



[2019] UKFTT 639 (TC)

**TC07415**

*LATE APPEAL – notices to require security for PAYE and NIC – appellants likely to be convicted if leave refused - appellant company continued to trade after security demanded leaving HMRC at risk – application dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/1897 and  
TC/19/4365**

**BETWEEN**

**QUADRAGINA LIMITED**

**-and-**

**CHARLES HORDER**

**Appellants**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Taylor House, Rosebery Avenue, London on 5 and 6 September 2019**

**Mr A Young, counsel, for the Appellants**

**Ms S Brown, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. Both appellants were the recipients of a notice of requirement issued by HMRC requiring them (with joint and several liability) to deposit security in respect of the PAYE/NIC liabilities of the appellant company. Both have sought to appeal the Notice of Requirement ('NOR') to the Tribunal.

### Subject matter of the hearing

2. Neither the company nor Mr Horder made a timely appeal to HMRC. Having required HMRC to conduct a review, neither of them took any further steps to challenge the NOR until appeals were lodged with the Tribunal many months later. Therefore, today's hearing was, firstly, to consider an application by both appellants for permission to make late appeals to HMRC. The parties were informed that the hearing would also hear the evidence and submissions in the appeal itself, and determine that matter if permission to appeal late were granted.

3. It was suggested by me and agreed with the parties' representatives at the hearing that they would make their submissions on both aspects of the hearing and the Tribunal would reserve its entire decision.

### New documents

4. At the outset of the hearing, Mr Young produced a small bundle of additional documents which had not previously been given to HMRC. This bundle comprised 3 items:

- (1) Unredacted copies of bank statements which HMRC already had sight of in redacted form and which (in redacted form) were in the bundle prepared by HMRC;
- (2) A copy of a 'linked-in' website page for a Mr Yakub Yousuf;
- (3) A copy of a loan agreement dated 31/5/18 between the appellant company and Notamvis Ltd.
- (4) Draft accounts for the company dated 4 March 2018 and made up to year ended 31 December 2017.

5. HMRC had not had sight of these items before and there was a short adjournment to allow them time to consider them. Having considered them, Ms Brown informed me that she had no objection to them being admitted as evidence, and they were admitted into the hearing.

### Mr Horder's evidence

6. Mr Horder gave a great deal of oral evidence at the hearing. As he had not, prior to the hearing, had much contact with HMRC nor given any explanation for the state of affairs of the company, HMRC were very much taken by surprise by his evidence. However, there had been no direction for the parties to exchange witness evidence in advance and so the appellants were not in breach of any direction. Moreover, HMRC did not apply for any adjournment to consider his evidence.

7. I am conscious that, due to the surprise nature of the evidence, HMRC were not in a position to take an informed decision on whether or not they wished to challenge it; nevertheless, it would have been open to HMRC in advance of the hearing to request a direction for witness statements or even (having heard Mr Horder's evidence in chief) to request an adjournment. They did not do so. They are bound by my findings of fact which I set out as follows.

### *Assessment of evidence*

8. In the absence of any evidence to the contrary, largely I accepted Mr Horder's account of the company's business and how its affairs were run. Mr Young suggested I had to accept everything Mr Horder said but that is not correct; Mr Horder was cross examined and some of what he said was internally inconsistent. I explain below where I found his evidence to be unreliable.

### *Mr Horder's job and health*

9. Mr Horder was a qualified accountant. He had been a partner in a firm of accountants. He had suffered with stress and depression for many years at least partly caused by working under pressure, which left him unable to do the job to the satisfaction of his partners. He suffered a break down in February 2015 which led to his GP referring him to a consultant.

10. In the summer of 2015, his partners asked him to leave the partnership and he did so in March 2016. He was able to take all but 1 of his clients with him and so was able to establish himself in business as a sole practitioner under the name of Godsons. This was satisfactory to him as he was under less pressure as his personal turnover reduced. He remained a sole trading accountant at the date of the hearing.

11. So far as his health was concerned, he saw the consultant to which he was referred by his GP for 2 years (2015-2017). He considered that he has been on a slow road to recovery since his breakdown. While he is improved, nevertheless, he still suffers with stress and anxiety which can make it difficult for him to get things done.

12. He produced a medical report by a Dr Fard dated 5 March 2019 who assessed him for the purpose of preparing the report, but who it appears had not seen him before. Dr Fard's opinion was that Mr Horder continued to suffer with profound anxiety and depression from time to time, provoked by stress and anxiety, and which could bring on an asthma attack. His concluding paragraph was that it 'was not wise for Mr Horder to attend court' although I find the basis of this opinion was that it would be stressful, might make him depressed and might bring on an asthma attack. In any event, Mr Horder did choose to attend the Magistrates Court hearing in January 2019 and this Tribunal hearing in September 2019.

### *The background to his appointment as director of Quadragina*

13. At some unspecified point in time some years in the past, Mr Horder met a Mr Tim Fulton. Some years later, Mr Fulton contacted him, and asked him to provide accountancy advice for a Dubai-based company with which Mr Fulton was connected. That brought Mr Horder into contact with a Mr Yakub Yousuf who appeared to be the owner of that company.

14. At some later unspecified point in time, that company ceased to trade and Mr Yousuf moved to the UK. In around 2014, Mr Yousuf instructed Mr Horder to do accountancy work on what Mr Horder referred to as the 'Fermine' account.

15. Mr Horder understood that Mr Yousuf's business was brand creation, particularly in the cosmetics industry. Mr Yousuf's clients would be the manufacturers of products; Mr Yousuf's expertise was, by use of advertising, to create customer awareness of a new brand or product name. Mr Horder said that Mr Yousuf had very successfully created the brand (ie customer demand) for a new alcohol-free perfume which had gone on to become a top-selling and expensive product, albeit, Mr Horder implied, being very cheap to manufacture.

16. Mr Yousuf asked Mr Horder to set up a UK company for him to carry on this business. He also asked Mr Horder to be the director of it: Mr Horder agreed. He arranged for himself and his sister (Ms Jane Horder) to become directors and shareholders of Quadragina Ltd. At the time, his understanding was that Mr Yousuf did not want to be a director because he had not left Dubai on a 'good note': Mr Horder was not concerned about this as he had been assured by his other contacts that there was nothing untoward in this.

17. Mr Horder was not paid for his role as director of Quadragina. It took very little of his time. He opened and operated the bank account; he paid the staff their salary and expenses, he also paid rent on the company's premises and (at the start) paid some tax to HMRC. Mr Horder also made (at least for a time) VAT, PAYE and NIC returns on behalf of the company and drew up its accounts.

18. Mr Yousuf was in charge of the business of the company: he had the ideas and contacts and met with the clients. He selected the staff for employment and gave them their instructions. He carried out the work with the help of the employees. The company started with 2 or 3 employees and had 6 by 2016. Mr Yousuf was paid at the rate of about £30,000 per annum, the other staff was paid about £22-27,000 per annum although one staff member by the end was paid at the rate of £40,000 per annum.

19. Mr Horder agreed that he (ie Mr Horder) was accustomed to act on the instructions of Mr Yousuf in regards Quadragina and to all extents and purposes the company was Mr Yousuf's. Mr Horder considered that Mr Yousuf was a shadow director of the company and I agree. He produced Mr Yousuf's 'Linkedin' profile which showed Mr Yousuf listed himself as 'Chairman and brand strategist' at 'Quadragina' since 2015. Mr Horder believed that the goodwill associated with the name of Quadragina had effectively been retained by Mr Yousuf as the company's website was created and owned by another UK company controlled by Mr Yousuf.

#### *The company's accounts*

20. The accounts produced by HMRC from Companies House showed that as at 31/12/15 its debt to HMRC for VAT and PAYE/NIC was £16,982.

21. One of new papers produced was draft accounts for year to 31/12/17 which showed for 2016 receipts of £90,963 and expenses of £107,070 (net loss of 16,107) and for 2017 receipts of £184,723 and expenses of £229,310 (loss of £44,587). Its creditors as at end 2016 were shown as £50,998 and as at end 2017 £95,485. The breakdown showed that these two figures comprised almost entirely PAYE/NIC and VAT.

22. Its outgoings were, bar rent, wages and expenses. In other words, from the start the company accumulated liability to HMRC but did not pay it. It was paying its rent and wages but not its tax.

#### *The company's tax returns*

23. Mr Horder commenced making RTI returns for PAYE for the month to 5 June 2015; the last return he filed was for the month to 5 February 2018; thereafter the company was assessed on the basis of HMRC's estimate. Its monthly liability had commenced at £152 and steadily increased; its last return (February 2018) was for £9,284 PAYE and NIC.

24. The last recorded payment of PAYE/NIC liability was on 26 May 2016; Mr Horder said that he had originally intended to pay the early amounts out of his own money but this had not happened. He accepted that no PAYE/NIC was paid by the company for two years from May 2016 to mid-2018. (Some of its outstanding PAYE/NIC liabilities were treated as paid in mid-2018 as explained in §§43-44, 55 and 69 below).

25. Mr Horder accepted that the company only made VAT returns for the first year of trading and then only paid the VAT owing on those returns up to Spring 2016, and so, as with the PAYE/NIC, the company traded for over 2 years without submitting VAT returns nor paying the VAT owing. He accepted that he was aware of the company's VAT default position and thought it very odd that HMRC did nothing about it.

26. He also said he reimbursed expense claims out of company funds but, over time, the expense claims got larger and were no longer accompanied by evidence of the expenses. He continued to cause the company to pay them.

27. His explanation for how he allowed this state of affairs to come to pass was that he was frequently assured by Mr Yousuf that the company had substantial work-in-progress that Mr Yousuf was in the process of collecting the money and there would shortly be the funds to pay the tax.

*Mr Horder's relationship with Mr Yousuf and the company*

28. Mr Horder said that at the outset he had trusted Mr Yousuf absolutely. This is certainly borne out by how he acted: he set up a company in his own and sister's name on the understanding nevertheless that it would be to all intents and purposes Mr Yousuf's company.

29. However, Mr Horder's evidence was somewhat contradictory about his relationship with Mr Yousuf in 2018. On the one hand, it was his evidence that he had become concerned with the position by late 2017 or early 2018. He prepared the accounts I referred to above in March 2018. These showed that the company was insolvent at least on the balance sheet test (as it owed more money than it possessed or was owed). Mr Horder decided in March 2018 to cease making payments of salary as he was 'not getting any sense out of Mr Yousuf' and the situation by the summer of 2018 was, he said, 'nasty'.

30. However, it was also his evidence that he was at that time persuaded by Mr Yousuf that the company was not actually insolvent as very significant amounts of work-in-progress would be billed and paid. He was assured that the company was also due bonuses and success payments which were worth far more than the outstanding tax. And despite his decision to cease paying wages, I find that he paid, on Mr Yousuf's instructions, significant sums out of company funds to Mr Yousuf and other 'ex' employees up to nearly the end of September 2018.

31. It seems fair to conclude that his relationship with Mr Yousuf in 2018 was ambivalent; Mr Horder had become concerned but was still to some extent acting on Mr Yousuf's instructions. I accept that the relationship had entirely deteriorated by some time in 2019 in that, as Mr Horder said, he had not heard from Mr Yousuf in the four months before the hearing. Mr Horder appeared no longer to act on Mr Yousuf's instructions and he now considered himself to have been duped by Mr Yousuf. He regrets trusting him and now remembers that he knew that Mr Yousuf had connections with another company (Napiershall Formula Ltd) which had failed owing HMRC substantial amounts of money.

*The notices of requirement*

32. HMRC issued a notice of requirement for PAYE/NIC to Quadragina, Mr Horder and Ms Jane Horder on 27 February 2018. The NOR required £78,593.47 to be paid by 8 April 2018.

33. Mr Horder explained that dealing with the NOR became his priority but, he said, ill health made him slow to respond. He did not reply to HMRC until 6 April 2017. His letter pointed out that Ms Horder had no involvement in the company and it was an administrative error she had not been removed as a director. He said he hoped to be able to make a 'settlement proposal' and confirmed that 'no further salary payments are being made, until we receive your agreement to do so'. He asked for a 30 day extension.

34. HMRC sent a letter dated the same date to both Mr Horder and the company which notified him that he was committing an offence because he had not paid the security by the due date of 8 April: either the letter was misdated or sent too early and in any event appears to have crossed with Mr Horder's letter of the same date.

35. On 17 April 2019, in response to Mr Horder's letter, HMRC sent a letter to Ms Jane Horder at her home address. The greeting within that letter was however 'Dear Mr Horder'. The letter went on to say that HMRC had received a letter from Quadragina telling HMRC that she no longer had financial control over the company and it was clear she had been removed as a director; therefore, the notice of requirement was withdrawn.

36. On the same day, HMRC sent a letter to Quadragina at Ms Horder's home address (as this was the company's correspondence address) addressed 'Dear Mr Horder' saying that HMRC had agreed to his request to remove the NOR from Ms Horder and to grant the requested extension: the company was now required to pay the security by 27/5/18. It stated 'we have no objection to you making payment of wages to your staff and you should do so as normal'.

37. It confirmed a NOR was also given to Mr Charles Horder and that both the company and Mr Horder were jointly and severally liable to provide the security.

38. Virtually the same letter was also sent to Mr Horder at his home address on the same date.

39. Mr Horder attempted to speak to HMRC by phone on 30 April 2018. He told HMRC that the company could not continue to trade if the NOR was not withdrawn. HMRC sent a warning letter to Mr Horder on 3/5/18.

#### *The loan*

40. The company was offered a loan by Notamvis Ltd; the written loan agreement was signed on 31 May 2018. Tim Fulton was the director of Notamvis. Mr Horder said that Mr Yousuf negotiated the loan on behalf of Quadragina, but, with the benefit of hindsight, he now realised that Mr Yousuf actually controlled Notamvis.

41. The terms of the loan was that £100,000 would be lent; £25,000 on the day of signing, and 5 further payments of £15,000 on the last day of the 5 subsequent months. The terms were extremely beneficial to Quadragina. No interest was to be charged and no security was required. The money was to be repaid in stages falling due in 2019.

42. The first three instalments were paid to Quadragina (totalling £55,000). Quadragina is in no position to repay it and has defaulted but Mr Horder has had nothing from Notamvis demanding payment. I find this indicates that he was right and the loan was not really at arm's length. It is more likely than not that Mr Horder is right in his belief that Mr Yousuf controlled Notamvis and organised the loan from it in an attempt to persuade Mr Horder to let the status quo continue and Quadragina trading.

#### *The payments to HMRC*

43. The date of the loan and the amount of the first instalment were too late and too little to meet the NOR, which required over £78,000 to be paid by 27 May 2018. Nevertheless, Mr Horder on behalf of the company and out of the funds loaned to it, paid £24,001 to HMRC on 1/6/18; a further £10,000 on 9/7/18 and a further £15,000 on 3/9/18. In total, the company paid £49,001 to HMRC.

44. Mr Horder was disgruntled that, at the first hearing in the Magistrates' Court in January 2019, the officer representing HMRC had not known that this money had been paid until he pointed it out to her. Ms Brown's position was that Mr Horder had paid it to HMRC under the wrong reference number and so it had been applied to the company's outstanding PAYE and NIC debt to HMRC and not in part payment of the security. Mr Horder did not accept that it had been paid under the wrong reference number. His point was that the NOR was his prime concern and he had been careful to make the payments under the right reference. I revert to this point below when I consider Mr Butler's evidence.

*When did the company cease to trade?*

45. The appellants' case was that the company ceased to trade when Mr Horder announced to Mr Yousuf in March 2018 that the company would no longer pay wages and that invoices should not be issued. It was also his case that his letter of 6 April 2018 which informed HMRC that the company would not pay wages was the same as notification that it had ceased trading, although he accepted the letter had not expressly said so.

46. I do not accept that the letter could be read as notification that the company had ceased trading; a company does not need to have nor pay employees in order to trade (as unpaid directors can trade on behalf of a company). Moreover, his letter of 6 April only said the company would not pay wages unless HMRC consented to this; HMRC's reply effectively did consent. The letter could not reasonably be understood as notice that the company had ceased trading.

47. Moreover, Mr Horder never gave HMRC notice that the company no longer had employees and so once Mr Horder stopped making RTI returns, HMRC had continued to assess the company each month for PAYE/NIC on the basis of an estimate. Mr Horder did nothing about this; nor had he ever taken steps to put the company into liquidation, although his explanation for this is that he had been hoping to pay off the company's debts.

48. Most significantly, the unredacted bank statements which HMRC saw for the first time in the hearing showed that a large number of payments were made out of the company's bank account during June – September 2018. Mr Horder said he made the payments on Mr Yousuf's instructions although, in so far as they were to 'ex' employees he told Mr Yousuf that they were loans. The statements showed, for example, payments totalling £10,800 to Mr Yousuf himself, £4,250 to Mr Theo Baker and £2,157 to Ms Zara Mohammad, all of which Mr Horder identified as 'ex' employees. There were other payments to other persons. Initially in his evidence, Mr Horder admitted that the sums he was paying bore close resemblance to the amounts he had earlier paid these people as salary. He then retracted that evidence and said he was told the payments were for reimbursement of expenses. This evidence was at odds not only with his retracted statement but also with his insistence that he had told Mr Yousuf that the payments were merely advances and had to be repaid. It was also at odds with his statement that only Mr Yousuf incurred substantial expenses. I find what he said on this unreliable. I find it more likely than not that, taking account of all the circumstances including the amounts, these payments were payments of salary.

49. It follows I cannot be satisfied that the company actually did cease to trade in March 2019. Mr Horder had never really been involved in the trading activities and was not in a position to say when they actually stopped. Moreover, on his own evidence staff members were still being paid substantial sums up to September 2018 which indicated that they were still working. I find that the company was still trading up to at least 21 September 2018 the last date on the statements. However, I do accept that trading had stopped by the date of the hearing. I do not know when it stopped.

#### ***Mr Butler's evidence***

50. Mr Butler was the HMRC officer who took the decision to issue the NOR to the company and to Mr and Ms Horder. His evidence concerned the reasons why he chose to issue the NOR and why it was not later revised; it was relevant to the question of the reasonableness of HMRC's decision-making and not relevant to the question of whether the late appeal should be admitted.

51. I find from his evidence that he chose to issue the NOR because, firstly, the company had traded for some years declaring PAYE/NIC liabilities but without making any payment towards its liabilities and, secondly, the company had refused to engage with HMRC and in particular had ignored warning letters which had been sent to it.

52. He accepted that he had calculated the amount of the NOR in line with HMRC's standard formula although I also accept that he had considered whether it was appropriate to do so and had decided that it was. The amount of the NOR represented two elements: one part was an estimate of the company's PAYE/NIC liabilities for the next four months, based on an average of its declared liabilities for the previous 12 months. The second and larger part was an amount representing its accrued PAYE/NIC liabilities.

53. He was aware, because he checked when issuing the NOR, that the company had outstanding VAT liabilities. He considered issuing a VAT NOR but decided to press ahead and just issue the PAYE/NIC NOR because he thought the situation urgently called for an NOR, and including the VAT matter would hold it up as he would have to go through the procedure of sending warning letters for VAT before he could issue a VAT NOR.

54. He received and responded to Mr Horder's letter of 6 April 2018. He checked Companies House and decided it was appropriate to remove the NOR from Ms Horder. He did not consider that it was appropriate to remove or reduce the NOR in respect of the company or Mr Horder. While he noted that Mr Horder's letter said that the company did not intend to pay wages until HMRC authorised it, this suggested that the company was intending to continue to trade; moreover, he did point out to the company that HMRC had no objection to them paying wages. This therefore gave the company the reassurance it requested and he had no reason to believe that the company would cease to pay wages. It was reasonable to assume, as he did, that the company would continue to generate liability to account for PAYE and NIC.

55. He agreed that it was pointless to issue a NOR where there was no prospect of payment nor prospect of a change of behaviour and for that reason he would not issue one against an insolvent company in the process of liquidation.

56. As mentioned above, the money paid by the company in mid-2018 was not registered on HMRC's systems as a payment towards the NOR but simply as a reduction in outstanding liabilities. He considered the company had failed to pay over the money with the correct reference as set out in the advice sent with the NOR. Therefore, the money had been offset against the company's outstanding liabilities and was not treated as part payment of the security. The payment was insufficient to discharge the company's existing PAYE/NIC liabilities: it still owes HMRC PAYE and NIC from September 2017 onwards, some of which was declared by the company in its RTI returns and some of which was estimated by HMRC once Mr Horder ceased to make RTI returns. And no payments at all have been made towards its VAT debt since Spring 2016.

57. I accepted Mr Butler's evidence with one caveat: there was a dispute between Mr Horder and HMRC whether Mr Horder had paid the money referred to above into the right account and with the right references as notified to him for it to count as (part) payment of the security, or whether he had paid it in such a manner that HMRC were correct to treat it as part payment of the company's outstanding PAYE/NIC debt.

58. For reasons explained below, I do not have to resolve whether as a matter of fact the payments were properly payments towards the security, and it seems better that I do not decide this as (a) neither party came to the hearing armed with the necessary documentary evidence on this and (b) it is really a matter for the Magistrates' Court to decide as they have jurisdiction over compliance.

#### **THE APPELLANTS' CASE**

59. Mr Young said that his clients applied for permission to appeal late on the basis:

- (1) Mr Horder's medical condition at the time the application should have been made;
- (2) Mr Horder had been unrepresented and had not understood the need to appeal.



60. He said his clients' grounds of appeal if permission to appeal were given were:
- (1) HMRC were unreasonable to require security in the sum demanded and unreasonable not to amend it after receiving Mr Horder's 6 April 2018 letter;
  - (2) Reasonable security was paid;
  - (3) The Notice of Requirement was withdrawn in respect of Mr Horder;
  - (4) The Notices of Requirement were void as they had to be reissued (but were not) when the Notice of Requirement to Ms Horder was withdrawn.

#### **THE LAW ON LATE APPEALS**

61. The three letters giving notice of the NOR were dated 27 February 2018 and notified each appellant of the right to ask HMRC to reconsider the matter within 30 days. Mr Horder did not contact HMRC until 6 April which was outside this time limit, but HMRC waived the time limit in their reply of 17 April, which removed the NOR on Ms Horder. That letter effectively gave the company and Mr Horder 30 days to lodge an appeal with HMRC. Neither appellant did so. It appears no appeal has been lodged with HMRC at all; Quadragina lodged its appeal with the Tribunal on 25 March 2019 and Mr Horder lodged his appeal with the Tribunal on 19 June 2019.

62. Properly understood, these are therefore applications to be able to lodge a late appeal with HMRC under s 49 TMA, but all parties clearly wanted the Tribunal to determine the appeal if it decided to extend time. In any event, it seems to me that the principles on extending time to lodge an appeal are the same whether the appellants were late lodging their appeal with HMRC or late lodging it with the Tribunal.

63. I think both parties were agreed that *Martland* [2018] UKUT 178 (TCC) set out how the Tribunal should approach applications for leave to make a late appeal. It is a three stage process as set out at [44] of that decision, the last of which is a balancing exercise considering all of the circumstances.

#### **Stage 1: is the delay serious?**

64. The last day for notifying HMRC of a challenge to their decision was 30 days after HMRC's letter of 17 April 2018; the company's appeal was therefore approximately 11 months' late and Mr Horder's appeal was approximately 14 months' late.

65. HMRC point out that in *Romasave* [2015] UKUT 254 (TCC) the Upper Tribunal considered a three month delay to be serious and significant. I agree with HMRC that the delays by the company and Mr Horder were serious and significant. They were significant as it took the appellants approximately 12 times as long to lodge their appeals as they were given by law. It was serious because time limits are there to provide certainty to the parties and time limits should be respected.

#### **Stage 2: reasons for delay?**

##### *Ill-health?*

66. The reason given by both appellants for their late appeals was Mr Horder's illness as evidenced by Dr Fard's letter. Ms Brown's view was that (a) the doctor's opinion did not in fact evidence an inability to lodge an appeal at the right time; and (b) even if Mr Horder was ill, he should have got someone else to lodge the appeal far earlier than he actually did lodge it.

67. I agree with Ms Brown that Mr Horder's illness was not shown to be the cause of the delay and therefore did not explain it. Properly analysed, Dr Fard's report was quite unspecific about the effect of his illness on his ability to conduct his affairs. It was focussed on the effect that attending court might have on him and not on his ability to conduct his affairs.

68. In any event, I am entitled to look at the evidence in its entirety. Up to February 2018, Mr Horder was capable of filing the company's RTI returns as he did so; in March he was capable of drawing up a set of accounts for the company as he did so. Mr Horder's own evidence is that he was making decisions about the conduct of the company's affairs in March 2018; he wrote to HMRC at the start of April and phoned them at the end of April. His evidence about how he could clearly recollect that conversation was because he was busy attending other meetings that day and had to slot in the phone call to HMRC when he arrived early for a business meeting. He signed the loan agreement in May 2018 and was making a significant number of payments from the company's accounts in June – September 2018. He attended court in January 2019.

69. Most significantly, throughout the period concerned, Mr Horder has run his own business as a sole trader accountant.

70. While I accept that Mr Horder had a significant stress-related health problem, and that it has caused him to have a breakdown in 2015 and resulted in him becoming a sole trader with a reduced workload, I do not accept that he is unable to function at least relatively normally. I consider that, as he was clearly fit enough to do all that he did do in 2018 and 2019 as outlined above, he was fit enough to lodge an appeal on his own behalf and that of the company at any time in 2018-19.

71. Therefore, I find that the appeals were not lodged late because he was too ill to do so. In any event, I also agree with Ms Brown's second point: if Mr Horder did have an ongoing illness which prevented him lodging appeals, it was a long term illness which had lasted at least since 2015 and he had time to appoint someone else to act on behalf of the company and himself. But, as I have said, I do not accept that his long-term illness did prevent him lodging the appeals in a timely fashion.

*Mr Horder was unrepresented*

72. Mr Young suggested a second reason for the late appeals and that was Mr Horder's naivete in such matters; he was not represented and had not realised that he needed advice. Had he sought advice, said Mr Young, he would have been advised to appeal.

73. I am unable to accept that Mr Horder was unaware of the gravity of the NORs. All the letters sent by HMRC carried a warning about the risk of criminal conviction. They came with many pages of explanation. All the letters told him to contact HMRC if the recipient did not agree with the decision.

74. Mr Horder clearly understood this because (albeit late) he did contact HMRC and successfully persuaded HMRC to withdraw the NOR issued to Ms Jane Horder. With respect to the NOR issued to himself and the company, he also took action. He told HMRC the company would pay no more wages; he told Mr Yousuf the company would pay no more wages nor issue any more invoices. A loan was arranged and signed on 31/5/19, monies were received and paid over to HMRC. It appears that Mr Horder had decided to attempt to comply rather than appeal. He had the opportunity to take advice at that time but did not do so; with hindsight, he may regret not doing so.

75. The authorities suggest that being self-represented is not a good excuse for failing to meet deadlines, at least where there is no real difficulty in a self-represented person meeting the deadline: see [47] of *Martland*. Mr Horder was clearly capable of communicating to HMRC disagreement with their decision, but chose at the time neither to appeal nor to seek advice. His decision was that the company would attempt to comply. Neither the company nor Mr Horder have a good excuse for lodging a late appeal, particularly one as late as these appeals.

### **Stage 3: all relevant circumstances**

#### ***Respect for time-limits***

76. Ms Brown said it was important time limits should in general be respected; it was otherwise not fair on compliant taxpayers. I agree with her. While this point can be stated shortly, it is very important. Time-limits are there to be respected as, without time limits, justice cannot be fairly administered. It is for the appellants to justify their application for the time-limits to be waived and very good grounds would need to be established.

#### ***Effect of refusal on the parties***

##### *Further litigation?*

77. The parties were not agreed on what the effect of refusal of the application to extend time would be on the parties. Mr Young's position was that, if the FTT refused to accept a late appeal, then it would lead to further litigation and costs in the Magistrates' Court. His view was that I should give leave to make a late appeal, and then decide the appeal, on the basis of the evidence I had heard, as it was more efficient than refusing the late appeal, as that would, he said, mean that all the evidence would have to be heard over again in the Magistrates' Court.

78. I accept that to a limited extent he is right. The grounds of appeal were:

- (a) The NOR was unreasonable in amount;
- (b) The NOR issued to Mr Horder was withdrawn (Mr Horder's appeal only);
- (c) The NORs were void (as not properly re-issued);
- (d) Reasonable security had been paid.

79. I agree with Mr Young that the Magistrates Court appears to have jurisdiction to determine issues (b), (c) and (d) above because they are questions fundamental to whether an offence has been committed. They must determine (i) whether there was a valid NOR and (ii) whether it was in fact breached. I have heard evidence on issues (b)-(d) but if I do not determine these matters because I refuse to extend time, then it seems inevitable that that evidence would have to be heard again in the Magistrates' Court.

80. However, the largest part of the evidence related to issue (a) (whether the NOR was excessive). And while the FTT cannot tell the Magistrates' court the extent of its jurisdiction, nevertheless, the right to appeal a NOR is only to appeal it to HMRC and then to the FTT under Reg 97V. There is no right to appeal a NOR to the Magistrates' Court which is seized only with the jurisdiction to determine if the NOR has been unlawfully breached. It follows that only the FTT can decide that it was unreasonable to issue the NOR or that it should be varied. So even refusing leave to appeal out of time will not lead to the matter being entirely re-heard: the largest part of Mr Horder's evidence and nearly all of Mr Butler's evidence related only to issue (a) and that evidence would not be relevant in the Magistrates' court and would not need to be re-heard.

##### *Conviction?*

81. While Mr Young did not put it quite like this, another effect of refusing leave to appeal would be the risk conviction of the offence of breach of the NOR by both appellants. This is obviously a very serious matter, although even more serious for Mr Horder than for the company. Mr Horder is a professional man in practice as an accountant: a conviction is likely to be a disciplinary matter for him. The company, on the other hand, is only a statutory fiction and in any event is no longer trading and insolvent so a conviction, while serious, is less serious for it than for Mr Horder.

82. So what is the risk of conviction if I refuse to extend time to appeal? It is not normally for the FTT to consider the probability of success when weighing up the detriment to an

appellant of being unable to appeal; nevertheless, because the hearing proceeded on the basis I would hear both issues together so that I could determine the appeal if I decided to extend time, I have in fact heard all the evidence and submissions and so am in a position an informed view and, secondly, *Martland* was clear that ‘obvious strength or weakness’ in a case was relevant when considering leave to appeal out of time. So does the appellants’ case in the Magistrates’ court have an obvious strength or weakness?

*The NOR issued to Mr Horder was withdrawn*

83. Issue (b) was Mr Horder’s case that the notice issued to him (not the company) was withdrawn. (I note, in passing, that this is an issue over which both this Tribunal and the Magistrates’ Court would have jurisdiction: the Tribunal has jurisdiction to hear an appeal against an NOR and so it must follow the Tribunal can also decide whether there is a valid NOR.)

84. Mr Horder’s case on this appears very weak. I was not addressed on the law on this matter; the appellants did not seem to be suggesting that the NOR on Mr Horder was actually withdrawn and the import of Mr Butler’s evidence, which I accept, was that it was not. However, even if HMRC did not intend to withdraw the NOR, it seems to me that if they took actions which would reasonably be understood as a withdrawal of the NOR, then they would be taken to have withdrawn it, albeit unintentionally.

85. However, it would not be enough for the appellant to be able merely to show that Mr Horder subjectively thought it had been withdrawn. And in any event, I note that Mr Horder in evidence never claimed to have actually thought that the NOR issued to him had been withdrawn; all he said was that he had taken comfort from the fact he thought that the letter could be read as withdrawal of the NOR on him. Therefore, he has not proved as a matter of fact that he ever thought the NOR issued to him had been withdrawn.

86. Operating on the basis, therefore Mr Horder would have to show (at the least) that the letter he relies on as the letter withdrawing the NOR on him could reasonably be understood as such, I consider his factual case.

87. As a matter of fact, the letter which withdrew the NOR was sent to Ms Horder at her address; the only reason Mr Horder could ever have been aware of it was because his sister chose to show it to him. The text of the letter made it quite clear that the reason for the withdrawal was HMRC’s acceptance of the points Mr Horder had made in his letter asking for the NOR on his sister to be withdrawn and in particular that she was no longer a director. However, Mr Horder knew that he remained a director; he knew that he had written the letter asking for the NOR to his sister to be withdrawn because she did not control the company. It seems barely arguable that any reasonable person in these circumstances could have considered the letter as a withdrawal of the NOR issued to Mr Horder, despite the greeting within the letter being ‘Dear Mr Horder’. When this is combined with the fact at the time time Mr Horder received a letter addressed to himself, and another letter addressed to the company, confirming that he remained jointly and severally liable with the company for the NOR, it is obvious that Mr Horder’s factual case on issue (b) is very weak and unlikely to succeed.

*The NORs were invalid*

88. His case (c) was that the NOR were invalidly reissued rests on the law which provides

(3) in a case which falls within regulation 97P(2)(b), the notice must include, or be accompanied by, the names of each other person form security is required.

(4) The notice may contain such other information as the officer considers necessary.

(5) A person shall not be treated as having been required to provide security unless HMRC comply with this regulation and regulation 97R(1).

89. While it follows that a failure to give proper notice will invalidate the NOR, I found it difficult to see how factually there was a reasonable prospect of a case that the NORs were invalid. The NOR issued to Mr Horder, Ms Horder and the company did notify each of them that the other two were also issued with the same notice. When HMRC withdrew the notice from Ms Horder, they then wrote again to Mr Horder and the company telling them this and notifying each that the other remained jointly liable.

90. Again, without deciding the point, I think his case on this very weak.

*Compliance with the NOR*

91. His last line of defence, issue (d) was that he complied with the NOR by providing security. However, the NOR was for £78,593.47 and was originally due for payment on 8 April 2018; that was deferred by letter dated 17 April 2018 to 27 May 2018 (40 days later). There was no subsequent deferral. The NOR was therefore not complied with because only £49,001 was paid and it was paid in three tranches all of which were paid after the due date of 27 May 2018.

92. Therefore, while compliance with the NOR is something which appears to be in the exclusive jurisdiction of the Magistrates' Court, it appears that the appellants' prospects of success on this are weak.

*Conclusion on conviction*

93. If I refuse leave to appeal, it seems very likely to me that both appellants will be convicted. A conviction would be a very serious matter for them, particularly Mr Horder.

94. From HMRC's point of view, such a conviction would for HMRC would reinforce their position that persons must comply with NORs or make timely appeals against them. NOR are an important method of compliance for HMRC because they enable tax revenues to be protected against companies which continue to trade without paying their tax liabilities.

***Effect of Grant of leave to appeal on the parties***

*Litigation resolved in one hearing?*

95. Mr Young's point was that if I gave leave to appeal out of time, both parties were agreed and came to the hearing prepared for the Tribunal to rule on the appeal. That would (subject to any appeal) be a saving in court time and costs of the parties.

96. I agree that that would be a likely outcome of extending time to appeal.

*No conviction?*

97. Much more significantly, however, it seems to me that the effect of allowing this application is very likely to result in neither appellant being convicted. The reason for this is as follows.

98. Firstly, Regulation 97V on *Appeals* provides at (7):

(7) On the final determination of an appeal under this regulation –

(a) subject to any alternative determination by the tribunal or court, any security to be given is due on the 30<sup>th</sup> day after the day on which the determination is made, or

(b) HMRC may make such arrangements as it sees fit to ensure the necessary reduction in the value of security held.

99. The obvious implication of these provisions is that the normal effect of an appeal against a PAYE/NIC NOR is to defer the due date of payment of the security until 30 days after the

date of the Tribunal's determination. Since an offence is only committed if the security is not paid by the due date, the acceptance of a late appeal is very likely to have the effect of meaning that no offence has been or will be committed at least until 30 days after the determination of the appeal.

100. Secondly, it appears that the Tribunal has full appellate jurisdiction to reduce the amount of the NOR.

97V Appeals

....

(5) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may –

- (a) confirm the requirements in the notice,
- (b) vary the requirements in the notice, or
- (c) set aside the notice.

101. As the FTT in *D-Media Communications Ltd* [2016] UKFTT 430 (TC) at [20-21] concluded, the ability for the FTT to vary the amount of the NOR and the fact that the NOR is only payable 30 day after the Tribunal's decision, indicates that the Tribunal should re-make the decision on the basis of the information available to the Tribunal at the date of the hearing. In effect, the Tribunal has something akin to full appellate jurisdiction over the *amount* of the NOR.

102. This conclusion may sit oddly with the Tribunal's limited supervisory jurisdiction over the question of whether the decision to require the security was reasonable in the first place: the effect of the legislation is that (at least for timely appeals) the question of whether it was reasonable of the officer to require security at the time the NOR was issued appears largely irrelevant because the Tribunal must decide whether to vary the requirements as from the current date. It is not entirely irrelevant because the Tribunal must (under its normal supervisory jurisdiction) decide whether the issue of the NOR was reasonable, and if it was not, must set it aside unless inevitably it would have been the same if made properly; but where its conclusion is that the NOR was reasonably issued, it must then go on to exercise full appellate jurisdiction to determine whether the requirement should be varied and from when it should apply, with the default rule being it applies from 30 days after the tribunal's decision.

103. I note in passing that Mr Young addressed me at length on his case that the Tribunal's jurisdiction was entirely appellate and *John Dee* was (he said) wrongly decided and not binding. I do not really need to consider this because it is clear the Tribunal does have appellate jurisdiction over the *amount* of the NOR which, as I have said, amounts to full appellate jurisdiction over the dispute where the NOR was reasonably issued in the first place.

104. So I don't really need to address the question of whether the original decision to impose the notice to require security was reasonable; Mr Young said several times that the appellants no longer advanced a case that it was unreasonable on the facts known to Mr Butler at the time. They thought it unreasonable that (a) Mr Butler imposed it in an amount which covered the arrears as well as projected liability and (b) that he did not reduce it when informed that the company no longer intended to pay wages.

105. I consider any appeal based on the original issue of the NOR to have poor prospects. The legislation (s 97N(1)) clearly anticipates that security may be required for future and past liability. And so far as (b) is concerned, the statement that the company would no longer pay wages was (i) not a clear statement it was ceasing to trade and (ii) caveated by the qualification that it would pay wages if HMRC agreed, and HMRC were giving that agreement. Therefore,

it was reasonable for Mr Butler to assume, as he did, that the company was going to continue to trade and the NOR was still needed; in any event the supervisory jurisdiction is over HMRC's decision to issue the NOR and not any later decision to revise or refuse to revise it.

106. So, as I have said, the important question is whether, if leave to appeal out of time was given, would the Tribunal vary the NOR? As the information available to this Tribunal is that the company is *now* insolvent and has *now* ceased trading, I consider it has a very good case that no security is necessary *now* in order to protect the revenue. On the contrary, HMRC should protect the revenue by taking steps to place the company in liquidation.

107. In conclusion, allowing leave to appeal seems very likely to result in a decision that it is no longer appropriate for any security to be required. In other words, it is very likely the appeal would succeed. So giving leave to appeal late would be very advantageous to the appellants who (it seems to me) would be saved from criminal conviction. They would no longer be in breach of the NOR as (a) the date for compliance would move to 30 days after the Tribunal hearing and (b) it would most likely be reduced to nil in any event.

108. And the effect of grant of leave to appeal on HMRC, so far as these particular appellants are concerned, would appear to be minimal: the purpose of a NOR is to protect the revenue. A NOR on this company is likely to be reduced to nil as at a current date precisely because a NOR would not appear to protect the revenue as the company is insolvent and not trading. A NOR would appear to be of no advantage to HMRC now on the facts of this particular case and so extending time to appeal against the NOR would not appear to be disadvantageous to HMRC.

#### **Should leave to appeal out of time be given?**

109. I take into account all factors above, and all factors mentioned in the hearing, even if I do not specifically refer to them in the decision or this conclusion.

110. The appeals are lodged very late; but the effect on the appellants of granting or refusing leave to appeal late is very stark. Either they will very likely be convicted of an offence if leave is refused, or very likely not be convicted if leave to appeal out of time is granted. So far as HMRC is concerned, a NOR from this company will no longer protect revenues as it is insolvent and not trading and in that narrow sense HMRC are not really disadvantaged by leave to appeal being granted. Moreover, while of lesser importance, I also note that granting leave to appeal will also probably cut down the number of legal hearings in this dispute.

111. These factors are in favour of granting leave to appeal. Is there anything against it? I think that there is.

112. Compliance with time limits is very important; time limits for appeals with NORs are particularly important because NORs are there to protect revenues. NORs are intended to prevent companies continuing to trade without paying over the tax they collect on HMRC's behalf (in this case, PAYE and NIC).

113. Where a company's response to a NOR is to cease trading, then time may not be quite so much of the essence. But that is not the situation which existed here. The appellants' response in April 2018 to the NOR was, at best, a half hearted attempt to cease to trade and a half-hearted attempt to comply with the NOR. Mr Horder ceased making RTI returns and ceased the issue of invoices. But I have found the company did continue to trade and payments were still being made to its staff; I do not know when it ceased to trade and pay its staff but it was not until the end of September 2018 at the earliest and quite possibly for some time after that.

114. I recognise that it did pay a significant amount of money to HMRC in mid-2018 albeit it was insufficient to cover the NOR and paid too late; and while it was treated as reducing the arrears, substantial PAYE/NIC arrears remain.

115. Moreover, its continued trading left HMRC at risk. Indeed, it appears Mr Yousuf operated the company in a manner that left it unable to pay the tax liabilities arising out of its trading. I find this because Mr Horder's evidence was that Mr Yousuf made the decisions on payments and receipts. The company was VAT registered and invoiced for work including VAT but never paid the VAT to HMRC. It employed and paid workers and collected the PAYE and NIC and, except for small amounts at the outset, never accounted for it. It seems the money received by the company was, at Mr Yousuf's choice, spent entirely on rent, wages and expenses so that none was left to pay HMRC. It is now insolvent. After the NOR was received, it continued to trade but no longer issued invoices nor made RTI returns, which, while it would make it harder for HMRC to assess actual liability does not mean there was no liability and I find that there would, at the least, have been some PAYE and NIC liability up to at least September 2018.

116. The appellants clearly considered Mr Yousuf a shadow director of the company and I find he was. His decision to operate the company in a way which left the company unable to pay its tax is therefore attributable to the company. Granting the company leave to appeal late would in effect legitimise the decision of the company (a) not to appeal the NOR and (b) to continue to trade, leaving HMRC at risk and (c) to only part-pay HMRC and do so late.

117. Mr Young described Mr Horder as a patsy and Mr Horder accepted that that was a valid description of himself. He had, for whatever reason, allowed the company to trade without paying its taxes for some years and was now left, as director, with responsibility for that situation. And while Mr Horder may well have intended the company to cease trading in April 2018, he did not put his decision into practice because he continued to make payments out of company funds on Mr Yousuf's instructions and thereby allowed the company to continue to trade. And while, as I have said, a significant sum was paid to HMRC, it was insufficient to discharge the NOR or accrued liabilities and was in any event paid late.

118. In these circumstances, on balance, I do not think that either of the appellants has justified their application to be allowed to make a late appeal. While permission to appeal late is probably the difference between being convicted and not being convicted, permitting a late appeal would endorse the appellants' decision not to challenge the NOR, nor to fully comply with it, but to continue to trade with HMRC at risk. Taking into account the importance of complying with time limits and with notices of requirement, I do not think in these circumstances it is right to extend time to appeal.

119. Leave to appeal out of time is refused to both appellants.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

120. 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.

**BARBARA MOSEDALE  
TRIBUNAL JUDGE**

**RELEASE DATE: 21 OCTOBER 2019**