *Chappell v Pensions Regulator* [2019] UKUT 209 (TCC) at [71] and in *HMRC v BMW Shipping Agents Limited* [2021] UKUT 91 (TCC) (‘*BMW Shipping Agents*’) at [26].

30. HMRC accepted that the deadline for filing their statement of case had expired 60 days after the FTT issued its decision in *Thomson, Mungavin and Worsfold*, ie on 16 September 2018. In their application of 1 December 2021, HMRC stated that the reason for failing to provide their statement of case in September 2018 was that they were under the misapprehension that Ms Sweby’s appeal was stayed until other Tribunal matters had been determined. The “other Tribunal matters” appears to be a reference to *Outram*. It appears that,

for reasons unknown, HMRC failed to apply before 16 September 2018 for a further extension of time or stay until after the FTT released its decision in *Outram* on 27 April 2021. HMRC acknowledged this in their application where they submitted that if the correct procedures had been followed, ie if HMRC had applied for and the FTT had granted a further stay or extension, there would have been no progress in Ms Sweby's appeal until April 2021.

31. Even if HMRC had made a further application, it would have been on the same terms as the previous one, ie 60 days from the release of *Outram*. Accordingly, if HMRC were operating under the misapprehension that there was a further stay, the statement of case should have been filed on 27 June 2021. HMRC accepted this in their application where they stated:

“Assuming the stay expired at the end of June 2021, i.e. 60 days following the *Outram* decisions, HMRC contacted Ms Sweby's Representative to see if a settlement could be reached.”

32. In fact, HMRC made no attempt to serve their statement of case by 27 June and only contacted Mr Brothers on 7 July. The day after they contacted him, Mr Brothers told HMRC that the time limit for filing the statement of case had expired in 2018.

33. I do not accept HMRC's submission that they should be granted a retrospective extension of time because they would have been granted an extension or amendment if they had applied. If that were correct then compliance with rules and directions would become unnecessary where a party could reasonably argue that it could have applied to have them amended or extended. That submission cannot be right. In this case, no application was made for more than three years and to ignore that because one could have been made would be completely inconsistent with the need for compliance with rules, practice directions and orders.

34. Even if HMRC believed that the proceedings were stayed until 27 June (and there is no evidence to support this), it does not explain why HMRC did not comply with that time limit or make an application for a further stay or extension before 27 June.

35. HMRC then further compounded their error. Notwithstanding that they knew in July 2021 that the time limit had expired almost three years earlier, HMRC made no application to the Tribunal for almost five months. In their application, HMRC sought to explain the further delay by saying:

“Rather than immediately file for such an extension in the absence of a drafted statement of case, HMRC have, since that time [ie July 2021], requested the papers back from their storage facility where they were sent in 2016, arranged for access to the papers due to the ongoing pandemic, consulted their papers, scanned in the papers so they are available in electronic form for ease of access and drafted their statement of case so that at the time of this application [ie December 2021], the Tribunal and Ms Sweby will be able to see the case of HMRC which should be considered alongside this application.”

36. This offers no explanation for the delay in applying for an extension of time as there was no need to obtain the papers and draft the statement of case before making an application and every reason to apply expeditiously. In circumstances such as this, the party who is in default should contact the FTT, and copy the other party, as soon as possible. The purported explanation also reveals that HMRC had not even begun drafting their statement of case by July 2021, ie more than 60 days after the release of *Outram*. This demonstrates that even if there had been a further stay or extension, as they mistakenly believed, HMRC would not have been in a position to comply with the assumed extended time limit. That shows a casual attitude to compliance with the FTT directions which is inconsistent with the guidance given in the cases cited above and which the FTT will not tolerate.

37. In justification of their application, HMRC submitted that they have an arguable defence to Ms Sweby's appeal and that it would be in the interests of justice to extend time for service of the statement of case. HMRC contended that refusing their application would amount to barring HMRC from participating in the appeal. As this is an appeal against a discovery assessment and a penalty and the burden of proof is on HMRC, this would lead to the appeal being allowed. HMRC argued that to bar them from proceedings due to a clerical error and without a warning as required under rule 8(3)(a) of the FTT Rules would not be in accordance with the overriding objective in rule 2(1)(b). HMRC pointed out that Ms Sweby had never applied for HMRC to be barred from taking part in the appeal until her response to their application and the FTT had never made a rule 8(3)(a) direction that failure to serve the statement of case on time could lead to HMRC being barred from further participation.

38. In summary, Ms Sweby submitted that the delay of almost three and a half years is significant and particularly so when, as in this case, the events to which the appeal relates occurred many years earlier. Ms Sweby stated that memories fade over time and the delay potentially prejudices her case. Ms Sweby argued that she was also prejudiced by the delay in that she may be too late to bring proceedings against the accountants on whose advice she entered into the arrangements under appeal. Ms Sweby applied for HMRC to be barred from taking any further part in the proceedings under rule 8(3)(b) FTT Rules on the ground that, given the length of the delay and the potential prejudice that it would cause her, HMRC's failure to co-operate, ie serve their statement of case, meant that the FTT could not deal with the proceedings fairly and justly.

39. In their application of 1 December 2021, HMRC made no reference to the three-stage test in *Martland* which is why I asked them to address it in their further submissions in response to Ms Sweby's objections and application for a barring order to which I now turn.

40. Applying that three-stage approach required by *Martland*, I first consider the seriousness and significance of the failure to comply with the time limit. The statement of case in Ms Sweby's appeal was due to be filed 60 days after the release of the FTT's decision in *Thomson, Mungavin and Worsfold* on 16 July 2018, ie by 16 September 2018. This was an extension of the original time limit prescribed by rule 25(1)(c) of the FTT Rules of 60 days from the date the FTT sent the notice of appeal to HMRC in 2016. The purpose of the time limit in rule 25(1)(c) and in the FTT's directions is to avoid delay, so far as compatible with proper consideration of the issues, and promote the efficient disposal of proceedings in the FTT. In this case, when it was eventually served on 1 December 2021, the statement of case was three years, two months and 15 days late. In my view, such a delay cannot be described as anything other than serious and significant and, to their credit, HMRC accept that and do not attempt to contend otherwise.

41. The second stage is to establish the reason or reasons for the failure to comply with the time limit. The reasons were set out in HMRC's application of 1 December 2021 and are discussed above. In their further submissions, HMRC accept that the failure to provide the statement of case on time was caused by the fact HMRC failed to carry out a file review when *Thomson, Mungavin and Worsfold* was issued and never made an application for a further extension or stay.

42. HMRC say that they only became aware of their failure to comply when it was pointed out by Mr Brothers on 8 July 2021. HMRC try to justify the delay between 8 July and the filing of the statement of case on 1 December 2021 as necessary to ensure that HMRC had sufficient documentation on hand to make their case and to avoid making the application without having sight of the documents which were intended to be relied upon to prove their case. HMRC stated that the documents had not been reviewed since 2016 and they only had a



draft of a statement of case which had been prepared previously and required updating to cover later case law and to account for the gap in time.

43. The third stage is to consider all the circumstances of the case and conduct a balancing exercise. In this case, I must consider the merits of the reason(s) given by HMRC for their failure to serve the statement of case within the extended time limit and the further delay in applying for a retrospective extension of time to remedy that failure. I must then assess the prejudice which will be caused to each party if I grant or refuse HMRC's application for an extension of time to serve their statement of case, giving particular weight to the need for compliance with rules, practice directions and orders.

44. I have already described the reasons given by HMRC for their failure to serve their statement of case or apply for an extension of time to do so. The reasons may be summarised as an administrative error or series of such errors. I consider that the reasons for the failure given by HMRC have very little merit. As the UT pointed out in *BMW Shipping Agents* at [50] and [51], it will not usually be good enough for a party to say, on an application for relief from sanctions, that a genuine attempt was made to comply or that they honestly thought they had complied with the rules. It seems to me that HMRC simply had no good explanation for failing to appreciate, until it was pointed out to them by Mr Brothers, that they had overlooked a date for compliance with their obligation to serve a statement of case for almost three years. There was no justification at all for HMRC then taking a further five months to make an application to the FTT for an extension of time to serve the statements of case.

45. In relation to prejudice, HMRC contended that Ms Sweby will not be prejudiced by the effect of the passage of time on Ms Sweby's ability to recall events as HMRC bear the burden of proving that they were entitled to raise the discovery assessment and therefore there is no requirement for Ms Sweby to give any evidence or provide any documentation. HMRC acknowledge that Ms Sweby will give evidence to refute the contention that she acted at least carelessly in bringing about the loss of tax. It seems to me that HMRC rightly do not attempt to challenge Ms Sweby's contention that memories will have faded and the recollection of events will have dimmed during the period of the delay. The fact that HMRC bear the burden of proof on some issues is no answer to that contention. It is clear, and HMRC seem to accept, that if HMRC discharges its burden of proof then there is a risk that Ms Sweby will be prejudiced by her inability to recall the details of events to challenge HMRC's case. I consider that it is more likely than not that Ms Sweby's ability to conduct her case has been significantly prejudiced by the delay in the production of the statement of case. The prejudice to HMRC if I refuse to grant the extension is that they will not be able to resist Ms Sweby's appeal. As that prejudice is the consequence of HMRC's own failure to comply with the FTT's directions, I do not give it as much weight as the prejudice caused to Ms Sweby. I consider that, on balance, the prejudice caused to Ms Sweby outweighs the prejudice that will be suffered by HMRC.

46. For the reasons discussed above, I have decided that HMRC's application to extend the time to serve their statement of case should be refused.

47. HMRC submitted that an evaluation of all the circumstances of the case does not merit the "rather draconian and final outcome" that HMRC should be barred from the appeal and not be permitted to present their evidence. I disagree. The failure to serve a statement of case for a prolonged period has created a significant risk of prejudice and, in my view, made it impossible for the FTT to deal with the proceedings fairly and justly in 2022. It seems to me that, as HMRC acknowledged, a refusal to grant an extension of time is tantamount to barring them from taking any part in the proceedings. However, I do not need to consider Ms Sweby's application for HMRC to be barred because, as HMRC have failed to serve a statement of case

in accordance with the FTT Rules, it is inevitable that their opposition to Ms Sweby's appeal must fail for lack of a pleaded case and Ms Sweby's appeal must be allowed.

**DISPOSITION**

48. For the reasons set out above, I refuse HMRC's application for an extension of time to provide their statement of case and allow Ms Sweby's appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JUDGE GREG SINFIELD  
CHAMBER PRESIDENT**

**Release date: 06 APRIL 2022**