[2019] UKFTT 569 (TC)

TC07363

COSTS – Application for costs – late – Denton and Martland considered – Chappell distinguished – permission given – HMRC unreasonable behaviour? – yes – costs awarded but only for part of the period claimed and subject to a detailed assessment – application granted in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/03236

BETWEEN

BASIL TUCKER **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Cardiff on 12 August 2019

The Appellant in person

Mr Paul Joseph, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns an application for costs made by the appellant (or "**Mr Tucker**") which arises from the withdrawal by the respondents (or "**HMRC**") on 13 November 2017 of their defence to an appeal made by Mr Tucker against HMRC's conclusion, in a closure notice made at the end of an enquiry into his 2012/2013 tax return, that certain losses claimed by Mr Tucker should be disallowed (the "**negligible value claim**").

2. I need to decide three things:

(1) Firstly, if this application has been made out of time, whether I should give permission to Mr Tucker to make this application.

(2) Secondly, if I give him permission, whether HMRC have behaved unreasonably in withdrawing their defence when they did and not earlier;

(3) Finally, if they have, the amount of costs which Mr Tucker should be awarded. This will depend, to some extent, on the date from which I consider HMRC to have acted unreasonably.

3. For the reasons given later in this decision, I have decided that:

(1) Mr Tucker may make this application out of time.

(2) HMRC have behaved unreasonably in failing to withdraw their defence to his appeal earlier than they did.

(3) The date on which they should have withdrawn is not, as Mr Tucker has claimed, in October 2014, but is 27 July 2017. I also direct that Mr Tucker's costs should be subject to a detailed assessment.

A summary of the relevant law

Costs-the legislation.

4. The power to award costs is conferred pursuant to section 29(1) of the Tribunals, Courts and Enforcement Act 2007 which provides:

> **"29 Costs or expenses**
>
> (1) The costs of and incidental to-
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

5. The relevant Tribunal Rule ("**Rule**") is Rule 10, which provides, inter alia;

"10. Orders for costs

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs ;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …….

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings…….

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the

proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;……"

Costs - Case law

6. In the case of *Haworth and others v HMRC* [2019] UKFTT 0149, Judge Brooks has provided the following neat summary of the relevant case law.

> "10. In all other cases, ie appeals categorised as basic, standard or where an appellant in a complex category case has, like KBTL, opted out of the costs shifting regime, the Tribunal may only make an order in respect of costs if "it considers that a party or their representative had acted unreasonably in bringing, defending or conducting the proceedings (see Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).
>
> 11. In *Tarafdar v HMRC [2014] UKUT 362 (TCC)* the Upper Tribunal observed that:
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> > "'[18]…The scope of [unreasonable conduct] has been discussed in this Tribunal in *Catana [2012] UKUT 172 (TCC)* where Judge Bishopp, at [14], described it as covering:
> >
> > "cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonable resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side"
> >
> > [19] The costs 'of an incidental to the proceedings' cover only those costs incurred in the course of preparing and pursuing the appeal…,and, on an application by the appellant, it is only the reasonableness of HMRC's conduct in defending or conducting the proceedings that falls to be considered. The reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question whether it was reasonable of HMRC to defend, or to continue to defend, the appeal.
> >
> > [20] Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10 , the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially.'
>
> The Upper Tribunal went on to say, at [34]:
>
> > "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
> >
> > (1) What was the reason for the withdrawal of that party from the appeal?
> >
> > (2) Having regard to that reason, could that party have withdrawn at an earlier stage?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

12. In *Distinctive Care Limited v HMRC [2018] 155 (TCC)* , at [44], the Upper Tribunal referred to its decision in *Market and Opinion Research International Limited v HMRC [2015] STC* in which it endorsed the following approach:

(1) the threshold implied by the works 'acted unreasonably ' is lower than the threshold of acting 'wholly unreasonably' which had previously applied in relation to proceedings before the Special Commissioners;

(2) it is possible for a single piece of conduct to amount to acting unreasonably;

(3) actions include omissions;

(4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;

(5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;

(6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;

(7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and

(8) the power to award costs under Rule 10 should not become a 'backdoor method of costs shifting'.

It added, at [45]:

"…one small gloss to the above summary, namely that …questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight"

13. Additionally, the meaning of "unreasonable" was considered in *Ridehalgh v Horsefield* [1994] in the following terms:

> 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because the more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a

reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

14. The Lands Chamber of the Upper Tribunal in *Willow Court Management Company v Alexander [2016] UKUT 290 (LC)* observed, at [22] that the "language and approach" (of an identical provision to the Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) to be "clear and sufficiently illuminated by the decision in *Ridehalgh* ."

In *Distinctive Care Limited*, the Court of Appeal also said:

"30. The UT also stated at [33] of *Tarafdar* that the proper enquiry is "whether HMRC had unreasonably prolonged matters once they were in the tribunal, or whether they should have withdrawn the assessment at an earlier stage". In *MORI* the UT described *MORI's* case as asserting that the information and explanations available to competent, trained HMRC officers at various stages of the proceedings prior to the hearing at which HMRC abandoned its defence had been sufficient to enable the officers acting reasonably to conclude that the claim ought not to be defended further: see [43]. The UT approved the statement of the FTT in that case that a failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct. The authority cited for that was *Southwest Communications Group Ltd v HMRC [2012] UKFTT 701 (TC), [2013] SWTI 390* . In that case the FTT (Judge Raghavan) rejected the suggestion that HMRC's failure to settle the case at the internal review stage prior to the FTT appeal being lodged could amount to HMRC unreasonably defending or conducting proceedings. Judge Raghavan said that the earliest acts he could consider, whether these were framed as HMRC continuing to defend the appeal or as an omission in not settling the case sooner, were those arising after the appeal was notified. Judge Raghavan went on at [45], however, to reject HMRC's contention:

> " … that it was not until the witness statements drew together matters which it said had been presented in a "piecemeal" fashion that HMRC was in a position to settle. While it is no doubt a welcome bonus for HMRC if the evidence the appellant chooses to rely on … draws matters together in a comprehensive and well structured way for HMRC to consider, that is not the function of witness statements. Rather it is to be assumed that HMRC will once proceedings are started review all the relevant material that has been put before it, something which it will need to do in any event to finalise a Statement of Case and List of Documents, and will make an ongoing assessment of whether a case should continue to be defended."

31. I agree with that statement although I take the reference there to "once proceedings are started" as meaning once HMRC has been notified of proceedings. It would be inconsistent with the structure of the FTT Rules to treat the conduct of the respondent prior to being notified of the appeal as conduct 'in the proceedings' for the purposes of rule 10(1)(b) . The FTT Rules do not require the appellant to serve the notice on the respondent and in the present case DCL did not do so. It is the tribunal itself that gives notice of the proceedings to the respondent under rule

20(5) . At that point HMRC must consider their position in relation to the case in order either to notify the appellant of any new grounds under rule 24(4) or to deliver the statement of case to the tribunal and the appellant within the 60 days allowed by rule 25(1)(c) . HMRC must act promptly, once notified, if it becomes clear that the appeal cannot properly be defended."

Permission to make this application out of time-the legislation

7. The relevant Tribunal Rules which allow me to consider and possibly allow Mr Tucker's application that if this application for costs is late, he should be permitted to make this application out of time are Rules 2, 5 and 7, the relevant parts of which are set out below:

> **"2. Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (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.
>
> **5. Case management powers**
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;……

7. Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case);

(d) restricting a party's participation in proceedings; or

(e) exercising its power under paragraph (3) …….”

Permission to make this application out of time-Case law

8. Mr Joseph submitted that the relevant case which I should follow is the Court of Appeal decision in *Denton and others v TH White Ltd and Others* [2014] 1 WLR 3926 (“*Denton*”). His submission is that this is to be preferred to the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 (“*Martland* ”). His rationale for this is that *Denton* (as is the case in this application) deals with relief from sanctions once an appeal has been started i.e. where the Tribunal already has jurisdiction over an appeal. *Martland,* on the other hand is a case when the Tribunal needed to consider whether it should accept jurisdiction in the first place. The issue there was whether the appellant should be given permission to make a late appeal.

9. I accept his submission and I set out below an extract from the characteristically incisive judgment of Judge Herrington in the Upper Tribunal case of *Dominic Chappell v The Pensions Regulator* [2019] UKUT 2019 (“*Chappell* ”).

10. Judge Herrington’s decision also considers the extent to which the merits of an appellant’s case should be considered at the final evaluation stage when the matter in question is a case management issue over which the Tribunal already has jurisdiction (i.e. a *Denton* situation) rather than a case where the Tribunal is considering whether it should accept jurisdiction in the first place (i.e. a *Martland* situation).

“73. Rule 3.9 now provides:

“(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."

74. The key case setting out the approach the court should take in applying CPR Rule 3.9 is *Denton and others v TH White Limited and others* [2014] 1WLR 3926.

75. In *Denton*, the Court of Appeal was considering the application of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):

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

76. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

77. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the First-tier Tax Tribunal (FTT). Accordingly, it can be seen why the Supreme Court said that the same approach should be applied in the Tribunals.

78. Consequently, in considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) at [43] considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say in the same paragraph:

> "Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP* , the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

79. The Upper Tribunal then went on to set out how the three-stage process set out in *Denton* could be applied in the Tribunal context at [44] to [47] as follows:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.…The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the

merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

80. At [54] the Upper Tribunal rejected a submission that the merits of the underlying appeal are "ordinarily irrelevant" to any decision to admit a late appeal. That submission had been based on a statement by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495 where it said at [29 that "… the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues…". However, the Upper Tribunal said that Global Torch was concerned with a very specific case management decision (the strike out of proceedings for failure to comply with an unless order). The Upper Tribunal did not consider the point to apply to an exercise of judicial discretion as to whether it was appropriate for the FTT to assume jurisdiction over an appeal which had not been the subject of prior judicial consideration.

81. That statement therefore begs the question as to whether the merits of the proceedings is a relevant consideration on a reinstatement application in the Tribunals.

82. In *Daniel Peters (otherwise known as Inkey Jones) v HMRC* [2019] UKUT 0058 (TCC) , another case concerning a late appeal and where it was also argued on the basis of *Global Torch* that a Tribunal should regard the merits of a late appeal as being irrelevant in the balancing exercise, the FTT agreed with the statement at [54] in *Martland* that what was said in *Global Torch* does not apply to the exercise of judicial jurisdiction which will determine whether or not jurisdiction arises. That statement therefore left open the question to what extent the merits of the proceedings were a relevant factor in applications for a relief from sanctions, such as an application for reinstatement.

83. That point was considered by the FTT in *Reno v HMRC* [2019] UKFTT 0184 (TC) where the FTT was considering whether to reinstate a reinstatement application which had been struck out because it had not been pursued which itself had been made following the striking out of proceedings as a result of non-compliance with an unless order.

84. The FTT adopted the approach set out by the Upper Tribunal in *Pierhead Purchasing Limited* v HMRC [2014] UKUT 0321 where Proudman J said at [23] that the criteria to be considered when deciding whether an appeal should be reinstated included consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained. At [19] the FTT referred to *Martland* and said that

although the issue in that case concerned an application to make an appeal out of time it was clear from that case that the same principles applied when considering any relief from sanctions. The FTT therefore appeared to proceed on the basis that there is no difference in approach between what was said in *Pierhead Purchasing* and what was said in *Martland*.

85. However, with respect to the FTT, it appears to me that there is a difference in that in *Martland* the Upper Tribunal clearly drew a distinction as far as consideration of the merits of the case concerned, between a case involving a late appeal and where the Tribunal had to consider whether it should assume a jurisdiction which it would not otherwise have had and a case involving a case management decision to impose a sanction in relation to proceedings in respect of which the Tribunal already had jurisdiction.

86. In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch* , generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuburger said at [29] of the judgment in that case:

> "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment…."

87. The case management issue in that case was ultimately whether to grant relief against breach of an unless order which had resulted in the proceedings having been struck out for non-compliance with the order. That is precisely the position in this case.

88. At [31] Lord Neuberger set out the rationale for providing an exception to the general rule that the merits were irrelevant in the following terms:

> "In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions…"

89. In financial services cases in the Upper Tribunal governed by Schedule 3 to the Rules, there is no provision for either party to apply for a summary judgment.

90. However, Rule 8 (2) (a) of the Rules contains a mandatory strike-out provision in circumstances where the Tribunal does not have jurisdiction in relation to the proceedings. Rule 8 (3) (c) contains a discretionary power for the Tribunal to strike out proceedings if it considers that there is no reasonable prospect of the applicant's case succeeding and there is a comparable provision for respondents (such as TPR) in Rule 8

(7) which enables the Tribunal to bar the respondent from taking any further part in the proceedings if the conditions and either Rule 8 (2) or 8 (3) are met.

91. It seems to me that these provisions are analogous to provisions for summary judgment contained in the CPRs.

92. Although Mr Walmsley submitted that much of Mr Chappell's case, as set out in the Reply was without merit, he did not go as far in his submissions to say that TPR will be justified in making a strike-out application were the proceedings to be reinstated, and in my view, he was correct not to take that course.

93. Focusing on the position of the applicant and applying by analogy Lord Neuburger's test of whether the applicant has an unanswerable case by reference to the provisions of Rule 8 of the Rules regarding strike-out, the Tribunal would need to consider whether the applicant's case, as set out in the reference notice and his Reply, identifies an unanswerable case in relation to an issue that would justify the making of a barring order against TPR. Examples of that might be where the Tribunal would have no jurisdiction because TPR's action was clearly time-barred or where as a matter of law it was clear that there was no basis for TPR's contentions that the outcome sought fell within the scope of the relevant legislation so that its case had no reasonable prospect of succeeding.

94. It follows from what I have said that I should not take account of the merits of the case to the extent laid down by Proudman J in *Pierhead Purchasing*. In that context, I observe that *Global Torch* was decided after *Pierhead Purchasing* and as it is a judgment of the Supreme Court I am of course bound to follow it, again applying the principle that the Tribunals should adopt by analogy the approach taken in the courts to matters of this kind.

95. As regards the assessment of the seriousness of a breach in respect of which a sanction has been imposed, as Mr Walmsley submitted, the authorities in relation to CPR rule 3.9 demonstrate that although in considering applications for relief from sanctions, earlier breaches of orders committed during the course of the litigation are normally disregarded in determining the seriousness or significance of the breach in respect of which sanction was imposed, where the breaches are of a requirement contained in an "unless" order it is necessary, when assessing the seriousness and significance of that breach, to consider the underlying breach and the failure to carry out the obligation which was imposed by the original order or rule and extended by the "unless" order.

96. In *British Gas Trading Ltd v Oak Cash & Carry* Ltd [2016] 1 WLR 4530 the court explained that this was justified because an "unless" order does not stand on its own. It observed at [38] that the court usually only makes an "unless" order against a party which is already in breach. It went on to say at [38] and [39]:

> "38…. the "unless" order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation. A party who fails to comply with an "unless" order is normally in breach of an original order or rule as well as the "unless" order.

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

97. At [41] the court observed that the very fact that X has failed to comply with an "unless" order is undoubtedly a pointer towards seriousness and significance. That was because X is in breach of two successive obligations to do the same thing and because the court has underlined the importance of doing that thing by specifying an automatic sanction in default.

98. Furthermore, as Mr Walmsley submitted, in *Khandanpour v Chambers* [2019] EWCA Civ 570 the Court of Appeal has clarified that where the unless order in question has been imposed as a result of failures to comply with more than one order over time, one looks at the whole sequence of failures as representing the "underlying breach", not merely the immediately preceding one: see [37] to [39] of the judgment.

99. In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order.

100. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

101. I shall only consider the merits of Mr Chappell's reference to the extent that it appears that TPR's case has any feature such as those that I have described at [93] above."

11. With these principles in mind, I now turn to their application to the facts of this case.

Evidence and findings of fact

12. At this stage of this decision I set out and findings of fact which are of both general application and of specific relevance to the appellant's application that this costs application be heard out of time if it is indeed late. I make further findings of fact regarding the substantive costs application below. I was provided with two bundles of documents, one by HMRC and one by the appellant. In addition the appellant handed up some further documents at the hearing. Mr Joseph did not object to this. The appellant gave oral evidence and I found him to be an honest and truthful witness and I accept much if not all of his evidence. From this evidence I find the following facts:

(1) The negligible value claim was due to be heard at 10.30 on 13 November 2017 in Cardiff.

(2) At 08.16 Officer Anne Rees ("**Officer Rees**"), who had conduct of the appeal at that stage, sent the appellant an email which read:

> "Following reviewing the documents you provided in conjunction with reading your skeleton argument in preparation for the hearing today. HMRC has decided to withdraw their decision to disallow S131 ITA 2007 share loss relief and cancel the revenue amendment and the further tax due of £14,536.62.
>
> My colleague Mr Ikin will be writing to you confirming that the closure notice has been withdrawn and the tax cancelled
>
> A copy of this email has been sent to the tribunal"

(3) The appellant attended the hearing. His evidence was that "such was the speed of events that one minute I was entering the courtroom and moments later I was out on the street walking back to the car park". HMRC also told him (and I presume that this was Officer Rees) that they had sent him an email at 08.16 earlier that morning.

(4) The copy of the 13 November 2017 email referred to above does indeed appear to have been copied to the Tribunal. And on 16 November 2017 the Tribunal sent a letter to Officer Rees thanking her for notifying the Tribunal that HMRC were no longer defending the decision "which has been referred to the appellant".

(5) In a letter dated 16 November 2017 addressed to the appellant at his home address, the Tribunal told the appellant that HMRC had informed the Tribunal that HMRC will no longer be defending the decision assessment which was the subject of his appeal, and the Tribunal therefore allowed his appeal and any hearing date is cancelled. The letter went on to say that if the appellant had any further application with regards to this appeal it should be made within 28 days from the date of this letter, in the absence of which the file will be closed.

(6) I find as a fact that this letter of 16 November 2017 was sent by the Tribunal to the appellant. I also find as a fact that this letter was not received by the appellant at that time. The first time that it came to the appellant's attention was in response to the appellant's letter to the Tribunal of 23 November 2018. I am not clear precisely when, in response to that letter, the Tribunal sent Mr Tucker the letter of 16 November 2017. On 19 December 2018 Mr Tucker was able to write to the Tribunal thanking them for supplying a copy of that letter. In that letter he tells the Tribunal that he never received the original letter of 16 November 2017.

(7) The letter 19 December 2018 included an application for his costs. It did not include the relevant information required by Rule 10, which was pointed out to the appellant in the Tribunal's letter to him of 8 January 2019. In response to that, the appellant in a letter dated 18 January 2019 sent a schedule of costs together with supporting documentation to the Tribunal.

(8) Between December 2017 and May 2018, the appellant engaged in (somewhat spiky) correspondence with Mr Ikin concerning his self-assessment position and, in particular, penalties and interest. Correspondence concluded with Mr Ikin accepting that the net position as at 1 May 2018 was that HMRC owed the appellant £2.31.

(9) It is clear from the correspondence and from Mr Tucker's oral testimony that he was unhappy with the way in which HMRC had investigated his negligible value claim during the enquiry. His dissatisfaction stemmed from two things. Firstly that he had to provide a raft of paperwork, on numerous occasions, to the HMRC officer conducting the enquiry. Secondly it was his view that these documents supported the explanation that he gave in correspondence to that officer, namely that although the relevant shares

were legally owned by someone other than the appellant (Sujoy Bose), they were held by that individual as Mr Tucker's nominee. Beneficial ownership was therefore Mr Tucker's. He was frustrated that the enquiry officer could not accept this.

(10) He had, therefore, in 2016 raised a complaint about the way in which HMRC had handled the enquiry with the HMRC Adjudicator (the "**Adjudicator**"). However, in a letter dated 4 August 2016 the Adjudicator told the appellant that because his complaint was inherently interlinked with his appeal, they could not investigate his complaint until the appeal was completed.

(11) Unsurprisingly, therefore, following HMRC's withdrawal on 13 November 2017, the appellant renewed his application to the Adjudicator. The Adjudicator's decision was conveyed to the appellant in a letter dated 13 August 2018

(12) In the letter the Adjudicator makes the following statements.

> "However, on 31 October 2017, you sent a bundle of documents to HMRC's Solicitors Office together with your skeleton argument and witness statement. On the morning of the date for the hearing, the solicitor concerned was preparing for the hearing when the copy of the email numbered 124 and dated 3 October 2011 came to her attention. The email is mentioned in your skeleton argument at paragraph 22.
>
> She formed the opinion that this piece of evidence was conclusive, leaving HMRC no reasonable prospect of success. For this reason, and with no other guidance available at the time, she took the unilateral decision to withdraw.
>
> As it was the case that this one piece of evidence alter the probability of success so dramatically, it must follow that my consideration of this point must concentrate on whether there is any evidence that HMRC had access to that evidence before the submission of the bundle to the Tribunal.
>
> Our examination of HMRC's papers has found no evidence that this particular item of evidence was presented to them at an earlier stage. For this reason I do not uphold this element of your complaint"

(13) The Adjudicator returned to this point regarding her examination of HMRC's papers later in the letter, and stated as follows:

> "During our investigation we have reviewed all of HMRC's papers……"

(14) The appellant considered that the Adjudicator had been given incorrect information by HMRC, most notably that the first time that the email numbered 124 came to the presenting officers attention was when it had been sent to her in the bundle of documents on 31 October 2017. It was his view that that email had been sent to HMRC in 2014 or 2015. He attempted to persuade the Adjudicator to reopen her enquiry but she was not prepared to do so.

(15) Accordingly he took the matter up with the Parliamentary Ombudsman. In telephone conversations with the Ombudsman, he was asked what decision the court had reached in the negligible value claim. He told the Ombudsman that there had been no hearing and that HMRC had withdrawn their opposition to the appeal. The Ombudsman suggested to him that he needed to have something from the Tribunal setting out the decision that the Tribunal had reached. The appellant had no such evidence, and so wrote

to the Tribunal on 23 November 2018 indicating that he had heard nothing from the Tribunal following HMRC's withdrawal from the appeal on 13 November 2017 and "was wondering if the tribunal judge made any form of order at that time?".

(16) He also asked the Tribunal to send him a copy of any order that the Tribunal had made or in the alternative i.e. acknowledge that HMRC had withdrawn from proceedings at approximately 9.45 AM on the morning of Monday, 13 November 2017.

(17) It was in response to this letter, as set out above, that the Tribunal sent the appellant a copy of the letter dated 16 November 2017 which then led to the appellant's application for costs.

Discussion re late application

13. The first question that I need to address and answer is whether the appellant's application for costs has indeed been made out of time. I have found as a fact that the appellant did not receive the letter from the Tribunal dated 16 November 2017 until late November/early December 2018. The letter does, in my view, comprise a decision notice recording the decision which finally disposed of the negligible value claim pursuant to Rule 10 (4) (a). But it is Mr Joseph's submission that receipt of that notice is not the point. Time starts to run from the date on which the Tribunal "sends" that notice.

14. The appellant does not contest the submission. I have to say I find it slightly counter intuitive given that it is difficult for an appellant to make an application for costs if he is not notified of that decision. And if he never receives it, how does he know when time starts to run.

15. But, on examination, it seems to me that Mr Joseph is right. This is not a situation where a document must be "served", "given", or the appellant must be "notified". All that has to be shown is that the Tribunal "sent" the relevant notice. And I find that it did.

16. I do not think that anything in Section 115 Taxes Management Act 1970 or the Interpretation Act 1978 assists in interpreting this provision.

17. This might seem harsh on an appellant who, quite rightly, can say that he did not have notice of the decision. But it seems to me that this is something that can be taken into account by a Tribunal in exercising its discretion as to whether it should give permission to an applicant for permission to appeal out of time. Non-receipt of a crucial document goes into the second of the three *Denton* criteria, namely the reason why the application is made late. And indeed this is what I do later in this decision.

18. And so I find as a fact that the appellant's application for costs was made late. He had until 14 December 2017 to make that application and failed to do so.

19. In Mr Joseph's skeleton argument, he submits that no proper application to extend time has been made by the appellant with the result that is application for costs cannot proceed and should now be dismissed. However Mr Joseph did not pursue, let alone mention this point at the hearing, and in response to the his skeleton argument, the appellant submitted a three-page response which, taken together with his submissions at the hearing, do, to my mind comprise an application for an extension of time.

20. I therefore need to go on to consider the *Denton* criteria and whether or not I should grant an extension.

21. HMRC submit that the breach was serious and significant. I agree. The application was not made until just over a year after the time within which it should have been made. A delay of a year is, as HMRC suggests, "manifestly serious and significant".

22. I now need to consider the reason for the delay. HMRC submission is that no good reason has been advanced by the appellant for the delay. I disagree.

23. I have found as a fact that the appellant only received the decision notice dated 16 November 2017 sometime between 23 November 2018 and 19 December 2018. The application for costs was made on 19 December 2018. Clearly if we were considering the position of delay in the context of receipt by the appellant of the notice, any delay in making the application from receipt of the notice some time in that period and 19 December 2018 when he made his application was not serious nor significant.

24. The respondents also submit that the appellant has, throughout the negligible value claim complained of the way in which HMRC has behaved. It was open to him to make an application for costs "at any time during the proceedings". It was therefore open to him to have made an application for costs on the day of the hearing on 13 November 2017. He should have done so.

25. Mr Joseph also submits that the real reason why application for costs was made late was he had been told by the Adjudicator in her letter of 13 August 2018 that she had recommended that HMRC reimburse the costs of unnecessary professional fees incurred as a result of mistakes made by HMRC. The appellant had incurred few, if any, professional fees. And so he therefore made an application for his costs. But given that he had been told that he could only recover professional fees in August 2018, his delay of making the application until December 2018 is serious and significant.

26. Finally Mr Joseph submits that simply because the appellant is a litigant in person should not allow him to justify the delay by reason of ignorance of the law. The appellant is in the same position as anyone else and should know the Rules.

27. I have considered Mr Joseph submissions, but I accept the appellant's testimony concerning his reasons for making the application for costs in December 2018. His evidence was he did not know that he needed to make a cost application until he discussed the position with the Parliamentary Ombudsman. Following that, having written to the Tribunal seeking evidence of the Tribunal's decision, and having been prompted by the Ombudsman to ascertain the costs position, he made his application. I do not accept Mr Joseph submission that the reason for the application was based on the Adjudicator's comment that the appellant could only obtain professional fees by way of compensation and he had incurred none.

28. I can also see no principled justification for regarding ignorance of the law as a reason for bringing a late application. The parties referred me to paragraph 23 of *Martland* in which the Tribunal asks "first, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and cannot with reasonable diligence have become aware that there were grounds for an appeal?"

29. I have accepted Mr Joseph's submission that *Denton* is more relevant than *Martland*, but this is something of a double edged sword. In *Martland* the Tribunal deals specifically with litigants in person. But one justification for this is that *Martland* dealt with a late appeal and, as the Tribunal says in *Martland* "HMRC's appealable decisions generally include a statement

of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person".

30. There are no similar comments made regarding litigants in person in *Denton*. But even if I were to apply the principle set out in *Martland*, regarding litigants in person, I still consider that the is the law can, in certain circumstances, comprise a justifiable reason for making a late application (whether at an interlocutory stage, or in bringing an appeal in the first place).

31. In *Christine Perrin v HMRC* [2018] UKUT 156 ("*Perrin*")which dealt with reasonable excuse the Upper Tribunal said as follows:

> "It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question and for how long."

32. It was the appellant's submission that he was not aware of the possibility of claiming his costs until he was told of this by the Ombudsman. I am not entirely convinced by this given the comments regarding costs in the Adjudicator's letter to which I refer above. But I think that it is entirely reasonable for the appellant firstly to not understood the detailed prerequisites for making an in time costs application to HMRC and secondly not to have made an application until December 2018 following receipt of the copy letter of 16 November 2017.

33. In *Martland* it is clear that one of the reasons that a litigant in person is denied special treatment is because that HMRC often tell an appellant of his or her right to bring an appeal in plain English. This appellant received no such information from either the Tribunal or from HMRC.

34. In my view therefore Mr Tucker has cogent reasons for having failed to make his costs application until 19 December 2018.

35. I now turn to the third *Denton* criterion namely that I must evaluate "all the circumstances of the case". When doing so I will, like Judge Herrington, give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

36. The first point that I need to consider is whether I can consider the merits of Mr Tucker's application for costs at this third stage. Mr Joseph thinks that I can and I thought so too (on the basis of *Martland*), but *Chappell* has caused me to pause for considerable thought. Judge Herrington has recorded the principle set out in *Global Torch* that "the strength of a party's case on the ultimate merits of proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Voss, Norris and Mann JJ in those proceedings. One possible exception could be where a party has a case whose strength would entitle him to summary judgment……"

37. Judge Herrington thought that the circumstances in *Chappell* allowed him to take account of the merits of the appellant's case but only to a limited extent.

38. In my view where an appellant makes an application to submit a costs application late, I can consider the merits of that application. I say this because unlike the application in *Chappell* and *Global Torch*, the costs application is being made after the substantive appeal has been determined. It is a moot point whether it is in fact a case management issue in the first place. But even if it is, it does not look forward to the substantive appeal. It looks back at it.

39. In any case, I am not intending to consider the merits of the negligible value claim at this stage of the *Denton* analysis. Mr Joseph has not suggested that I do so. All I am intending to do is to consider the merits of the costs application itself when considering the balancing exercise. To my mind this is consistent with *Martland* and *Denton* even if this case is one in which the FTT already has jurisdiction as regards the negligible value claim. It is a very different situation from those which were considered in both *Chappell* and *Global Torch*.

40. Mr Joseph's view was that Mr Tucker's costs claim was wholly un-meritorious. I disagree. Even considering it on a cursory basis, it seems to me that Mr Tucker is able to prove that the crucial email was in HMRC's possession before the date when HMRC claimed to have received it, he has an arguable case that they should have realised its significance and thrown in the towel earlier than they finally did so.

41. As regards efficiency and proportionate cost, Mr Tucker's applications has generated the costs of the late application. But the cost of the substantive cost application would, in my view, have been the same whether it had been made in time or not. I have no doubt that Mr Tucker would have submitted a claim for costs which HMRC would have opposed on the basis (as they do here) and HMRC have not behaved unreasonably and in any case the claim for costs is excessive. They are entirely entitled to oppose Mr Tucker's application that he should be permitted to make his costs application out of time. But this of course has generated additional costs. Had they decided not to challenge that application, the costs of the costs application would have been the same. There would be no additional costs caused by opposing the late application.

42. HMRC have not truly been prejudiced by this late application. The costs of the costs application would have been incurred in any event. They had clearly not closed their files following the hearing on 13 November 2017 since in 2018 they were still in correspondence with both the appellant and with the Adjudicator.

43. In conclusion therefore I allow the appellant's application that he may make his costs application out of time. Although the delay in bringing the application is serious and substantial, the appellant has a good reason for that delay and the balance of prejudice weighs in his favour.

The Costs application

Burden of proof

44. I remind myself and the parties that the burden of showing that HMRC have acted unreasonably lies with Mr Tucker who must establish that they have done so on the balance of probabilities.

Findings of fact

45. I set out below further findings of fact which are relevant to the costs application. But before doing so, I think it is helpful to set out, in brief, the context of this application.

(1) The appellant made a negligible value claim in respect of shares which he claimed to have owned, beneficially, in Bose Packaging Ltd. He then claimed that this generated losses which he set off against income for the tax years 2011/12 and 2012/13.

(2) The shares were registered in the name of Mr Sujoy Bose ("**Mr Bose**"). However it was the appellant's contention that Mr Bose held the shares as nominee for him. Evidence of this included two versions of a shareholders agreement.

(3) HMRC did not accept that these shareholders agreements evidenced the nominee arrangements. It was not until the email dated 3 October 2011 was received by them that they accepted the nominee situation. They then accepted that the losses claimed by the appellant were available to set off against his income as he had originally claimed.

46. From the evidence in the bundles of documents and the oral testimony of Mr Tucker, I find the following facts:

(1) On 31 October 2014 HMRC opened an enquiry into Mr Tucker's tax return for the tax year 2012/2013.

(2) Mr Tucker appointed a firm of accountants, Watts Gregory to assist him with this enquiry.

(3) They sent copies of two shareholders agreements to HMRC. HMRC's statement of case records that a version 4 dated 12 January was sent to them on 12 November 2014.

(4) The appellant could not afford to pay for Watts Gregory's continuing involvement and took over the conduct of the enquiry himself. In his letter to Officer Cadman, the officer conducting the enquiry, dated 29 October 2015, the appellant refers to a signed shareholders agreement. He says that the first version of this was signed as early as 14 September 2011 (and he enclosed a copy of that document with his letter). He also indicated that that agreement had been revised with a further version being signed on 12 January 2012 (and he also included a copy of that agreement with his letter).

(5) The appellant sent his list of documents to Officer Rees with a covering letter on 8 June 2017. That list identifies an email dated 3 October 2011. The number of that document in the list is L124 ("**L124**").

(6) The text of that email is:

> "Hi Sujoy
>
> Had a long conversation with Ann: not easy but she is okay for me to cover the additional shares so that I will subscribe for 90,000 shares.
>
> I assured her that it would all be covered through our nominee agreement but as pointed out it does put you in a minority position. Where you were before was ideal if there was a difference of opinion between Mark and myself, with your 10% you were in the position to control the vote.

> Now your not, so in fairness mate its a very difficult position to be in but at least you have a partner that will not take advantage of the situation.
>
> Onwards and upwards,
>
> yours aye
>
> Basil"

In the foregoing email, Sujoy is Mr Bose, and Basil is Basil Tucker.

(7) In a letter dated 6 July 2017 the appellant sent Officer Rees his witness statement relating to the negligible value claim which was due to be heard on 13 November 2017. He included a copy of L124 with that letter, and refers to it at paragraph 61 of his statement in which he says

> "However this agreement was varied to 90,000 ordinary shares on 3 October 2011, proof of this is contained in a text between Sujoy Bose on the 28 October 2011 followed by a series of emails from 29 September 2011 and 3 October 2011. This correspondence is attached, numerals 121 & 124 et seq."

(8) In a letter dated 21 July 2017 to the appellant, Officer Rees told the appellant that she was compiling a bundle of documents in preparation for the hearing and included, with her letter, a list of documents that "HMRC do not hold all for which clarification is required to ensure that the documents held satisfied the list of documents". Document L124 is not included in her list.

(9) The bundle of documents were sent to Mr Tucker by Officer Rees with a covering letter dated 24 October 2017.

(10) The appellant's skeleton argument for the negligible value claim is dated 31 October 2017. It is not clear from correspondence when this was actually sent to HMRC, nor when it was received by them, but the appellant's costs schedule records that on 31 October 2017 "letters to Court & HMRC with skeleton argument."

(11) Paragraph 2 of the appellant skeleton arguments reads:

> "The appellant advises that this skeleton argument should be read in conjunction with the appellant's witness statement submitted to this tribunal and the respondents on 6 July 2017. However, for convenience a copy is attached to this skeleton argument."

(12) Paragraph 22 of the skeleton argument reads:

> "The text sent by Sujoy Bose to the Appellant on the 28th September 2011 (D121) constitutes an offer to act as the Appellant's nominee for an increased shareholding in the company and the Appellant's email dated 3rd October 2011 (D124) is acceptance of such offer and therefore confirms the contract."

Discussion

47. I need to pose and answer the three questions identified in the extract from *Haworth* above; namely what was the reason for HMRC withdrawing from the appeal; having regard to that reason, could HMRC have withdrawn at an earlier stage; and was it unreasonable for HMRC not to have withdrawn at an earlier stage.

Submissions

48. I answer these by reference to the facts set out above and to the parties submissions set out below.

49. The appellant's claim is based on the following submissions.

50. The first of these is that reference to document L124 is a "red herring". The issue in the negligible value claim was whether Mr Bose held the relevant shares as the appellant's nominee. This was clearly the case as he had said time and time again to Officer Cadman and it was evidenced by the shareholders agreements that had been supplied to her in 2015 if not earlier. It was unreasonable for HMRC not to have accepted that these agreements comprised conclusive evidence of the nominee arrangements.

51. Secondly, HMRC had been sent a copy of L124 in 2014/2015. The appellant had been told by Watts Gregory that he should send all information relating to his relationship with Mr Bose and the company to HMRC. This included, in particular, any documentation relating to the formation of the company and the nominee arrangements. He did this and sent HMRC three lever arch files of documents. He is absolutely sure that these documents would have included L124 even if he cannot provide a covering letter or any other corroborating evidence of that.

52. The list of documents which Officer Rees included in her letter 21 July 2017, identifying those documents not held by HMRC at that date, did not include L124. So certainly by that date (and, as mentioned above, the appellant considered well before that date) HMRC had received a copy of L124.

53. He also considered that HMRC's statement of case in the negligible value claim (at paragraphs 33ff) accepted the nominee arrangements.

54. Mr Joseph submits that this reading of HMRC's statement of case is misconceived and it simply sets out HMRC's understanding of the appellant's case.

55. The appellant has not been able to prove that L124 was sent to HMRC at any time before 6 July 2017. There is no documentary evidence supporting Mr Tucker's assertion that he must have done so and, importantly, the Adjudicator records that having been through HMRC's papers, her office and found no evidence that L124 had been sent to HMRC "at an earlier stage". He urged me that I should find this as a fact.

56. As regards the shareholders agreements, HMRC are entitled to test, in Tribunal, the evidence submitted by the appellant. Mr Tucker's evidence was opaque. HMRC were not clear of the evidential basis of his case.

57. Officer Rees was the HMRC officer who was responsible for the appeal. The Adjudicator correctly records that it was she who, having read L124 in conjunction with the appellant's

skeleton argument, decided to withdraw from the appeal. The basis of that withdrawal is in Officer Rees's email of 13 November 2017.

58. It was only once she had received the appellant's skeleton argument which, as it says in paragraph 2, should be read in conjunction with the appellant's witness statement that she was able to put two and two together as regards the nominee arrangements and it was this which caused her to come to the decision to withdraw from the appeal. Since the skeleton argument was not received until some time after 31 October 2017 and the hearing was on 13 November 2017, any delay in withdrawing before the latter date is reasonable and understandable.

59. HMRC do, however, accept liability for costs occasioned by the appellant's attendance at the hearing on 13 November 2017.

Discussion and conclusion

60. I agree with Mr Joseph that HMRC's statement of case for the negligible value claim does no more than record the appellant's case. It is not an admission of the nominee arrangements.

61. I agree with Mr Tucker that the Adjudicator has got her dates mixed up and that HMRC had received a copy of L124 along with his witness statement, on or around 6 July 2017.

62. It is clear that the reason why HMRC withdrew from the appeal was because Officer Rees understood the significance of L124 and accepted that as conclusive evidence of the nominee arrangements which the appellant had, since the enquiry commenced, claimed were in place.

63. It is the respondent's submissions that this "revelation" arose only after Officer Rees had received the appellant's skeleton argument. Mr Joseph submits that it was not possible for Officer Rees to have understood the significance of L124 and its relevance to the nominee arrangements unless and until this had been made clear to her in the appellant's skeleton argument. I am afraid I do not accept this. The history of the enquiry and the appellant's representations, in correspondence, throughout the enquiry focused on the nominee arrangements. The negligible value case stood or fell on this

64. L124 was clearly important Officer Rees. I find that she had a copy in her possession on or around 6 July 2017 along with the appellant's witness statement. It was incumbent on her to review that statement once she had received it. Officer Rees is an experienced and highly competent officer. I would have expected her to have undertaken such a review. There is no evidence that she was, for example, on holiday or under substantial pressure of work (although I suspect the latter to be the case). Given the significance of the nominee arrangements to the negligible value claim, I would have expected her to have scrutinised L124 on receipt of it. Its relevance is set out in paragraphs 60 and 61 of the witness statement. I accept that the appellant's skeleton argument says it should be read in conjunction with his witness statement. But the witness statement itself deals with the relevance of L124, and the information in paragraph 22 of the skeleton does little more than reflect what has already been said by the appellant in his witness statement (and in particular paragraphs 60 and 61 of it). HMRC should not have needed to have been spoon fed. I agree with the sentiments expressed by Judge Raghaven, recorded in *Distinctive Care*. "While it is no doubt a welcome bonus for HMRC if the evidence the appellant chooses to rely on… draws matters together in a comprehensive and well structured way for HMRC to consider, that is not the function of witness statements.

Rather it is to be assumed that HMRC will once proceedings are started review all the relevant material that has been put before it, something which it will need to do in any event to finalise a statement of case and list of documents, and will make an ongoing assessment of whether a case should continue to be defended"

65. The question is not whether, as a matter of fact, it was only when the skeleton argument was submitted that Officer Rees realised the significance of L124. The question is whether she should have realised the significance before then. I think that she should. On 24 July 2017 she had completed the bundle of documents for the negligible value claim. At some stage prior to that and following receipt of the appellant's witness statement she should have reviewed the appellant's case. In doing that she should have realised the significance of L124 given that the only significant issue in the negligible value claim was whether Mr Bose held the shares as nominee for the appellant. If Officer Rees thought that there was an unbeatable argument on 13 November 2017 she should have realised that it was unbeatable shortly after it was disclosed to her around 6 July 2017. It was unreasonable for HMRC not to have withdrawn shortly after that date.

66. The next point I need to consider is whether either L124 was disclosed to HMRC before that date and/or HMRC behaved unreasonably in not accepting that the shareholders agreements were conclusive evidence of the nominee arrangements and not withdrawing from the appeal shortly after they had received those documents.

67. As to the first of these, I agree with Mr Joseph that the appellant has not satisfactorily proved, on the balance of probabilities, that either he sent to HMRC, or that HMRC had received, L124 before it was sent to them with his witness statement on 6 July 2017. The burden of proof is on the appellant. He has stated that in the context of what he was told by Watts Gregory to disclose to HMRC, it is inevitable that he would have disclosed L124. Given its importance, I cannot accept this as adequate evidence. There is no corroboration. The Adjudicator records that their examination of the HMRC papers does not show any disclosure of L124 prior to its disclosure with the (in my view) the witness statement. I accept that and find it as a fact.

68. The appellant considers that it is very significant that in her list of documents that HMRC were missing, sent to him by Officer Rees with her letter of 21 July 2017, L124 was omitted. This clearly implied that they had received it before 21 July 2017. However I think it highly likely, and I find as a fact, that Officer Rees would by then have received the appellant's witness statement with which L124 had clearly been included. That had been sent to Officer Rees around 6 July 2017. So it is unsurprising that Officer Rees, having received L124 around that date, omitted it from her list of documents not held by HMRC. It clearly was so held. The omission from the list is not evidence that the appellant had sent L124 to HMRC in 2014/2015.

69. I now turn to the appellant's submission that HMRC should have accepted the shareholders agreements as conclusive evidence of the nominee arrangements and that it was unreasonable for HMRC to have continued contesting his appeal after these had been sent to them.

70. Whilst the shareholders agreements clearly set out that Mr Bose held shares as nominee for the appellant, there was considerable correspondence between HMRC and the appellant during the enquiry and indeed running up to the hearing as to whether these agreements were valid and binding, given that they were not signed by all parties to them. So there was, in any event some dispute between the parties as to their legal status.

71. The trial system in the UK is based on an adversarial process. The essential task for a Tribunal is to find facts, and in doing this it needs to examine the evidence and test it. This is true of documentary evidence as much as oral evidence. Simply because a document states something does not mean that it is conclusive evidence of the accuracy of that statement. It is entirely reasonable for HMRC not to take the shareholders agreements at face value but to test them against the oral evidence which Mr Tucker would have given in Tribunal. I disagree with Mr Joseph when he says that the appellant's case was opaque. It seems to me that the appellant's case was abundantly clear. It was that Mr Bose held shares as nominee as evidenced by the shareholders agreements. But HMRC are not bound to accept that contention at face value. I have no doubt that had the matter gone to trial, Mr Tucker would have been cross examined on his arrangements with Mr Bose to test whether the documents (i.e. the shareholders agreements and any other correspondence between the parties) accurately reflected the relationship between the parties. And it may be that as a result of that cross examination, Mr Tucker would not have come up to proof. There may have been flaws in his case which HMRC could exploit. In Mr Tucker's mind this might seem ridiculous. As far as he was concerned the shareholders agreement accurately reflected commercial and legal reality. An HMRC, in his opinion, should have accepted this at face value.

72. I appreciate that position, but I do not accept that by failing to accept it, HMRC have behaved unreasonably. Another HMRC officer might have conducted the case differently and accepted the shareholders agreements as conclusive proof of the nominee arrangements. But, "conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because the more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation."

73. It is my view HMRC have not behaved unreasonably in continuing to defend the appeal notwithstanding disclosure of the shareholders agreements to them in 2014/2015. They were entitled to put the appellant to proof that the documents reflected economic and legal reality.

74. So, in conclusion, it is my decision that HMRC did not behave unreasonably in continuing to defend the appeal following disclosure to them of the shareholders agreements, but did behave unreasonably in continuing to defend the appeal once they had received L124 on or around 6 July 2017.

75. In his skeleton, Mr Joseph suggests that it was reasonable that the decision to withdraw was made within 14 days of receipt of the skeleton argument. I think it was reasonable for Officer Rees to give herself 14 days from the date of receipt of the witness statement dated 6 July 2017 with which was included L124, to undertake a case review. Allowing for the vagaries of the postal system, I suspect receipt was some days later than 6 July 2017. I therefore decide that the appellant is entitled to his costs with effect from 27 July 2017.

Quantum

76. The appellant has submitted a schedule of costs. This reflects some 1096 hours of preparation, correspondence and meetings etc on top of which there is 70 hours of travelling time. It starts with him meeting HMRC on 31 October 2013 and ends with with "Draft letters to the Adjudicator……." on 5 August 2018.

77. As indicated above, the appellant is entitled to claim his costs with effect from 27 July 2017. He is not however (in so far as this application is concerned) permitted to claim his costs after the date of the hearing on 13 November 2017.

78. Rule 10 gives me a choice if I am minded (as I am) to make a costs order. I can either summarily assess the costs or I can order a detailed assessment. Mr Joseph submits that if I am minded to make a costs order then I should direct a detailed assessment. I agree, and I so order.

COSTS DIRECTION

79. I order that the respondents shall pay the appellants costs of the negligible value claim, on the standard basis, from 27 July 2017 to 13 November 2017 including, for the avoidance of doubt, any costs incurred on the 13 November 2017. The amount of those costs shall be assessed (if not agreed) pursuant to Rule 10(6) and (7).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 11 SEPTEMBER 2019