



[2019] UKFTT 0751 (TC)

**TC07508**

*STRIKE-OUT – appellant's failure to comply with unless order – previous defaults  
– Appellant's solicitor overlooking time limits - Rule 8(3), Tribunal Procedure  
(First-tier Tribunal) (Tax Chamber) Rules 2009*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2016/03644**

**BETWEEN**

**ZAFAR KHAN**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ALEKSANDER**

**Sitting in public at Taylor House, London EC1 on 2 May 2019 and 21 June 2019**

**Abbas Lakma QC (only on 21 June 2019) and Jenny Goldring for the Appellant,  
instructed by Maya & Co, solicitors**

**Howard Watkinson QC and Joshua Carey, counsel, instructed by the General Counsel  
and Solicitor to HM Revenue and Customs**

## DECISION

### INTRODUCTION

1. This decision relates to an application made by HMRC to strike out Mr Khan's appeal under Rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.
2. Mr Khan makes a retrospective application for an extension of time to comply with the Tribunal's directions.
3. The appeal concerns a personal liability notice issued to Mr Khan on 6 June 2016 for £288,977.50 in his capacity as the sole director of Anderson Security and Trading Limited. The notice of appeal against the PLN was filed on 5 July 2016.
4. HMRC applied to strike out Mr Khan's appeal on 14 January 2019.
5. Mr Lakma and Ms Goldring represented Mr Khan (Mr Khan did not appear on 2 May 2019), and Mr Watkinson and Mr Carey represented HMRC. A bundle of documents was produced in evidence.
6. On 15 March 2019, the Tribunal gave directions for the service of skeleton arguments by the parties no later than seven days before the hearing date. Ms Goldring's skeleton was served by email on the Tribunal on 1 May (the day before the hearing date), but was received too late in the day to be forwarded to me that evening. I only received the skeleton when it was handed to me on the morning of the hearing. I therefore adjourned the start of the hearing to give me time to read the skeleton. The hearing was listed for only half a day, and that was insufficient to be able to hear submissions from Mr Khan's representative (not helped by the failure to file Mr Khan's skeleton until the morning of the hearing, and therefore necessitating a late start). Because of the late start, the hearing went part-heard, and a further hearing was listed for 21 June to hear submissions from Mr Khan's representatives and HMRC's reply.
7. I declared to the parties during the course of the hearing that in the case of *Boreh v Djibouti* (one of the authorities cited to me on behalf of HMRC in the course of submissions), that one of my former partners had been criticised by the court in its decision (I am a fee-paid judge, and at the time of the first hearing, I was a solicitor in private practice). Neither party submitted that this gave rise to any concern about my ability to continue to decide this application and neither made any application that I should recuse myself.

### BACKGROUND FACTS

1. The background facts leading to this application are not disputed, and I find that the following table sets out a chronology of key events relating to the application:

Date	Event	Notes
2 June 2016	HMRC notify Anderson Security and Trading Limited of penalty assessment of £288,977.50	
6 June 2016	HMRC issue a personal liability notice on Mr Khan	
5 July 2016	Affinity Associates Limited (representing Mr Khan) file a notice of appeal against the personal liability notice	
15 July 2016	Tribunal issues directions for HMRC to file a statement of case within 60 days	
30 Sept 2016	HMRC serve their statement of case	
15 Dec 2016	Tribunal issues comprehensive directions which include directions that:	

	(2) HMRC serve their evidence by 5pm on 23 December 2016 (3) Mr Khan serves his evidence by 5pm on 27 Jan 2017 (4) HMRC serve any evidence in reply no later than 5pm on 6 weeks after compliance with direction (3) (7) and (8) No later than 5pm one month of date of compliance with direction (4), the parties notify each other of the witnesses required for cross-examination and a time estimate for that cross-examination (9) No later than 5pm two weeks after compliance with directions (7) and (8), parties to serve an agreed statement of various matters enabling Tribunal to list hearing	
23 Dec 2016	HMRC serve their evidence	
27 Jan 2017	Due date for service of Mr Kahn's evidence.	First breach
6 Feb 2017	HMRC write to Affinity Associates advising that if no evidence filed (or no response received) they will apply for the appeal to be struck out	
7 Feb 2017	Mr Khan telephones HMRC to request an extension of time to give him an opportunity to obtain new representation. HMRC agree to extension to 10 March 2017, but advise that if this deadline is missed, they will apply for appeal to be struck out.	First EOT
21 Feb 2017	LPD Luckmans (Mr Khan's new representatives) write to HMRC seeking three months extension to serve evidence	
22 Feb 2017	HMRC write to Tribunal stating that they agree to extension until 21 April 2017	Second EOT
21 Mar 2017	LPD Luckman's request copies of HMRC files	
23 Mar 2017	HMRC email copies of documents (other than exhibits) to LPD Luckmans	
10 April 2017	LPD Luckmans request three months extension to serve evidence. HMRC agree and Tribunal directs that evidence be served by 10 July 2017	Third EOT
30 June 2017	LPD Luckmans request two months extension to serve evidence	
4 July 27	HMRC object and apply for order that unless evidence served by 10 July, appeal to be struck out	
5 Sept 2017	Tribunal directs that, unless evidence served by 17 September 2017, appeal may be struck out	First Unless Order
15 Sept 2017	Appellant's evidence served.	
27 Oct 2017	HMRC serve evidence in response	

27 Nov 2017	Parties due to advise each other which witnesses required for cross-examination and time estimates for same. HMRC comply. Appellant's do not	Second breach
29 Nov 2017	HMRC write to LPD Luckmans asking to clarify issues in dispute. They do not respond	
6 Dec 2017	HMRC write to LPD Luckmans seeking agreement as to listing statement – whether they wish to cross-examine witness, time estimates for cross-examination, and requesting response by 8 December 2017	
19 Dec 2017	LPD Luckmans reply to letters of 29 Nov and 6 Dec	
20 Dec 2017	HMRC send listing statement to LPD Luckmans	
26 Feb 2018	Tribunal sends hearing notice to parties fixing hearing dates for 7-10 August 2018	
25 Apr 2018	Tribunal confirms hearing date moved to 31 August-6 September to accommodate HMRC's counsel	
20 July 2018	HMRC serve hearing bundle on LPD Luckmans. Maya & Co write to HMRC saying that they have just been instructed and request that hearing be adjourned for six months	
24 July 2018	HMRC refuse to agree adjournment	
14 Aug 2018	Maya & Co apply for hearing to be adjourned. Tribunal refuses application	
15 Aug 2018	HMRC serve their opening submissions	
3 Sept 2018	Maya & Co renew their application for an adjournment	
10 Sept 2018	Tribunal directs that hearing be adjourned, with agreement of HMRC, on basis that Mr Khan pays HMRC's costs of the adjournment	
11 Sept 2018	Tribunal issues directions with the consent of the parties which include: (i) that by 5pm on 6 Nov 2018, the Appellant shall serve any further evidence and make any application for disclosure; and (iv) that by 20 Dec 2018 the Appellant shall advise the Respondents in writing: (a) which of the Respondents' witnesses are required for cross-examination; (b) time estimates for the same; and (c) what matters remain in issue for the trial, with a brief explanation. Tribunal directs that in the light of the history of the matter, if either party fails to comply with any of the directions, their case may be struck out or barred.	Second Unless Order
6 Nov 2018	Mr Khan serves witness statements (without exhibits) and request for disclosure by email at 17:09. Hard copies of exhibits to witness statements are received by HMRC on 8 November 2018.	Third breach

6 Dec 2018	HMRC serve further evidence	
20 Dec 2018	Deadline for Mr Khan's statement as to cross-examination and issues in dispute	Fourth breach
27 Dec 2018	Junior and senior counsel to Mr Khan note failure to comply with directions and advise Maya & Co that breach be actioned immediately	
31 Dec 2018	Maya & Co write to HMRC notifying that witnesses are required for cross-examination and providing time estimate. They request extension of time to 31 January 2019 to supply list of issues in dispute	
7 Jan 2019	Maya & Co email HMRC prompting for a response to their request of 31 December for an extension of time	
9 Jan 2019	Maya & Co apply retrospectively for extension of time to 31 December for cross-examination statement and to 31 Jan 2019 for list of issues in dispute	
10 Jan 2019	Appellant has conference with counsel	
14 Jan 2019	HMRC object to extension of time and apply for appeal to be struck-out	
15 Jan 2019	List of issues in dispute is prepared by Maya & Co	
17 Jan 2019	Maya & Co serve list of issues in dispute	
15 Mar 2019	Tribunal serves notice of hearing on 2 May 2019 for strike out application. Direction given for skeleton arguments to be served no later than 7 days before hearing.	
25 Mar 2019	Maya & Co apply to postpone hearing date for strike-out application	
6 Apr 2019	Tribunal refuses application to postpone hearing date	
25 April 2019	HMRC serve skeleton argument	
1 May 2019	Maya & Co serve skeleton argument by email – but received by Tribunal centre too late to be forwarded to judge	Fifth breach
2 May 2019	Mr Khan's skeleton argument is handed to judge on morning of hearing	

2. It can be seen that there have been a series of failures by Mr Khan and his representatives to comply with the Tribunal's directions. There have been five express breaches of directions, and in addition, Mr Khan has made five applications (one retrospective) for extensions of time to comply with directions. The Tribunal has had to make two "unless" orders to procure compliance with the directions.
3. I note also that Mr Khan has had a number of representatives – he was initially represented by Affinity Associates Limited, he was then represented by LPD Luckmans, and is now represented by Maya & Co.

4. This application relates to the "unless" order made on 11 September 2018 that:

(1) that by 5pm on 6 November 2018, the Appellant shall serve any further evidence and make any application for disclosure;

[...]

(4) that by 20 December 2018 the Appellant shall advise the Respondents in writing:

(a) which of the Respondents' witnesses are required for cross-examination;

(b) time estimates for the same; and

(c) what matters remain in issue for the trial, with a brief explanation.

8. In relation to these directions, the Appellant served its witness statements (without exhibits) by email at 17:09 on Tuesday 6 November. Hard copies of exhibits to witness statements were received by HMRC on Thursday 8 November 2018.

9. The list of witnesses required for cross-examination and time estimates were served on 31 December 2018, and the list of issues in dispute was served on 17 January 2019.

#### THE LAW

10. The application by HMRC to strike out Mr Khan's appeal is made under Rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 8 provides as follows:

##### **8 Striking out a party's case**

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

[...]

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

11. The approach the Tribunal should take when considering whether to exercise its discretion to strike out an appeal was settled by the decision of the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55 which established a three-stage process. The decision of the Supreme Court was considered by the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 178 (TCC) in the context of an application for permission to make a late appeal. In *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906, the three-stage process was endorsed by the Upper Tribunal. The three stages are:

- (1) establishing the length of the delay and determining whether it was serious or significant
- (2) determining the reason or reasons why the default occurred, and
- (3) evaluating all the circumstances of the case (this third element being a balancing exercise which assesses the merits of the reasons for the delay and the prejudice that would be caused to the parties). In doing so account must be taken of the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected.

12. I was referred by counsel for both parties to various cases. I take the following points from those authorities:

- (1) An unless order is an order of last resort, and that if a party intentionally or deliberately flouts an unless order, he can expect no mercy (*Hytec Information Systems v Coventry City Council* [1997] 1 WLR 1666 at pp 164 to 1675).
- (2) *Hytec* does not lay down the law for all situations. The decision to strike-out will depend on the particular facts and circumstances of the case before the tribunal (*O'Hara v Rye* [1999] WL 148956).
- (3) Litigation must be conducted efficiently and at proportionate cost, which requires time limits to be followed (*Denton, McCarthy & Stone v HMRC* [2015] STC 973, and *Martland*).
- (4) Where a breach of an unless order, which itself was made as a result of failures to comply with previous orders, the assessment of seriousness should take account of the prior failures as well as the breach of the unless order itself (*British Gas v Oak Cash & Carry* [2016] EWCA Civ 153 *per* Lord Jackson at [38]-[39]).
- (5) The party cannot hide behind the defaults of his representative (*Daryani v Kumar* [2001] CP Rep 27, *Boreh v Djibouti* [2015] EWHC 769). But striking-out should only be used to punish misconduct by a representative if that sanction is proportionate in the light of the circumstances of the case (*Woodrow v Chalk Catering* [1992] 2 WLUK 71).
- (6) It is relevant in making any decision that the obligations of a party had been complied with, and that there is no evidence of deliberate non-compliance (*Thevarajah v Riordan* [2013] EWHC 3179 (Ch), *Phelps v Button* [2016] EWHC 3185 (Ch), and *Devon & Cornwall Autistic Community Trust v Cornwall Council* [2015] EWHC 1571 (Ch)).

13. A number of the authorities (such as *Devon & Cornwall Autistic Community Trust, Phelps, and Goldcrest Distribution v McCole* [2016] EWHC 1571 (Ch)) state that where a party seeks to blame his representatives for the breach, he should waive privilege in order to allow his representatives to explain themselves. Such a waiver was given in this case, and copies of email correspondence with Mr Khan's solicitors and counsel was produced in evidence.

#### **HMRC'S SUBMISSIONS**

14. HMRC submit that Mr Khan and his representatives have made deliberate attempts to delay and disrupt the appeal from coming on for a hearing, and that is the inference to be drawn from the chronology and from the changes in his representation. They give the following examples:

- (1) The Tribunal directed on 15 December 2016 that Mr Khan serve his witness evidence on 27 January 2017. Mr Khan failed to comply and on 7 February 2017 Mr Khan requested an extension of time to obtain new representatives. After four extensions

of time the Tribunal imposed an unless order against Mr Khan for service of his witness evidence. The evidence was eventually served on 15 September 2017, almost eight months after the date given in the original 15 December 2016 directions. The witness statement contains 9 pages with 65 pages of exhibits.

(2) The 15 December 2016 directions required the parties to notify each other of the witnesses required for cross-examination and of time estimates by 27 November 2017. HMRC complied by the due date. On 29 November 2017 HMRC wrote to Mr Khan's representatives requesting that they clarify what issues are in dispute. They do not respond. On 6 December 2017 HMRC wrote to Mr Khan's representative about an agreed listing statement, and requesting that they confirm whether they wished to cross-examine their witness (and the time estimates for the cross-examination). A response was requested by 8 December 2017. There was no response until 19 December 2017

(3) On 26 February 2018, the Tribunal fixed the final hearing of this appeal for 7-8 August 2018 (later moved to start on 31 August 2018 to accommodate HMRC's counsel). On 20 July 2018 HMRC were notified that Mr Khan had changed representative. The new representative then requested an adjournment of six months. HMRC submit that Mr Khan's change of representatives in the run up to the final hearing was calculated to force an adjournment, which it eventually did, with Mr Khan being directed to pay HMRC's costs thrown away.

(4) On 11 September 2018 the Tribunal directed (with the consent of the parties, and amongst other things) that (1) By 5pm on 6 November 2018 Mr Khan shall serve any further evidence and make any application for disclosure, and (4) by 20 December 2018 he shall advise HMRC in writing: (a) which of HMRC's witnesses are required for cross-examination, (b) time estimates for the same, and (c) what matters remain in issue for the trial, providing a brief explanation of why. The Tribunal directed that in the light of the history of the matter if either party failed to comply with any of the directions their case may be struck out/they may be barred. Mr Khan failed to meet the 6 November 2018 deadline, serving his witness statements beyond the 5 pm cut off and its exhibits 2 days late. Mr Khan then failed to comply with direction (iv) on 20 December 2018. On 31 December 2018 Mr Khan's representatives confirmed that they had not complied with the direction without offering any explanation as to why. Mr Khan eventually fully complied with direction (iv) on 17 January 2018, nearly a month late.

15. HMRC submit that the breaches are serious and significant. Whilst a breach of direction (i) could be tolerated, even under an unless order (amounting to 2 days of delay). However, the breach of direction (iv) a delay of a month in relation to an important case management direction, which has delayed listing and led to this application, is, submit HMRC, serious and significant, not least because it was in the context of the second unless order imposed against Mr Khan due to his failure to comply with the Tribunal's directions where the second unless order had been imposed as a direct result of the adjournment forced by his change of representation shortly before the hearing.

16. HMRC submit that there was no good reason for the breach. Mr Khan's submission that this was due to an "oversight" on the part of his representatives does not amount, say HMRC, to a good reason.

#### **MR KHAN'S SUBMISSIONS**

17. Ms Goldring apologised for the late submission of her skeleton argument, because of her involvement in another tribunal case which had only finished on the day prior to the hearing of this application.



18. Mr Khan's representatives reject HMRC's submission that the adjournment application made on 3 September 2018 was done to delay and disrupt proceedings. Rather, this an adjournment was sought because counsel considered that further preparation was required in order to properly present Mr Khan's case, as is demonstrated by the three further witness statements served on 6 November accompanied by two lever arch files of evidence. The fact that significant additional evidence was served shows that Mr Khan has been working diligently with his representatives to prepare his case.

19. As regards the various breaches, Mr Khan's representatives make the following submissions:

(1) It is accepted that there was a breach of the direction to serve evidence by 27 January 2017. The evidence was eventually served on 15 September 2017 following various extensions of time, and required supplementing in the evidence served on 6 November 2018. However, there were good reasons for the delay, in particular the change of representative, and the difficulty that the new representative had in obtaining material from the previous representative. In the end, LPD Luckmans obtained copies of the material from HMRC on 23 March 2017.

(2) It is accepted that there was a breach of the direction to advise HMRC by 27 November 2017 of which of their witnesses were required for cross-examination and for time estimates. Included in the bundle of documents was an email from Mr Khan's representative to HMRC apologising for the delay, but the writer had been on bereavement leave. Mr Khan's representatives do not accept that the change of representatives would have necessarily resulted in an adjournment as there were still some six weeks until the hearing date. The adjournment arose because counsel currently instructed considered that further preparation was required for the proper presentation of Mr Khan's case.

(3) It is accepted that there was a breach of the direction to serve witness statements on HMRC by 5pm on 6 November 2018. However, these were served by email at 17:09, and Mr Khan's representatives submit that it is extremely harsh to cite this breach as "lamentable compliance" (as HMRC said in their skeleton argument). The hard copies and exhibits were served two days late.

(4) It is accepted that there was a breach of the direction to indicate by 5pm on 20 December 2018 which of HMRC's witnesses were required for cross-examination (and to provide time estimates) (directions 4(a) and 4(b)), and to indicate what matters remain in dispute for the trial (direction 4(c)). There were produced at the hearing copies of correspondence (including correspondence between Mr Khan's solicitors and counsel, in respect of which privilege had been waived). Mr Khan's representatives submit that the correspondence clearly shows that there had been an oversight, rather than any deliberate attempt to delay and disrupt the case. On 27 December 2018, junior counsel responded to an email from Mr Khan's solicitors asking that the breach of the direction be actioned immediately. This was echoed by leading counsel later that day. On 31 December 2018 Mr Khan's solicitors emailed HMRC apologising that they had not notified HMRC of the witness details by 20 December, and confirming that one of HMRC's witnesses would be required for cross-examination (of between half a day to a day). They also requested an extension of time to 31 January 2019 for the summary of matters in dispute in order to be able to respond meaningfully to the additional evidence served on 6 December and HMRC's response to the request for disclosure. A further email was sent prompting HMRC for a response on 7 January 2019 – the fact that a prompt was made implies, it is

submitted, that no prejudice was caused by the delay – particularly as this was over the Christmas holidays.

(5) On 9 January 2019, Mr Khan's representatives made an application to the Tribunal for an extension of time for compliance with 11 September 2018 direction 4(c) (with consequential amendments to subsequent directions). It is submitted that the addition time was sought in order to be able to respond meaningfully to the additional evidence served on 6 December 2018 and HMRC's response to the request for disclosure.

(6) On 17 January 2019, Mr Khan's representatives served a detailed response (dated 15 January) in relation to direction 4(c). This was apparently prepared following a conference with Mr Khan on 10 January 2019.

20. It is submitted on behalf of Mr Khan that there was no deliberate attempt to delay the litigation. Rather, Mr Khan and his representatives have complied with all other directions and served detailed evidence in accordance with time limits. Any delay caused by the failure to comply with the 11 September 2018 directions has been minor and has not been prejudicial.

21. It is submitted that the failure to comply with the 11 September direction was caused by oversight on the part of Mr Khan's solicitors, and this oversight is evidenced by the documents produced in evidence at the hearing.

22. Mr Khan's representatives do not accept that the material that they were required to analyse in order to provide their statement of issues in dispute was brief, and that an extension was not required. Rather, they submit, the witness statement and response to disclosure served on 6 December 2018 reveals that there was a fundamental dispute between the parties as to the material that was (or was not) provided by HMRC to Mr Khan – this went to the heart of the case and to credibility.

#### DISCUSSION

23. I apply the three-fold test as follows:

(1) *establishing the length of the delay and determining whether it was serious or significant*: The delay in serving witness statements was a matter of a few minutes, but it took a further two days before the exhibits to those witness statements were served. The delay in notifying HMRC of the witnesses for cross-examination and the likely length of any hearing was 11 days. The delay in providing the list of issues was 27 days. Whilst I might have considered that the few minutes delay in serving the witness statements was trivial, no explanation was given as to why it took a further two days to serve the exhibits. On any basis the delays in notifying HMRC of the names of the witnesses for cross examination and the length of hearing, and providing the list of issues are serious and significant. Mr Khan's representatives submit that the breaches are neither serious nor significant on the basis that HMRC were not materially prejudiced by any delay caused – they refer to the fact that no trial date had been set, that the breach stretched over the Christmas holidays (when nothing much happens anyway), and that they had to prompt HMRC to respond to their email of 31 December. I consider that none of these explanations detracts from the seriousness and significance of the breaches (especially the delay in providing the list of issues), as the delay prejudiced the efficient listing of the appeal, the breach was of directions issued following the adjournment of a hearing occasioned by a late change in representation of Mr Khan, and the length of the delay was of itself serious and significant, and delay an enemy of justice.

(2) *determining the reason or reasons why the default occurred*: No reason was given for the delay in serving the exhibits to the witness statements. As regards the other breaches, in the words of Mr Khan's counsel, these occurred because the deadline in the

Tribunal's directions was overlooked by Maya & Co. In other words, these defaults arose in consequence of the negligence of Mr Khan's representatives.

(3) *evaluating all the circumstances of the case*: This evaluation is a balancing exercise in which I assess any merits of the reasons for the breaches and the prejudice that is caused to the parties. In doing I must take account of the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected. I deal with these circumstances below.

24. There are no merits in this case in the reasons for the breaches. Further, once the breaches had been drawn to the attention of Maya & Co by their counsel, there was no sense of urgency that these breaches had to be addressed. It took several days before they e-mailed HMRC seeking an extension of time, it took until 10 January until they had a conference with counsel, and then took a further five days to prepare the list of issues, and a further two days to serve it.

25. In reaching my decision, I do not agree with HMRC's submission that the changes by Mr Khan in his representation were deliberately made in order to frustrate the efficient conduct of this appeal and to cause delay. There is no evidence to support this submission. But I note that the change in representation from LPD Luckmans to Maya & Co took place at a very late stage, and as a result, the original substantive hearing of the appeal had to be adjourned.

26. The unless order of 11 September was made by agreement with the representatives of the parties, and so Mr Khan's representatives were well aware of what they and their client were required to do.

27. This was the second unless order made against Mr Khan during the course of these proceedings. Mr Khan and his representatives knew that they were "drinking at the last chance saloon".

28. There was a lamentable lack of urgency on the part of Mr Khan's representatives as regards the conduct of this appeal. This lack of any sense of urgency is a theme that runs throughout this dispute. The 11 September directions are the second occasion on which an unless order has been made by the Tribunal against Mr Khan. The 11 September unless order was made against a background of Mr Khan and his representatives having made five applications for extensions of time, three breaches of directions, and a prior unless order. The 11 September directions were made following the adjournment of the substantive hearing with Mr Khan paying HMRC's costs, and these directions were issued with the consent of the parties.

29. HMRC served their additional evidence on 6 December. Maya & Co did not correspond with their counsel about this until 27 December. As soon as Maya & Co's email was received by Ms Goldring, she drew their attention to the breaches of direction 4, and advised that these be actioned immediately. This was echoed on the same day by Mr Lakma. But it was not until 31 December that Maya & Co emailed HMRC seeking an extension of time, it was not until 10 January that a conference was held with counsel, and it then took a further five days to prepare the list of issues, and another two days to serve it on HMRC.

30. I find it particularly surprising that Mr Khan's counsel did not provide her skeleton argument until late on the eve of the first day of the hearing of the strike-out application, given that skeletons were directed to be served one week before the hearing. As a consequence of the late service of the skeleton, I had to delay the start of the hearing, with the consequence that the hearing could not finish on the same day, and a further hearing had to be arranged to allow for submissions on behalf of Mr Khan, and HMRC's reply.

31. It is acknowledged by Mr Khan's representatives that that the failure to comply with the 11 September directions was due to oversight by Maya & Co. They submit that it took until 17 January to prepare and serve a meaningful and detailed list of issues with an analysis of the

relevant evidence and the law, and that an application for extension of time was made on 7 January (and indeed Maya & Co had to prompt HMRC for a response to their 31 December email). But this is to miss the point that such a meaningful and detailed list was not required by the directions. No satisfactory explanation has been given for the delay from 27 December (when junior counsel drew Maya & Co's attention to the delay) until 31 December (when Maya & Co emailed HMRC), nor for the delay from 27 December until service of the list on 17 January. The submission by Mr Khan's counsel that it took this time to provide a "meaningful" response appears to me to be an attempt to justify the delay by explaining that it took more time to prepare something that was not in fact required.

32. Mr Khan's counsel submit that the delay occasioned by the overlooking of deadlines by Maya & Co was not deliberate, and that it was not done with any intention to disrupt the conduct of this appeal. I acknowledge these submissions. But this oversight, at the very least, shows that Maya & Co were negligent.

33. I note that in undertaking the balancing exercise in the third stage, I must take account of the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected. I agree with HMRC's submission that a delay of almost one month in relation to an important case management direction, which has delayed listing and led to this application, is serious and significant, not least because it was in the context of the second unless order imposed against Mr Khan.

34. Having weighed all the factors, I find that:

(1) The length of the delay in serving the list of issues was 27 days, and that this is a serious and significant breach.

(2) The reason for the delay was due to the negligence of Maya & Co, Mr Khan's solicitors.

(3) In standing back and looking at all the circumstances of the case, I find that the unless order made on 11 September was made by consent, and was against a background of multiple extensions of time and breaches of directions. Mr Khan and his representatives must have understood they were "drinking at the last chance saloon". Yet, even when the breach was pointed out to Maya & Co by counsel, there was no urgency in seeking to rectify the breach. Mr Khan's counsel submit that no prejudice arose in consequence of the breaches of the unless order, but I find that the failure to comply with time limits by 27 days is itself a serious and significant breach that prejudices the delivery of justice by this Tribunal.

35. I therefore order that the appeal be struck-out.

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

36. 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.

**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 DECEMBER 2019**