[2021] UKFTT 0067 (TC)

TC08052

PROCEDURE – application for permission for late notification of appeal – reliance on advisers – delay by HMRC in providing information –- case could be added to existing appeals without much further work – balancing of factors – permission granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00295

BETWEEN

HARRY CUMMINE **Applicant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the application 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 Applicant, 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. One of those Individuals was Mr Cummine, and his pension scheme was the Bridesmaid Pension Scheme ("BPS").

2. Each Notice contained identical requirements for information about the related 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 all the Notices.

3. ITFSL subsequently notified the appeals of over 20 Individuals to the Tribunal, and those appeals are proceeding. However, 42 pension schemes were wound up, including the BPS. ITFSL took a different approach with these Individuals, 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. In addition to the correspondence between ITFSL and HMRC, Mr Cummine communicated directly with Mr Fulwood, saying he was not the administrator and asking for a copy of the evidence on which HMRC was relying. That evidence was not provided until October 2019.

5. Mr Cummine's Notice of Appeal was eventually filed with the Tribunal on 16 January 2020; it included an application for permission to notify his appeal late ("the Application"). At the same time, ITFSL also filed the appeals and applications of another 31 Individuals ("other Applicants" and "other Applications").

6. I have issued a separate Tribunal decision notice for the other Applicants, under the name and reference *Stephen Adair and Others - TC/2020/00291 and others ("Adair and Others")***,** because many of the facts of Mr Cummine's case were different to those of the other Applicants. However, there are obviously some points of overlap. In this decision, references to "the Applicants" includes Mr Cummine, and references to "the Applications" includes his Application.

7. I considered the facts of Mr Cummine's case 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*"). It was common ground that Mr Cummine was seriously and significantly late in making the Application. However, he had good reason for all but the last six weeks of that delay. In addition, if permission was given for him to notify his appeal late, it could be added to the similar cases already proceeding before the Tribunal, and the litigation could therefore be conducted "efficiently and at proportionate cost".

8. Having considered and balanced all relevant factors, including those to which I was required to give particular weight, I decided to give Mr Cummine permission to make his appeal late and so allowed the Application.

THE EVIDENCE

9. HMRC provided the Tribunal with a Bundle of documents for Mr Cummine, which contained:

(1) the Sch 36 Notice;

(2) subsequent correspondence between ITFSL and HMRC;

(3) most of the correspondence between Mr Cummine and HMRC, although some communications were missing;

(4) downloaded pages from The Pension Regulator ("TPR") site in respect of the BPS, dated 22 September 2016; and

(5) Mr Cummine's Notice of Appeal to the Tribunal, including the Application.

10. 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 Applications. In addition, Mr Cummine also provided a short witness statement, which was not challenged by HMRC.

THE FACTS

11. The BPS was a defined contribution occupational pension scheme set up in 2011 by a company called Bridesmaid Ltd in its capacity as an employer, albeit that the company was dormant from 2010 until at least September 2016.

12. The setting up of the BPS was arranged by a colleague of Mr Cummine's called James Corr, with the assistance of an unnamed firm of pensions advisers. At some point before 22 September 2016, Mr Corr changed his employment, and his pro-rata share of the BPS's assets was transferred elsewhere.

13. As at 22 September 2016, the BPS's net assets were £760,644. On the same date, the scheme had two members, one of whom was Mr Cummine; the other was Mr Ian Cummine; they were also the only trustees, and I infer from Mr Cummine's correspondence that this remained the position at the time the Sch 36 Notice was issued.

14. When the BPS was established, the scheme administrator was a company called Tudor Capital Management Ltd. In 2013, that firm was taken over by Liddell Dunbar Ltd, which became the scheme administrator. HMRC suspected that the BPS 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 Liddell Dunbar about the BPS.

15. At or around the same time, or shortly afterwards, HMRC's Pensions Online system showed that Mr Cummine had replaced Liddell Dunbar as the scheme administrator, although the address on HMRC's system remained that of Liddell Dunbar.

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

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

17. The Notice 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 Cummine'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 Cummine that they were instructing ITFSL to "assist and represent" in relation to the Notice. Mr Cummine subsequently received regular updates from Liddell Dunbar and ITFSL; the former advised him throughout 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".

Correspondence, winding up and the statutory review

20. On 1 February 2018, Mr Cummine wrote to HMRC, under the letterhead "Bridesmaid Pension Scheme" authorising HMRC to speak to ITFSL. On 20 February 2018, ITFSL appealed Mr Cummine's Sch 36 Notice to HMRC.

21. In March 2018, on Liddell Dunbar's advice, the BPS was wound up, and its assets transferred to AJ Bell Ltd, and then on to a new pension scheme, called the Cummine Pension Scheme, administered by Everett Administration Ltd.

22. On 30 April 2018, HMRC refused Mr Cummine's appeal against the Notice. The refusal letter was sent to Mr Cummine, with a copy to ITFSL. On 21 May 2018, ITFSL asked for a statutory review. 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."

23. The email continued by setting out representations about the Notices which had been issued to their clients. On 22 October 2018, HMRC's Review Officer, Mr Mavani, issued his 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.

24. Under the heading "What Happens Next", Mr Mavani 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". He told Mr Cummine that if he wished to notify his appeal, he must attach a copy of his review letter to the Tribunal Notice of Appeal; he provided the web address of HM Courts and Tribunals Service and the telephone number of the Tribunal's Office in Birmingham, and informed Mr Cummine 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

25. On 29 October 2018, Mr Cummine wrote to HMRC, saying "I am puzzled as to why you are writing to me, as I have never been the Scheme Administrator", and that this role was filled by Liddell Dunbar. He sent his letter by recorded delivery to the address given in the statutory review letter, and received confirmation that it was delivered to HMRC on 31 October 2018. However, his letter did not reach Mr Fulwood.

26. 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 the BPS), 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."

27. 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."

28. Mr Fulwood also confirmed that the information and documents required by the Notices, as amended by Mr Mavani, were still required.

29. On 14 December 2018, HMRC issued Mr Cummine with a £300 penalty for failure to comply with the Sch 36 Notice, and sent a copy of the penalty to ITFSL. On 18 December 2018, Mr Cummine wrote to Mr Fulwood, marking his letter "urgent" and sending it by special delivery. He attached a copy of his earlier letter of 29 October 2018, and said he

disagreed with the decision to charge him penalties, as he had "never been the Scheme Administrator".

30. On 19 December 2018, Mr Brothers replied to Mr Fulwood's email of 26 November 2018, *inter alia* reiterating that the schemes were no longer in existence; asking to progress the cases on a "sample basis"; stating that ITFSL was appealing the penalties; and attaching a page headed "Liddell Dunbar Participants' Penalty Charges", which set out a list of pension schemes, including the BPS. 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.

31. On 23 December 2018, Liddell Dunbar emailed Mr Cummine and said that:

> "The tax advisers, Independent Tax have already disputed the original info request and are in discussion with HMRC on the dispute. IT will be writing to HMRC today to have the letter withdrawn. No action is needed."

Communications in January 2019

32. On 4 January 2019, Mr Fulwood emailed Mr Brothers, saying that his letter was not accepted as an appeal against the penalties, as he required "a specific response from each Individual, or you as their authorised agent, setting out the position relevant to them".

33. At some date before 17 January 2019, Mr Fulwood received Mr Cummine's letter of 18 December 2018, and a copy of his earlier letter of 29 October 2018. On 17 January 2019, Mr Fulwood and Mr Cummine spoke on the telephone. Mr Fulwood told Mr Cummine that his name was shown as BPS's scheme administrator on the HMRC Pensions Online system. He asked Mr Cummine about related documentation, and about the set-up letter and token which would have been required to enter that HMRC system. In response ,Mr Cummine:

(1) said he had never agreed to be scheme administrator, had never signed any documentation appointing him to that role, and in short was not the administrator;

(2) had no idea why his name was showing on the HMRC Pensions Online system in that capacity; he had never been issued with a token or the related letter and never logged into that HMRC system;

(3) attached a copy of TPR information dated 22 September 2016;

(4) said that in July 2018, Liddell Dunbar had invited the trustees to become scheme administrators, but they had declined as they did not have the necessary qualifications;

(5) explained that the BPS had been set up by Mr Corr, and that he had since left the scheme;

(6) asked Mr Fulwood for a copy of the information shown on the Pensions Online system, so he could "review and investigate" this;

(7) said that when he received the Sch 36 Notice, Liddell Dunbar had told him to ignore it, as they were dealing with it in their capacity as administrators; that Liddell Dunbar had subsequently told him to ignore all future HMRC letters as ITFSL had been appointed to deal with the matter, and that ITFSL's opinion was that "HMRC had no right to be requesting such information", he understood from Liddell Dunbar's email of 23 December 2018 that ITFSL had asked for the Notices to be withdrawn; and

(8) having had this conversation with Mr Fulwood, he would ask Liddell Dunbar for further advice.

34. Mr Fulwood said he would treat Mr Cummine's letter of 18 December 2018 as an appeal against the fixed £300 penalty. The following day, 18 January 2019, Mr Cummine wrote down what had been said in the telephone conversation and sent that letter to Mr Fulwood by recorded delivery.

35. On 22 January 2019, Mr Fulwood responded to Mr Cummine's letter, but no copy of that response was in the Bundle. Mr Fulwood passed a copy to Liddell Dunbar on 25 January 2019, and on the same day, told Mr Fulwood that he was waiting to hear from Liddell Dunbar as to that firm's conversations with ITFSL.

February to August 2019

36. On 12 February 2019, Mr Fulwood emailed Mr Cummine, asking him to "confirm [his] intentions with regards to the outstanding information". At some subsequent point, although again no copy of this communication was in the Bundle, Mr Cummine told Mr Fulwood that he would no longer be communicating directly with him, and he was to deal with ITFSL.

37. On various dates between 13 February and 20 February 2019, HMRC issued daily penalties to the other Applicants, but not to Mr Cummine.

38. 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. The BPS was highlighted on the heading of one of the letters.

39. In the text of that template letter, Mr Brothers asked Mr Fulwood to provide a statutory basis for the refusal to accept his earlier letter as an appeal against the fixed penalties issued in December 2018, and asked that the subsequent daily penalties be withdrawn because the £300 penalties had been appealed by his earlier letter.

40. On 20 March 2019, Mr Fulwood replied to Mr Brothers, saying:

> "…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…
>
> 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."

41. 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 that 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.

42. On 29 March 2019, Mr Fulwood wrote a further letter to Mr Brothers in response to the template letter dated 22 February 2019 on which the BPS name had been highlighted. Mr Fulwood 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, and then said (wrongly) that "no valid appeal is yet before me in respect of Mr Cummine". He advised that further daily penalties would shortly be issued, although in fact no daily penalties had yet been issued to Mr Cummine. In relation to the Notices, 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 Cummine, drawing attention to his warning of continued penalty action.

43. On 5 April 2019, Mr Brothers sent another batch of identical letters to Mr Fulwood, in which he described HMRC's refusal to treat the cases on a "grouped" basis as fallacious, disingenuous and an abuse of process.

44. On 13 May 2019, Mr Fulwood told ITFSL that he would accept late appeals against the penalties, providing they were from the Individual to whom the Notice had been issued, and asking that a late appeal be submitted by Mr Cummine against the penalties charged. He therefore again failed to acknowledge that:

(1) he had already told Mr Cummine that his letter of 18 December 2018 was an in-time appeal against the fixed penalty, and

(2) no daily penalties had as yet been issued to Mr Cummine.

45. On 10 July 2019, Mr Fulwood issued Mr Cummine with daily penalties of £60 a day from 14 December 2018 to 9 July 2019, totalling £6,240.

August to October 2019

46. 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 the penalties had been appealed to HMRC by his letter of 19 December 2019. In relation to the subsequent daily penalties, he repeated the grounds of appeal set out at §30, 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…".

47. 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 cases 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.

48. Meanwhile, on 25 September 2019, Mr Fulwood had written again to Mr Brothers, setting out TMA s 49F and then saying, in respect of the Sch 36 Notice issued to Mr Cummine: "You did not transmit an appeal in respect of Mr Cummine 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".

49. Mr Fulwood sent a copy of that letter to Mr Cummine, and on the same day also wrote a separate letter directly to Mr Cummine, in which he:

(1) said that had he received Mr Cummine's letter of 29 October 2018, he would not have issued the £300 fixed penalty, and he was therefore allowing Mr Cummine's appeal against that penalty;

(2) added that, because there was no fixed penalty, he was also withdrawing the daily penalties issued in July 2019;

(3) explained that reason those penalties had been imposed was because, despite initially providing HMRC with some information, Mr Cummine had then decided not to engage in direct communication but instead told Mr Fulwood to deal with ITFSL;

(4) warned that if the information required by the Notice was not provided within 30 days, he would issue another £300 penalty, and that would in turn be followed by daily penalties; and

(5) emphasised that there was "categorically no ongoing technical debate with Independent Tax, around the issue of the Notice or in respect of the scheme being wound up".

50. On 8 October 2019, Mr Cummine wrote to Mr Fulwood, referring to his earlier letters and to the telephone conversation of 17 January 2019, and saying he was "deeply concerned" that Mr Fulwood was still referring to him as the scheme administrator. He reiterated what he had said on 17 January 2019, including his request for a copy of the relevant part of the HMRC Pensions Online System, saying "to date I have not received any documentation from you. Can you please provide this" and "I would also like you to explain to me why have you ignored my previous communications about this" and he "considered it inappropriate and unfair on your part to continue to harass me over this matter. You are causing me undue stress and worry".

The ADR application

51. Meanwhile, on 1 October 2019, Mr Tateson of ITFSL had 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."

52. On 15 October 2019, ITFSL applied for ADR on behalf of Mr Cummine and the other Applicants. In those applications, ITFSL set out an explanation as to why in their view ADR was appropriate, and said ADR should have been offered before the Notices were issued.

53. On 18 October 2019, Mr Fulwood replied to Mr Cummine's letter of 8 October 2019. He apologised for not having responded to his earlier request for information from the Pensions Online System, and enclosed two screen shots, one of which showed Mr Cummine's name as the administrator, and the other the address held for him, which was "c/o Liddell Dunbar Ltd". He asked Mr Cummine to provide the remaining information required in the Notice.

54. On 23 October 2019, Mr Cummine responded. He acknowledged that his name was shown as the administrator on the HMRC system, but pointed out that it also gave Liddell Dunbar's address and not his own address. He said this proved he had not registered on the system, and also that he was not the administrator, and added that it was "a shame he was not provided with the copy of the screenshot earlier. Hopefully this is now an end to this matter".

55. The ADR applications were considered by Mr Fallon, an HMRC officer who was also an accredited mediator. 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."

56. 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."

57. 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".

Mid-November 2019 to mid-January 2019

58. On the same day, 15 November 2019, Mr Fulwood wrote to Mr Cummine saying that his letter did not mark "an end to the matter", as HMRC still required information about the BPS, and noting that Mr Cummine had previously said he was going to "investigate" what had happened by talking to Liddell Dunbar. He noted that the BPS had been wound up, and asked for "an overview of the dispersal of the assets" of that scheme.

59. On 22 November 2019, Mr Cummine responded, saying he had been told by Liddell Dunbar not to deal directly with HMRC, and that "Liddell Dunbar have advised that this matter has been referred for ADR". I find as a fact that, as at that date, Liddell Dunbar had not yet informed Mr Cummine that ADR had been refused on 11 November and that the alternative suggestion had been refused on 15 November.

60. On 16 January 2020, ITFSL filed Mr Cummine's Notice of Appeal, including the Application. The grounds of appeal were the same as set out earlier in this decision notice, see §30.

THE LAW

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

The legislation

62. 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."

63. 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

64. 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.

65. 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."

66. 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.'"

67. 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".

68. 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'."

69. 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".

70. 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 MR CUMMINE'S CASE

71. I now apply the three stage approach in *Martland* on the basis of the facts, taking into account the parties' submissions. These submissions were however made in relation to all the Applicants taken together, not in relation to Mr Cummine individually.

The length of the delay

72. The statutory time limit is 30 days after HMRC issued the review decision, see TMA s 49G(5)(2) and (5)(a). Mr Cummine was therefore required to notify his appeal against Mr Mavani's review decision within 30 days of 22 October 2018. His Application were made on 16 January 2020, so almost 14 months late.

73. 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."

74. 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

75. On the basis of the findings of fact, I set out below the reasons for the delay.

Compliance with the deadline in Mr Mavani's letter

76. On 22 October 2018, Mr Mavani issued his statutory review. This said (my emphasis):

> "If I do not hear from you and you do not appeal to the Tribunal within 30 days of this letter, I will assume that 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".

77. It is possible to read the above sentence as saying that if Mr Cummine wrote to Mr Mavani within 30 days, the matter would not be settled under TMA s 54, and that writing to HMRC was an alternative to notifying the appeal to the Tribunal. Mr Cummine wrote to HMRC on 29 October 2018, well within the 30 days mentioned in Mr Mavani's letter. Although as a matter of law that did not satisfy the statutory requirements, Mr Cummine nevertheless did what he understood had been asked of him in Mr Mavani's letter, and this provides a good reason for at least his initial failure to notify.

HMRC's delay in providing the information from the Pension Online System

78. Mr Cummine spoke to Mr Fulwood on 17 January 2019, and asked for a copy of the information from HMRC's Pensions Online System on which HMRC were relying. This was only provided on 18 October 2019. Until then Mr Cummine thought that Mr Fulwood was mistaken for the reasons in his letter of 17 January 2019; this is clear from Mr Cummine's letter of 8 October 2019. HMRC's delay in providing Mr Cummine with the information on which they were relying thus provides him with a good reason up to 18 October 2019.

Reliance on incomplete information about ADR

79. By the time Mr Cummine received the Pensions Online screen shots, ITFSL had applied for ADR. As a result, Mr Cummine said on 22 November 2019 that he was not providing a substantive response to Mr Fulwood's further letter of 15 November 2019.

80. Mr Cummine had not been told that HMRC had already refused both the ADR application and the alternative proposal: this had happened on 11 November 2019 and 15 November 2019 respectively. It was reasonable of Mr Cummine to wait until he had been informed that the process had failed. I have not been told when this was, but have allowed two weeks, to the end of November 2019.

Reliance on advisers generally

81. I have set out in *Adair and Others* why ITFSL's and Liddell Dunbar's reasons for delay were not good reasons, see [81] to [95] of that judgment: those passages are imported into this decision by reference. Mr Cummine relied on those advisers as well as making his own contact with HMRC.

82. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 ("*Hytec*"), the Court of Appeal set out the principles relevant to reliance on advisers. The issue before the Court in *Hytec* 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.."

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

> "We accept HMRC's general point that, <u>in most cases</u>, 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."

84. 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."

85. 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*."

86. 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."

87. 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".

88. 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 Mr Cummine's case took it outside that normal range, and decided that this was the position until the end of November 2019. This was because he made direct contact with HMRC; sought to

ensure that HMRC had relevant information about his position; and did not unquestioningly accept the approach advised by ITFSL and Liddell Dunbar. Instead, he balanced that recommended approach against his own experience of dealing directly with HMRC, which included:

(1) Mr Fulwood's failure to provide the evidence on which he said he was relying until October 2019; plus

(2) in letters to Mr Brothers about Mr Cummine, one of which was copied directly to him by Mr Fulwood, and one of which may have been provided to him by ITFSL, Mr Fulwood said that no appeal had been made against the fixed penalty, despite having already agreed that Mr Cummine's letter of 18 December 2018 was an appeal. Mr Fulwood also referred to charging further daily penalties, when no such penalties had been issued. These mistakes cannot have increased Mr Cummine's confidence in the HMRC process, and made his continued reliance on ITFSL and Liddell Dunbar more reasonable.

The final period of delay

89. Mr Brothers submitted that the two month delay between (a) the formal refusals of ADR and the mediation alternative in mid-November and (b) the filing of the Notice of Appeal in mid-January, was due to the Christmas and New Year period, plus the need to obtain consent from Mr Cummine and the other Applicants to file their Notices of Appeal with the Tribunal.

90. I find that neither the Christmas break nor ITFSL's need to obtain consent from all the Applicants, provide a good reason for the delay. That is because over a year had already passed since the review letters and ITFSL had had plenty of time to obtain the Applicants' consent to notification. There was no evidence before the Tribunal as to when ITFSL communicated with the Applicants, or how they provided consent. In addition, as each Notice 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.

Conclusion on reasons for delay

91. I find that Mr Cummine had a good reason for all but the last six weeks of the delay from the end of November 2019 to the filing of the Application on 16 January 2020.

All the circumstances

92. 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

93. 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]. Although the delay in Mr Cummine's case was around 14 months, there was a good reason for all but six weeks of that delay.

HMRC's approach

94. HMRC bear some responsibility for the delay. Mr Cummine responded to the invitation in the review letter to contact HMRC directly, and HMRC did not point out to him that this was insufficient to meet the statutory requirements to prevent his appeal from being determined under TMA s 54. Mr Fulwood then failed to send Mr Cummine the evidence on

which HMRC were relying until October 2019, despite that having been requested in January of that year. These failures by HMRC to respond to and recognise Mr Cummine's individual position form part of the relevant circumstances.

Reliance on advisers

95. 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."

96. However, the UT 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. In Mr Cummine's the position is also the same as at the second stage, for the reasons set out at §88. I therefore find that some weight can be placed on Mr Cummine's reliance on ITFSL and Liddell Dunbar.

Negotiation

97. 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

98. 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."

99. 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

100. Mr Brothers also 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 the Applicants had all given unchallenged evidence that they were not administrators.

101. In his correspondence with HMRC, Mr Cummine provided further evidence, stating that he had never signed a deed appointing him as scheme administrator. That evidence has

some weight. In addition, Mr Cummine said that in July 2018, Liddell Dunbar had asked that he and the other BPS trustee accept that appointment, but they had declined because they lacked the necessary expertise. I place little weight on that evidence as it is unclear how it reconciles with the scheme having being wound up in March 2018.

102. In any event, Mr Cummine's 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, including Mr Cummine, can only give evidence as to their knowledge, not as to their position as a matter of law.

103. Mr Cummine's other grounds of appeal were set out at §30 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 Mr Cummine and not to BPS, the recipient clearly does exist.

(2) *There is no tax position to check*: HMRC disagree: they say that Mr Cummine is the scheme administrator 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 Mr Cummine is the scheme administrator, he thus has a tax position to check.

(3) *The documents are not reasonably required:* If, as HMRC contend, Mr Cummine is the scheme administrator, 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, Mr Cummine may also have liabilities in his capacity as administrator.

(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 Notice is that its requirements are straightforward and clear.

104. I am thus unable to find that that the merits of the appeal are "overwhelmingly" in Mr Cummine's favour, or that they have any "obvious strength". As a result, the merits do not form part of the balancing exercise.

Before the statutory review

105. Mr Brothers submitted that HMRC had delayed providing the statutory reviews for Mr Cummine and the other Applicants, 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.

106. 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 §22) that ITFSL had asked HMRC for more time to provide submissions and thanked HMRC for waiting to receive them.

107. 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

108. 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.

109. 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

110. 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".

111. 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.

112. In any event, I was unable to identify any "discrepancies in HMRC's paperwork" in relation to Mr Cummine's 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 key factor was that the notice had not been served. The approach taken in *Rashid* is not a relevant factor.

Other prejudice to the parties

113. Mr Brothers also submitted that if the Applications were dismissed, the Applicants, including Mr Cummine, 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.

114. In addition, Mr Brothers said that, if the Applications were to be allowed, this would create little extra work for HMRC or the Tribunal, 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.

115. 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.

116. I therefore accept that if permission were given, the Tribunal and HMRC would be able to add Mr Cummine's appeal to the existing cases with relatively little extra work. This would reduce the cost and effort which would be required. However, there would be *some* extra work for both HMRC and the Tribunal, because a separate case file must be maintained for Mr Cummine in addition to those for the existing appellants. It is also possible that in the course of exchanging evidence for the appeal, other factual or legal 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

117. 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.

118. The following factors favour allowing the Application:

(1) there are good reasons for all but the last six weeks of the delay;

(2) if the Application were to be refused, Mr Cummine would have to incur time and cost in complying with the Notice;

(3) there were shortcomings in the way HMRC dealt with Mr Cummine's case;

(4) some weight can also be placed on Mr Cummine's reliance on Liddell Dunbar and ITFSL; and

(5) it would be relatively simple to list Mr Cummine's appeal with those of the other Individuals whose cases were already in process, so that there would be relatively little extra cost or effort required of HMRC and the Tribunal. This is one of the two factors to which I must ascribe particular importance: in other words, if the Application were allowed, the resulting litigation would be efficiently and proportionately managed, because Mr Cummine's appeal would be added to the cases already before the Tribunal

119. On the other side of the scales is Mr Cummine's failure to meet the statutory time limit. That too is a matter to which I must ascribe particular importance, but I must also take into account that there was a good reason for all but six weeks of that delay.

120. Having carried out the weighing exercise, the balance favours Mr Cummine, and I grant him permission to notify his appeal late.

DECISION AND APPEAL RIGHTS

121. Mr Cummine's Application is allowed. He has permission to notify his appeal late.

122. 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: 12 MARCH 2021