TC03057

Appeal number: TC/2009/11840

PROCEDURE – application for reinstatement of appeal struck out for failure to comply with a direction to serve evidence accompanied by an "unless order" – approach to be adopted by the tribunal – personal issues of appellant's director – whether appellant's failure to comply was caused by the appellant or by the appellant's representatives – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

FONESHOPS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 22 February 2013 and 6 November 2013

Mr Mohammed Shakeel, director, for the Appellant

Christopher Kerr, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an application by the appellant, Foneshops Limited ("Foneshops") for reinstatement of its appeal which was struck out by the Tribunal by direction released on 29 June 2012.

2. I shall deal with the procedural history in some detail, but the proximate reason for the striking out of Foneshop's appeal was the failure by Foneshops to comply with a direction of the Tribunal issued on 21 February 2012 for the service of witness statements and exhibits. That direction had included a statement that failure to comply with the direction would lead to the proceedings being struck out. Following an application by Foneshop's for a stay due to the ill-health of Mr Shakeel, the director of Foneshops, a hearing was held at which Judge Khan directed that the appeal be struck out under rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Procedure Rules").

3. By way of an email dated 31 July 2012, Foneshops applied for reinstatement of the appeal. HMRC oppose that application, but they take no point in respect of the timing or form of the application.

The appeal

4. To put this application in context, Foneshop's appeal is a substantial one. It is against the decision of HMRC, dated 11 June 2009, to deny input tax credits for VAT in the sum of £25.3 million, arising out of transactions in VAT accounting periods 11/05, 03/06, 04/06 and 05/06. The grounds for the decision were that those transactions were connected with the fraudulent evasion of VAT, and that Foneshops knew, or should have known, of the connection. The appeal thus falls within the category of cases that have become commonly known as missing trader intra-Community fraud, or MTIC, cases.

The procedural history

5. Foneshop's appeal was made on 10 July 2009. At that stage Foneshops was represented by the Khan Partnership.

6. HMRC served their statement of case on 19 September 2009.

7. On 2 December 2009 directions by consent of the parties were issued by the Tribunal providing for the parties to serve and file their respective lists of documents by 15 January 2010.

8. On 23 February 2010 Foneshops notified the Tribunal that the Khan Partnership had ceased to act for Foneshops, and that the company would be dealing with the matter directly. The letter requested that a preliminary case management hearing that had been listed for 5 March 2010 be postponed because Mr Shakeel had a personal matter to attend to on the same day at Slough County Court. HMRC consented to the

adjournment of the hearing on 3 March 2010, and on the same day the Tribunal allowed the adjournment.

9. On 9 March 2010 Foneshops applied to stay the appeal for six months because of Mr Shakeel's personal tax matters pending before the Tribunal which he explained had been ongoing for some five years and were taking up all his time and effort. HMRC did not receive a copy of that application until it was served on them by the Tribunal on 12 April 2010.

10. On 19 April 2010 HMRC wrote to the Tribunal indicating their opposition to Foneshops' application and seeking a hearing to consider that application and to make case management directions. That letter for some reason was not received by the Tribunal, which on 7 June 2010 granted the six-month stay. That notification to the parties was followed, on 8 June 2010, by a further request from HMRC for a directions hearing.

11. That request was acceded to by the Tribunal, which on 24 June 2010 listed a directions hearing for 26 July 2010. For that hearing Mr Shakeel produced a written statement setting out his reasons for seeking an adjournment, namely that he was dealing with the legal processes around his personal tax assessments. His application included the following:

> "… I cannot see why this matter cannot be delayed as we are at the very early stages with this appeal and the delay will not affect the appeal outcome but would serve helping me to deal with this appeal when it comes to a full hearing. I am also currently trying to seek third party funding and getting legal representation for this appeal through various sources. I feel I do not have the suitable capacity to take on this appeal, considering the complexity the appeal will involve and the time and care that it should be afforded. I need adequate time to prepare this case and not be constantly thinking about my personal assessment in the background.
>
> There are other factors I would like the tribunal to take into consideration, for example I have a small amount of funds saved up and would like to allocate these to legal representation for this appeal but with the personal assessments in the background pending I am not able to do so, which will effect (sic) the outcome of this appeal. Furthermore, HMRC in its letter dated 11th June 2009 (Exhibit 10) have acknowledged and confirmed there are currently claims to input tax against expenses for periods 3/06 4/06 and 5/06 these total £64,985.31 and I am currently pursuing this amount and others."

12. At the hearing on 26 July 2010, and by directions released on 27 July 2010, Judge Radford made directions for an extended time for service of lists of documents and witness statements according to the following timetable:

> (1) HMRC's list of documents and witness statements and exhibits: 12 January 2011.

(2) Foneshops' list of documents and witness statements and exhibits: 14 April 2011.

(3) HMRC witness statements and exhibits in reply: 11 June 2011.

(4) Foneshops' witness statements and exhibits in reply: 6 September 2011.

In addition, the Tribunal directed that by 20 September 2011 Foneshops should serve and file a list of issues in dispute, and that the parties should by 27 September 2011 provide dates to avoid for a pre-trial hearing on the first available date after 13 October 2011.

13. On 10 December 2010 HMRC applied for an extension of time for the service of its list of documents and witness statements and exhibits to 30 March 2011, on the ground that the case was exceptionally large and complex and that the officer responsible for the matter had been required to reduce his working hours due to domestic care responsibilities.

14. Foneshops having objected on 27 December 2010 to HMRC's application, Mr Shakeel wrote to the Tribunal on 23 January 2011 to provide further details of his objection, and to express his "overall frustration". He confirmed that he had not received HMRC's list of documents and witness statements that had been due, according to the directions of July 2010, by 12 January 2011. He referred to his own personal tax issues, to the withholding by HMRC of Foneshops' funds through extended verification over the three years from 2006 to 2009 and to the failure, as Mr Shakeel saw it, of HMRC to deal with the claim for input tax recovery on the company's expenses. As regards that latter point, Mr Shakeel provided the Tribunal with a copy of a "without prejudice letter" to HMRC dated 23 January 2011 complaining that the expenses claim had not been dealt with. On 3 February 2011 HMRC supplied the Tribunal with their reply to that letter, indicating that a request made to Foneshops on 11 June 2009 for copies of the invoices to support the claim had received no reply.

15. HMRC's application came on for hearing on 25 February 2010 before Judge Tildesley. A direction was made that unless HMRC served their list of documents and witness statements by 1 June 2011 they would be debarred from taking any further part in the appeal. It was further directed that the parties should provide dates to avoid for a pre-trial review in June 2011 by 11 March 2011. No direction was made in respect of Foneshops' list of documents and witness statements. The direction was notified to the parties on 2 March 2011.

16. The pre-trial review hearing was subsequently, on 6 April 2011, listed for 10 June 2011. On 7 May 2011 Mr Shakeel wrote to the Tribunal requesting that the hearing be postponed for three months due to the death of his mother, and the need for him to grieve and support the family. That application was opposed by HMRC by notice of objection filed on 8 June 2011, they having received a copy of Mr Shakeel's application on that day. In the meantime, on 31 May 2011 and 1 June 2011, HMRC had served 117 folders of evidence on Foneshops.

17. On 9 June 2011 Judge Wallace directed that the hearing of 10 June be vacated, but made directions setting a revised timetable based on the earlier July 2010 directions:

(1) Foneshops' list of documents and witness statements and exhibits: 1 August 2011.

(2) HMRC witness statements and exhibits in reply: 1 October 2011.

(3) Foneshops' witness statements and exhibits in reply: 1 November 2011.

(4) Foneshops to provide list of issues: 15 November 2011.

(5) Dates to avoid for a pre-trial review: 22 November 2011.

18. Foneshops did not comply with the direction to serve its list of documents and witness statements and exhibits by 1 August 2011. Nor did it make any application for an extension of time. Following notification by HMRC to the Tribunal on 22 August 2011 of Foneshops' failure to comply, the Tribunal of its own motion listed a hearing on 3 October 2011.

19. At that hearing Foneshops was granted an extension to 3 February 2012 to serve its evidence. There was some dispute over what had transpired at the hearing, but I accept that Judge Gort warned Mr Shakeel, for Foneshops, that failure to comply with the direction could lead to the appeal being struck out, and informed him that it was Foneshops' last chance. However, the direction released by Judge Gort contained no reference to the possibility of striking out.

20. On 1 February 2012, Smith & Williamson wrote to the Tribunal to inform it that it had been instructed by Foneshops to act as its representative in the appeal. It attached a notice of application dated 1 February 2012 for an extension of time to 6 May 2012 for the service of its witness evidence and exhibits, on the ground that Smith & Williamson had only recently been instructed and needed time to review the evidence served by HMRC.

21. Having regard to its application, Foneshops did not comply with the direction to serve its evidence by 3 February 2012. By notice of objection served on 13 February 2012 HMRC objected to the extension, pointing out that Foneshops had been in possession of the evidence served by HMRC for more than eight months. The objection went on to state that if the Tribunal was minded to grant a further extension of time, HMRC requested that it be in the form of a direction that unless Foneshops complied by 4 May 2012, the appeal would be struck out without further order or direction.

22. The matter came before me on the papers on 20 February 2012, when I made a direction that Foneshops should serve its witness statements (including exhibits) on HMRC not later than 4 May 2012, and that failure to comply would lead to the proceedings being struck out. That direction was sent to Smith & Williamson and HMRC on 21 February 2012.

The strike out

23. Foneshops failed to comply with that direction. It made no application for any extension of time. On 10 May 2012, referring to Foneshops' sustained non-compliance with Tribunal directions without proper explanation, HMRC sought to have the appeal struck out. The Tribunal listed a hearing of that application for 27 June 2012, and notified HMRC and Smith & Williamson on 21 May 2012.

24. On 25 May 2012 Mr Martin O'Neill, a partner in Smith & Williamson, wrote to the Tribunal saying that his firm was aware that the deadline for serving the Foneshops' witness statements had passed, but that it had been unable to take instructions in this respect. The letter explained that their client (by whom was meant Mr Shakeel) had informed Smith & Williamson that he had been ill and unable to work on preparation for the appeal. However, they had not been able to ascertain the nature of the illness as they had had very little contact with their client in recent weeks. They requested that no action be taken in respect of the appeal until their client's health and fitness to continue could be properly ascertained.

25. That application was not served by Smith & Williamson on HMRC, who received it from the Tribunal on 19 June 2012, on which date they renewed their strike-out application.

26. The hearing took place on 27 June 2012 before Judge Khan. On that day Foneshops served a witness statement of Mr Shakeel of six pages, a 17 page statement of case and approximately 110 pages of exhibits, consisting of commercial documents and correspondence, which were not identified or formally produced in the witness statement. Mr Shakeel appeared in person for Foneshops, who were otherwise unrepresented. He gave the Tribunal the following explanations for the non-compliance by Foneshops with the direction of 21 February 2012:

> (a) He claimed that he had not been informed about the unless order by Smith & Williamson.
>
> (b) He had been ill, and confined to bed for two weeks. He produced no medical evidence in support of this claim.
>
> (c) On 29 May 2012 there had been a bereavement in the family. In support of this, Mr Shakeel produced a death certificate and a letter from the brother of the deceased.

In his written submissions, Mr Shakeel also made the point that his solicitors had been provided with a copy of 116 files of evidence served by HMRC, and would be in a position to keep matters on track. Foneshops wished to continue with the appeal and was confident of success, having identified several incorrect points in HMRC's evidence. Mr Shakeel also referred to the delay between 2006 and 2009 for HMRC's extended verification, and the further delays in HMRC serving their evidence, it having been received only after an unless direction had been made in that respect.

27. Judge Khan directed that the appeal be struck out under rule 8(1) of the Tribunal Procedure Rules for failure by Foneshops to comply with the direction of 21 February 2012. He found that Foneshops had provided no satisfactory explanation for the non-

compliance. The direction was released on 29 June 2012 and was sent by the Tribunal to Smith & Williamson and HMRC on 2 July 2012.

The application to reinstate the appeal

28. The application for reinstatement was made on 31 July 2012. The principal grounds may be summarised as follows:

(1) Foneshops had instructed Smith & Williamson to act on its behalf in relation to the appeal and recover repayment of VAT withheld regarding overheads in order to further finance and progress this appeal.

(2) The application made by Smith & Williamson for further time up to 6 May 2012 for Foneshops to serve witness statements had not been agreed by Foneshops, and Foneshops had not been informed of this.

(3) Foneshops had not been informed of the Tribunal's "unless direction" of 21 February 2012, and of the risk of the appeal being struck out, until 17 July 2012. Smith & Williamson had not passed on a copy of that direction or any further correspondence. Smith & Williamson had only informed Foneshops of HMRC's application to strike out the appeal on 18 May 2012 (the application said "1 May 2012", but I accept this was a simple error, and that 18 May 2012 is the correct date), and that this was also the first time that Foneshops had been informed that the deadline for the service of evidence had passed.

(4) Other matters had affected Foneshop's ability to deal with the appeal:

(a) Mr Shakeel's mother had died (this was a little before May 2011) and he had to deal with resulting personal family problems.

(b) Mr Shakeel's sister had needed his support and assistance due to a family matter, which appears to have involved a crime reported to the police.

(c) Mr Shakeel's wife's aunt had been critically ill and had been in hospital for a considerable time. Mr Shakeel had been visiting her and looking after her. She had subsequently died on 11 August 2012.

(d) A very close family friend had died on 29 May 20112, and in the two months prior to her death Mr Shakeel had helped to look after her and spent considerable time with her.

(5) The witness statements and documents had been served and in the interests of justice this appeal should be reinstated.

The personal matters

29. In his argument before me, in addition to the points made in the application, Mr Shakeel referred to his own medical issues, in particular his arthritis which had necessitated hip operations, and to the passing away of his wife's mother in January 2013.

30. In my view none of these matters can provide a ground for reinstatement of the appeal. There was no evidence as to how, if at all, it was said that these matters, although no doubt distressing and time-consuming for Mr Shakeel, would have prevented Foneshops from complying with the direction for the service of its evidence. In his evidence, Mr Shakeel made clear the importance he gave to such family matters, and that he regarded them as more important than issues of money, such as the prosecution of this appeal. That may have been his view, but it does not provide a basis for excusing a breach of a Tribunal direction providing for a strike out on failure to comply.

Lack of knowledge of the Tribunal's unless direction of 21 February 2012

31. Foneshop's application falls to be determined therefore by reference to Mr Shakeel's claim that (a) Smith & Williamson did not send him a copy of the Tribunal's direction of 21 February 2012; (b) he had not been aware of the proposal to fix a date in May 2012 as the date for service of Foneshop's evidence; (c) he had not been aware of the terms of the direction fixing a deadline of 4 May 2012; (d) he had not been aware that the Tribunal had directed that failure to comply with the direction would lead to the appeal being struck out; and (e) he had not known before 18 May 2012 that HMRC had applied for the appeal to be struck out.

32. In his evidence before me on 22 February 2013 Mr Shakeel referred to certain correspondence between himself and Mr O'Neill of Smith & Williamson. It was put to Mr Shakeel in cross-examination that Mr Shakeel's claims concerning the alleged failings of Mr O'Neill and Smith & Williamson had been fabricated.

33. In the circumstances I decided that the proper course was to issue a witness summons to Mr O'Neill requiring him both to attend to give evidence and to produce correspondence (whether physical or electronic), notes of telephone conversations and meetings to, from and between Smith & Williamson and Mr Shakeel concerning the conduct of the appeal (excluding legal advice as to the merits of the appeal, which might, where required, be redacted). That explains, at least in part, the lengthy delay between the first and second days of this hearing.

34. During the witness summons process a possible issue of litigation privilege was raised. I reserved this for determination, as necessary, at the commencement of the resumed hearing. In the event no point was taken, and I received unredacted copies of the documents from Mr O'Neill. Mr O'Neill also took the trouble to produce his own witness statement for which I am grateful.

35. In view of the evident differences between Mr Shakeel and Mr O'Neill, I directed that Mr O'Neill should be examined in chief by Mr Kerr for HMRC, and cross-examined by Mr Shakeel.

The facts

36. I make the following findings of fact having regard to the evidence I received from both Mr Shakeel and Mr O'Neill. Where the evidence differed, I will indicate whose evidence I preferred and the reason for that preference.

37. Mr O'Neill first met Mr Shakeel in the spring of 2009 when Mr Shakeel attended a conference at which Mr O'Neill gave a presentation on the subject of conducting an MTIC appeal in the tax tribunal. After that meeting, Mr O'Neill recorded Mr Shakeel's details on file.

38. Mr O'Neill was a speaker at another conference on 25 November 2010. After that meeting Mr O'Neill contacted Mr Shakeel by email on 15 December 2010 offering to meet him. There was an email exchange in which Mr O'Neill provided assistance to Mr Shakeel in relation to an application made by HMRC in this appeal (that must have been HMRC's application for an extension of time for service of its evidence, to which Foneshops objected on 27 December 2010). There was no meeting, and contact broke off.

39. The next contact was in December 2011. It was Mr Shakeel who contacted Mr O'Neill and asked for a meeting. The meeting took place on 21 December 2011 at the Holiday Inn, Maidenhead. It lasted about one hour. There was a discussion generally about the appeal and the fact that Mr Shakeel had conducted it himself since its inception. Mr Shakeel also referred to his successful conduct of an appeal in relation to a direct tax investigation. In respect of the VAT appeal, Mr Shakeel told Mr O'Neill that he had earlier in the year appeared in this Tribunal and that he had had difficulty asking for more time in which to serve his witness statements.

40. The detail of this conversation was a matter of some dispute. Mr Shakeel claimed that he had not been aware at the time of the hearing before Judge Gort on 3 October 2011 that reference had been made to the possibility that failure to comply could lead to a striking out of the appeal, although he was aware that Foneshops were being given a last chance. Mr O'Neill's evidence was that Mr Shakeel had explained to him the "unless" terms that had been suggested by the judge when making the direction for compliance by 3 February 2012, and that Mr Shakeel understood the seriousness of such an order, and that he had escaped from an unless direction being made "by the skin of his teeth". Mr Shakeel had not sought from Mr O'Neill any explanation of what an unless order entailed; Mr O'Neill considered that this was because Mr Shakeel understood what that meant.

41. I accept Mr O'Neill's evidence in this regard. The approach of Mr Shakeel was one of brinkmanship. He had sought assistance on a previous occasion only when faced with an application by HMRC. In my view, the only reason Mr Shakeel sought further assistance from Mr O'Neill in December 2011 was because he was aware of the serious nature of the deadline fixed by Judge Gort. He was aware of that because he had been warned by Judge Gort of the possibility that the appeal could be struck out for non-compliance. He was well aware of the nature and seriousness of an unless order.

42. At the December 2011 meeting, Mr Shakeel made it clear that he was not able to fund the conduct of the appeal. He referred to the fact that HMRC had withheld payment of all VAT claimed by Foneshops, including the VAT that related to business overheads. He had been told by HMRC that this VAT could be repaid on satisfactory presentation of the invoices relating to that claim, which amounted to £65,000 to £85,000. There was in addition an amount of £35,000 frozen in an account with the First Curaçao International Bank ("FCIB"). The bulk of the discussion concerned how Mr Shakeel could fund the appeal, either by using a litigation funding company, a guarantee from an insurance company or by releasing and using the retained funds to part-fund the appeal.

43. Mr Shakeel put it to Mr O'Neill that the third party funding was something that Mr O'Neill had simply offered to do on behalf of Foneshops. Mr O'Neill's evidence, which I accept, was that this was something that would require payment by Foneshops, and that he had explained to Mr Shakeel that he would need to be provided with the invoices in relation to the overhead expenses. I find that it had been made clear that any work to be done by Smith & Williamson was on a fee-paying basis.

44. Mr O'Neill sent Mr Shakeel a draft letter of engagement on 19 January 2012. I accept Mr O'Neill's evidence that he would not have done so unless Mr Shakeel had first confirmed that Foneshops wished to go ahead on that basis. The letter of engagement followed an email from Mr Shakeel of 17 January 2012 that had enquired of Mr O'Neill whether he was going to contact the Tribunal to confirm that Smith & Williamson had been instructed and ask for an extension of time. There had also been an earlier email from Mr Shakeel to Mr O'Neill on 11 January 2012 in which Mr Shakeel referred to paperwork he was expecting from Mr O'Neill and which said:

> "On the IPT website today their (sic) was a decision relating to a company called DI & GI Electronic Ltd this was based on CONTA (sic) Trading and it would be very useful to have your views on this case.
>
> Did I explain time is not on our side as the last direction (sic) are coming to an end very soon which I attach."

45. I also accept that the terms set out in the draft letter of engagement reflected, except in relation to the amount of the fee, what had been agreed. The terms included the following:

> "1. **The Services and Your Responsibilities**
>
> 1.1 Details of the services ("the Services") we will provide and of your responsibilities in connection with those services are set out in the Appendix to this letter.
>
> 1.2 The Services are all the services which it has been agreed that we will provide. We shall not be responsible for giving or obtaining any advice outside the scope of the Services.

We will be happy to discuss any additional services which you may require. The terms upon which we will provide any additional services will be agreed between you and us in writing.

…

3. **Fees**

3.1 Details of how our fees will be calculated are set out in the enclosed terms and conditions.

In accordance with our discussions we will charge you £5,000 (*this was later revised to £3,000*) (plus VAT and disbursements) to:

a) Inform the Tribunal of our instruction to act on your behalf and to make an application for additional time in which to serve witness statements.

b) Apply for repayment of VAT withheld regarding overheads.

Thereafter we will agree a fee structure to enable the case to proceed to a full hearing.

…

APPENDIX

Services and Responsibilities

1. **The Services - Investigation**

1.1 We will provide you with the following services in connection with the ongoing VAT litigation:

a) in consultation with you, prepare and submit an interim claim for repayment;

b) conduct the appeal before the Tax Tribunal;

c) liaising with your other advisers in connection with the VAT appeal."

46. The draft letter was accompanied by a covering letter which requested Mr Shakeel to provide certain information, such as passport, utility bill and a copy of the latest set of Foneshop's audited accounts in order to comply with Smith & Williamson's procedures for the taking on of a client.

47. Mr Shakeel's position was that on the basis of the engagement letter, Smith & Williamson had been engaged to take over the responsibility for the appeal. I do not accept that. In my view, despite the Services having been described as they were in the appendix, it was clear that the initial engagement was only in respect of the application for additional time for the making of witness statements, and the work on the funding of the appeal. Any further work on the appeal was clearly dependent on a further agreement being reached on the fees. I find that Mr Shakeel knew this; an email from him to Mr O'Neill dated 1 February 2012, which preceded the signing of the engagement letter on 20 February 2012, makes it clear that Mr Shakeel understood that further fees – Mr Shakeel referred to £80,000 to £100,000 – would be required for the further conduct of the appeal. I find that Mr Shakeel was not misled by Mr

O'Neill in this respect. I also find that Mr Shakeel could not have thought that the engagement was on a no win-no fee basis.

48. As I noted earlier, it was on 1 February 2012 that Mr O'Neill wrote to the Tribunal to notify it that Smith & Williamson had been instructed to act on behalf of Foneshops. That was curious in two respects. First, Foneshops had not at that time been formally accepted as a client of Smith & Williamson, because no engagement letter had been signed, and the usual checks had not been made. Secondly, in response to an email from Mr Shakeel of 26 January 2012 enquiring whether he had yet written to the Tribunal, on that day Mr O'Neill had told Mr Shakeel that a letter had been sent, which was not the case. Mr O'Neill expressed regret for this. It is clearly an episode that ought not to have taken place. But I am satisfied that Mr O'Neill acted in this respect, albeit misguidedly, out of the best of motives: he wanted to help Mr Shakeel despite the latter's prevarication over the letter of engagement, and in particular the question of payment of fees.

49. The correspondence around this time shows Mr Shakeel's concerns over the potential cost of the entire appeal, and his reluctance to go ahead without total certainty on the costs question. At the same time he was anxious about obtaining an extension of time for the service of a witness statement and list of documents, asking Mr O'Neill in an email of 1 February 2012 whether there was any news on the deadline of 3 February 2012 for the service of these documents, or whether it was necessary to put in a witness statement.

50. There remained a lack of agreement over the terms of engagement. On 14 February 2012 Mr O'Neill sent an email to Mr Shakeel to advise him that HMRC had objected to the application for an extension of time. He advised that it would be better to agree something with HMRC. The objection of HMRC to the extension of time sought by Foneshops was resolved by Mr O'Neill acceding to HMRC's request that any extension be accompanied by an "unless order". That was then the basis for the direction released by the Tribunal on 21 February 2012, setting a date for the service of Foneshop's witness evidence at 4 May 2012.

51. There was a dispute over the information given by Mr O'Neill to Mr Shakeel about the Tribunal's direction, and in particular the provision that the appeal would be struck out if the direction was not complied with by 4 May 2012. It is clear, however, that Mr O'Neill did not send Mr Shakeel a copy of the direction that was sent by the Tribunal to Smith & Williamson, nor did he advise him of the precise date for the service of the witness evidence. Instead, I heard from Mr O'Neill that he had had a conversation with Mr Shakeel during which he had explained that he had agreed with HMRC for a three-month extension, with an unless order. He had been in Manchester at the time, and had spoken to Mr Shakeel from a car park. According to Mr O'Neill, he had been clear that Mr Shakeel had fully understood the fact and significance of the unless order; that Mr Shakeel had been well aware of the nature of an unless order had been apparent to Mr O'Neill from the references made by Mr Shakeel to what had transpired at the directions hearing before Judge Gort.

52. Mr Shakeel disputed that this telephone conversation had taken place. He said that he had been unaware of the date at which witness evidence had been served, and that he would not have agreed to an unless order. He would instead have taken his chances before the Tribunal. In this respect I accept the evidence of Mr O'Neill. The urgency with which Mr Shakeel was pursuing the issue of an extension of time in his correspondence with Mr O'Neill up to the making of the direction by the Tribunal, and the absence of further references to that in the email exchanges following 21 February 2012, indicate that Mr Shakeel must have been made aware of the fact that an extension had been granted. I find that Mr O'Neill did inform Mr Shakeel of that fact, and of the fact that the direction included an unless order, and further that Mr Shakeel knew of the import of the unless order.

53. That finding is also supported by the fact that, on 22 February 2012, Mr Shakeel sent an email to Mr O'Neill informing him that on that day he had arranged for the documents served by HMRC to be copied and sent to Mr O'Neill. Mr Shakeel must have known at that time that there was a further period in which Foneshops could serve its own evidence. There had been a meeting on 20 February 2012 between Mr Shakeel and Mr O'Neill at with the letter of engagement had been signed, with an amendment reducing the fee payable from £5,000 to £3,000; Mr Shakeel gave Mr O'Neill a cheque for £2,000. Mr O'Neill's evidence, which I accept as it accords with the terms of the letter of engagement, was that it was agreed that, as the engagement then stood, Mr O'Neill would not be drafting Mr Shakeel's witness statement. That was dependent on further fees being paid, which it was hoped would be facilitated by the claim for the overheads input tax.

54. That then explains Mr O'Neill's response to Mr Shakeel's email of 22 February 2012 when, on the same day, Mr O'Neill enquired about the schedules for the input tax claims that had been discussed. The facts surrounding those invoices were also the subject of some dispute. Mr Shakeel disputed whether those invoices had been sent at all to Mr O'Neill. However, I accept the evidence of Mr O'Neill in this respect, when he said that he had received the invoices in his office and had "thumbed through" them, although he had done no work on them. It had turned out that the invoices would not support a claim for input tax recovery, as they had not been paid. Mr O'Neill's evidence, which I accept, was that he knew this because Mr Shakeel himself had told him.

55. Even if it had been the case that the invoices had not been sent to Mr O'Neill, this would only have reinforced the fact, which I find, that there was never any realistic prospect of the claim for the recovery of input tax financing the appeal. This was clearly not something regarded by Mr Shakeel as a priority. He had failed himself to produce the relevant evidence to HMRC and either delayed or failed completely to deliver the invoices to Mr O'Neill. Mr Shakeel said that he was trying to buy time until the input tax claim could be made, but he did not do anything to progress that claim. I find that his sole purpose was to buy time.

56. The cheque that Mr Shakeel had given to Mr O'Neill could not be encashed by Smith & Williamson, since its client acceptance procedures had not been finalised. It was necessary for Mr Shakeel to provide certain information, including signing a non-

investment client information form. Smith & Williamson also wanted details of the sole shareholder of Foneshops, a Mr Kurshid Begham. On or around 2 April 2012 Mr O'Neill telephoned Mr Shakeel to leave a message concerning the need for this information, but Mr Shakeel did not respond.

57. Mr O'Neill made two attempts to call Mr Shakeel in the period between 22 February and 4 May 2012. He left a message for Mr Shakeel to call him on both occasions, being careful, for reasons of client confidentiality, only to leave his contact details and not to say anything about the case. His main concern at that stage was to enquire whether he and Smith & Williamson remained engaged by Foneshops. On 11 May 2012, which was after the due date for the service of Foneshops' witness evidence, and after the time at which the unless order would have taken effect, Mr O'Neill wrote to Mr Shakeel to say that he had been trying to call for the last few days, and asked that Mr Shakeel give him a call. Mr Shakeel emailed in response on the same day to say that he had been ill (this illness was explained as having lasted about two weeks). He said: "I have the expenses invoices copied now. Hope all else is well." There was a conversation between Mr Shakeel and Mr O'Neill on that day.

58. Mr O'Neill then made further attempts to contact Mr Shakeel by telephone and email on 14 and May 2012. In his email of 15 May 2012 he said that he had "left at least 5 voicemails for you and have not received a response". In that email Mr O'Neill also advised Mr Shakeel: "The time has run out at the Tribunal and HMRC are moving to strike out your appeal. Something has to be done straight away." Mr Shakeel did not respond, as in an email of that date Mr O'Neill asks Mr Shakeel to arrange for somebody to call on his behalf, as something needed to be done about the issue that had been discussed on 11 May 2012.

59. That issue, as appears from an email from Mr Shakeel to Mr O'Neill on 18 May 2012, in part at least concerned the further funding of the appeal. Mr Shakeel told Mr O'Neill that he was not in a position to raise £10,000, and that he only wanted to go forward with the appeal with finance from the input tax on overhead expenses. Mr O'Neill then replied on the same day to advise of the urgency of the matter of the strike out application, the fact that Mr Shakeel had not paid the second instalment of the agreed fee on account and the need for payment if Mr O'Neill was to prepare witness statements for Foneshops. On 22 May 2012, Mr O'Neill advised Mr Shakeel that he had drafted a letter to the Tribunal requesting further time on account of Mr Shakeel's illness. On 23 May 2012, Mr O'Neill advised of the hearing that had been listed for 27 June 2012, and strongly advised Mr Shakeel that a witness statement should be served before the hearing.

60. The next correspondence from Mr Shakeel, in reply to Mr O'Neill's email of 23 May 2012, was an email from Mr Shakeel to Mr O'Neill of 19 June 2012. It read as follows:

> "I have had health issues and then their was a bereavement in the family together with the fact that no major advance's have been made with these types of appeal at the tribunal hearings.

> I doubt there is much point I had hoped I would be able to recover my expenses receipts and have some chance of getting my contra deals money at least.
>
> From the start I had explained Funds are short and having lost so much already I don't want to give HMRC any more of my money.
>
> Things are where they are and I need to know if you will be attending the hearing on the 27th June or should I go on my own?
>
> I understand you are not a charity and need funds to do anything for me but I only wanted to go forward with this if we managed to get my expenses money and with that to purchase a insurance policy to progress this appeal.
>
> I am sorry to have messed you about but what else could I have done or do? I am happy to call you any time to discuss further."

61. Following a further telephone conversation, in which according to Mr Shakeel's evidence Mr Shakeel was not willing to give Mr O'Neill what Mr O'Neill had requested in order to act on Foneshops' behalf, Mr O'Neill sent Mr Shakeel, on 26 June 2012, the submission served by HMRC in respect of their strike-out application.

62. After the hearing on 27 June 2012, at which the appeal was struck out, Mr O'Neill contacted Mr Shakeel again on 15 August 2012 to ask whether Mr Shakeel wanted to take matters further, and to ask him what should be done regarding Foneshops' papers. On that day Mr Shakeel replied to the effect that he was applying for the reinstatement of the appeal, and to ask when Mr O'Neill had advised him about the previous directions and the unless order. There followed an exchange of correspondence concerning the dispute as to whether and when Mr O'Neill had advised Mr Shakeel in these respects: those are matters I have considered above.

The law

63. Mr Kerr submitted that the correct approach to applications to reinstate was that adopted by Judge Sinfield in *Globalised Corporation Limited v Revenue and Customs Commissioners* [2012] UKFTT 556 (TC), where he considered briefly how he would have dealt with an application to reinstate in that case had he not already decided not to grant the appellant an extension of time.

64. With respect to the learned judge, I am unable to follow that approach. I am of course not bound by another decision of the First-tier Tribunal, and what was said by Judge Sinfield was strictly obiter. The facts in *Globalised Corporation* were different, in that the appellant had not been represented at the hearing at which the appeal had been struck out. That may have led the judge to consider the application in the context of rule 38 of the Tribunal Procedure Rules, which deals with the setting aside of decisions where there has been a procedural irregularity. However, in my view this provision is not analogous to the right to apply for reinstatement under rule 8(5); that provision does not require any reference to procedural irregularities.

65. In my view, the correct approach to an application to reinstate an appeal is to consider what is fair and just in all the circumstances, having regard to the reasons for

the striking out of the appeal and the reasons for any non-compliance by the relevant party. That, in essence, is nothing more than an application of the overriding objective in rule 2 of the Tribunal Procedure Rules. But some guidance on matters to be taken into account can be found in the Civil Procedure Rules. It has been held by the Upper Tribunal, in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), that the factors formerly referred to in CPR rule 3.9 are relevant to consideration of an application to make a late appeal. However, as rule 3.9 is concerned primarily with relief from sanctions, it is even more apt in the case of an application to reinstate.

66. The current version of CPR rule 3.9 is expressed in general terms, as follows:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.

67. That is essentially the same approach as the one I regard as applicable to reinstatement applications in this Tribunal. But, although CPR rule 3.9 is no longer expressed in terms of particular factors to take into account, those factors remain appropriate to any consideration of the question of fairness and justice. Those factors are as follows:

> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party.

68. Of these, para (f) is particularly relevant on the facts of this case. It is relevant to have regard to the extent to which the failure to comply was attributable to a party's representative, rather than the party itself: see *Sayers v Clark Walker* [2002] 1 WLR 3095, and to similar effect *R v Commissioners of Customs and Excise, ex parte British Sky Broadcasting* [2000] EWHC Admin 370.

Discussion

69. In this case the application to reinstate was made promptly, albeit just outside the 28-day period specified by rule 8(6) of the Tribunal Procedure Rules. No point was taken on the timing of the application.

70. The reason the appeal was struck out was the failure by Foneshops to comply with the direction of the Tribunal for service of its witness evidence by 4 May 2012, and the fact that the direction had been accompanied by an unless order specifying that the appeal would be struck out if the direction was not complied with. That direction had been made unopposed following an earlier failure on the part of Foneshops to comply with a direction for service of its list of documents and witness evidence, and a warning from a Tribunal judge that the direction given on 3 October 2011 was Foneshops' last chance.

71. The making of an unless order is a step that is not lightly taken. It signifies that the Tribunal has considered it necessary to make such an order because of the risk of continued failure to comply. Directions made by the Tribunal should not be regarded as optional; it is essential to the proper administration of justice that cases are managed efficiently and that, as the overriding objective requires, delay is avoided so far as compatible with proper consideration of the issues. Furthermore, when a Tribunal has given consideration to the question of strike out, with the benefit of the representations of the parties, and has decided in the circumstances to strike out an appeal, the prospect of the appeal being reinstated ought not to be regarded as routine.

72. There is no doubt that a decision not to reinstate would have a profound effect on Foneshops. It would no longer be in a position to pursue its appeal for the recovery of a substantial sum of input VAT which HMRC have refused to repay. That would clearly be prejudicial to Foneshops. However, that cannot be decisive; if it were, the same would apply to all such applications. It is necessary to have regard to the circumstances of the failure to comply with the Tribunal's direction in considering whether it would be in the interests of justice to relieve Foneshops of the consequences of its failure.

73. I referred earlier to my conclusion that the personal issues referred to by Mr Shakeel in both this application and at the hearing before Judge Khan are not persuasive in favour of a reinstatement of the appeal. The principal issue, in my view, is whether it was Mr Shakeel (in this respect there is no difference between Mr Shakeel and Foneshops) or Mr O'Neill and Smith & Williamson who were responsible for the failure to comply. I am clear that, on the evidence and on the findings I have made in this respect, the responsibility lay with Mr Shakeel. I reach that conclusion for the following reasons:

(1) Before being represented by Smith & Williamson, Foneshops had failed to comply with a direction that its witness evidence and list of documents be served by 1 August 2011. That demonstrates that Mr Shakeel was at that time careless of his responsibility to comply with Tribunal directions. I do not accept the argument raised by Mr Shakeel that HMRC had been responsible for considerable delay between the dates of the transactions and the making of the

decision from which Foneshops had appealed. Any such delay by one party does not excuse the delay of another party.

(2) When Mr Shakeel instructed Mr O'Neill, it was on a limited basis, as set out in para 3 of the letter of engagement. The reason Mr Shakeel wanted Foneshops to be represented at that time was because of the difficulty encountered by Mr Shakeel in persuading the Tribunal, in October 2011, to give Foneshops more time to put in its witness evidence, and because Mr O'Neill had offered the prospect of helping Mr Shakeel obtain funding for the appeal. At that time, Mr Shakeel was focused, not on complying with the Tribunal's directions, but on seeking more time to do so.

(3) As I have found, Mr Shakeel was made aware in telephone conversations with Mr O'Neill of the need for an agreement with HMRC for an unless order and of the fact that an unless order had been made, with a deadline for the delivery of the witness evidence of some three months from February 2012. Mr Shakeel knew what this meant, even if he was not sent the Tribunal's direction of 21 February 2012, and not made aware of the actual deadline of 4 May 2012.

(4) On the other hand, Mr Shakeel took no steps to enquire the position from Mr O'Neill. He took no interest in the deadline for the service of the witness evidence, or in the precise terms of the direction and the unless order. He arranged to have copies of the documents served by HMRC delivered to Mr O'Neill but did little or nothing to assist Mr O'Neill in respect of the invoices for the overheads that were required for the funding element of the instructions. He showed a marked reluctance to enter into a fees agreement, to pay the modest fees sought by Mr O'Neill or to provide information necessary to become a client of Smith & Williamson. There is no doubt in my mind that Mr Shakeel was well aware that Smith & Williamson had not been instructed to conduct the appeal generally, or to prepare Foneshops' witness evidence, yet he took no steps in that regard either on his own account or to put Smith & Williamson in a position to assist him.

(5) Mr Shakeel failed to respond to telephone calls from Mr O'Neill. The illness claimed by Mr Shakeel as an explanation for this was one of short duration, and came at a late stage, around the same time that the deadline for the service of the witness evidence was passing. Even when Mr O'Neill emphasised the urgency of the situation, Mr Shakeel was slow to respond. An insight into his reasoning can be found in the email of 19 June 2012. It is clear from that, as well as earlier references by Mr Shakeel, that he was aware of the progress of other MTIC cases through the tribunals and courts. He was concerned, in the light of other unsuccessful appeals, at incurring further expense. His motivation at all stages can be seen to be to delay matters until the prospects for the appeal might have improved, and some funding could be arranged, without any additional resources being provided by Foneshops.

74. In my view, a reasonable appellant in the position of Foneshops would have taken active steps in the conduct of the appeal after Smith & Williamson had been instructed. In the knowledge that a direction had been made for the service of the witness evidence and that the scope of the engagement of Smith & Williamson was

limited, and did not include the preparation of that evidence, a reasonable appellant would have taken steps to ascertain the precise details of the direction, and to ensure that it was complied with. That would be so if the direction had not contained an unless order; that it did makes it even more the case that a reasonable appellant, knowing as Mr Shakeel did of the significance of the unless order, would have taken active steps to ensure the direction was complied with, whether by producing the witness evidence itself or taking steps to ensure that its representative was put into a position to do so.

75. Foneshops, through Mr Shakeel, did none of these things. By failing to do so it caused the failure to comply. There is, in my view, on the evidence no good explanation for that failure. I do not consider that Mr Shakeel at any time had the intention of complying with the direction; if he had, he would have taken active steps to do so by 4 May 2012. His failure to comply can therefore be regarded as intentional. The belated service of a witness statement and certain documents on the day of the hearing of HMRC's strike out application does not remedy that failure, nor does it affect the view I have taken as to Mr Shakeel's intention.

76. At the hearing of HMRC's strike out application on 27 June 2012 the Tribunal heard representations from Mr Shakeel on both the personal issues and the alleged failure by Smith & Williamson to inform him of the unless order. The Tribunal decided that the appeal should be struck out. I have heard those representations, in particular those relating to Smith & Williamson, at greater length and in greater detail, and I have had the benefit of evidence from Mr Shakeel and from Mr O'Neill. On that basis, I find no reason to accede to Foneshop's application for the appeal to be reinstated. In the circumstances of this case it would not, in my judgment, be in the interests of justice to do so.

Decision

77. The application of Foneshops that this appeal be reinstated is accordingly refused.

Application for permission to appeal

78. This document contains full findings of fact and reasons for the decision. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2013