[2014] UKFTT 403 (TC)

TC03532

Appeal number: TC/2010/09581

Appeal progressing without payment of tax or hardship relief – jurisdiction to make Directions in absence of compliance with section 84(3),(3A)&(3B) VATA 1994 – status of Directions and Orders so made - barring order against HMRC – application for relief – applicability of Mitchell principles as applied by McCarthy & Stone – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COMPASS CONTRACT SERVICES UK LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR PETER DAVIES

Sitting in public at 45 Bedford Square, London, on 28 February 2014

Mr David Scorey instructed by Deloitte & Touche LLP for the taxpayer

Ms Jessica Simor QC and Mr Nicholas Gibson instructed by the General Counsel and Solicitor to HMRC for the Crown

CROWN COPYRIGHT 2014

DIRECTIONS

1 HMRC's application for the lifting of the tribunal's order of 16 August 2013 barring them from taking any further part in this appeal is dismissed.

2 The tribunal's barring order of 16 August 2013 remains in effect.

3 The taxpayer shall no later than 30 May 2014 apply to the Listing Office for a case management hearing to be fixed in order to determine directions for the hearing of the appeal.

4 The taxpayer's application for costs is dismissed.

REASONS FOR DIRECTIONS

1 This is an application by HMRC dated 21 August 2013 for the tribunal's order of 16 August 2013 barring them from taking any further part in these proceedings to be lifted. By notice of objection dated 23 August 2013, the taxpayer Compass Contract Services UK Limited ('Compass'), objects to the application and seeks the maintenance in force of the barring order.

Facts

2 The appeal in this case was lodged by notice dated 21 December 2010 against a decision of HMRC on 22 November 2010 with regard to an assessment made on 3 September 2010 to recover input tax which HMRC say was wrongly claimed by and allowed to Compass; the tax at issue was £1,258,259. The appeal notice is signed by a Mr Jon Wray of Compass, and in regard to payment of the tax claimed the form was completed as follows:

> **5 Indirect tax appeals only (Hardship Application)**
>
> Have you paid or deposited the disputed tax? *No*
>
> Have you applied to HMRC for their agreement that the appeal may proceed without payment or deposit of the disputed tax? *Yes*
>
> If you applied to HMRC, please tell us the status of your application. *Granted*

3 It was agreed between the parties that no hardship application had in fact been made to HMRC or agreed by them, and it was conceded by Mr Scorey on instructions that, having regard to his client's resources, no such application could have been sustained. Nevertheless, Compass claims that some sort of agreement, tacit or otherwise, did exist between them and HMRC that payment of the tax could at least be deferred: we had no clear evidence about this and, since it was accepted that whatever agreement there may have been was not a 'hardship' agreement within section 84 (as to which, see below), we did not pursue the matter. We note that HMRC did not seek payment of the tax in the course of the appeal, but it was voluntarily deposited on the day before this hearing.

4 The notice of appeal was accompanied by detailed grounds, which included a standover application to 31 May 2011 stating that the parties were in discussions and considered that the discussions were likely to narrow or resolve the issues between them. There was no objection to the application,

and a stay was ordered by the tribunal on 10 January 2011. A further stay until 31 October 2011 was granted, on the application of HMRC made on 27 May, by order of 10 June; a stay was ordered again until 31 December 2011, this time on the application of Compass made on 31 October (the order not being made till 6 December).

5 A month passed after that stay expired, and on 1 February 2012 HMRC applied for an extension to 1 April that year, which was granted by order dated 23 February. HMRC further applied on 29 March for a stay until 31 May and that was granted by the tribunal's order dated 1 May. On 28 May, HMRC applied for a further stay to 30 July but, although there was no objection from Compass, no stay was granted and the tribunal of its own motion on 17 July gave notice that a PTR hearing would take place on 4 September; to this, HMRC replied on 18 July asking why the hearing had been set down, explaining the continuing negotiations and referring to their unactioned stay application.

6 The outcome was that the tribunal agreed to vacate the hearing on 4 September and, on HMRC's renewed application, granted a stay to 28 September by order dated 28 August. On 25 September, HMRC applied for a further stay to 29 October, which was granted on 12 October; and on 29 October HMRC applied for a stay to 28 November, which was granted on 6 November, but on condition that HMRC's statement of case should be lodged by 31 January 2013. On 16 January 2013, HMRC applied to the tribunal for either a further stay of 60 days, or (in effect) a direction that Compass should serve full grounds of appeal with the Revenue statement of case following – though no date was proposed by which it should be served.

7 The matter was then dealt with by a tribunal judge who made the following direction on 18 March 2013: (i) Compass to deliver amended grounds of appeal within 56 days of the direction being released; (ii) HMRC to deliver their statement of case within 56 days of receiving the amended grounds of appeal; (iii) in the absence of a settlement or compliance with these time limits, "the party in default may have its appeal struck out or may be barred from taking any further part in the appeal as the case may be". This brought potentially into play the provisions of Rule 8(3)(a), to which we refer below.

8 Compass complied with the direction and lodged amended grounds of appeal on 9 May 2013, which gave HMRC until 4 July to serve their statement of case. Negotiations were continuing meanwhile, a meeting taking place on 20 June, following which further documentation was to be provided to HMRC by Compass. HMRC, however, failed to comply with regard to their statement of case and on 22 July a judge made an 'unless' direction which stated that if HMRC did not lodge their statement within 14 days of the release of the direction (i.e. by 5 August) "the respondent will be barred from taking any further part in the proceedings". This brought potentially into play the provisions of Rule 8(1), to which we also refer below.

9 Next, HMRC wrote to the tribunal on 24 July referring to "the tribunal correspondence dated 22 July" – i.e. the 'unless' direction – and saying:-

> The commissioners client (sic) is in the process of amending the case summary and as such I would be grateful if a further period of 30

> days could be granted to allow for the statement of case to be prepared.

10 The only response from the tribunal was an order dated 16 August which provided:-

> The respondents are hereby BARRED, pursuant to Rules 8(3)(a) and 8(7) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, from taking any further part in these proceedings.

11 On 21 August, HMRC made the application which is now before us, 16 days after the deadline which they had failed to meet had expired.

12 A witness statement by Ms Cheryl Hugill was put in evidence and accepted without cross-examination. Ms Hugill is a barrister in HMRC's Solicitor's Office and is the Head of the VAT and Duties Litigation Team which deals with all disputes concerning the indirect taxes. In 2013, 973 such cases arrived to be dealt with. The Team have what is referred to as "an administrative support system" composed of junior administrative staff who are not legally qualified. Their task is to act as liaison between the officers of the tax administration, who make the tax liability decisions, and the Litigation Team's lawyers.

13 Shortly before the present case came to Ms Hugill's attention, she became aware of another case in which a barring order had been made and referred it to the Director of Litigation and to the Solicitor and General Counsel. After investigation, Ms Hugill decided that her system was not sufficiently robust, and on 8 August instituted new procedures under which the junior staff had to refer any 'unless' direction to her at once. In addition, all cases in which an extension of time to file the statement of case had been given were identified, and any that had not been allocated to a lawyer were to be referred to Ms Hugill for immediate allocation.

14 The barring order of 16 August – a Friday – came to Ms Hugill's attention on the following Monday, 19 August and by Wednesday 21 August the present application for relief had been lodged with the tribunal. Unfortunately, the measures put in place on 8 August had not sufficed to identify the 'unless' direction in this case and a further search had to be instituted to make sure that there were no others that had slipped through the net. Further measures were put in place accordingly to strengthen those adopted on 8 August.

15 Ms Hugill's conclusion was that the system had been insufficiently robust to deal with the risk of cases being delayed, and that it was clear that the junior member of staff who had dealt with this case had not realised the significance of the 'unless' direction and that "a training need was identified". Ms Hugill said that matters should have been referred to her immediately upon the making of the directions.

Legislation

16 The appeal in this case comes to the tribunal by virtue of section 83(1)(p) of the Value Added Tax Act 1994, in respect of an assessment under section 73. Section 84 of the Act then provides:-

(1) References in this section to an appeal are references to an appeal under section 83.

. . .

(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.

(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if—

(a) HMRC are satisfied (on the application of the appellant), or

(b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),

that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship.

(3C) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, the decision of the tribunal as to the issue of hardship is final.

17 Rules 2 and 8 of the Tribunal Rules, so far as relevant, provide as follows:-

2(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;

(d) using any special expertise of the Tribunal effectively; and

(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.

8(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.

(2) The tribunal must strike out the whole or a part of the proceedings if the tribunal-

(a) does not have jurisdiction in relation to 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.
(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.
(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.

18 The present Civil Procedure Rule bearing on analogous situations in civil ligation provides:

> 3.9 (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.

Case law

19 A number of authorities was been cited in argument, and reference appears to them below, but it may be convenient here to cite extracts from three of those principally in point.

20 In *Marcan Shipping v Kefalas* [2007] 1 WLR 1864, Moore Blick LJ observed of ‘unless’ orders in general:-

> [34] In my view it should now be clearly recognised that the sanction embodied in an “unless” order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect. This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, “activated”. The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms. If an application to enter judgment is made under rule 3.5(5) , the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal, but it

may often be better to make all reasonable efforts to comply and to seek relief in the event of default.

[35] The second consequence, which follows from the first, is that the party in default must apply for relief from the sanction under rule 3.8 if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by rule 3.9 to consider.

[36] The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as "good housekeeping purposes".

21 In *Mitchell v Newsgroup Newspapers Ltd* [2014] 1 WLR 795, the Master of the Rolls, giving the judgment of the Court of Appeal, made the following observations:-

[37] We recognise that CPR r 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR r 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned.

[40] We hope it will be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the noncompliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle *de minimis non curat lex* (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

[41] If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. 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. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.

[45] On an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective. If the application for relief is combined with an application to vary or revoke under CPR r 3.1(7) , then that should be considered first and the *Tibbles* criteria applied. But if no application is made, it is not open to him to complain that the order should not have been made, whether on the grounds that it did not comply with the overriding objective or for any other reason. In the present case the sanction is stated in CPR r 3.14 itself: unless the court otherwise orders, the defaulting party will be treated as having filed a budget comprising only the applicable court fees. It is not open to that party to complain that the sanction does not comply with the overriding objective or is otherwise unfair. The words "unless the court otherwise orders" are intended to ensure that the sanction is imposed to give effect to the overriding objective. As we have said, the principles by which the court should decide whether to order "otherwise" are likely to be the same as the principles by which an application under CPR r 3.9 is determined. In most cases the question whether to relieve a party who has failed to file a costs budget in accordance with CPR r 3.13 from the CPR r 3.14 sanction will therefore be dealt with under CPR r 3.14 . That did not happen in the present case. That is why the question of relief from sanctions was dealt with under CPR r 3.9.

[46] The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as "the culture of delay and non-compliance" will continue despite the introduction of the Jackson reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to

this judgment should ensure that the necessary changes will take place before long.

[48] We have earlier said that the court should usually grant relief for trivial breaches. We are not sure in what sense the judge [in a previous lower decision on which the Court was commenting] was using the word "unintentional". In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. We share the judge's desire to discourage satellite litigation, but that is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders. In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR r 3.9 . In other words, once the new culture becomes accepted, there should be less satellite litigation, not more.

[59] We therefore dismiss the appeals against both orders. The master did not misdirect herself in any material respect or reach a conclusion which was not open to her. We acknowledge that it was a robust decision. She was, however, right to focus on the essential elements of the post-Jackson regime. The defaults by the claimant's solicitors were not minor or trivial and there was no good excuse for them. They resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants. Although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback.

22 In *McCarthy & Stone (Developments) Limited v RCC* UKUT PTA/345/2013, Judge Sinfield sitting in the Upper Tribunal considered the application of the *Mitchell* approach to the tribunals, and made these observations:-

[41] HMRC cannot complain that the sanction provided by the UT Rules does not comply with the overriding objective or that the consequences of it are such that it must be fair and just to grant relief from it. HMRC must find reasons in the circumstances of the case, rather than in the nature or effect of the sanction, why it would be fair and just to grant the application. I do not consider that the fact that HMRC had been granted permission to appeal by the FTT is relevant to the question of whether it would be fair and just to grant HMRC's application. The grant of permission to appeal is what started time running and it has nothing to say about why the time limit was not met. The fact that McCarthy & Stone knew that HMRC had been granted permission to appeal is equally irrelevant to the issue for the same reason. Finally, the fact that HMRC gave no indication that they had abandoned the appeal is also not relevant to the issue of why the time limit was not met and whether fairness and justice require the default to be relieved from the sanction in the UT Rules .

[43] I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, i.e. more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. The overriding objective in the UT Rules requires the UT to avoid unnecessary formality and seek flexibility in proceedings.

[44] An informal and flexible approach may mean that a self-represented litigant is granted relief from a failure to comply with the rules, including

time limits, in circumstances where a more experienced and better resourced party is not. That difference in treatment between different parties does not mean that the UT is applying dual standards but only that the level of experience and resources of a party are factors which should be taken into account in considering all the circumstances of the case. Such factors will, however, carry less weight than the two principal matters which must be considered in the new CPR 3.9.

[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules.

[46] The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

[47] As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders.

[48] Accordingly, in considering HMRC's application to be allowed to serve a notice of appeal after the time limit for doing so has passed, I have treated the need for appeals to be conducted efficiently and the need to enforce compliance with the UT Rules as important issues which carry greater weight than the other issues in the case. I turn to consider those issues next. As discussed below, I have also had regard to the different matters listed in the old CPR 3.9 but I have given them less weight in making my decision. They are discussed in more detail below.

[49] Unlike the example given by the Court in *Mitchell*, this was not a case where, because of overwork or other reason, a solicitor simply overlooked a deadline which the Court stated would be unlikely to be a good reason to grant an extension of time. In this case, Mr Stok and Mr Coleman received the notification of the grant of permission to appeal and, it appears, did not inform others of it when, for different reasons, they stopped working at the Solicitor's Office. Mr Williams and Mr Beresford missed the FTT's email with the decision granting permission to appeal when reviewing Mr Stok's files after he had gone on long term sick leave. Although I accept that it is easy to overlook one email among so many, I consider that the fact that this one was missed shows that this appeal was not being efficiently managed after Mr Stok's departure. There was no evidence that Mr Stok had not maintained the file relating to the appeal properly. It should have been clear

from looking at the case file that an application to appeal had been made to the FTT on 8 February. A decision from the FTT should have been expected within a few weeks (certainly before the date of Mr Stok's departure) and a simple search of Mr Stok's inbox would have discovered the email which had the name and reference of the appeal in its subject line. The evidence shows that, despite it being an active matter, Mr Williams did not review the file for this appeal until prompted to do so by Mr Belbin's telephone call on 28 June. I conclude that, between 12 April and 28 June, this appeal was not being conducted efficiently.

[50] The fact that the appeal was not being conducted efficiently does not inevitably lead to the conclusion that HMRC's application must be refused. In particular, if there is a good reason for the conduct then this factor would weigh less heavily against HMRC. The burden is on HMRC to satisfy me that there was a good reason for the time limit not being met. HMRC's frank admission that they made an administrative error is commendable but does not provide any explanation for the failure to comply with the time limit. Although Mr Stok went on long term sick leave from 12 April, HMRC expressly disclaimed any reliance on his illness either before or after his absence as a reason for the failure. I think that is right. HMRC Solicitor's Office has many lawyers and paralegals and should be able to handle cases in the event that a lawyer falls ill or leaves. No reason was given why Mr Williams' review of Mr Stok's active case files and email account did not reveal that the FTT's decision granting permission to appeal had been received. In short, HMRC are not only unable to give a good reason for the failure to serve the notice of appeal on the UT within one month, they are unable to give any explanation at all. It seems to me that, in the circumstances of this appeal, it would not be consistent with the need to ensure that appeals in the UT are conducted efficiently to allow HMRC to serve a notice of appeal almost two months after the time limit has expired.

[51] In *Mitchell*, the Court of Appeal stated, at [48], that "… we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial."

[52] The failure by HMRC Solicitor's Office to provide the notice of appeal for a period of 56 days after the time limit for doing so had expired was neither minor nor trivial. The service of the notice of appeal on the UT, which then sends it to the respondent, is an important part of the appeal process without which further progress is impossible. The fact that a failure to comply with a time limit is neither minor nor trivial does not preclude the UT from extending time in order to enable the party to comply if there was a good reason for the default and it is fair and just to do so in all the circumstances of the case. As discussed above, HMRC have not advanced any reason for the failure to comply with the UT Rules other than administrative error which I equate with the "well-intentioned incompetence" mentioned in *Mitchell*. As in that case, I find that the administrative error that led to a breach of the UT Rules was neither minor nor trivial. Refusing applications to extend time limits made after they have expired reinforces the need for parties to comply with the time limits in the UT Rules and directions made under them. In the absence of any good reason for failing to comply with the time limit, I can find no reason, in the circumstances of this case, not to apply the sanction provided by Rule 23(5)(b) of the UT Rules and refuse to admit HMRC's notice of appeal.

[53] As the Court of Appeal noted in *Mitchell* at [35] quoted above, Sir Rupert Jackson said in his report that the new CPR 3.9 does not preclude the court taking into account all of the matters listed in the old CPR 3.9 but it should avoid the need for judges to embark upon a lengthy recitation of

> factors. It seems to me, therefore, that it is no longer necessary to conduct the exercise undertaken by Morgan J in *Data Select v HMRC* [2012] UKUT 187 (TCC) in every case. *Data Select* concerned an application to the FTT for an extension of time for making an appeal. The FTT considered that, in the exercise of its discretion, it should have regard to the factors referred to in the old CPR 3.9 as well as the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which is identical to the overriding objective in the UT Rules. When the case came before the UT, Morgan J held, at [34], that, as a general rule, when a court or tribunal is asked to extend a relevant time limit, it asks itself the following questions:
> (1) what is the purpose of the time limit?
> (2) how long was the delay?
> (3) is there a good explanation for the delay?
> (4) what will be the consequences for the parties of an extension of time? and
> (5) what will be the consequences for the parties of a refusal to extend time?
> The court or tribunal then makes its decision in the light of the answers to those questions.
>
> [54] Morgan J, in [35] and [36], referred to *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261, [2006] CP Rep 17; *HMRC v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196; and *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135, [2006] STC 1218 as useful guides to the approach to be taken to applications. And, indeed, I was referred to all of those cases by one or other, sometimes both, of the parties.
>
> [55] Morgan J also held, at [37],that the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in the old CPR 3.9, is the correct approach for the FTT to adopt in relation to an application to extend time. In my view, that approach can no longer be regarded as correct in the light of the guidance given by the Court of Appeal in *Mitchell*. That is not to say that the factors in the old CPR 3.9 are irrelevant. Those factors may, depending on the case, be part of "all the circumstances of the case" which it is appropriate to consider. The matters listed in the old CPR 3.9 are a useful aid to ensure that all relevant other issues have been taken into account. In my view, it is no longer necessary, however, to treat the matters in the old CPR 3.9 as a checklist of issues which must be set out in full and considered in every decision.

Submissions – the Crown

23 Ms Simor QC, for HMRC, submitted that the only proportionate response to her application was for the tribunal to lift the barring order.

24 Ms Simor pointed out firstly that no hearing had taken place before any of the three directions or orders leading up to the barring - the warning direction of 18 March 2013, the ‘unless direction’ of 22 July or the barring order of 16 August. They were all directions made by the tribunal of its own motion and without notice to the parties; accordingly, none was made in full awareness of the surrounding circumstances, the positions of the parties, or the consequences for the parties, and the Tribunal could not therefore have assessed their necessity or proportionality.

25 In so far as the barring order was concerned, the tribunal was obliged under Rule 8(1) to make it in light of the terms of the 'unless' direction of 22 July 2013, and it followed that the tribunal was not exercising a discretionary power, or weighing up all the circumstances and assessing its relative merits, its necessity or its proportionality. Thus, whilst the barring order referred to Rule 8(3), it is clear from the terms of the 'unless' direction that the barring order had to have been made under Rule 8(1); the tribunal had no discretion.

26 So, in deciding whether or not to allow the application to set aside the tribunal was not reviewing the exercise of a discretionary power but, for the first time, it was deciding whether it would be reasonable to bar HMRC from further participating in the proceedings, which included consideration of whether (if necessary) an alternative more proportionate approach should be applied in relation to HMRC's non-compliance.

27 Having regard to the overriding objective in the Rules (read, insofar as appropriate, by reference to the post-Jackson approach under the Civil Procedure Rules to granting relief from sanctions) and the facts of this particular case, it would not be reasonable or proportionate to maintain the barring order so as to preclude HMRC from taking any further part in the proceedings.

28 While HMRC accepted the importance of adherence to directions of the tribunal, the default in this case was not significant either in terms of the length of time taken by HMRC to comply, or in terms of the consequences for Compass: in legal terminology, it could properly on the specific facts of the case be described as 'trivial', albeit that HMRC had taken it extremely seriously. As soon as HMRC realised that it had defaulted, it acted swiftly to comply, serving its proposed statement of case and application to lift the barring order within 5 days (and within only 3 working days), which was only 16 days after the deadline set by the 'unless' direction.

29 The default had arisen because a junior support officer had not realised the significance of the 'unless' direction. This is reflected in the fact that, two days after the direction was made, HMRC had applied for an extension of time, though the tribunal did not respond to that application. No prejudice had been suffered by Compass as a result of HMRC's default, or would be if the bar on its participation were to be lifted. Compass formed part of a large and well-resourced group of companies advised by professional tax advisers and lawyers, which HMRC considered to have wrongly reclaimed £1.25m of input tax.

30 At no point in the more than three years since it issued its appeal had Compass sought to have its appeal heard; and indeed it had only served its detailed grounds of appeal on 9 May 2013 (nearly two and a half years after lodging its notice of appeal) on being required to do so by the tribunal. Compass had sought to negotiate a settlement with HMRC and was, in the period after filing its detailed grounds of appeal, continuing to negotiate; far from being prejudiced by any delay, it had not itself shown any interest in getting the appeal determined, preferring to seek a negotiated settlement.

31 The consequences of shutting HMRC out from defending the case (including by way of lodging a statement of case) would potentially be extremely serious. Thus, the tribunal would have to determine the legality of

the assessment on its own, without either evidence or legal argument from HMRC; the tribunal could not simply allow the appeal, since it would thereby have failed to carry out the function assigned to it under the Value Added Tax Act 1994 section 83(1)(p) in a fair and just manner.

32 Moreover, it was not clear that the tribunal could properly decide the appeal on its own in the circumstances, since the matters to be resolved in the substantive appeal concerned questions of fact, namely at what point HMRC had, in HMRC's opinion, sufficient information to justify the making of the assessment, and questions of law regarding entitlement to reclaim VAT on the facts of the case. HMRC did not shy away from the very serious nature of a failure to comply with an 'unless' direction, and had both taken action promptly and had taken steps to minimise the chances of this happening again.

35 Ms Simor submitted that whilst to the greatest extent possible HMRC should be treated as any other litigant, in determining whether the lifting of a barring order is the appropriate and proportionate approach in accordance with the overriding objective, recognition must be given to the difference between purely private civil proceedings, and proceedings such as these. Here there was potentially £1.25m of tax claimed from the public purse, which it is believed should not have been claimed. If that was the case, the money should be available to the Treasury for public purposes. There was therefore a public interest in the question being determined on a properly informed basis, in contrast to private law civil proceedings where taxpayers' money and the services funded by that money were not at issue. If necessary, a proportionate way to deal with HMRC's failure in these circumstances would be by way of a costs penalty.

36 On the eve of the hearing, Ms Simor submitted an addition to her skeleton argument taking, for the first time, the point that as the tax at issue had not been paid or hardship agreed with HMRC the tribunal had no jurisdiction to make the directions and the barring order. Section 84(3) was she said categorical, and did not allow the tribunal to act in relation to the appeal until its provisions had been satisfied. On this argument, no relief from the barring order was possible because the order had been made without jurisdiction; a declaration to that effect would be appropriate and the appeal could proceed as though the order had not been made.

37 Ms Simor then made detailed submissions on the effect of tribunal's rules and their relation to the Civil Procedure Rules – which we take as an alternative to her submission that the directions and order had been made without jurisdiction. The relevant principle was that the tribunal could regulate its own procedure, subject to the overriding objective of the Rules that the tribunal should deal with cases fairly and justly. Thus:

- Rule 5(2) specifically provided that the tribunal might give a direction in relation to the conduct or disposal of the proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- Rule 6 provided for a power for the tribunal to make directions on its own initiative or on the application of one or more of the parties.
- Rule 6(5) specifically provided that, if a party wished to challenge a direction which the tribunal had given, it could do so by applying for another direction which amended, suspended or set aside the first direction.

- Rule 7 provided that, where there was non-compliance with directions, the tribunal could exercise its power under rule 8 to strike out or to restrict a party's participation in proceedings: rule 7(2)(c) and (d).
- Rule 8(1) provided that in the case of failure 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, the proceedings, or the appropriate part of them "will automatically be struck out".
- In addition to the mandatory obligation to strike out/bar further participation for non-compliance set out in rule 8(1), the tribunal also had a discretionary power to strike out/bar for non-compliance with a direction where the relevant direction stated that the party 'could' be struck out if it failed to comply: rule 8(3)(a).
- Rule 8 also provided for other circumstances in which the Tribunal might strike out or bar a party: rules 8(2), 3(b) and 3(c).

38 While HMRC could not be struck out so as to lead to an appeal automatically being allowed, it could only be barred "from taking further part in the proceedings": rule 8(7)(a). The Tribunals Procedure Committee specifically considered objections to this difference in treatment between a taxpayer and HMRC, but noted that there is a relevant distinction and that it would "not necessarily be appropriate to rule in favour of the taxpayer, whatever the merits of its appeal, simply because of a failure to respond": see the Response from the Tribunal Procedure Committee of June 2009 to the consultations on the draft First-tier and Upper Tribunal Rules from May to November 2008, at § 34.

39 In HMRC's submission, the distinction is essential in order to ensure that the Tribunal can decide cases on the law and the facts. The Rules as formulated therefore make clear that the behaviour of the respondents should not necessarily mean that the appellant should win its case. In a case where a taxpayer was manifestly not entitled to the relevant monies claimed, it would be contrary to the public interest for it to receive them because of a failure to comply with a time limit by HMRC; HMRC is not in an equivalent position to a private litigant, but acts in the public interest to recover tax.

40 The direction of 18 March 2013 was a direction pursuant to which the tribunal had a discretionary power to strike out under rule 8(3)(a) because it stated that non-compliance could lead to the parties being struck out or barred. The direction of 22 July 2013 was a direction pursuant to which the tribunal was obliged under rule 8(1) to strike out/bar for non-compliance, since it stated that non-compliance would have that consequence. In relation to a strike out or barring under rule 8(1) or 8(3)(a), the appellant or respondent could "apply for the proceedings, or part of them, to be re-instated", i.e. for the bar on the respondent to be lifted: rules 8(5) and 8(7)(b).

41 Although, where the respondent has been barred from taking further part in proceedings under rule 8, the tribunal *may* summarily determine any or all issues against the respondent – rule 8(8), it is clear that a decision to determine an appeal summarily would not follow as a matter of course. The tribunal must exercise its discretion in the light of the overriding objective, and taking into account the relevant principles of EU law. HMRC did not submit that a barring order could never be made in an appeal involving taxes and accepted that the rules providing for 'barring orders' were lawful, but it was argued that where the tribunal is requested to exercise its jurisdiction under rule 8(5) it must

consider carefully whether or not it is proportionate to maintain the barring order (particularly where an alternative sanction may be sufficient).

42 HMRC's submissions then turned to a comparison with the Civil Procedure Rules ('the CPR'), which provided a regime that is similar to that in the Tribunal Rules but included a significant difference. Whilst CPR 3.3 allows for the court to make an order of its own initiative – an 'unless' order deriving from powers under 3.1(3) and 3.4(2)(c) – if this is done without giving the parties an opportunity to be heard it is open to the parties to apply to have the order set aside, varied or stayed; and the court is obliged to alert the parties to that right. Thus, had the 'unless' direction of 22 July 2013 been made by the High Court, there would have been an express reference to the possibility for the parties to apply to have it set aside, varied or stayed in the direction itself.

43 HMRC's letter of 24 July 2013 sent two days after receipt of the direction, asking to extend time by 30 days, could have led to variation of the direction to that effect. While the tribunal had the power to deal with HMRC's letter of 24 July 2013 as an application under Rule 6(5) or, indeed, to have made a direction of its own volition (cf. rules 6(1) and 5(2)) to amend, suspend or set aside the 'unless' direction, it either did not recognise that or chose not to do so.

44 Importantly, the Tribunal Rules do not provide for parties to make such an application within the specific framework of rule 8, and the 'unless' direction did not state that the parties could apply for it to be varied. Nor, as noted above, do the parties have any express right to be heard before the tribunal either makes the direction or exercises its power to strike out for non-compliance pursuant to rule 8(1) (a mandatory power) or rule 8(3)(a) (a discretionary power). This is in contrast to the position where a barring order is made under rules 8(2), (3)(b) or (3)(c), where the tribunal is obliged to give the parties an opportunity to be heard prior to making an order striking out or barring: rule 8(4).

45 This contrast is a further reason why the tribunal in an application under Rule 8(5) must carefully consider the proportionality of the barring order in all the circumstances. A party struck out or barred under rules 8(1) or 8(3)(a), and not afforded an opportunity to have the proportionality of imposing that sanction considered before the order was made, should not be denied proper consideration of the proportionality of maintaining the sanction. In this case, neither party was heard prior to the making of the direction of 18 March 2013, the making of the 'unless' direction on 22 July 2013, or the making of the barring order on 16 August 2013.

46 Moreover, it appears that the tribunal took the view that the 'unless' direction could not be varied by application of the parties. HMRC's letter of 24 July 2013 seeking an extension of time (in effect, an application to amend, suspend or set aside the direction), received no response, presumably on the basis that he tribunal considered that it could not vary or stay the 'unless' direction. It is likely that the tribunal did in fact have the power under rules 5(2), 5(3)(a) or 6(5) to amend, suspend or set aside the 'unless' direction and/or to grant or refuse the 30-day variation sought.

47 Accordingly, this is the first point at which the tribunal will be able to consider the relative interests of justice in the making of the 'unless' direction,

which is clearly relevant to the question of whether the subsequent automatic barring should be lifted. Therefore, an application under rule 8(5) for the bar to be lifted is not directly analogous to an application for relief under CPR 3.8-3.9: 'Relief from sanctions'. In the latter case, the decision to impose the sanctions will in most cases only have been made after the civil court has either received and heard an application by one of the parties seeking a particular order, or heard the parties in the context of a decision of its own to impose an unless order.

48 Therefore, the tribunal cannot determine the application under rule 8(5) on the assumption that it was necessary and proportionate; the decision as to whether to lift the bar must involve consideration of all the circumstances of the case in order to determine the requirements of justice, and whether the order was in fact necessary and proportionate. If the 'unless' direction was a disproportionate response to the original breach, having regard to its consequences, that factor is highly relevant to a decision whether or not to lift the bar.

49 The Court of Appeal has repeatedly emphasised the very great care that needs to be taken by a court before it decides to impose an 'unless' order for the striking out of a party's case, having regard to the grave consequences of non-compliance. An 'unless order' or 'conditional order' striking out a statement of case was described by Ward LJ as an "atomic weapon in judicial armoury": *Hytec Information Ltd v Coventry City Council* [1997] WLR 1666 at 1676D.

50 Moore Bick LJ described such an order as "one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified": *Marcan Shipping* at [36]. In particular, the learned judge noted that he found it "difficult to imagine circumstances in which such an order could properly be made for what were described ... as 'good housekeeping purposes'.": ibid. To be properly satisfied of the 'necessity' of deploying this "atomic weapon of the judicial armoury" one would normally expect the court or tribunal to hear the parties, unless the tribunal is particularly familiar with all the background, through earlier hearings, non-compliance etc.

51 Exercising its powers under rule 8(5) the tribunal is required by rule 2(3) to have regard to the overriding objectives in rules 2(1) & (2). In recent *obiter* decisions, the Upper Tribunal and First-tier Tribunal have indicated a willingness to follow the new approach adopted under the CPR following the Jackson reforms to deciding whether or not to grant relief from sanctions: see *McCarthy* (refusing an application for a 56-day extension of time after HMRC failed to lodge its notice of appeal before the Upper Tribunal in accordance with the time limit); and in *Foneshops Limited v RCC* (a refusal of permission to appeal) (TC/2009/11840) the tribunal stated *obiter* at [10] that "there is no reason in principle why such an approach should not also apply in the First-tier Tribunal".

52 Before adopting such an approach, the tribunal would also need to be satisfied that it complied with:-
a. the 'overriding objective';
b. the conceptual difference between private civil litigation conducted under the CPR rules and tax cases in which HMRC acts in the public interest – and

where, in indirect tax cases and excise cases, it acts pursuant to an EU law obligation; and
c. the practical differences between private civil litigation under the CPR and appeals before the FTT.

53 The Court of Appeal gave guidance as to application of the new simplified CPR rule 3.9, post-Jackson, in *Mitchell*. Lord Dyson noted that the new simplified rule did not preclude the court taking into account all the factors previously listed in rule 3.9(a)-(i), but meant that in considering "all the circumstances of the case" "paramount importance and great weight" should be given to the two factors now specifically listed in (a) and (b), subject to the Guidance given by the court at [36] & [37]. Further, Lord Dyson noted that the use of the word 'justly' in rule 3.9 was a reference back to the 'overriding objective' at [37]. The Guidance as to how CPR 3.9 should be approached was set out at [40] & [41].

54 HMRC submits that whether the tribunal applies the *Mitchell* approach (giving paramount importance to the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions), or whether the tribunal gives greater emphasis to the wider circumstances (having particular regard to the overriding objective), or whether the tribunal applies a combination of the two, the balance in all cases is strongly in favour of the bar being lifted.

55 Applying Lord Dyson's approach in *Mitchell*, the first question is the 'nature of the non-compliance'. HMRC submits that its non-compliance occurred in the context of it having written to the Tribunal two days after receiving the 'unless' direction to seek a further 30 days to prepare its statement of case. Moreover, as soon as HMRC realised the consequences of its non-compliance (and that the thirty-day extension had evidently not been granted), it acted swiftly to comply with the direction, issuing its statement of case and appeal against the barring order within five days - three working days - which was only 16 days after the deadline set by the 'unless' direction. Accordingly, the default was of 16 days only.

56 While it is difficult to characterise any failure to comply with such a direction as 'trivial', the circumstances here could not therefore be said to have been 'significant' and could properly be characterised, as a matter of law, as 'trivial'. If that is accepted by the tribunal, the barring order should be lifted and no further analysis is required.

57 If the tribunal considers that the non-compliance in this case cannot be characterised as 'trivial' in a legal sense, then HMRC submits that the tribunal should in any event grant relief having regard to the reason for the default. The default occurred in circumstances where an application to extend time had been made, and where the terms of the direction were not altogether clear. Further, the original failure to comply with the 18 March 2013 directions occurred in circumstances where the parties were actively negotiating; a meeting took place on 20 June 2013.

58 As the Court of Appeal noted in *Mitchell*, "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": [41]. Here, the tribunal did not give notice to or seek representations from the parties

following non-compliance with the directions of 18 March 2013, and was not therefore aware of the parties' circumstances when it made the 'unless' direction. The Court of Appeal in *Mitchell* also observed that "applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event": [41]. HMRC submits that this is a relevant factor.

59 The wider circumstances also militate in favour of the bar being lifted. It would not be unfair or unjust to Compass for HMRC to be permitted to take part in the proceedings; Compass has suffered no prejudice as a result of HMRC's non-compliance, and does not even suggest as much. It is submitted that it is practicable in this case to ensure that the parties participate fully, without that undermining the integrity of the tribunal system or in any way prejudicing the appellant: Rule 2(2)(c).

60 The tribunal must look amongst other things at the parties' resources: rule 2(2)(a). Here, Compass is part of a large group of well-resourced companies, acting on the advice of tax and legal advisers. This is not a case of an unrepresented individual, or a small company or individual that has been kept out of money to which it claims it is entitled in such a way that its ability to continue its business is in any sense threatened. Compass has not pursued its appeal but has sought to negotiate a settlement with HMRC and HMRC has sought to co-operate. Since the assessment in 2010, the parties have been involved in protracted negotiations concerning a wider settlement of tax issues concerning the Group than the VAT issue with which this appeal is concerned.

61 For nearly three years following the notice of appeal on 21 December 2010, Compass at no point pressed for the hearing of the appeal but engaged HMRC in negotiations. The grounds of appeal specifically included a standover application, and detailed grounds were not served until 9 May 2013 following the directions by the tribunal on 18 March 2013 - directions made in response to the letter from HMRC asking for a further stay of 60 days or, alternatively, for the tribunal to direct Compass to serve detailed grounds.

62 Compass received a detailed explanation of HMRC's case on 14 June 2013 and met HMRC to discuss this further on 20 June 2013, after which Compass was to provide further documentation and it was proposed that a further meeting would be held after that. Far from suffering any prejudice, Compass has sought to delay its appeal and, since the 'unless' direction was made by the tribunal of its own motion and without notice to the parties, cases such as *Hytec* cannot assist because the direction was not a "necessary forensic weapon" in part of a civil dispute, but a 'case management' tool used by the tribunal to compel the parties to progress the case.

Submissions – the taxpayer

63 Compass contends that the application for relief from the barring order should be dismissed, with costs.

64 *Hytec* provides useful guidance on unless orders under the CPR, which apply equally to the same "overriding objective" which is the guiding principle in the Tribunal Rules. Auld LJ, at 1676, encapsulated the essence of an 'unless' order when he stated:-

> Such an order is, by its nature, intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court.

Ward LJ articulated the key principles of 'unless' orders at 1674-5:

> (1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the last chance to put his case in order.
> (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.
> (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.
> (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.
> (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.
> (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice.
> (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

Lord Woolf MR concluded the judgment of the Court, at 1679, noting that in that case the defaulting party "was the author of its own misfortune" such that its pleading was struck out.

65 More recently, in *Marcan Shipping* Moore-Bick LJ noted the nature of 'unless' orders when considering whether the sanctions of such an order were automatic or whether a further enforcement order was required. The learned judge held that the preclusive nature of such orders took effect immediately without the need for further order; the onus was on the person against whom the sanction operated to seek relief [14]; and at [30] that the scheme of the rules relating to conditional orders was that the consequences of non-compliance take effect in accordance with the terms of the order.

66 In *Attorney General of Trinidad and Tobago v Universal Projects Ltd* [2011] UKPC 37, the Privy Council rejected an appeal by a defendant who, after a previous delay, failed to comply with an 'unless' order. The defence was not served by the extended deadline and some three days thereafter judgment was entered. Relief from sanctions (under very similar provisions to CPR Rule 3,9) was not granted, despite the fact that the judgment was for in excess of $30 million. In relation to the rules regarding default judgment, Lord Dyson said that "in so far as the conditions are regarded as draconian, they serve the purpose of improving the efficiency of litigation."

67 The scheme adopted in the Tribunal Rules reflects the rationale of 'unless' orders found in the CPR in rules 8(3)(a), 8(5) and 8(7). The jurisprudence on the prior regime is also instructive insofar as it reveals an awareness of the

need to enforce rules and control procedure. For example, in *CCE v Young* [1993] STC 339, the onus was upon the defaulting party to show any mitigating circumstances which justified the non-imposition of the sanction.

68 The tribunal has been equally robust under the present rules. For example, in *Malt Beverages BVBA v The Director of Border Revenue* [2013] UKFTT 550 (TC) the tribunal, in the process of striking out the commissioners' claim, noted at [53] "A strike out for non-compliance with an order of the tribunal is normally because the party could have complied, but did not." In *Foneshops Ltd v RCC* [2013] UKFTI 675 (TC) the tribunal refused to reinstate a statement of case following a strike out under rule 8(1). In *First Class Communications Ltd v RCC* [2013] UKFTT 90 (TC), the tribunal considered the effect of barring the commissioners and did not indicate that it made any difference to the enforcement of unless order; it noted at [50]:

> The tribunal has power to bar HMRC from taking any further part in the proceedings. Barring HMRC from some or all of the proceedings does not necessarily mean HMRC will lose its appeal, although in many cases that would be the effect as it would leave HMRC unable to offer evidence: however, in a usual appeal the burden of proof is on the appellant and the appellant would still need to make out a *prima facie* case to succeed. In this case, I understand the burden of proof is on the appellant. Nevertheless, barring HMRC is likely to have much the same effect as summary judgment against HM RC and I approach it on that basis.

69 As the commissioners accept, courts and tribunals are now positively encouraged to take a firmer control over procedure and enforce deadlines and rules in the post-Jackson era. Indeed, recent cases demonstrate a sea-change towards a more robust and proactive approach. The obvious example, also identified by the commissioners, is *Mitchell.* In that case, the Court of Appeal held that the late submission by the appellant of its costs budget resulted in a £500,000 reduction in the legal fees claimed. The excuse advanced by Mr Mitchell's solicitors was that their resources were under pressure and stretched. This was emphatically rejected by the Court of Appeal – see especially at [41], [45], [46] and [59].

70 The Court of Appeal's deliberately "tougher and less forgiving approach" in *Mitchell* has since been consistently adopted by courts when considering applications under CPR 3.9 for relief from sanctions for failure to comply with rules practice directions and court orders: see for example, *Webb Resolutions Ltd v E-Surv Ltd* [2014] EWHC 49 (QB), at [18] – [25]; *M A Lloyd & Sons Ltd (t/a KPM Marine) v PPC International Ltd (t/a Professional Powercraft)* [2014] EWHC 41 (QB), at [20] – [21]; *Karbhari v Ahmed* [2013] EWHC 4042 (QB), at [24] – [29]; *Thevarajah v Riordan* (2014] EWCA Civ 15 (CA) (Civ), at [27] – [28] and [35] – [36]; *Harrison v Black Horse Ltd* [2013] EWHC B28 at [45] – [54]; *Durrant v Chief Constable of Avon and Somerset* [2013] EWCA Civ 1624, (CA) (Civ), at [1] – [3], [38], [40] – [41], [47] – [49]; SC *DG Petrol SRL v Vital Broking Ltd* [2013] EWHC 3920 (QB) (Comm), at [17] – [18] and [27] – [30].

71 Most importantly, however, it has been followed in the Upper Tribunal of this Chamber in *McCarthy*. In that case, the Upper Tribunal refused to grant an

indulgence to the Commissioners in respect of delays caused by administrative errors: see [37]. At [42], the Upper Tribunal noted that the post-Jackson approach should be adopted in the tax tribunals and made the position for tribunals clear at [41], [45], [49], [50] and [51].

5 72 There are striking parallels between the evidence given by the commissioners in *McCarthy* and that of Miss Hugill in the current appeal. She provides a very short statement, just over two pages of text, without exhibits. In 2013, the commissioners received 973 new appeal cases which she had to manage by the use of "administrative support staff," who are not legally 10 qualified. Another appeal in 2013 had revealed generic and structural weaknesses in the internal procedures; though steps were taken to remedy them, they failed to identify the warning direction or the barring order. The reason for the default was that the system was "insufficiently robust to deal with the risk of cases being delayed".

15 73 The evidence is unsatisfactory for five reasons. First, it is generic evidence about systematic failings with the Solicitor's Office, without any details in respect of the present case. Secondly, Miss Hugill fails to explain why it was that this appeal had apparently not been allocated to a lawyer, despite three years of prolonged negotiations and the terms of the warning direction. 20 Thirdly, it fails to explain how, in the absence of the case being allocated to a lawyer, the commissioners were able to seek directions for service of amended grounds of appeal by Compass, or what steps the commissioners took following the tribunal's instigation of a pre-trial review in 2012, with the obvious consequence that a statement of case would be needed.

25 74 Fourthly, pleas of incompetence and lack of resources have frequently been advanced by the commissioners by way of mitigation, and have been dismissed just as frequently: e.g. *Wine Warehouse Europe* [1993] VATTR 307, at 313; in *CEC v Neways International (UK) Ltd* [2003] EWHC 934 (Ch) the court noted at [35] that the commissioners statement that "in some way the 30 housekeeping had failed" was not enough by way of explanation; in *UK Tradecorp Ltd v CEC (No.3)* [2005] STI 896 the tribunal rejected such an explanation, at [41]. Fifthly, the substantive issues in the case are not germane to the application for relief from the barring order.

75 The authorities cited make it abundantly clear that the commissioners 35 should expect no leniency unless extenuating circumstances beyond their control can be demonstrated, and their case is nothing more than yet another variation on the theme of lack of resources and internal incompetence. What is clear is that the disorganisation and inappropriate allocation of resources was either deliberate, or the result of poor management at a senior level - both of 40 which are culpable.

76 The negotiations while the appeal was pending are a red herring. Parties are able - indeed, encouraged - to talk constructively, but they must also comply with the rules. Likewise, the parties' prior acquiescence in stays does not relieve the commissioners of their obligations to comply with the tribunal's 45 directions, the stated purpose of which was to accelerate the proceedings through the appeal process. The commissioners' awareness of, and engagement in, the negotiations makes it all the more inexplicable that they ignored the directions and failed even to allocate a lawyer to this appeal.

77 The suggestion that Compass's original notice of appeal was deficient is wrong. The notice was perfectly valid and the commissioners were fully cognizant of the issues. Compass submits that the obvious inference was that the commissioners' desire for an amended notice of appeal (but not mentioning this point to Compass) was simply a means of deferring their obligation to provide a statement of case. Payment of the amounts in dispute remained unpaid by Compass because the commissioners did not insist upon payment: if they had wished to insist on payment at any point, they could have done so.

78 Compass's primary defence in the appeal is that the assessment is time-barred. This is, by definition, a defence founded on legal principle unconnected to the merits. By their very nature, time limits do not go to the merits of a matter but act as a "guillotine" to provide legal and procedural certainty. In any event, it is Compass's position that it has a very strong case in respect of its technical arguments on the substantive liability issue. Certainly, the tribunal cannot decide the merits now and must proceed on the basis that Compass has a legitimate case. Consequently, it is submitted that reference to the merits of the appeal is unhelpful and irrelevant.

79 The commissioners' "special pleading" that they should receive a special indulgence because of their mission to ensure that the public purse is protected entails the submission that the state or other public bodies do, or should, receive greater latitude in terms of failing to comply with court orders. The commissioners have cited no authority in support of such a contention and they are merely another litigant before the courts and tribunals system. Far from the Revenue being in a favoured position, the authorities have noted that taxpayers often require protection from the excesses of the state.

80 Thus, it was stated in *Woolwich v IRC* [1993] A.C. 70, that when one is dealing with the commissioners one is contending with "the coercive power of the state" (at 171), such that when money is demanded by the state from the citizen "the inequalities of the parties' respective position is manifest" (at 198). The fact that the appeal has not progressed for three years means that the threat of the assessment has hung over Compass that long, a position which also deserves some sympathy.

81 The commissioners express concern that if the barring order is not lifted procedural difficulties would be imposed upon the tribunal in resolving the appeal. This is not a good reason to indulge the commissioners' default in this case and indeed this argument would operate as to reinstate all barring orders and, in effect, render nugatory *vis-a-vis* the state the coercive powers in rule 8. That cannot be right, not least because rule 8 expressly contemplates such a scenario. Secondly, it is denied that practical problems would arise. Rule 8(8) provides for, in effect, summary judgment and, if that is not appropriate, the tribunal is not unaccustomed to hearings in the absence of one of the parties.

82 The commissioners seek to draw a distinction between the mandatory power to strike out in rule 8(1) and the discretionary power in rule 8(3). This is misguided. Rule 8(1) merely provides a statutory codification of the rule in *Marcan Shipping*, i.e. a failure to comply with an unless direction will incur the relevant sanction without the need for further order. Rule 8(3) merely provides a non-exhaustive list of circumstances in which such a direction may be made. As such, the commissioners are wrong to suggest that there are two jurisdictional bases upon which to disbar them.

83 The commissioners complain about the fact that they were disbarred without the opportunity to make representations, but the warning direction expressly notified them that they had the right to apply to amend, set aside or vary the order; the commissioners failed to avail themselves of that opportunity. It is difficult to see what benefit they can now gain from that omission.

84 Compass submits that the tribunal acted entirely reasonably and properly in its directions and communications with both patties, in issuing the warning direction, the subsequent 'unless' direction and final barring order. There is no further "fair warning" that the tribunal could have given. The commissioners have simply ignored the tribunal and as such have been the authors of their own misfortune and, post-*Mitchell*, their behaviour cannot escape sanction. Compass submits that the application should be dismissed and that the commissioners should pay Compass's costs, to be assessed if not agreed.

Conclusions –
(i) non-payment of tax

85 We address first the submission by Ms Simor that the directions and barring order – being made in contravention of the injunctions in section 84 against the tribunal proceeding with an appeal, where no payment of the tax at issue has been made, and no 'hardship' application has been made or accepted – have been made without jurisdiction and are therefore of no effect. The argument is, as we understand it, that compliance with section 84(3)-(3C) is a condition precedent to the tribunal having jurisdiction to deal with an appeal (though it does not affecting the validity and existence of the appeal itself).

86 The submission was initially attractive in its simplicity, not least because it conveniently avoids the need to confront the difficult issue of whether to give relief from the barring order. We are nonetheless persuaded by Mr Scorey's submissions at the hearing that this analysis goes too far and, while apparently giving full effect to the statutory prohibition, in the result produces a situation which cannot have been the legislator's intention. Thus, should there be – as in this case – a failure to respect the requirements of section 84 and the case were still to proceed to a conclusion, the consequence would have to be that the decision of the tribunal would be void; and, more serious still, that any appeal proceedings from that decision would also fall.

87 The likelihood of this happening is not remote. It appeared from argument that HMRC do on occasion take the view that no payment of tax is needed in particular circumstances when a protective appeal is made, and a possible view is that the care and management provisions entitle the commissioners so to proceed. There was, however, no evidence upon which we could reach such a conclusion in this case and the error which occurred may simply have been the result of ignorance of the provisions of section 84 on the part of Mr Wray, who signed the notice of appeal on behalf of Compass. Such a mishap may well occur from time to time, given the very wide range of appeals coming before the tribunal, and the equally wide range of persons who are the appellants or their advisers.

88 An interpretation of section 84 which gives effect to the statute but which produces a workable result is therefore to be preferred to one which at first sight seems clear and straightforward, but is nonetheless apt to produce

consequences which cannot have been intended by parliament. The injunction in section 84 is addressed to the tribunal and it is for the tribunal to find ways to respect it which are proportionate to the overriding objectives. We conclude therefore that, once the section is found not to have been applied, it is for the tribunal to examine the actions taken in contravention of the prohibition afresh, of its own motion – though of course representations from the parties should also be invited.

89 In the context of an application for relief from a barring order, as in the present case, the two exercises can effectively be combined. Ms Simor's submissions emphasise that the contested directions and order were all made without notice to the parties and without hearing argument from them. We will address that issue separately but, in terms of looking at the barring order in particular, the tribunal is in this instance in a position, on account of the breach of section 84, to approach the issue *de novo* and to consider not only whether relief should be given but whether the directions and order should have been made.

90 Before proceeding to the main issues, however, it must be said that both parties in the present appeal are considerably at fault in allowing the position in which the tribunal finds itself to have occurred. Both sides are well represented at professional level and cannot be excused for not identifying the failure to comply with section 84, or the effective misrepresentation of the position in the notice of appeal. As rule 2 specifically provides, both parties are under an obligation to cooperate with the tribunal in the discharge of its functions, and we conceive that there is a professional obligation in addition to that to draw the tribunal's attention to an issue fundamental to the lawful conduct of the appeal.

(ii) the principles

91 Before addressing the merits of the directions and the barring order, it is appropriate to identify the factors which, from the authorities, may be taken into account in doing so in the context of the 'new approach' deriving from the Court of Appeal's decision in *Mitchell* and the Upper Tribunal's decision in *McCarthy* .

92 Firstly, although the CPR do not apply to the tribunals, tribunals should have regard to the approach adopted by the courts in implementation of the CPR: *McCarthy* at [43].

93 Second, certainly in the pre-Jackson case law, an 'unless' direction is a last resort and should be made where there have already been defaults by the party to whom it is addressed and not as 'good housekeeping' measure: per Moore Blick LJ in *Marcan Shipping* at [36]; per Auld LJ in *Hytec* at 1674; *CEC v Young* [1993] STC 339 at 343; *Foneshops Ltd v RCC* [2013] UKFTT 675 at [70].

94 Third, the tribunal will look for prejudice to the other party, either in terms of delay or in costs, resulting from the default: *Hytec* per Auld LJ at 1675; *Wine Warehouse Europe v CEC* [1993] VATTR 307, at 313.

95 Fourth, the default to be relieved must have been due to circumstances beyond the defaulter's control, or at least must be such as to be characterised

as 'trivial': per Auld LJ in *Hytec* at 1675, and per Lord Dyson MR in *Mitchell* at [41].

96 Fifth, the decision in regard to relief must serve the overall purposes of justice: per Auld LJ in *Hytec* at 1675, and rule 2(2) of the Tribunal Rules.

97 Sixth, the checklist in the former text of CPR 9 may be taken into account, though not definitively: *Mitchell* at [49]; *McCarthy* at [47]; *Foneshops* at [68].

98 Lastly, that the parties should, in principle, be heard: rule 2(2)(c), 8(5) and 30.

99 Much of the debate between the parties in this case has related to the approach of the civil courts and to the guidance given by the CPR in relation to 'unless' orders. But we need to be careful to recognise that the administration of the Tribunal Rules will not always mirror that of the CPR. Parliament has established the tribunal system to provide a specialist and appropriate means of resolving certain categories of dispute, in this case tax appeals, and in that context the first instance jurisdiction of the tribunal is required to deal with a very wide range of cases, both as regards their complexity and importance, and as regards the level assistance the tribunal may expect from those – if any – who represent the parties. At the same time, the Tribunal Rules must be applied to every case, with the implication that their interpretation must not be over-refined or be allowed to become opaque.

(iii) directions without notice

100 A particular complaint throughout Ms Simor's submissions has been that the two directions and the barring order were made without notice and without hearing the parties. As has been indicated, the circumstances of this appeal render it unnecessary to consider whether this means that an application for relief should be heard as a representation on the merits of the making of the orders, or as one on the merits of giving relief, assuming the orders to have been well-made in the first place.

101 Rule 6 of the Tribunal Rules provides specifically:-

> 6(1) The tribunal may give a direction on the application of one or more of the parties or on its own initiative.

102 This follows the very extensive case management powers contained in rule 5, which enable the tribunal to deal with the high volume of cases coming before it expeditiously and straightforwardly; in this context, 'own initiative' directions will, bearing in mind the imperatives for avoiding unnecessary formality and seeking flexibility stated in rule 2(2)(a), often be the most appropriate way in which to deal with the interim procedural steps which need to be taken. In so far as the barring order was concerned, this point is underlined by the contrast drawn in rule 8(4) between a barring under paragraphs (2) or (3)(b) or (c) of the rule, where the parties must be given an opportunity to be heard before the action is taken, and a barring under paragraph (1) or (3)(a) where there is no such requirement.

103 It is, moreover, always open to any party who feels that further consideration is required to apply under rule 6(5) for a direction to be varied or suspended. In so far as the Revenue's case suggests that the two directions and

the order should not have been made without notice to the parties, who could then have sought to make representations to the tribunal, we think that it is an example of adding an impermissible gloss to the plain meaning of the rules themselves, and would risk giving rise to the kind of over-refinement to which we have referred.

104 We do not overlook the observation of Moore-Blick LJ in *Marcan Shipping* that he would "find it difficult to imagine circumstances in which [an 'unless'] order could properly be made for what were described in *Keen Phillips v Field* as 'good housekeeping purposes' ". The position at which this appeal had arrived by the making of the first direction on 18 March 2013 was significantly out of order and the tribunal was fully entitled, in the circumstances of more than two years of extensions of time having been allowed, to exercise its powers under rule 5 to ensure that the delay in proceeding with the appeal did not continue. Nor can it be argued that the time then allowed for the directions to be complied with was too short, and indeed no submission to that effect has been made.

105 We do not see that the contested directions could fairly be characterised merely as 'good housekeeping': there is a public interest in the efficient and timeous resolution of disputes and it is proper for the tribunal by its case management decisions to have regard to that. The delay in this case had become unacceptable and, in the absence of an application to vary the directions, any objection to their being made without notice cannot be sustained.

(iv) possible variation of the 'unless' direction

106 There was, however, the application for an extension of time on 24 July 2013 which could, as Ms Simor contends, perhaps have been treated as an application under rule 6(5) to vary the direction. It is regrettable that the application was not expressed as one for the variation of the direction, because it would then have been listed for hearing, or at least notified to Compass for them to object to it or not. We cannot now speculate on what would have been the outcome if that had been done, but understandably in the circumstances it was not done and the barring order thus took effect.

107 It is also unfortunate that the rule 8(3)(a) was cited as the only basis for that order when in fact rule 8(1) was also in point but, as again Ms Simor points out, the order of 16 August 2013 did not in strictness need to be made at all – the barring became automatic after the last date for compliance with the requirements of the direction of 22 July 2013 had passed. The explicit barring order was made nonetheless so that no one should be in doubt as to the position reached.

108 Having concluded that the directions were properly made without notice to the parties and in a justifiable exercise of the tribunal's jurisdiction, we are left therefore with the question whether relief should given against the barring order, and the order varied or rescinded, or whether it should be maintained. Various factors fall to be considered in examining all the circumstances of the case, but none on its own can be decisive.

(v) the reasons for the missed deadline

109 The first factor is the nature and circumstances of the error. The evidence shows that the conduct of the case was in the hands of a person described as a

junior officer who was not legally qualified and who, according to Ms Hugill's evidence, had not realised the significance of the 'unless' direction and was in need of more training. This is not dissimilar to the situation in *Mitchell* where the solicitors responsible for missing a time limit were under-resourced and unable to cope with the volume of work which they had. It differs of course in that the problem here was not on its face lack of resources, but the use of unqualified staff with insufficient training or supervision.

110 But the substance of the matter is similar, relating essentially to adequate resources being available. Solicitors, whether in the public sector or the private sector, have the same temptation to try and conduct legal work without employing properly qualified lawyers or legal executives, because it is less expensive to do so. They do so at their own and their clients' risk, and either training or supervision must make up the deficit of qualification, or errors will occur. If they do, it will be difficult to plead good reason for the default, and in the circumstances revealed by the evidence in this case the error committed was within the control of the Revenue.

111 Whether the commissioners choose to outsource the work to solicitors in private practice, which is often the case, or whether they choose to employ better qualified staff, or whether they put in place the necessary levels of training and supervision, are all matters for them. But whatever steps the Revenue have taken, or may take, to avoid a repetition of the default cannot detract from this conclusion.

112 This leads on to the question whether the error was trivial. Ms Simor was at pains to emphasise that HMRC were not asking the tribunal to conclude that a breach of its very emphatic 'unless' direction was a trivial matter, but she argued nonetheless that the missing of the deadline here was trivial in the legal sense of the term. It is difficult to see that distinction emerging from the words used by the Master of the Rolls in *Mitchell*. What he said was:-

> Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms.

113 It would stretch language to describe an overrun of 16 days' delay as having "narrowly missed the deadline" or as a "failure of form rather than substance" and the default in this case was for significantly longer than it had been on the facts of *Mitchell*.

(vi) prejudice to the taxpayer

114 The next factor to consider is whether the default can be said to have prejudiced the taxpayer. Delay in establishing the basic pleadings in an appeal which was, by August 2013, already more than two and a half years old must of necessity involve some prejudice to the taxpayer in regard to the uncertainty created as to whether or not a substantial liability has to be reckoned with and will need to be provided for. Against that is the evidence, which is not contested, that the parties were genuinely in ongoing negotiation, that Compass was well aware of the arguments advanced by the Revenue and that Compass had at no stage sought to press on with the appeal.

115 Moreover, having not paid the tax at issue, Compass had no immediate financial incentive of the kind normally felt by a taxpayer to hasten matters on. We have already remarked that both parties to the appeal were at fault in this matter of the payment of the tax and it is difficult in that regard to be sympathetic to Compass's position on account of the Revenue's delay.

116 To speak generally, the degree of prejudice to one party by reason of the other party's delay will vary according to the circumstances of the case, and may go from being negligible at one end of the scale to being serious at the other end, but there will almost always be some disadvantage inherent in delay, however limited. In this case, there has been no evidence to suggest that the disadvantage to Compass has done more than barely register at the bottom end of that scale and it cannot be a significant factor in our decision.

(vii) prejudice to the hearing

117 Ms Simor submits strongly that barring HMRC and their statement of case from the proceedings would make it difficult, or near to impossible, for the tribunal to determine the appeal adequately or justly. There is much force in this argument: in this appeal, the tribunal would need to determine the legality of the assessment under appeal, which is challenged as to the timing of it, and the substantive questions of entitlement to input tax which are likely to be complex. The merits of the appeal are yet to be decided and the rules are clear that the tribunal, though it may deal with the appeal "summarily" – rule 8(8) – cannot simply allow it without examining the evidence and hearing argument. There is no presumption that, if the Revenue are barred, the taxpayer must win.

118 Ms Simor has pointed out, moreover, that the inability of the Revenue to give evidence as to the circumstances of the assessment is likely to work against the taxpayer's interest – though that does not necessarily mean that directions for the production of evidence from HMRC's officials cannot be obtained by Compass, should it seek to pursue that course. But the probable damage to the thoroughness of the hearing of the case appears at first blush to be one of the strongest arguments in favour of relief from barring. Yet, as Ms Simor accepts, the rules providing for barring orders are lawful and HMRC does not contend that such orders should never be made in tax cases.

119 The prejudice to an untrammelled hearing of an appeal which a barring order entails must therefore be accepted as a factor which does not, in principle, conflict with the overriding objective and as, again in principle, a proper consequence of the making of such an order. In this case, Mr Scorey has indicated that Compass is content to live with whatever disadvantage may flow from the Revenue's being unable to put forward their own evidence. Indeed, in the many cases in which a taxpayer is unrepresented and has a poor understanding of the issues, the tribunal is well accustomed to the exercise of compensating for that deficit. It is therefore difficult to see that a degree of prejudice to the trial of the matter can in the present appeal be an unacceptable consequence of the order, or a persuasive reason for relief from it.

(viii) a difference in public law litigation?

120 Allied to this issue is the contention, also put forward by Ms Simor, that litigation before the tribunal is public law litigation and, as such, is subject to a somewhat different conception of the public interest than is to be seen in the context of private law litigation in cases such as *Mitchell*, and the other authorities on the CPR and on 'unless' orders. Thus, there is the public

interest in the collection from each taxpayer of the right amount of tax, an interest in which every taxpayer at large shares and which builds on the interest of other litigants before the courts or tribunals in the efficient administration of justice; and there is the public interest in the financing of whatever projects parliament has decided should be undertaken.

121 Ms Simor said that there was therefore a contrast between the two types of litigation which emphasised the need for HMRC's default to be dealt with proportionately – for example by way of a costs penalty. Proportionality required that the need to ensure the efficient administration of justice was not allowed to obscure the possibility that this taxpayer could receive money to which it is not entitled at the expense of taxpayers in general. Although HMRC should to the greatest extent possible be treated as any other litigant recognition must, it is said, be given to the distinction between public law and private law proceedings and the sanctions applied to defaults be adapted proportionately.

122 This is an argument that has not, as far as we can see, been addressed elsewhere and we are therefore without authority on it. If correct, Ms Simor's submission has important implications for the perception, at least, of judicial even handedness in tax litigation and it is easy to see how it could be said that the parties were being treated differently on the same facts. It could plausibly even appear to be the case that the correctness of the tribunal's decisions as to tax liability is greater than the importance of a correct decision in a dispute *inter partes* in the civil courts, a proposition which we would be uncomfortable to accept.

123 If special account is to be taken of the public interest in the correct payment of tax in a sense which differs from the public interest in the correct determination of civil disputes, then the point must be established elsewhere than at first instance. The First-tier Tribunal is bound by the decisions of the Upper Tribunal and there is nothing in its decision in *McCarthy* which would support the taking account of this further consideration in the way suggested. On the contrary, the tenor of the decision in *McCarthy* is that special exceptions and special situations should not be sought out to detract from the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders.

Costs

124 Mr Scorey has applied for the costs of this hearing. Under rule 10(1), the award of costs in a situation such as this can effectively only be made if the party against whom the award is given "has acted unreasonably in bringing, defending or conducting the proceedings".

125 The arguments which Ms Simor QC has advanced on behalf of the Crown in applying for relief against the barring order are perfectly proper ones to deploy and we can see no basis on which it could be said that it was unreasonable for the commissioners to put them forward. While it is true that the weight of authority is on the whole against Ms Simor, it would be quite contrary to the ethos and purpose of the tribunal system for it to be concluded that a party arguing a difficult case should thereby be characterised as acting unreasonably.

5

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 30 April 2014