[2021] UKFTT 0094 (TC)

TC08077

PROCEDURE – application to amend grounds of appeal – Quah and Martland considered - application rejected

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06041
TC/2018/06042

BETWEEN

MICHELLE MCENROE
MIRANDA NEWMAN **Appellants**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Application determined on the papers and without a hearing on 30 March 2021

DECISION

INTRODUCTION

1. This is a case management decision. The underlying appeal is against closure notices issued by HMRC to the appellants (or the "**sellers**") on 17 April 2018. By those closure notices, HMRC sought to adjust the amount of capital gains tax ("**CGT**") for which the appellants were liable for the tax year 2013/2014. The adjustment increased the amount of CGT payable by each of the appellants by £52,606.80.

2. On 21 September 2018 the appellants appealed against the closure notices. On 26 February 2021 the appellants formally applied to amend their grounds of appeal. I have to decide whether to allow that application.

BACKGROUND FACTS

3. On 25 October 2013 the appellants entered into a contract (the "**contract**") to sell all of the issued share capital of a private limited company called Kingly Care Partnership Ltd (the "**company**") to Active Assistance Finance Ltd (the "**buyer**").

4. The contract included a number of relevant clauses, one of which identifies the consideration as being £8 million (broadly speaking).

5. At the time of completion of the contract, the company owed the Allied Irish Bank approximately £1.1million (the "**AIB loan**").

6. On completion the buyer (or the buyer's solicitors I am not clear which) transferred an amount equivalent to the AIB loan to the sellers' solicitors who then use that money to discharge the AIB loan.

7. The balance of the consideration payable on completion was paid to the sellers' solicitors who held it on behalf of the appellants.

8. It is the appellants case that they are liable to CGT on the basis that the sale proceeds amounted to the consideration less the amount of the AIB loan (in other words, in round figures, approximately £6.9 million). This is on the basis that the amount of the AIB loan was not taxable consideration in the first place or, alternatively, if it was, it is deductible for CGT purposes. It is HMRC's view that the sale proceeds amounted to £8 million, and the appellants are liable to CGT on that basis. It is for this reason that they have adjusted the amount of CGT payable by the appellants for that tax year pursuant to the closure notices.

9. In the notice of appeal and the accompanying grounds of appeal brought by the appellants on 21 September 2018, the essence of the appellant's appeal was that "we believe that this matter admits of only one conclusion, which is in accordance with both the contractual provisions, the statutory provisions, the economic reality, and common sense. That conclusion is £6,918,863.06 which was the sum received by the Sellers is attributable to the sale of the Shares and the sum of £1,081,136.94 was attributable to the agreed redemption of the Bank Debt, paid at the Buyer's order to the Seller's Solicitor under order to discharge the Bank Debt post completion when all the benefit accrued to the Buyer and not the seller."

10. The appellants brought the appeal following receipt of a review letter (the "**review letter**") from HMRC dated 24 August 2018 which summarises the situation as HMRC saw it,

including a detailed summary of the communications between the parties and the arguments that had been raised by each of them prior to that date.

11. The appeal then proceeded in a conventional manner until the Covid pandemic. Following that and requests from the Tribunal as to whether the parties thought that the appeal might be dealt with without a hearing and on the papers, Judge Geraint Williams issued directions on 5 November 2020 along with a covering letter. The covering letter explained to the parties that, given that they had both agreed to this, the appeal would be dealt with by a paper determination on the basis of written submissions from the parties. The directions directed the appellants to circulate their submissions on or before 19 November 2020. HMRC had a right to reply.

12. The appellant's submissions were sent to HMRC on 20 November 2020. They firstly submitted that as a matter of contractual interpretation, they should be taxed on the consideration less the amount of the AIB loan. However, they then submitted an alternative argument, namely that if the AIB loan was, as a matter of contractual interpretation, not consideration for CGT purposes (or non-deductible) then "the appellants consider that "rectification" of the contract would be appropriate in order that the intention of the parties to the contract is correctly reflected……" (The "**rectification point**").

13. On 25 January 2021 HMRC circulated a document entitled "Respondents submission to appellants statement of case of 20 November 2020" in which they set out their view that the rectification point constituted a new ground of appeal to which HMRC objected.

14. The appellants subsequently responded to those submissions on 26 February 2021 indicating that they were unaware that this rectification point comprised new grounds of appeal and made a formal application that they be permitted to amend their grounds of appeal to include the rectification point (the "**application**").

THE LAW

15. In her decision, in the case of *Tersam Gekhal v HMRC* [2016] UKFTT ("*Gekhal")* 0356, Judge Bailey set out an excellent synopsis of the relevant law which relates to an application for permission to amend a statement of case. I gratefully adopt it and set it out below.

> **"Applications for permission to amend a document**
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> 24. It is clear that the Tribunal has the power to allow a party to amend its case. This is set out in Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Procedure Rules") which provides:
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> > (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
> >
> > (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
> >
> > (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction permit or require a party to amend a document;

25. Rule 2(3) of the Procedure Rules requires us to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.

26. Following the decision of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 we consider it acceptable for the Tribunal to have regard to the approach adopted under the Civil Procedure Rules as useful guidance when considering how to proceed in the Tribunal. In the recent decision of this Tribunal in *Moreton Alarm Services (MAS) Limited v HMRC* [2016] UKFTT 192 (TC), concerning an application made on the first day of the substantive hearing to amend the Respondents' Statement of Case, the Tribunal adopted a similar approach.

27. In Moreton Alarm Services the Tribunal considered and applied the principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). *Quah* concerned an application by the claimant, made three weeks before the first day of the trial, to amend her particulars of claim. At paragraphs 36 to 38 of *Quah*, Mrs Justice Carr set out the relevant principles in determining whether permission to amend should be granted:

> 36. An application to amend will be refused if it is clear that the proposed amendment has no real prospects of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
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> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and

29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

38. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

28. In her submissions on behalf of the Respondents, Ms Lemos took us to extracts from the White Book on civil procedure, setting out guidance in relation to the Civil

Procedure Rules ("CPR") Part 17.3 (concerning amendments to statements of case) and CPR Part 24 (concerning the grounds for summary judgment).

29. Applying the principles set out in *Quah* to the two applications before us, we consider the factors which we should take into account here are:

a) whether the proposed new ground has real prospects of success (and if it does not then that is determinative of the application);

b) the reasons given as to why the application is made now and the explanation given for any delay in making the application;

c) the prejudice which might be caused to the other party if the application is permitted (recognising that there is a limited costs regime and so it would not ordinarily be possible for an award of costs to be made); and

d) the prejudice which might be caused to the applicant if the application is refused.

30. In weighing those four factors our principle objective is to deal with the case fairly and justly.

31. We do not ignore the comments in *Quah* that a heavy burden lies upon an applicant who comes very late in the day to seek permission to amend, and that any application which causes the substantive hearing date to be lost should be considered as being very late. Here the day which was to have been spent hearing the substantive appeals was spent hearing both parties."

16. *Gakhal* was decided before the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 ("*Martland*"). But the principles reflected in the decision are aligned very closely with those set out in *Martland*. Although *Martland* deals with the principles which should be considered on an application to admit a late appeal, they apply to any application which needs to consider relief from sanctions. In this case the appellants are seeking permission to amend their grounds of appeal to include the rectification point; the sanction being not to permit the appellants to do so. The relevant passage from *Martland* is set out below:

"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

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

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

17. I therefore propose to adopt the principles set out by Judge Bailey in *Gakhal*. I shall however consider the length of any delay and whether it is serious and significant, and I shall bear in mind that when I am considering the balance of prejudice, which equates, in my view, to the third *Martland* criterion of an evaluation of all the circumstances of the case, and the balancing exercise which essentially assesses the merits of the reasons given for the application and the prejudice which might be caused to both parties by granting or refusing permission, I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate costs, and for statutory time limits to be respected.

SUBMISSIONS

18. In their submissions circulated on 20 November 2020 in which they first raised the rectification point, the appellants make the following points in support of it: they cite the case of *Lobler v HMRC* [2015] UKUT 152 ("*Lobler*") as authority that the First-tier Tribunal, whilst it has no power to order rectification, may deal with a tax case on the basis that if rectification would be granted by a court with that jurisdiction, a taxpayer's tax position would follow as if such rectification had been granted; the principles of rectification were summarised in *Investec Bank (UK) Limited v Zulman* [2009] EWHC 1590. Those principles

are; (i) it is a form of relief which corrects a written agreement which does not reflect the true terms of an agreement between the parties (ii) there must have been a continuing common intention relating to the relevant contractual provision (iii) the written agreement fails to properly record the agreement between the parties because of a common or unilateral mistake (iv) if corrected the written agreement would accurately reflect the agreement between the parties, and (v) convincing proof is required to counteract the cogent evidence of the parties intention as displayed by the contract itself; certain clauses of the contract could and should be amended to reflect the reality of what was intended by the parties, including the consideration clause, the clause dealing with the repayment of the AIB loan and clauses dealing with the redemption of that loan and for completion accounts; the appellant's professional advisers may not have taken adequate care in the drafting of the contract to unambiguously reflect the intentions of the parties.

19. In their submissions of 25 January 2021, HMRC submit as follows: The Tribunal should consider the application in light of the principles set out by the Upper Tribunal in the case of *Martland*; the delay should be considered by reference to the period which is permitted for lodging an appeal; the appeal was lodged on 21 September 2018 and the application, at its earliest, was made on 20 November 2020; that delay is serious and significant; the appellants have provided no good reasons for the lateness; litigation should be conducted efficiently and at proportionate cost and statutory time limits should be respected; the Tribunal should give considerable weight to this proposition; the appellants have failed to comply with a relevant statutory time limit, namely to set out its full grounds of appeal in its original appeal; they have only done this two years after they should have done; if the application is allowed HMRC will be prejudiced as they will have to divert resources to defend an appeal which they were entitled to consider had already been addressed in earlier submissions; other taxpayers would also be prejudiced as HMRC's and the Tribunal's resources which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits will be diverted to consider this appeal; the balance of prejudice weighs in favour of rejecting the application given that even though the appellants will not be permitted to raise the rectification point, that does not outweigh the weight of the foregoing factors such as delay and paucity of reasons; the Tribunal does not need to carry out a detailed evaluation of the merits of the underlying appeal, but to the extent that the merits should be considered, the appellants case is weak as no reasonable explanations for the delay have been provided.

20. In the application the appellants submit that: the appeal was not late and was brought within the statutory period in September 2018; they state that "the reason for the amendment is that legal advice that the equitable remedy of "rectification" was only provided to them in April 2019 and the decision of [*Lobler*] together with its high level of significance to the appeals was only brought to their attention, and to the attention of [their representatives], in October 2020" ; HMRC have provided no evidence for their assertion that their case is weak; even though litigation should be conducted efficiently and at proportionate costs, there are circumstances where the interests of justice require a Tribunal to allow an appellant to run an arguable point of law in view of its importance to an appellant's case.

DISCUSSION

21. I turn first to the merits of the rectification point since unless it has a real prospect of success, I must reject the application. The test, as set out in *Quah* is whether the point is arguable or better than arguable, or, to the contrary, whether it is inherently implausible, self-contradictory or unsupported by contemporaneous documentation.

22. The difficulty I face is that neither party has recognised the importance of *Quah*, and so neither party has dealt, head on, with the issue of whether the appellant's rectification point is arguable or better than arguable.

23. HMRC have simply stated that, in their view, to the extent that the merits of the case should be considered, the appellants case is weak. But I do not think that they are referring here to the merits of the arguments in favour of the rectification point. The justification for this statement is "as no reasonable explanations for the delay have been provided". Whilst this might be relevant to the second stage of the *Martland* test, I cannot see that it justifies a conclusion that the rectification point is implausible self-contradictory or unsupported by contemporaneous evidence.

24. But the appellants do not set out clearly what they believe to be the strength of the rectification point and why it is arguable or better than arguable. Indeed they have asserted that rectification is governed by certain principles, one of which is that convincing proof is required to counteract the cogent evidence of the parties intention as displayed by the contract itself. Yet they have not set out, in their application, the nature of that cogent evidence.

25. However I do think that I have sufficient evidence before me on which to come to a conclusion on this point. That evidence is set out in the correspondence between the parties as evidenced in the review letter, the grounds of appeal, and in HMRC's statement of case. This evidence is that the AIB loan was not paid by the buyer or the buyer's solicitors to the sellers' solicitors as agent for the sellers, but instead was held by the sellers' solicitors against what I suspect was an undertaking, to use that money to discharge the AIB loan. And this would accord with commercial reality since in these circumstances, a purchaser is keen to ensure that when it acquires a company and the deal is that an outstanding loan must be repaid, the purchaser would want to pay the amount necessary to discharge that loan to the debtor (in this case the company) against an undertaking by the sellers' solicitor, in this case acting on behalf of the company, to use the funds to discharge the outstanding debt (in this case the AIB loan). And a properly drafted share sale and purchase agreement would reflect this. And in these circumstances a properly drafted consideration clause would not include the amount required to discharge the loan (in this case the AIB loan) and would, usually identify the consideration payable for the sale of the shares as being the price less the amount required to discharge the debt There would then be a condition, usually in the part of the contract which deals with what happens at completion, that at completion the funds paid to the sellers' solicitors to discharge the debt (in this case the AIB loan) would be paid to the creditor at completion. As I say, the evidence is that the AIB loan was paid to the sellers' solicitors who discharged the AIB loan, but the consideration clause in the contract identified the consideration as being the gross amount of £8 million rather than the net amount of approximately £6.9 million.

26. It is true that, as have I mentioned above, the appellants have not specifically led any evidence which could comprise convincing proof, as part of their application, to counteract the terms of the contract itself. But the fact of the cash flow set out above is sufficient for me to conclude that the rectification point is arguable and is not inherently implausible self-contradictory or unsupported by contemporary evidence. I can see the contract may not reflect the terms of the real agreement which was made between the parties in October 2013 as a result of a mistake by the parties or the parties representatives.

27. However if the appellants are to succeed on the rectification point, they will have to adduce convincing proof of the real agreement and any mistake. This is an important and significant point and one to which I return at the final evaluation stage, below.

28. I am therefore satisfied that the rectification point passes the first limb of the *Quah* test, and I must now go on to consider the remaining limbs in light of the *Martland* principles I have set out above.

29. It is my view that notwithstanding that the parties have agreed, and the Tribunal has directed, that the appeal is suitable for a paper determination, the application is very late. Usually an application will be deemed to be very late where a trial date has been fixed and where permitting an amendment would cause the trial date to be lost. That is not the case here since there is no fixed trial date, but that is because the hearing is not to be held either face-to-face or by way of a video link. However the directions given by Judge Williams on 5 November 2020 were, essentially, to deal with the final submissions of the parties which will be used by the Judge to make the paper determination. Those submissions are, in essence, the final stage in the process beginning with the making of the appeal in September 2018, and its determination, on the papers, (which, were it not for the application to amend, would in my view have very likely taken place already).

30. I turn first to the length of the delay and the consideration of whether it is serious and significant. It is HMRC's view that the starting point for this consideration is the date of the original appeal, namely 21 September 2018, and so the delay is more than 2 years. I do not think this is right. The delay must be tested against the date on which the appellants first became aware that their original grounds of appeal were inadequate and of the rectification point. The appellants unchallenged evidence on this, set out in the application is that the legal advice that the equitable remedy of rectification should be considered was provided to them in April 2019, and the case of *Lobler* together with its significance to the appeals was only brought to their attention in October 2020. It is these dates which I believe are relevant to the consideration of delay.

31. If legal advice was given to the appellants in April 2019 that "the equitable remedy of 'rectification' should be considered by the appellants…." as is stated in the application, then the delay in bringing the rectification point is clearly serious and significant. The rectification point was not raised until November 2020, a delay of some 18 months. The appellants have given no explanation as to why if that legal advice was provided in April 2019, its significance to the appeals was only brought to their attention, and indeed to the attention of their representative, in October 2020. No reason has been given for this delay. Nor why, if they did not tell their representative of their legal advice in 2019, why they did not do so. And it seems to me that if legal advice was given in April 2019 that they should consider the rectification point, then they should have done so with greater alacrity than is evidenced by their delay in making their application to amend the grounds of appeal in November 2020. If they had not told their representative, they should have done so, and if they had told their representative, why did that representative not act on that information.

32. Nor have the appellants given any explanation as to why the *Lobler* decision and its significance was only brought to their attention, and the attention of their representative, in October 2020. I am surprised that the legal advice given in April 2019 did not mention *Lobler* given that it is an important case on rectification.

33. To my mind if the appellants were given legal advice in April 2019 which on their evidence was that the equitable remedy rectification should be considered by them, and did not act on that until November 2020, that is a serious and significant delay.

34. I now turn to the second *Martland* criterion, namely the reasons for the delay. HMRC's view is that no reasonable explanation for the delay has been given albeit that they are considering the delay between the date of the appeal and November 2020. As I have said, I think this is not the correct period, but I agree with HMRC that no satisfactory reason has been given by the appellants for the delay between April 2019 and November 2020 in making an application to amend the grounds of appeal to include the rectification point. In the application, the appellants assert that the *Martland* criteria are not applicable. Yet this is incorrect for the reasons I have given above. It is clearly important that an application to amend grounds of appeal includes an explanation as to why that amendment is only being made at the date of the application. The appellants have explained that it only became aware of the rectification point in April 2019, and sought to justify the application in November 2020 on the basis that *Lobler* and its high level of significance was only brought to their attention in October 2020. But no explanation has been given as to what happened in the intervening period, and why they did not act on the April 2019 legal advice at that time. I do not consider that the failure to appreciate the significance of *Lobler* until October 2020 is a good reason for having failed to act on the April 2019 legal advice and make an application to amend their grounds of appeal to include the rectification point well before November 2020.

35. I now turn to the final stage of the *Martland* analysis, namely an evaluation of all the circumstances. This involves a balancing exercise, assessing the merits of the reasons given for the delay and prejudice which would be caused to both parties; and I should take into account the particular importance of the need for litigation to be conducted efficiently, at proportionate costs and for statutory time limits to be respected; I can also have regard to any obvious strengths or weaknesses of the appellant's case.

36. I have also concluded that this is a very late amendment and thus a heavy burden lies with the appellants to justify why they should be able to proceed with the rectification point. They need to show the strength of their case and why justice to them and to HMRC and other court users require them to be able to pursue it.

37. I have concluded, too, that the appellants have passed the first limb of the *Quah* test, namely that the rectification point is arguable, and is not inherently implausible, self-contradictory or unsupported by contemporaneous documentation.

38. However, in having regard to any obvious strengths or weaknesses of the appellant's case, I am conscious that they must provide convincing proof of the fact that the contract fails to reflect the true agreement between the parties as at October 2013 and that that failure arises from a mistake, either a common mistake or a unilateral mistake, by them or their representatives. I have seen no such convincing evidence, and without it I cannot move from my conclusion, in favour of the appellants, that they have an arguable case, to a further conclusion, also in their favour, that it is an obviously strong one. Whilst arguable, its success will depend very largely on the detailed documentary and oral evidence from the relevant parties. And in order to provide this, I suspect that the appellants will need to go back to their original advisers and to obtain evidence from them, both by way of witness statements and subsequently, at the hearing, by way of oral evidence, as to all the circumstances surrounding the deal for the sale of the shares in the company.

39. I do not know whether that evidence will support the rectification point. What I do know is that it will have a very significant impact on these proceedings and the form of the hearing. Any such evidence will require to be tested by HMRC, and it is likely that this will mean that the appeal is unsuitable for paper determination and should be conducted by way of a face-to-face or video hearing. It will considerably lengthen the proceedings and increase their cost both in time and money. I appreciate that had the rectification point been raised in the original grounds of appeal, then the proceedings and the nature of the hearing would have catered for the additional evidence and an examination of it. So that in the long run, no overall prejudice to the administration of justice could be said to have arisen by the late application for inclusion of the rectification point in the appellant's case. But we are where we are on the basis of the appellants original grounds of appeal and a change in procedural tack will inevitably result in, at the very least, administrative inconvenience. In this case it will require a complete overhaul of the case by both parties.

40. And it will considerably prejudice HMRC in the sense that they will now have to consider an entirely new case which includes new evidence, at a time when they could quite justifiably have concluded that the only issue was one of contractual interpretation, and indeed it is on this basis that they agreed to a paper determination.

41. The appellants argued that there are circumstances where the interests of justice militate towards allowing appellants to amend their grounds of appeal to raise a point of law which had not been made in good time given its importance to an appellant's case. But that submission was based on case law which predates *Martland* and *Quah,* and both of those cases illustrate that, when weighing the balance of prejudice and evaluating all the circumstances, an opportunity of running a meritorious technical argument may be outweighed by other factors including the length of the delay in bringing forward the point and the lack of reasons for doing so.

42. Indeed it is clear from the *Martland* line of cases, and in particular from the Upper Tribunal decision in *HMRC v Katib* [2019] STC 2106 that the financial hardship of depriving an appellant an opportunity to bring an appeal because that appeal was brought late, even if in those circumstances the financial consequences were such that he would lose his home, were not sufficient to weigh the balance of prejudice in favour of permitting a late appeal. The Upper Tribunal indicated that hardship was a common feature which could be raised by many appellants, and in the circumstances of that case it could not be given sufficient weight to overcome the difficulties posed by the fact that the delays were very significant and there were no good reasons for them.

43. I have concluded that the length of the delay in bringing forward the rectification point is serious and significant, and that the appellants have given no good reasons for that delay.

44. If I reject the application then the appellants may suffer financially as they will lose the opportunity of running an alternative argument which is not unarguable. And so will be prejudiced. But that loss of opportunity and the possible financial detriment which may result does not have sufficient weight to overcome the difficulties posed by the fact that I have concluded that the length of the delay in bringing forward the rectification point is serious and significant, and that the appellants have given no good reasons for that delay.

45. Finally, this application must be seen in the context of the admonition in *Quah* that a much stricter view is taken nowadays with the non-compliance; parties can no longer expect indulgence if they fail to comply with their procedural obligations; and, in the language of

Martland, when undertaking an evaluation of all the circumstances of the application and undertaking a balancing exercise which essentially assesses the merits of the reasons given for the late application and the prejudice which might be caused to both parties by granting or refusing permission, I should take into account the particular importance of the need to comply with directions and time limits; and that litigants should be able to obtain justice efficiently and proportionately and that the court should enable them to do so.

46. When considered from this viewpoint, I have no hesitation in concluding that given; to succeed on the rectification point the appellants will need to adduce convincing evidence which establishes that the contract fails to reflect the agreement between the parties as at October 2013, and that failure is a result of a mistake, and the appellants have provided no details of the evidence that they will so adduce and so have not been able to convince me of the strength of their case; that it is my view that any such evidence is likely to have a very serious impact on the nature and timing of the hearing of this appeal; the serious and significant delay between April 2019 and November 2020 in raising the rectification point and seeking to amend their grounds of appeal; and the inadequacy of the reasons given for that delay, the balance of prejudice weighs heavily in rejecting the appellant's application.

DECISION

47. I reject the appellants' application that they should be entitled to amend their grounds of appeal by including the rectification point. The grounds of their appeal, therefore, are restricted to those set out in the original grounds of appeal dated 21 September 2018 as supplemented by paragraphs 1-23 a) – e), 24, 26 -31 and 33-34 of the appellant's submissions made pursuant to the Tribunal's directions of 5 November 2020 which were emailed to HMRC on 20 November 2020. They shall not be entitled to raise or argue the rectification point at the hearing or paper determination of this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 07 APRIL 2021