[2021] UKFTT 0066 (TC)

TC08051

PROCEDURE –applications for permission for late notification of appeal – reliance on advisers – significant delays without good reason –- whether reasonable to await outcome of ADR application – cases could be added to existing appeals without much further work – balancing of factors – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers:
TC/2020/00291;TC/2020/00292;TC/2020/00294
TC/2020/00299;TC/2020/00300;TC/2020/00302
TC/2020/00305;TC/2020/00307;TC/2020/00309
TC/2020/00310;TC/2020/00311;TC/2020/00312
TC/2020/00313;TC/2020/00314;TC/2020/00315
TC/2020/00316;TC/2020/00317;TC/2020/00319
TC/2020/00325;TC/2020/00326;TC/2020/00327
TC/2020/00329;TC/2020/00331;TC/2020/00332
TC/2020/00333;TC/2020/00336;TC/2020/00337
TC/2020/00338;TC/2020/00339;TC/2020/00342
TC/2020/00344

BETWEEN

STEPHEN ADAIR; PAUL HAGGETT; LEE MARTIN; STUART NASH; DAVID GARBETT; BRUCE CORNFOOT; DAVID MCCRACKEN; DAVE SARGENT; PAUL ALLART; RICHARD PRIOR; SIMON GALLEY; STEVEN BEARD; CHRIS MURPHY; BRUCE CRAIG; MAUREEN URE; JOHN KNOWLES; KENNY WALKER; PAUL LANGHAM; MICHAEL SHIPLEY; MARION PATERSON; COLIN MCCLURG; DAVE HILL; ANNE MOXON; DANNY O'ROURKE; PATRICK GRAY; ANDREW BROWN; SHAUN STOKOE; JASON CARLEY-SMITH; DAVID VIRGO; BRYCE WHITTLE; GARY SUMMERS **Applicants**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the applications on 22 January 2021 without a hearing, having considered the written representations from Mr Gary Brothers, of The Independent Tax & Forensic Services LLP, on behalf of the Applicants, and from Mr Paul Marks, of HMRC's Solicitor's Office, on behalf of the Respondents.

DECISION

SUMMARY

1. In January 2019, HM Revenue & Customs ("HMRC") issued around 70 individuals ("the Individuals") with Notices under Finance Act 2008, Sch 36, para 1 ("Sch 36 Notice(s)" or "Notice(s)") on the basis that they had each become administrators of different pension schemes.

2. Each Notice contained identical requirements for information relating to each scheme, and each Individual appointed The Independent Tax and Forensic Services LLP ("ITFSL") as agent when dealing with HMRC. ITFSL appealed the Notices to HMRC on behalf of the Individuals; the appeals were refused, and ITFSL requested statutory reviews. The Review Officers substantially upheld the Notices.

3. ITFSL subsequently notified the appeals of over 20 Individuals to the Tribunal, and those appeals are proceeding. However, the pension schemes of 42 Individuals had been wound up, and with these ITFSL took a different approach, embarking on lengthy correspondence with Mr Richard Fulwood, the HMRC case officer, in an effort to resolve the appeals without notifying them to the Tribunal.

4. Of the 42 Individuals, 10 settled their appeals with HMRC before the end of 2020, and one, Mr Cummine, engaged in direct correspondence with Mr Fulwood, but did not settle his appeal. I have issued a separate Tribunal decision notice for Mr Cummine, under reference TC/2020/00295. This decision concerns the other 31 Individuals, as listed on the front sheet of this decision notice ("the Applicants").

5. The Applicants' Notices of Appeal were eventually filed with the Tribunal on 16 and 17 January 2020; those Notices included applications for permission to notify the appeals late ("the Applications"). The facts of all the Applications are almost identical, and the Tribunal directed that they be case managed and heard together. HMRC and ITFSL both provided consolidated submissions, and both used the facts of one Applicant, Mr Adair, by way of exemplar. HMRC provided separate Bundles for each of the Applicants.

6. In this decision, I have first made findings of fact in relation to Mr Adair. I then reviewed each of the separate Bundles provided for the other Applicants to see if there were any material factual differences. I next considered those facts in the light of the relevant case law, in particular *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") and *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*").

7. It was common ground that all the Applicants were seriously and significantly late in making the Applications. I found that there was no good reason for all but two weeks of that delay. In deciding whether to give permission, particular weight must be given to that failure to comply with the statutory time limit. However, if permission were given, the Applicants' appeals could be added to the similar cases already proceeding before the Tribunal, and the litigation could therefore be conducted "efficiently and at proportionate cost". This too was a factor to which I was required to give particular weight.

8. I considered and balanced all relevant factors, including those to which I was required to give particular weight. I decided that the extent of the delays and the lack of good reasons for those delays weighed more heavily on the scales than the relative ease of listing and hearing the cases, and refused permission for the Applicants to make their appeals late.

9. The Applicants filed separate Notices of Appeal in relation to the penalties issued for failure to comply with the Notices. This decision notice does not relate to those Notices of Appeal, which I understand are currently stayed pending the resolution of the Applications.

Terminology

10. As explained above, in this decision:

(1) the term "Individuals" is a reference to all those who both received a Sch 36 Notice relating to their pension scheme and then appointed ITFSL to act on their behalf.

(2) the term "Applicants" refers to those Individuals who filed Notice of Appeals (including applications for permission to notify those appeals late) on 16 or 17 January 2020. This decision concerns only the Applicants.

(3) the Individuals who are not Applicants are thus:

(a) those whose appeals were notified to the Tribunal within the statutory time limit;;

(b) those who settled their appeals with HMRC before January 2020; and

(c) Mr Cummine, whose application has been considered separately.

THE EVIDENCE

11. As noted above, the Tribunal was provided with separate Bundles of documents for each of the Applicants, so 31 in total. The Bundles each contained:

(1) the Sch 36 Notice issued to that Applicant, and the subsequent correspondence between the parties; and

(2) the Applicant's Notice of Appeal to the Tribunal.

12. HMRC also provided a separate generic "correspondence bundle" containing certain relevant correspondence between the Tribunal and the parties during the period after the filing of the Notices of Appeal. In addition, I had a copy of the Tribunal file for Mr Adair, and this included some further correspondence between the Tribunal and the parties. Each Applicant also provided a short witness statement using essentially the same words. The witness statements were not challenged by HMRC.

THE FACTS

13. The facts section of this decision has been divided as follows:

(1) the facts relating to Mr Adair until the date the Notices of Appeal were filed with the Tribunal;

(2) the facts relating to the other Applicants until the same date; and

(3) the facts relating to all Applicants after the Notices of Appeal were filed, until shortly before this determination.

Facts about Mr Adair's case up to the making of the Application

14. At some point a pension scheme, called the Adair Pension Scheme, was established. The Tribunal was not informed of the date, but it is not relevant for the purposes of the Application. Mr Adair was a trustee of the scheme and I infer that he and/or his family were beneficiaries.

15. The original scheme administrator was a company called Tudor Capital Management Ltd. At some point that firm was replaced by Liddell Dunbar Ltd. HMRC suspected that the pension scheme may have been set up as part of a series of transactions to avoid corporation tax and income tax, and in January 2017, issued a Sch 36 Notice to that firm about the scheme. At or around the same time, or shortly afterwards, HMRC's Pensions Online system showed that Mr Adair had replaced Liddell Dunbar as the scheme administrator.

16. On 24 January 2018, HMRC issued Mr Adair with a Sch 36 Notice. This was headed:

> "Notice to provide information and produce documents.
>
> The Adair Pension Scheme.
>
> Scheme Administrator: Mr S Adair."

17. It began as follows:

> "I am writing to you as the Statutory Scheme Administrator of the above named pension scheme.
>
> This letter is an information notice. It is a legal request for information and documents.
>
> I am now issuing this notice as I believe the information I am requesting is reasonable for HMRC to check the tax position of this Pension scheme. As the Scheme Administrator you may be liable to any tax charges associated with the Scheme."

18. Attached to the Notice was a Schedule setting out 14 information requirements. These related to the following:

(1) Mr Adair's appointment and role as administrator of the scheme;

(2) details of assets held by the scheme and in particular of any shares held and asset disposals; and

(3) details of the advisers to the scheme, its members and the trustees.

19. Liddell Dunbar told Mr Adair that they were instructing ITFSL to "assist and represent" in relation to the Notice. Mr Adair then received regular updates from ITFSL and from Liddell Dunbar, and his witness statement specifies that the Liddell Dunbar updates advised him that he "was following the correct process and not to be concerned with the letters HMRC were issuing as these were being dealt with on [his] behalf". However, no copies of these updates were exhibited to the witness statement or otherwise provided to the Tribunal.

Correspondence and the statutory review

20. On 1 February 2018, Mr Adair wrote to HMRC, under the letterhead "Adair Pension Scheme" authorising HMRC to speak to ITFSL. On 3 April 2018, ITFSL appealed Mr Adair's Sch 36 Notice to HMRC. On 8 May 2018, HMRC refused the appeal. On 23 May 2018, ITFSL asked for a statutory review of the decision.

21. On 4 October 2018, ITFSL emailed HMRC under the heading "HMRC reviews – information notices for pension schemes" and said they were now providing their "detailed representations as part of our clients' formal review". The email began:

> "We are grateful to you for your patience. Given the large number of cases involved, we had wanted to ensure uniformity of approach across the group, which has taken a little time."

22. Their email continued by setting out representations about the Notices issued to their clients. On 22 October 2018, HMRC's Review Officer, Ms Hilliard, issued her review decision, which:

(1) said that the scheme's bank statements were statutory records and there was therefore no right of appeal against that part of the Notice;

(2) upheld all other elements of the Notice, apart from the requirement to provide information about members and trustees; and

(3) made some other minor amendments.

23. Under the heading "What Happens Next" Ms Hilliard said: " if you do not agree with my conclusion you can ask an independent tribunal to decide the matter within 30 days of the date of this letter". She told Mr Adair that a copy of her review letter must be attached to the Tribunal Notice of Appeal; provided the web address of HM Courts and Tribunals Service and the telephone number of the Tribunal's Office in Birmingham, and informed that further information was available in HMRC's Manuals on their website, or by calling the telephone number on her letter. He then continued:

> "if I do not hear from you and you do not appeal to the Tribunal within 30 days of this letter, I will assume you agree with my conclusion and the matter will be treated as settled by agreement under Section 54(1) of the Taxes Management Act 1970."

Correspondence in 2018 after the review decision, and the issuance of fixed penalties

24. On 21 November 2018, Mr Brothers of ITFSL emailed HMRC under the heading "various pension schemes". He said he was seeking to agree with HMRC "a sensible and proportionate approach to move your concerns and enquiries on, recognising that the Notices that we are instructed on are an absolute replication of each other". He suggested that the schemes could be divided into two groups: those which "have been wound up and no longer exist" and the others. In relation to the first category (which included Mr Adair and all the Applicants), he said:

> "…we are unable to list any disagreement of the Notices with the Tribunal as there is no taxpayer to list into the Tribunal. In view of these unusual circumstances, and our suggested discussions below, might we suggest that this cohort of Notices is set to one side, currently to allow us to discuss the wider picture and hopefully to agree a proportionate and collaborative approval to advancing HMRC's general concerns across the whole of the group that received notices."

25. On 26 November 2018, Mr Fulwood responded to Mr Brothers, refusing to accept the proposal in his email, and saying:

> "when a scheme is wound up, the individual retains their liabilities and obligations as scheme Administrator of the Pension Scheme, by virtue of section 271(4) Finance Act 2004…the individual still maintains a tax position [and] continues to have responsibilities."

26. Mr Fulwood also confirmed that the information and documents required by the Notices, as amended by Ms Hilliard, were still required.

27. On 14 December 2018, HMRC issued Mr Adair with a £300 penalty for failure to comply with the Sch 36 Notice, and sent a copy of the penalty to ITFSL. That penalty notice

told Mr Adair he had the right to appeal the penalty, and that if he did so, he could subsequently either request a statutory review or notify the appeal to the Tribunal.

28. On 19 December 2018, Mr Brothers replied to Mr Fulwood's email of 26 November 2018, saying that under FA 2004, s 271(5)-(13), an administrator could apply to HMRC to be released from that role, and if HMRC refused, he could appeal that refusal to the Tribunal. He also said that the Notices were not "reasonably required"; reiterated that the schemes were no longer in existence; asked to progress the cases on a "sample basis"; and said that "disproportionate costs" were being incurred as the result of HMRC's attitude. He ended by stating that ITFSL was appealing the penalties, and attached a page headed "Liddell Dunbar Participants' Penalty Charges", which set out a list of pension schemes, including the Adair Pension Scheme. Mr Brothers said that the grounds of appeal against the penalties were, in the alternative:

(1) The taxpayer no longer exists.

(2) There is no "tax position" to check.

(3) The documents are not "reasonably required"

(4) The items are requested for third party purposes but incorrectly on a first party notice.

(5) The notice is not competent.

(6) There is no precision to this statutory request.

Correspondence in 2019 and the daily penalties

29. On 4 January 2019, Mr Fulwood emailed Mr Brothers, saying:

> "You have been appointed as representative for a number of Individuals, who have been the recipient of an Information Notice and in their capacity as the statutory Scheme Administrator of a specific registered pension scheme, whether or not that particular scheme has since wound up. Each Individual Notice to which you may refer has potentially been subject to an independent review and/or an Individual may have received a penalty Notice… I therefore require a specific response from each Individual, or you as their authorised agent, setting out the position relevant to them. I cannot accept a letter in respect of 'various pension schemes' which does not name the Individual to whom the decision is made and contains reference to a number of other Pension schemes."

30. On 20 February 2019, HMRC issued Mr Adair with daily penalties at £30 a day for 67 days, a total of £2,010. The penalty notice told Mr Adair that HMRC still required the information requested in the Notice; that he should provide that information within thirty days, and if he did not do so, HMRC might charge daily penalties of £60 a day. The notice also said that Mr Adair had the right to appeal the notice, and that if he did so, he could either request a statutory review or notify the appeal to the Tribunal.

31. On 22 February 2019, Mr Brothers sent Mr Fulwood 43 essentially identical letters, each headed with the same list of pension scheme names. The only difference between those 43 letters was that on each a different scheme name was highlighted. One copy of the letter highlighted The Adair Pension scheme.

32. In the text of that template letter, Mr Brothers described Mr Fulwood as having taken a "peculiar and rather pedantic" approach, and asked him to provide a statutory basis for his refusal to accept Mr Brothers' earlier letter as an appeal against the fixed penalties issued in

December 2018. He also asked that the subsequent daily penalties be withdrawn because the £300 penalties had been "appealed"; he said he was considering making a claim for "wasted costs" against HMRC; and he added that:

> "should it be necessary to remit any of the penalty charges for the consideration of the Tribunal, given the appeals which are in place, we further put HMRC on notice of an unreasonable costs application under Tribunal Rule 10."

33. On 20 March 2019, Mr Fulwood replied, saying:

> "As you are aware HMRC issued a notice under Schedule 36 Finance Act 2008 to the Statutory Scheme Administrator of each scheme, a named individual in each case and this was a notice to provide information and documents in relation to the Pension Scheme. That Notice was appealed by the Statutory Scheme Administrator. HMRC refused the appeal and you as the authorised representative of each individual Statutory Scheme Administrator requested an Independent Review in respect of each individual information notice served on each individual Statutory Scheme Administrator.
>
> There was no group appeal, there was no group independent review, how could there be when these are individuals each of which are the Statutory Scheme Administrator for their own autonomous pension scheme. These are registered with HMRC as 43 distinct separate schemes, each with a different Statutory Scheme Administrator. Each of the 43 pension schemes are separate and have individual facets from each other with different members, a different statutory scheme administrator, a different pension scheme bank account and so on. How can a sample or any one of these schemes be representative of any other scheme? They are not a collective.
>
> Information relating to any one or a group of the 43 pension schemes, cannot under any circumstances be taken as being information relevant to or representative of any one autonomous pension scheme.
>
> Your proposed approach raises concerns about taxpayer confidentiality. HMRC has a duty of confidentiality and cannot disclose the details of specific identifiable individuals or legal entities to others, who have no entitlement to know about HMRC's actions on any other independent autonomous Statutory Scheme Administrator, the pension schemes that they are scheme administrators of and which furthermore, should have no bearing on their liability to HMRC. Each individual Statutory Scheme Administrator is not in a position to know, certainly from HMRC's perspective, action that any other individual or any other named Pension scheme, may be subject to.
>
> Therefore any appeals, representations or indeed applications to the tribunal, must therefore be in respect of and personal to that Individual, in line with the legislative provisions of Schedule 36 Finance Act 2008 and the appeals procedures at S49 Taxes Management Act 1970.
>
> HMRC has therefore so far and will continue to do so, conduct its enquiries on such an individual basis."

34. Mr Fulwood also said that in his email of 4 January 2019 he had been "clear that [he] wanted an appeal from each Individual, to include the grounds of appeal", and pointed out that for some of the Individuals there was no outstanding information; some had not received penalties, and some Notices had already been appealed to the Tribunal, and Mr Brothers' generic approach was therefore problematic. He added that he was now responding individually in relation to each of the recipients of the Notices.

35. On the following day, 21 March 2019, Mr Fulwood wrote a further letter to Mr Brothers in response to the template letter dated 22 February 2019 from the Adair Pension Scheme. He reiterated that he had not accepted Mr Brothers' letter of 19 December 2018 as a valid appeal against the penalties issued for failure to comply with the information Notices, because the Notices had been issued to the Individuals, not to the schemes, and also because HMRC had to deal with each individual separately for reasons of confidentiality, and so could not deal with the recipients of the Notices "on a collective basis". He advised that further daily penalties would shortly be issued.

36. In relation to the Notices (rather than the penalties), he reminded Mr Brothers that where no appeal is notified to the Tribunal within 30 days of a review decision, that appeal is treated as settled under the Taxes Management Act 1970 ("TMA") s 54, and that "the basis on which the information notice is issued is therefore not in point" because no appeal had been notified to the Tribunal. On the same day, Mr Fulwood sent a copy of his letter to Mr Adair, drawing attention to the warning of continued penalty action.

37. On 5 April 2019, Mr Brothers sent another batch of identical letters to Mr Fulwood, in which he described Mr Fulwood's refusal to treat the cases on a "grouped" basis as fallacious, disingenuous and an abuse of process; said that this collective approach had not been rejected by the Review Officer, and that the Tribunal and HMRC's litigator were treating the otherwise similar appeals which were already before the Tribunal for determination on a group basis, with a view to a direction under Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Mr Brothers again asked Mr Fulwood to cancel the penalties and the Notices, and said that, if he did not do so:

> "the matter is still capable of very simple remedy. Give that there was clear intention to appeal, we say effectively and HMRC say ineffectively done, then we can make a later appeal in any event. We suggest that it is beyond doubt that the two-legged test of 'reasonable excuse' and 'without unreasonable delay' would be met given the correspondence since December, and the clear intention to appeal within time in any event.
>
> If HMRC require this matter to be regularised by us submitting a late appeal for each, which they will then accept, then we will put that on an agreed footing to resolve this impasse.
>
> However should neither of the above prove acceptable to HMRC, then we will be faced with the need to submit appeals, and potentially late appeals, to the Tribunal for their adjudication."

38. Mr Brothers said that if late appeals had to be made to the Tribunal, this would incur "unreasonable costs" for which he would seek a costs order from the Tribunal under Rule 10. He ended by saying that if he did not have a reply, ITFSL "will commence listing each client at the Tribunal".

39. My reading of this letter is that Mr Brothers was considering asking the Tribunal to give permission for late appeals to be made against the penalties, and that he is not here referring to late notification of the appeals against the Notices.

40. On 15 May 2019, Mr Fulwood confirmed he would accept late appeals against the penalties, providing they were from the Individual to whom the Notice had been issued, and that each appeal made reference to the penalties charged on that Individual; he added that he would suspend any further penalty action until 31 May 2019.

41. However, no such letters were sent to HMRC by 31 May 2019, or, indeed, by 10 July 2019. On that date, HMRC issued Mr Adair with further daily penalties at £60 a day, totalling £8,340. The penalty notice had the same information about appealing as on the previous notices. The covering letter confirmed that HMRC still required the information set out in the Sch 36 Notice, as amended by Ms Hilliard.

42. On 1 August 2019, Mr Brothers wrote to Mr Fulwood, again heading his letter with the names of all the pension schemes not yet notified to the Tribunal. He said that Sch 36, para 48 did not require that a notice of appeal against a penalty be made by the individual to whom the Notice was addressed and there was no statutory requirement that the individual was named when making an appeal. He said that the penalties had been appealed to HMRC by his letter of 19 December 2019. In relation to the subsequent daily penalties, Mr Brothers repeated the grounds of appeal set out at §28, and ended by saying that ITFSL was "in the process of applying for Alternative Dispute Resolution ["ADR"] so that we may discuss matters with a greater degree of transparency in the hope that we can come to an understanding as to how this case will move forward…".

43. On 3 September 2019, Judge Mosedale heard various interlocutory applications relating to the appeals of those Individuals which had already been notified to the Tribunal, including an application that they be stayed while ITFSL applied for these remaining appeals to be accepted into ADR. At the hearing, HMRC's litigator, Ms Johnson, gave evidence that appeals against Sch 36 Notices were "never or almost never" accepted into ADR. Judge Mosedale accepted that evidence; refused the stay, and said that it seemed to her "quite unlikely that the [Applicants'] appeals would be accepted into ADR. Judge Mosedale's written decision was issued on 7 October 2019.

44. Meanwhile on 18 September 2019, Mr Fulwood had sent out two further letters, one to Mr Adair and one to Mr Brothers. The letter to Mr Adair reiterated that as the appeal against the Notice had not been notified to the Tribunal, the review decision was treated as agreed between the parties in accordance with TMA s 49F and s 54. It also set out the history of Mr Fulwood's communications with ITFSL; said that the penalties had not been validly appealed, and that if the Notice was not complied with within the next 14 days, HMRC would issue further daily penalties dating back to July 2019.

45. In his letter to Mr Brothers, Mr Fulwood referred to the applicable legislative provisions and added that although he had previously offered to accept late appeals against the penalties, the position had now changed as the offer had not been accepted. He also set out TMA s 49F and then said "you did not transmit an appeal in respect of Mr Adair to the Tribunal and therefore the review conclusion is treated as agreed and the appeal extinguished". He added that "Schedule 36 Information Notices are outside of the scope of Alternative Dispute Resolution".

46. On 1 October 2019, Mr Tateson of ITFSL called Mr Fulwood asking for a meeting to discuss the Notices. On 10 October 2019, Mr Fulwood replied, summarising what had happened so far, saying that "our opposing views have been shared and we have reached an impasse and a further meeting is unlikely to change our respective views", and adding:

> "With regards to Alternative Dispute Resolution (ADR), for clarity, as you have already been made aware, HMRC do not generally accept Schedule 36 disputes into ADR. These are commonly categorised as 'basic' cases by the Tribunal and therefore deemed as out of scope as per our guidance at https://www.gov.uk/guidance/tax-disputesalternative-dispute-resolution-adr. However you are not precluded from making an application

> if you believe ADR is the appropriate route for your clients' dispute, the ADR team will consider the suitability of each case on its own merits."

The application for ADR and the further daily penalties

47. On 15 October 2019, ITFSL applied for ADR on behalf of Mr Adair and the other Applicants. The application set out an explanation as to why ITFSL they considered ADR was suitable, and said ADR should have been offered before the Notices were issued.

48. On 11 November 2019, Mr Fallon, an HMRC officer who was also an accredited mediator, considered the ADR applications. On 11 November 2019, Mr Fallon first called ITFSL and then wrote to them saying:

> "All of your current applications are outside the scope of the HMRC Alternative Dispute Resolution scheme. Schedule 36 notices are specifically excluded as a point of policy. So please take this as a formal rejection of all of those applications.
>
> On a more positive note, you have suggested the use of mediation on a sample of disputed cases, following provision of all requested documentation, to at least clarify and narrow down the dispute. I'm going to discuss this with my fellow mediator Sharon and then take this proposal to the HMRC team to explore. I will be in touch when things are clearer."

49. On the following day, Mr Fallon emailed Mr Brothers saying:

> "I will be contacting the HMRC team to pass on your proposal later today. Please do not assume that HMRC will defer any action in the interim. You can take it that HMRC will continue on their current course unless you are explicitly told otherwise."

50. On 15 November 2019, HMRC rejected ITFSL's alternative proposal, saying "Information relating to any one scheme, cannot be taken as being information relevant to or representative of any one autonomous pension scheme and so satisfy the information Notice".

51. On 20 December 2019, HMRC issued a further daily penalty to Mr Adair. The Tribunal was not provided with the amount of that penalty, but assuming it ran from 11 July 2019 through to 19 December 2019 at £60 a day, it would have been for £9,720.

52. On 16 January 2020, Mr Tateson emailed Mr Fulwood, saying "we now appeal against the penalty issued on 20 December 2019". He gave the same grounds of appeal as set out earlier in this decision and continued:

> "Please also accept this correspondence as our further appeal against the penalties previously issued to our client on 14th December 2018, 20th February 2019 and 10th July 2019. We understand that you will consider that these appeals are made late. The reason for the late appeals are that (as you will be aware) we have sought to engage with HMRC through informal means and formally through ADR…Since the finalisation of the ADR application process, we have actively engaged with our client in order to come to a pragmatic solution as to how we take this issue forward given the duress of the ever increasing penalties."

53. On 16 January 2020, ITFSL filed Mr C's Notice of Appeal, including the Application. The grounds of appeal were the same as set out earlier in this decision notice, see §28.

Facts about the other Applicants up to the making of the Application

54. The other Applicants were identified by HMRC as being in a similar position to Mr Adair in relation to pension schemes set up with the involvement of Tudor Capital Management and/or Liddell Dunbar. Each Applicant was issued with a Sch 36 Notice in identical terms to that received by Mr Adair, other than as regards the name of the scheme and the name of the Applicant.

55. The correspondence from ITFSL to HMRC set out above was also identical for each of the Applicants, and Mr Fulwood's letters to Mr Brothers either related to all the Applicants or were in the same terms. In addition:

(1) Ms Hilliard or another HMRC Review Officer issued each Applicant with an individual review conclusion letter. The wording of these letters is identical, and all include the information under the heading "what happens next" at §23;

(2) Mr Fulwood sent each Applicant a copy of his letters to Mr Brothers dated 21 March 2019 and 18 September 2019. He also wrote to each of them on or around the same date; the wording of those letters mirrored his letters of 21 March 2019 and 18 September 2019 to Mr Adair.

(3) On various dates between 12 and 17 December 2018, Mr Fulwood issued fixed penalty notices. Like Mr Adair, the other Applicants were told HMRC still required the information requested in the Notice and that if it was not provided within thirty days, HMRC might charge daily penalties of £60 a day.

(4) On various dates between 13 and 20 February 2019, Mr Fulwood issued daily penalties of £60 a day. The total amounts varied from £1,890 to £2,070, depending on the exact date of issue and the time lapse since the fixed penalty notice. The wording of this and the subsequent penalty notices was the same as hose sent to Mr Adair, other than as to the name.

(5) Mr Fulwood issued further daily penalties at £60 a day on dates between 3 July 2019 and 10 July 2019. The amounts varied from £7,920 to £8,700 depending on the date of issue and the time lapse since the issuance of the previous daily penalties.

(6) A third tranche of penalties was issued between 10 December 2019 and 18 December 2019. The Tribunal did not have the same particularised information about these penalties, but on the basis that they were also at £60 a day for the period since July 2019, they would have been over £9,000 each.

56. ITFSL filed Notices of Appeal, including the Applications, on 16 and 17 January 2020; these were identical to that of Mr Adair, other than in relation to the names.

Direct contact between the Individuals and Mr Fulwood?

57. All the Individuals received communications from Liddell Dunbar and ITFSL, which advised that they were "following the correct process and not to be concerned with the letters HMRC were issuing as these were being dealt with on [each Individual's] behalf", see §19.

58. Despite that advice, several Individuals responded to one or more of Mr Fulwood's communications and went on to settle their appeals, whether by providing the information required in the Notices or otherwise. I was not directly informed of the number, but as (a) Mr Brothers' initial email of 21 November 2018 listed 42 names, and (b) the Tribunal received Notices of Appeal in January 2020 from the 31 Individuals who were also Applicants, plus Mr Cummine, I find that 10 Individuals resolved their dispute over the Notices by dealing directly with Mr Fulwood.

59. Only three other Individuals made any direct contact with HMRC. One, Mr Cummine, engaged in extensive and detailed correspondence, and I have issued a separate decision notice in relation to his permission application. A second, Mr O'Rourke, emailed HMRC on receipt of the Notice, asking for a telephone number to discuss the matter, but appointed ITFSL as his representative soon afterwards and made no further direct contact. There was clearly no relevant difference between his position and that of the other Applicants.

60. The third, Mr Whittle, wrote to Mr Fulwood on 20 September 2019, on receipt of his letter dated 16 September 2019 (which mirrored that sent to Mr Adair on 18 September 2019). Mr Whittle's letter said:

(1) He had not previously made contact with HMRC because he had been advised not to do so, but had now written because "a considerable period" had elapsed and there was "no end in sight".

(2) He had only that day established that he was the administrator of his pension scheme, having previously thought he was not.

(3) He had "no expertise in these matters" and had been relying on his advisers, but was "now of the opinion that [he had] been misled from start to finish".

(4) He asked Mr Fulwood to provide information as to where he stood with HMRC and "how we are going to proceed together to get it sorted, without any interference from others who have their own agenda".

61. However, the Tribunal has no evidence of any further direct communication between Mr Fulwood and Mr Whittle. On or around 15 October 2019, ITFSL submitted an ADR application for Mr Whittle using the same template approach as that used for Mr Adair and the other Applicants, and HMRC refused that application. On 17 January 2020, ITFSL filed a Notice of Appeal for Mr Whittle which was identical to that filed for the other Applicants, and his witness statement uses the same standard wording. I consider at the end of this decision whether Mr Whittle's position should be distinguished from that of the other Applicants.

All Applicants: the Notices of Appeal and subsequent procedure

62. On 30 January 2020, the Tribunal asked the parties to put forward case management proposals and they did so, although progress was interrupted by the onset of the pandemic. On 6 August 2020, Judge Amanda Brown directed that all the Applications be joined and proceed together, and that the parties inform the Tribunal by 19 August 2020 as to whether they agreed to the Applications being decided on the papers.

63. On 19 August 2020, ITFSL objected to the Applications being decided on the papers, in part because each Applicant would give witness evidence. On 3 September 2020, Judge Kempster issued new directions. Direction 3 dealt with witness statements, and Direction 4 read:

> "HMRC are directed to confirm by 5pm on 2 October 2020 whether they accept the witness statements provided in accordance with direction 3. In the event that HMRC accept the statements provided in accordance with paragraph 3 above, the out of time application will be determined on the papers by the Tribunal. If…HMRC indicate that they do not accept the witness statements…the out of time application shall be determined at a video hearing."

64. On 2 October 2020, HMRC notified the Tribunal that they accepted the Applicants' witness statements, and went on to say that the Applications were therefore to be determined on the papers. On 8 October 2020, Mr Brothers repeated his request that the Applications should not be determined on the papers. On 21 October 2020, Judge Kempster confirmed that the Applications were to be decided on the papers, and there was no challenge to that decision.

65. On 15 December 2020, the Tribunal wrote to the parties, noting that the directions had been complied with and that the Applications would be listed for a hearing on the papers. The letter ended by saying "if either party wished to make any further submissions then these should be received by the Tribunal no later than 23 December 2020". No such further submissions were received and the Applications were listed to be decided on the papers before me.

THE LAW

66. I set out below both the relevant statutory provisions and the case law.

The legislation

67. TMA s 49E provides for HMRC to carry out a statutory review. TMA s 49F is headed "Effect of conclusions of review" and reads:

> "(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).
>
> (2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.
>
> (3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.
>
> (4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G."

68. TMA s 49G is headed "Notifying appeal to tribunal after review concluded", and so far as relevant to the Applications, reads:

> "(1) This section applies if
>
> (a) HMRC have given notice of the conclusions of a review in accordance with section 49E…
>
> (2) The appellant may notify the appeal to the tribunal within the post-review period.
>
> (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
>
> (4) …
>
> (5) In this section 'post-review period' means
>
> (a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6)…"

The case law

69. The Upper Tribunal ("UT") decisions in *Martland* and *Katib* relate to failures to make appeals to HMRC within the relevant time limit, rather than to failures to notify appeals to

the Tribunal. However, it was common ground that the Tribunal should take the same approach when deciding the Applications.

70. In *Martland*, the UT set out Rule 3.9 of the Civil Procedure Rules ("CPR"), which reads:

> "(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."

71. The UT then considered the authorities, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 ("*Denton*") and *BPP v HMRC* [2017] UKSC 55 ("*BPP*"). The UT said*:*

> "[40] In *Denton*, 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)]".'
>
> [41] 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.'"

72. At [42] the UT noted that the Supreme Court in *BPP* had implicitly endorsed the approach set out in *Denton.* That Court also confirmed at [26] that "the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach".

73. At [43] the UT said:

> "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'."

74. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

75. The UT also said at [46]:

> "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…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."

APPLICATION OF THE LAW TO THE APPLICANTS' CASES

76. I now apply the three stage approach in *Martland* on the basis of the facts, taking into account the parties' submissions.

The length of the delay

77. The statutory time limit is 30 days after HMRC issued the review decision, see TMA s 49G(5)(2) and (5)(a). The Applicants were therefore required to notify their appeals against HMRC's review decisions within 30 days of 22 October 2018. However, the Applications were made on 16 and 17 January 2020, so almost 14 months late.

78. In *Romasave v HMRC* [2015] UKUT 254 (TCC), the UT said at [96] that:

> "In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

79. The delay in this case was over four times longer than the three months referred to in *Romasave*. It was clearly serious and significant.

Reasons for the delay

80. The reasons for delay changed during those fourteen months. I have identified five periods as set out below. I have then separately considered the role of the advisers, ITFSL and Liddell Dunbar.

Period 1: From the statutory review to Mr Fulwood's letter of 26 November 2018: five days

81. HMRC's review letters were issued on 22 October 2018. The thirty days expired on 21 November 2018. On that day, Mr Brothers wrote to Mr Fulwood, asking that HMRC take a different approach in relation to the Individuals whose schemes had been wound up, on the basis that these appeals could not notified to the Tribunal as there was no longer an appellant. Mr Fulwood replied on 26 November 2018. He did not accept that there was no appellant, and refused Mr Brothers' suggestion that HMRC take a different approach.

82. I accept that Mr Brothers genuinely believed that the position was different for Individuals whose scheme had been wound up, and I also accept that it was not until Mr Fulwood replied that ITFSL knew HMRC disagreed with Mr Brothers' view of the law and his suggested approach.

83. Although Mr Brothers first contacted HMRC to raise these issues on the very day on which the statutory deadline for notifying an appeal expired, I nevertheless accept that it was then reasonable for him to wait until Mr Fulwood replied, plus a further short period to notify the appeals – in total, around two weeks. I accept that the Applicants have a good reason for that two week delay.

Period 2: From 27 November 2018 to 1 August 2019: eight months

84. During the next period, Mr Brothers wrote the following letters:

(1) On 19 December 2018, he responded to Mr Fulwood's letter of 26 November 2018; this was a gap of over three weeks. In his letter, Mr Brothers continued to argue about the validity of the Notices and sought to appeal the fixed penalties. Mr Fulwood responded on the penalties on 4 January 2019, and issued the first batch of daily penalties in mid-February.

(2) Mr Brothers responded on 22 February 2019, after a further gap of some six weeks. His letter focused on the penalties. Mr Fulwood replied on 21 March 2019.

(3) On 5 April 2019, after a gap of some two weeks, Mr Brothers replied, again focusing on the penalties,. On 15 May 2019, Mr Fulwood offered to accept late appeals against the penalties.

(4) On 1 August 2019, after two and a half months, Mr Brothers wrote again to Mr Fulwood following the issuance of the third batch of daily penalties.

85. As can be seen from the above, Mr Brothers' focus for most of this period was on the penalties, not on the need to notify the appeals. There were long gaps in Mr Brothers' response times – in particular, the two and a half months between 15 May 2019 and 1 August 2019, for which there was no explanation.

86. From the summary of the correspondence set out earlier in this decision, it is clear that Mr Fulwood's letters do not contain even a glimmer of a suggestion that he had changed his position from that in his initial letter of 26 November 2018. In addition, on 21 March 2019, he reminded Mr Brothers that where no appeal is notified to the Tribunal within 30 days of a review decision, it is treated as settled under TMA s 54, and that no appeals had been notified for any of the Applicants. Mr Brothers' response on 5 April 2019 made no reference to that key legislative provision.

87. Mr Brothers submitted that this eight month delay was reasonable, because (a) ITFSL had remained of the view that appeals could not be notified because there were no appellants, and (b) the Applicants "reasonably believed that this dispute could be resolved without the

need to trouble the Tribunal". However, he nevertheless accepted that "it became increasingly clear" that the parties remained in disagreement about the relevance and/or importance of the schemes having been wound up, and that ITFSL had "articulated" their view to HMRC "on numerous occasions in response to various correspondence". In other words, even Mr Brothers agreed that HMRC's position did not change throughout this period.

88. I find that there was no good reason for the failure to notify the appeals to the Tribunal during this eight month period. Instead, ITFSL simply continued to reiterate points which HMRC had already rejected.

Period 3: From 1 August 2019 to 14 October 2019: Two and a half months

89. On 1 August 2019, Mr Brothers told Mr Fulwood that ITFSL was "in the process of applying for" ADR. However, those applications were made on 15 October 2019, some two and a half months later. No explanation has been provided for that delay. The wording of each ADR application was identical, other than in relation to the names of the Applicants and the pension schemes, so this was not a particularly time-consuming task.

90. I considered for myself whether the delay related to the hearing which took place before Judge Mosedale on 3 September 2019; her decision was issued on 7 October 2019. However, the only link between that hearing and the Applicants' position is that Judge Mosedale was asked to stay *the notified appeals* pending the resolution of the Applicants' requests to be accepted into ADR. The hearing thus does not provide a justification for a delay in *making* those requests for ADR, and Judge Mosedale herself criticised this unexplained delay.

Period 4: From 15 October 2019 to 15 November 2019: one month

91. ITFSL finally applied for ADR on 15 October 2019, and the application was rejected on 11 November 2019. Four days later, on 15 November 2019, HMRC also rejected ITFSL's alternative proposal involving mediation for "a sample of disputed cases".

92. Mr Brothers submits that it was reasonable for the Applicants to wait to see the outcome of the ADR and of the mediation alternative before notifying the appeals to the Tribunal. However, I do not agree, because:

(1) ADR was not even mentioned until August 2019, some nine months after the issuance of the review letter, and the applications were made after a further three months. ADR was clearly not the reason for the delay in notifying the appeals.

(2) In any event, ITFSL had been made aware that HMRC were very likely to reject the ADR applications. This was clear from:

(a) Judge Mosedale's hearing on 3 September 2019, where HMRC's litigator warned ITFSL that the Applicants were very unlikely to be accepted into ADR, and Judge Mosedale concurred with that view; and

(b) Mr Fulwood reiterated this when he wrote to ITFSL on 18 September 2019 and 10 October 2019.

93. As regards the alternative sample approach, Mr Brothers had proposed this in his first letter to Mr Fulwood on 19 December 2018, and Mr Fulwood rejected that approach and reiterated that refusal on 20 March 2019. ITFSL were therefore aware that this approach was not acceptable to HMRC, long before it was raised again following the failure of ADR. There was no good reason for delaying the notification in order to allow this suggestion to be raised and rejected one more time.

Period 5: From 16 November 2019 to 16 January 2020: two months

94. The Applicants' Notices of Appeal were eventually filed on 16 and 17 January 2020, over two months after HMRC had refused both ADR and the alternative proposal. Mr Brothers says that this further delay was caused by:

(1) the Christmas and New Year break; and

(2) the number of individual Applicants, and the need for ITFSL to communicate with each of them to obtain their agreement to notification.

95. This further two month delay was twice as long as the statutory time limit for notification. Although I accept that normal business slows down over Christmas, over a year had already passed since the review letter, and ITFSL had had plenty of time to obtain the Applicants' consent to notification. Moreover, there was no evidence before the Tribunal as to when ITFSL communicated with the Applicants, or how they provided consent. Moreover, as each of the Notices of Appeal is drafted in identical terms, other than as to each Applicant's name and address, little extra work was involved once consent had been obtained. There was no good reason for this further delay.

Reliance on advisers

96. The Applications are, of course, made by the Applicants. ITFSL had conduct of their appeals, and apart from a short initial period of two weeks, there was no good reason for ITFSL's delays in notifying their appeals to the Tribunal.

97. The Applicants relied on ITFSL and Liddell Dunbar, receiving updates from both, with the latter advising that they were "not to be concerned with the letters HMRC were issuing as these were being dealt with on [the Applicants'] behalf" by ITFSL.

98. Although neither party made submissions on this point, I considered whether the Applicants had a good reason for the delays because they relied on one or more advisers who failed without any good reason to notify their appeals by the due date.

99. The Court of Appeal set out the relevant principles in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 ("*Hytec*"). The issue before the Court was whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant. Ward LJ, giving the leading judgment, said at p 1675:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent…were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself.."

100. In *Katib* the UT said at [49] (their emphasis):

> "We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant."

101. The UT returned to this issue at [54], saying:

> "It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant."

102. The UT then cited the passage from *Hytec* set out above, and continued at [56] by concluding that the correct approach in Mr Katib's case was:

> "…to start with the general rule that the failure of Mr Bridger [Mr Katib's adviser] to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a 'good reason' for missing those deadlines when considering the second stage of the evaluation required by *Martland*."

103. This was followed by the following comment at [58]:

> "…the core of Mr Katib's complaint is that [his adviser] Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise."

104. In deciding that little weight be given to Mr Katib's reliance on his adviser, the UT also took into account that Mr Katib should have noticed "warning signs", including direct contact from HMRC in the form of enforcement action, which "should have alerted him", and they concluded Mr Katib was "not without responsibility in this story".

105. It follows from this case law that the Tribunal should not normally find that a person's reliance on his adviser provides a good reason for delay. I considered whether the facts of the Applicants' cases took them outside that normal range, and decided that they did not. That is because:

(1) Mr Fulwood communicated directly with the Applicants in March 2019, and attached a copy of his letter to Mr Brothers. That letter included a reference to the fact that where no appeal is notified to the Tribunal within 30 days of a review decision, the appeal is treated as settled under TMA s 54, and that "the basis on which the information notice is issued is therefore not in point" because the Applicants had not notified their appeals to the Tribunal.

(2) Mr Fulwood wrote a second letter directly to each Applicant in September 2019. This referred to TMA s 49F and s 54, and said that as the appeal against the Notice had not been notified to the Tribunal, the review decision was treated as agreed between the parties.

(3) The Applicants also received significant and repeated penalties well before the Notices of Appeal were filed: fixed £300 penalties in December 2018; daily penalties of

around £2,000 in February 2019, and further daily penalties of around £8,000 in July 2019.

(4) The above letters and penalties were more than sufficient to provide the Applicants with "warning signs" that something was going wrong with the process, and that it was unwise blindly to rely on Liddell Dunbar's advice "not to be concerned" by HMRC's letters.

(5) A significant minority of Individuals who were originally part of this group did not unquestioningly follow the advice to ignore HMRC's communications, and instead contacted Mr Fulwood.

106. I find that the Applicants' reliance on ITFSL and Liddell Dunbar does not provide them with a good reason for the delay in notifying the appeals.

Deliberate delay?

107. HMRC submitted that ITFSL deliberately delayed notifying the appeals to the Tribunal because the Notices related to the year ended January 2018, and (presumably to the extent that part of that year fell within 2016-17) the ordinary time limit of four years was due to expire on 5 April 2021. HMRC accused ITFSL of having "used the Tribunal process as a way of frustrating HMRC in the use of their statutory powers".

108. I reject this submission, because:

(1) HMRC did not refer to any evidence to support that submission and I was unable to identify any;

(2) Instead, my reading of Mr Brothers' correspondence is that he genuinely believed it would be better to settle these cases by discussing them with HMRC rather than notifying the appeals to the Tribunal. Indeed, far from "using the Tribunal process" as a way of frustrating HMRC, Mr Brothers considered that the cases should be settled *outside* the Tribunal process; and

(3) although HMRC may be in a better position to issue assessments within the ordinary time limit had the Applicants complied with the Sch 36 Notices, they can issue assessments on a best judgment basis even if they do not receive the information required by the Notices. In addition, if further information later comes to light, HMRC may be able to issue discovery assessments. There would thus have been little point in deliberately using delaying tactics to prevent assessments.

Conclusion on reasons for delay

109. I accept that the Applicants had a good reason for an initial delay of some two weeks after the 30 day deadline. There was no good reason for the further delay of just over a year.

All the circumstances

110. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise.

The need for time limits to be respected

111. Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as "a matter of particular importance" in *Katib*; the same point is made in *Martland* at [46]. In the Applicants' case the delay was around 14 months, and apart from a short initial period of around two weeks, there was no good reason for that delay. This factor weighs heavily against the Applicants.

Negotiation

112. Mr Brothers asked that weight also be put on the attempts to settle the cases by negotiation. However, I disagree, because:

(1) the TMA sets out two routes for a taxpayer to resolve a continuing dispute following an HMRC decision:

(a) the taxpayer can appeal to HMRC and then notify the appeal to the Tribunal. There is no time limit for this notification (TMA s 49D); or

(b) the taxpayer can accept a statutory review or request one if not offered by HMRC, in which case,

(i) HMRC must provide a "view of the matter" letter;

(ii) the statutory review must be carried out by a different HMRC officer, not the decision maker,

(iii) the review officer must take into account any representations made on behalf of the taxpayer;

(iv) if the taxpayer disagrees with the review officer, the appeal can be notified to the Tribunal within the following 30 days;

(v) if the taxpayer does not notify the appeal, the dispute is deemed to have been settled in accordance with the terms in the review letter.

(vi) Parliament has therefore decided that a taxpayer can only continue with its dispute if it notifies the Tribunal either within the 30 day time limit, or within such longer period as the Tribunal subsequently allows (TMA ss 49A-C, TMA 49E-I; TMA s 54).

(2) The Applicants chose the second route, and ITFSL's insistence on continuing to negotiate takes no account of those clearly structured statutory provisions.

(3) HMRC's position was absolutely clear from Mr Fulwood's letter of 26 November 2018, so this was not a case where both parties were involved in any sort of negotiation. Instead, ITFSL simply continued to reiterate points which HMRC had already considered and rejected.

ADR and mediation

113. Mr Brothers also submitted that the applications for ADR and mediation were relevant factors. He sought to rely on Rule 3(1) of the Tribunal Rules, which says:

> "The Tribunal should seek, where appropriate—
>
> (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
>
> (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure."

114. I place no weight on this point, for the following reasons:

(1) Until an appeal has been notified, there are no "proceedings", so the Tribunal has no jurisdiction. The Tribunal Rules thus have no application to the period before the Applicants file their Notices of Appeal.

(2) Rule 3 is, in any event, explicitly subject to the requirement that both parties "wish" to use the procedure. This derives from the Tribunals, Courts and Enforcement

Act 2007 s 24(1) which provides that the Tribunal's Rules must have regard to the principle that mediation is to take place "only by agreement between those parties".

(3) ITFSL was on notice, before it applied for ADR, that the ADR application was very unlikely to succeed, and that Judge Mosedale had agreed with HMRC that (a) Sch 36 Notices were normally unsuited to ADR and (b) this was particularly the case in relation to the Applicants' appeals.

(4) Even had ADR had been open to the Applicants, ITFSL did not raise that possibility until 1 August 2019, some ten months after the review letter had been issued, and there was a further ten week delay between ITFSL telling HMRC that it was considering ADR, and actually making the applications.

(5) Since the Applicants had neither notified their appeals within the time limit, nor applied to the Tribunal for permission to notify late, their appeals were deemed to be settled under TMA s 54, and as a matter of law there was no subsisting dispute which could be resolved by ADR.

(6) In relation to the "alternative approach" of using a sample of cases, Mr Brothers had suggested this as far back as December 2018, and it was robustly rejected by Mr Fulwood on 4 January 2019, so there was no reasonable basis on which any part of the delay could be ascribed to waiting to find out whether HMRC would accept that alternative.

Merits

115. Mr Brothers submitted that if the Applications were to be allowed, the appeals would succeed, because the Notices were "invalidly issued and therefore not competent". He relied in particular on the fact that the Notices were addressed to the Applicants "as the statutory scheme administrator" of the relevant pension schemes, and that the Applicants had all given unchallenged evidence that they were not the administrators.

116. However, that evidence does not decide the issue. Whether a person is the administrator of a pension scheme under FA 2004 is a mixed question of fact and law. For example, under s 272 of that Act, the trustee of a scheme may be liable as a scheme administrator, and by s 273 a member may liable. The Applicants can only give evidence as to their knowledge, not as to their position as a matter of law. Moreover, the Applicants' witness statements would not be the only evidence before the Tribunal: the Pensions Online system recorded that each of the Applicants *were* the scheme administrators, and on 20 September 2020, one of the Applicants, Mr Whittle, told Mr Fulwood that he had just established he was the administrator of his pension scheme, having previously thought he was not.

117. The Applicants' other grounds of appeal were set out at §28 and are italicised below. As required by *Martland,* I consider these in outline:

(1) *The taxpayer no longer exists*: As the Notices were issued to the Applicants and not to the pension schemes, the recipient of each Notice clearly does exist.

(2) *There is no tax position to check*: HMRC disagree: they say that the Applicants are scheme administrators and as such may be liable to the scheme sanction charge, which FA 2004, s 239(1) provides is a charge to income tax. If the Applicants are scheme administrators, they thus have a tax position to check.

(3) *The documents are not reasonably required:* If, as HMRC contend, the Applicants are scheme administrators, it is certainly arguable that the documents and information are reasonably required.

(4) *The items are requested for third party purposes but incorrectly on a first party notice*: This appears to be a submission that the true taxpayer is the pension scheme, but as HMRC say, the Applicants may also have liabilities in their capacities as administrators.

(5) *There is no precision to this statutory request:* It is difficult to know what is meant by this point. HMRC's skeleton argument refers to the fact that as some of the Individuals responded to HMRC, it must follow that the Notices were comprehensible. My own reading of the Notices is that their requirements are straightforward and clear.

118. There is thus no basis on which I could find that the merits lie with the Applicants, let alone that they are "overwhelmingly" in their favour, or have any "obvious strength". As a result, the merits of the appeal do not form part of the balancing exercise.

Before the statutory review

119. Mr Brothers submitted that HMRC had delayed providing the statutory reviews, and that this delay should be part of the balancing exercise for the purposes of deciding whether to give permission for the Applicants' late notifications. He said that TMA s 45E requires HMRC to notify the conclusions of the review within 45 days, but that the Applicants' reviews had been requested in May 2018 and were not provided until October 2018.

120. I do not agree that an earlier delay by HMRC in making a review decision is a relevant factor in the context of the balancing exercise, and in any event:

(1) TMA s 45E(6)(b) allows the 45 days to be extended if agreed between the parties; and

(2) it is clear from Mr Brothers' letter of 4 October 2018 (see §23) that ITFSL had asked HMRC for more time to provide submissions and thanked HMRC for waiting to receive them.

121. On the evidence, HMRC are not to blame for the delay, and an extension of time had in any event been agreed between the parties.

After the Notice of Appeal

122. Mr Brothers also asked the Tribunal to weigh in the balance the Applicants' compliance with Tribunal directions issued since the filing of the Notices of Appeal.

123. I doubt whether subsequent behaviour is a relevant consideration for the purposes of this balancing exercise. In any event, compliance with the Tribunal directions is expected of both parties, and does not provide any extra weighting in favour of the Applicants when deciding whether to give permission for a late notification.

Rashid

124. Mr Brothers also sought to rely on *Rashid v HMRC* [2020] UKFTT 378(TC), a decision of Judge Popplewell. Mr Brothers submitted that the judge "found that discrepancies in HMRC's paperwork weighed in the Appellant's favour when considering whether the late appeal can be made".

125. The role of the Tribunal when deciding to allow a late appeal or a late notification is (a) to find the facts and (b) assess and weigh those facts in the light of the guidance given by the UT and the courts. Comparing the particular facts of one FTT permission case with another is rarely a useful exercise.

126. In any event, I was unable to identify any "discrepancies in HMRC's paperwork" in the Applicants' case. My own reading of *Rashid* is that the key factor in one of Mr Rashid's two applications was the apparent merits, and in the other, the notice had not been served. The approach taken in *Rashid* is not a relevant factor.

Reliance on advisers

127. Earlier in this decision, I have set out parts of the UT's judgment in *Katib*, including their finding at [56] that reliance on advisers "is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*". The UT continued in the same paragraph:

> "…when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

128. However, the UT then went on to find that, for the same reasons as in relation to the second stage, the behaviour of Mr Katib's adviser had no "real weight" at this third stage.

129. The position is the same in the case of the Applicants. As set out at §105, they all received the review decision with its clear statement as to the time limits for notifying appeals; they received direct communications from Mr Fulwood reiterating the statutory time limit for notification and they were issued with repeated and significant penalties. In short, they received more than enough information for them to consider whether they should unquestioningly accept the approach advised by ITFSL and Liddell Dunbar. This is also clear from the fact that a significant minority of Individuals did recognise the warning signs, and took separate action. I therefore place little weight on the fact that the Applicants relied on ITFSL and Liddell Dunbar.

Other prejudice to the parties

130. Mr Brothers submitted that if the Applications were to be dismissed, the Applicants would experience the prejudice of having to comply with the Notices, and this would cause them to incur time and cost. That is however an inevitable consequence of losing the opportunity to challenge an HMRC decision at the Tribunal, and I accord it little weight.

131. Mr Brothers also sought to argue that the penalties were relevant, because the grounds for appealing the penalties are the same as the grounds set out on the Applicants' Notices of Appeal. However, I do not accept that. The Applicants have separate appeal rights in relation to the penalties, and those appeals (and any related applications for permission to appeal late) are not before me to decide. As a result, any related prejudice cannot form part of this decision.

132. Mr Brothers also said that, if the Applications were allowed, there would be little extra work for HMRC or the Tribunal. This was because the cases of those Individuals whose appeals had been notified in time were already proceeding, and the facts of their cases were essentially the same as those of the Applicants. I accept that there is some independent support for this submission;

(1) Judge Mosedale refused to direct that those other cases proceed under Rule 18 of the Tribunal Rules, but instead directed that they proceed together, on the basis that their similarity meant that this was likely to involve little extra work, compared to preparing lead cases under Rule 18; and

(2) HMRC's skeleton refers to the facts of the Applicants' cases as being "identical" to those already before the Tribunal.

133. However, HMRC also say that, while the *facts* are essentially the same, there are some "technical differences" between the Applicants' cases and the others already before the Tribunal, although I was not provided with any further details as to the nature or extent of those differences.

134. I therefore accept that if permission were given, the Tribunal and HMRC would be able to add the Applicants' appeals to the existing cases with relatively little extra work. This reduces the cost and effort which would be required. However, there would be *some* extra work for both HMRC and the Tribunal, because separate case files must be maintained. It is also possible that in the course of exchanging the evidence for the appeals, differences might emerge which have as yet not been identified. Nevertheless this is a significant factor and I return to it below.

Balancing the circumstances

135. Once the circumstances have been identified, they must be balanced. The consistent message from *Denton*, *BPP*, *Martland* and *Katib* is that particular weight is to be given to two factors:

(1) for litigation to be conducted efficiently and at proportionate cost; and

(2) to enforce compliance with rules, practice directions and orders.

136. There are three factors which favour allowing the Applications:

(1) if the Applications are refused, the Applicants will have to incur time and cost in complying with the Notices;

(2) the delays were caused by the Applicants' advisers rather than the Applicants directly; and

(3) it would be relatively simple to list these appeals with those of the other Individuals, so that there would be relatively little extra cost or effort required of HMRC and the Tribunal.

137. The first and second carry little weight, but the third is one of the two factors to which I must ascribe particular importance: if the Applications were allowed, the resulting litigation could be efficiently and proportionately managed, because the appeals would be added to the cases already before the Tribunal.

138. On the other side of the scales is the very serious and significant failure to meet the statutory time limit of 30 days. Instead, there was a fourteen month delay and a good reason for only two weeks of that period. That too is a matter to which I must ascribe particular importance.

139. On both sides of the scales there is thus a factor to which particular importance must be ascribed. However, given the Applicants particular circumstances, these factors are not of

equal weight, and those in favour of refusing the Applications outweigh those in favour of allowing them. This is because:

(1) ITFSL was well aware of the statutory position and the 30 day time limit. This had been clearly set out in the review letter, and ITFSL had organised the notification of other Individuals' appeals in line with that time limit;

(2) the unreasonable delay in making the Applications was over thirteen times longer than the statutory limit;

(3) within that period were long gaps during which ITFSL did not communicate at all with HMRC – in particular:

(a) the six week gap between 4 January 2019 and 22 February 2019, for which there was no explanation;

(b) the two and a half month gap between 15 May 2019 and 1 August 2019, again without any explanation;

(c) a further unexplained gap of two and a half months between Mr Brothers first mentioning that ADR was being applied for, and the making of the ADR applications; and

(4) the delay of two months between HMRC refusing the alternative approach on 15 November 2019 and the filing of the Notices of Appeal on 16 and 17 January 2020. There was also no good explanation for that delay.

140. These repeated and largely unexplained delays demonstrate a casual disregard for the statutory requirements, and are additional to the overall lack of any good reason for the failure to comply with the time limit. In my judgment this factor outweighs those on the other side of the scales, namely the relative ease with which these cases could be listed and heard, taken together with the minor factors at §136(1) and (2).

Mr Whittle

141. I considered whether the position was any different for Mr Whittle, who made direct contact with Mr Fulwood on 20 September 2019, saying that he was "now of the opinion that [he had] been misled from start to finish". However, that letter was written almost a year after the review decision, so there had already been a very serious and significant delay without any good reason, and Mr Whittle did not take any further steps following the letter of 20 September 2019. I decided that there was little difference between his position and that of the other Applicants and that the outcome was the same.

DECISION AND APPEAL RIGHTS

142. The Applicants are refused permission to notify their appeals late.

143. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 11 MARCH 2020