[2022] UKFTT 00121 (TC)

TC 08452

INCOME TAX – penalties for late filing and late payment of tax – appeal against penalties dismissed in full – subsequent application by Appellant for award of wasted costs against three HMRC officers – whether extension of time should be granted to make such application, Martland considered – no – whether wasted costs order can be made against persons who are not members of a legal professional body – no – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2021/00038

BETWEEN

PAUL OWEN **Applicant**

-and-

1) KA SHUN LO
(2) VALERIE ANDERSON
(3) MARGARET EARING **Respondents**

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the application on 30 March 2022 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis that a paper hearing would be in the interests of justice and neither party objected to this treatment.

DECISION

INTRODUCTION

1. This decision concerns an application for wasted costs made by the Appellant on 11 February 2022. This application is made against three named HMRC officers and was filed with the Tribunal almost five months after my decision in *Paul Owen v HMRC* [2021] UKFTT 0335.

2. In that decision (the "2021 Decision"), I dismissed the Appellant's appeal against three penalties. Those penalties, totalling £198, were imposed for the Appellant's late submission of his tax return for 2018/19 (one penalty of £100), and for the Appellant's late payment of an additional £997 tax due under that tax return (two penalties of £49 each).

3. The 2021 Decision on penalties contained an extensive case history to which it will be necessary to make some further reference during this decision. It will also be necessary, in this decision, to set out the detail of events that followed the issue of the 2021 Decision.

SUMMARY OF MY CONCLUSIONS IN THIS DECISION

4. As this decision is lengthy, it is appropriate for the benefit of the parties to set out my conclusions at the outset:

   (1) the Appellant's application for permission to make a costs application out of time is dismissed; and (in case I am wrong in my decision on the application for an extension of time)

   (2) the Appellant's application for wasted costs is dismissed.

5. The reasons for each of these decisions are set out below.

STRUCTURE OF THIS DECISION

6. There are two sections to this decision. The first section concerns the Appellant's application for permission to make an application for wasted costs out of time, and the second section concerns the substance of the Appellant's application for wasted costs against the three Respondents who are all officers of HMRC.

7. In reaching my decisions on these applications, I have taken into account everything drawn to my attention in the parties' written submissions. It is however inevitable, given the detail of the arguments and given the quantity of material before me, that not everything in the application and voluminous submissions can be given specific mention in this decision.

SECTION 1 – APPLICATION FOR PERMISSION TO MAKE AN APPLICATION OUT OF TIME

8. It is helpful to start with a chronology of the events from the release of the 2021 Decision, making any necessary findings of fact, before moving on to the relevant Tribunal rules and the case-law relevant to applications for an extension of time.

Factual background

9. On the basis of the documents before me I make the following findings of fact:

10. At approximately 9 am on 14 September 2021, the 2021 Decision was released to the parties by the Tribunal clerks. The 2021 Decision was a full decision, as stated at the conclusion of the decision. In the Tribunal's covering letter, it was also stated that the decision released was a full decision, and that letter also explained how a party could appeal and the relevant time limit for seeking permission to appeal.

11. The 2021 Decision was emailed to both parties under cover of separate emails. Although the Appellant was, and is, willing to use email in his communications with the Tribunal, he refuses to use email in communications with HMRC. The Appellant has explained that he is

concerned that, if HMRC have his email address, he is liable to fall victim to phishing emails from fraudsters pretending to be HMRC. Therefore, communication between the Appellant and HMRC – when it occurs – is by post.

12. At approximately 9 pm on 14 September 2021, the Appellant emailed the Tribunal:

> "I would like to ask for a review of this decision based upon a small but significant error of law, which would be likely to misinform and mislead taxpayers suffering similar failures in the processing of their data."

13. The Appellant continued by noting that in the 2021 Decision I had referred to the fact that the Appellant could himself raise any concerns he had about HMRC's data handling with the Information Commissioner's Office (the "ICO") but that I would not make a referral. The Appellant's concerns about HMRC's data handling had apparently arisen out of what I concluded was a mistake in a letter from HMRC dated 23 December 2020 sent to the Appellant. In that letter two mutually contradictory statements were made about whether the Appellant had, by that date, paid all of the tax due from him for 2018/19. The mistake post-dated all relevant events and was not relevant to the decisions made in the 2021 decision.

14. In his 14 September 2021 email, the Appellant noted that the ICO did not have the power to award compensation or provide any other remedy for the mishandling of data, and he quoted a passage from the ICO's website which suggests that a person who had suffered loss by reason of data mishandling by an organisation, and who was not offered compensation by that organisation, would have to pursue their remedy in court. There are links on the website page to the civil courts in the UK. There is no suggestion on the ICO website that a person should seek compensation by commencing an appeal to a tribunal.

15. The Appellant continued:

> "The ICO therefore instead advises that any remedy for damages (such as those the Appellant suffered because of HMRC's processing errors) must be pursued through the Courts and Tribunal Service, which is what the Appellant did."

16. If the Appellant had misunderstood the ICO website, and incorrectly believed that compensation for what he believed was the mishandling of data by HMRC could be achieved through an appeal to the First-tier Tribunal against penalties imposed by HMRC, then it is odd that the Appellant did not ask the Tax Chamber to award him compensation because of that alleged data mishandling.

17. The 2021 Decision made no reference to the possibility of compensation being awarded by the ICO or indeed any outcome from a referral to the ICO.

18. On 21 September 2021, the Appellant sent a further email to the Tribunal. This email took a very different tack to the Appellant's 14 September 2021 email, and (as it has transpired) was the beginning of the Appellant's current focus.

19. Attached to the Appellant's 21 September 2021 email was a copy of a letter dated 27 October 2020, that was marked "Official-Sensitive". I take judicial notice of the fact that current Cabinet Office guidance provides that there are currently three levels of security classification, of which "official" is the lowest. It is a classification that applies to the majority of information that is created or processed by the public sector, including routine business operations and services. "Sensitive" is not a security classification but a handling caveat for certain information, including personal data.

20. The Appellant made no reference to the "Official-Sensitive" marking when providing the document to the Tribunal.

21. This letter was written by Ms Earing, the Third Respondent, to a person called Ceri. The Appellant states that the letter was provided to him by the ICO and, on the balance of probabilities, I find that Ceri worked for the ICO. This letter (the "Earing letter") contains HMRC's response to questions posed to them by the ICO. In the Earing letter, the Third Respondent confirms that:

(1) HMRC knew the Appellant's level of employment income from payroll data supplied by his employer in the period 2012 to 2019, and

(2) HMRC had not notified the Appellant of his liability to the High Income Child Benefit Charge ("HICBC") prior to September 2019.

22. The Appellant's email of 21 September 2021 to the Tribunal began:

> "The attached evidence was not able to be considered by this Tribunal, as its pursuance was subject to the stay of proceedings on TC/2020/01953. If I had pursued this evidence while that Appeal was stayed, wasteful extra costs (to be claimed under Section 29 of the Courts, Tribunal and Enforcement Act) would have been incurred."

23. Appeal TC/2020/01953 (the "2020 appeal") is an appeal brought by the Appellant against assessments to tax for tax years 2012/13 to 2017/18, raised to collect the High Income Child Benefit Charge ("HICBC"), and related penalties. The 2020 appeal is currently stayed behind the appeal of *Wilkes*, and it was stayed behind *Wilkes* on 21 September 2021. The appeal that was concluded by the 2021 Decision has always been a separate set of proceedings, and has not been subject to a stay. The Appellant did not explain why a stay in separate set of proceedings should prevent him from disclosing a document in the appeal that concluded with the 2021 Decision.

24. The Appellant's email of 21 September 2021 then made an allegation that HMRC officers had intentionally misled the Tribunal. He continued:

> "This evidence shows that not only was HMRC fully aware of the Appellant's liability to self assessment as early as 2012 but that the tax assessments which were the subject of this Hearing are shown to be fabrications (and wholly unnecessary as HMRC now admits to have been in full possession of all information necessary to calculate the Appellant's liability to HICBC since 2012)."

25. As set out above, the 2021 Decision was only concerned with the Appellant's appeal against one late filing penalty and two late payment penalties. There were no assessments to tax in issue in the 2021 proceedings.

26. The Appellant's 21 September 2021 email continued with the Appellant arguing that HMRC were in contempt of court, and that the Earing letter should influence me to overturn the decisions I had reached in the 2021 Decision. The Appellant stated that he would also refer the matter to the Attorney General's Office.

27. The Appellant's emails of 14 and 21 September 2021 were both referred to me. I considered the 2021 Decision afresh in the light of both of those emails. In respect of the complaint in the 14 September 2021 email, I noted that the 2021 decision was correct in its references to a person being able to make a referral to the ICO, and that there were no references in the 2021 decision to the ICO awarding compensation. I concluded that the 2021 Decision was neither inaccurate nor misleading.

28. In respect of the complaint in the 21 September 2021 email, I noted that the Appellant was referring to a document that was apparently in his possession prior to the hearing and which he seemed to consider relevant to his appeal against the late filing and late payment

penalties, but that he had chosen not to disclose to the Tribunal or HMRC prior to the release of the 2021 Decision. The Appellant did not appear to have met the criteria for the admission of fresh evidence on appeal, if that was the intended reason for the Appellant providing the Earing letter to the Tribunal.

29. The Tribunal wrote to the Appellant, on my instructions on 1 October 2021. In that letter I explained that a review was possible only as part of considering an application for permission to appeal, and I asked the Appellant to let the Tribunal know whether he wished to make an application to have the 2021 Decision set aside, or whether he wished to seek permission to appeal against the 2021 Decision. In this letter the Appellant was also informed that copies of both of his emails had been sent to HMRC, and the Appellant was reminded that all correspondence that he sent to the Tribunal should also be copied to HMRC.

30. The Appellant made no reply to that letter.

31. At about this time a series of emails were sent to the Tribunal by the Appellant for the attention of the Tribunal President, Judge Sinfield. The Tribunal file (which is primarily concerned with the appeal proceedings, rather than satellite matters) does not have copies of all of those communications but does contain records of the following correspondence and documents. I have recorded these below, with details where relevant.

Date	*Type of document*	*From*	*To*	*Summary of contents*
1 October 2021	Application for contempt	Appellant	Judge Sinfield	Unknown as no copy of this document is available on the Tribunal file
6 October 2021	Email	Appellant	Judge Sinfield	The Appellant thanked Judge Sinfield for his response but declined the apparent suggestion that the Appellant seek permission to appeal the 2021 decision if he considered that decision wrong in law. The Appellant stated he did not believe an appeal this would address the contempt he understood he had identified.
14 October 2021	Email	Appellant	Judge Sinfield	This is set out in more detail below
1 November 2021	Email	Appellant	Judge Sinfield	Chasing a response to his earlier email
1 November 2021	Emailed letter	Tribunal	Appellant	This is set out in more detail below
2 November 2021	Email	Appellant	Judge Sinfield	This is set out in more detail below
9 November 2021	Email	Appellant	Judge Sinfield	The Appellant requested Judge Sinfield direct the First and Second Respondents to provide a response to the Earing letter within 1 week
12 November 2021	Email	Tribunal	Appellant	Judge Sinfield repeated that it would be inappropriate for the Tribunal to become involved in matters outside its jurisdiction

12 November 2021	Email	Appellant	Tribunal	This is set out in more detail below
17 November 2021	Email	Appellant	Tribunal	Chasing a response to his earlier email
17 November 2021	Email	Tribunal	Appellant	This is set out in more detail below
17 November 2021	Email	Appellant	Tribunal	This is set out in more detail below

32. It is necessary to set out more detail of some of the correspondence noted above. In the Appellant's 14 October 2021 email sent for the attention of Judge Sinfield, the Appellant began by thanking Judge Sinfield for his explanation that the Tribunal has no enforcement power for contempt. After a long explanation from the Appellant of how he had reached his conclusion that either the Third Respondent had provided false evidence to the ICO, or the First and Second Respondents had provided false evidence to this Tribunal, and how this latter event constituted a contempt upon the Tribunal, the Appellant suggested what he considered to be a solution to the contempt he believed he had identified:

> "Finally, I remain optimistic that this Tribunal does have the means to resolve this matter within FTTT Rules. I will now propose a two stage process for remedy of this matter.
>
> 1. Under Part 2 of the FTTT Rules, an Order for Costs can be made by any party, or by the Tribunal, "if the Tribunal considers that a party of their representative has acted unreasonably in bringing, defending or conducting the proceedings;". I would like to submit that by failing to disclose their prior knowledge of my liability to HICBC since 2012 as detailed in the ICO evidence, that the Respondent has acted unreasonably, in both Appeals. Furthermore, in TC/2020/0593 and in TC/2021/00038 that as the Respondent knew to be, could reasonably have expected to know or has by negligence submitted false evidence in both Appeals that they have also acted unreasonably. Under this resolution, the matter of whether the submit the alleged false statements to the police would (as suggested above) be for the Tribunal to decide upon alone. It could be that HMRC will object to this conclusion and make representations to the contrary. In that case those representing HMRC in both appeals must sincerely believe that they have no case to answer for these alleged criminal offences. If that is the case, I will progress this matter to the second stage. Or it could be that this Tribunal rejects this proposed resolution or rejects the application for costs. If that is the case, I will also progress this matter to the second stage, which is:
>
> 2. This matter is put before the Attorney General and the police to pursue according to the evidence, the accused being [the HMRC officer presenting the 2020 appeal] and [the Second Respondent] as authors of the allegedly false statements tendered as evidence.
>
> I understand that as part of this proposed remedy, I will need to assemble a Schedule of Costs for each appeal. These costs would be quite modest for TC/2021/00038 and can be assembled quickly. … The wasteful costs for both appeals are likely to exceed the amounts under each Appeal but not by a significant margin. They would also be fully itemised for the Tribunal's scrutiny.
>
> I respectfully and humbly offer this as a resolution to this matter. I note that time may be a factor here. …

…

> I would therefore be very grateful for Judge Sinfield's thoughts on this proposed remedy and the questions I have posed above in this case."

33. It is unclear how an award of costs in favour of the Appellant could cure a contempt of the Tribunal that the Appellant alleged had been committed by (at least) two HMRC officers, or why it would no longer be necessary for the Appellant to report that very serious allegation to the police or the Attorney General's Office.

34. Nevertheless, it is clear from this 14 October 2021 email that, by this date, the Appellant had made sufficient reference to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") to understand that Paragraph 10(3)(b) required any application for costs to be accompanied by a Schedule of Costs. The Appellant also seemed to be aware that there was a time limit for making an application, and that he should act quickly.

35. In a letter sent to the Appellant on 1 November 2021, Judge Sinfield made clear that the Tribunal had no enforcement powers, and that he expressed no view on the alleged dishonesty. Judge Sinfield stated:

> "The Tribunal is not in a position to have a concluded view on whether HMRC staff dishonestly made false statements and, in such circumstances, it would not be right to make allegations to the police or impose any sanction."

36. It is clear from that sentence that the Tribunal was not going to contact the police, or take any other action, in respect of the Appellant's allegations of contempt.

37. The Tribunal's letter concluded:

> "[the Applicant] refers to a possible application for costs based on unreasonable conduct. If he makes such an application it should be referred to Judge Bailey as the judge who dealt with the substantive appeal."

38. There was no other reference to costs in Judge Sinfield's 1 November 2021 letter.

39. In his 2 November 2021 email to the Tribunal, the Appellant set out his understanding that the police had already concluded that:

> "HMRC's persistent efforts to conceal the evidence that the ICO provided to this Tribunal (which the ICO provided to me without notifying HMRC, as required by law) amounted to criminal intent to deceive me as an Appellant and this Tribunal.
>
> The police did not open a criminal investigation speculatively – they did so based on that evidence already in the Tribunal's possession. The police (and my) reluctance to intervene has been to ascertain HMRC's full motive behind concealing the evidence that HMRC had prior knowledge of liability to HICBC – which it now transpires was to gain a legal advantage in these proceedings. …
>
> I have not updated the police since Judge Bailey's Decision. I note those proceedings in TC/2021/00038 are already concluded and the ICO's evidence has been in HMRC's possession for over a month without response. I will therefore now await HMRC's reply to the ICO's evidence and the Tribunal's judicial response. I will also prepare the Schedule of Costs …"

40. The Appellant does not state the date on which he contacted the police but, if he had not updated them since the release of the 2021 Decision, then it follows that he must have reported his allegations to them before 14 September 2021. It must also be the case, given the Appellant's description of the police response, that the police had also been provided with a copy of the Earing letter when the Appellant made his report.

41. In his 12 November 2021 email to the Tribunal the Appellant wrote:

> "I would like to know when [the First and Second Respondents] will answer to the false evidence that they submitted in the tainted TC/2021/00038 appeals and when the assessment for referral to the police by the Tribunal will be completed.
>
> I have no option but to continue to accrue wasted costs until that determination is reached."

42. It is unclear why the Appellant thought the Tribunal might make a referral to the police, given that Judge Sinfield had made it clear in his 1 November 2021 letter that no action would be taken, or why the Appellant considered another referral to the police was required, given the Appellant's statement that the police had already opened an investigation upon a referral that he himself had made.

Appellant's first attempt to make a costs application

43. At about 12:30 pm on 17 November 2021, the Appellant filed his first application for wasted costs. The Respondents to this application were HMRC, but the application was expressly not copied to them. This first application was subsequently referred to me as the judge who had made the 2021 Decision.

44. About three hours later on 17 November 2021, the Tribunal conveyed Judge Sinfield's response to the Appellant's earlier emails. Judge Sinfield was not made aware at that time that a costs application had been made. In that email, Judge Sinfield made it clear to the Appellant that there was no question of re-opening the appeal concluded by the 2021 Decision, and that if the Appellant considered the 2021 Decision was wrong in law then he should make an application in writing for permission to appeal, within 56 days of the 2021 Decision having been released. The letter dictated by Judge Sinfield concluded:

> "As I have also tried to explain previously, [the Appellant] must pursue any remedy other than an appeal elsewhere. There is nothing further to say on this subject and I will not respond to any further correspondence in relation to HMRC's alleged misconduct or any possible grounds for contempt."

45. The Appellant replied to Judge Sinfield's 17 November 2021 later on the same day by noting that the deadline for him to make an application for permission to appeal to the Upper Tribunal had expired on 9 November 2021, and that he hoped the Tribunal staff would give their full co-operation to the police.

46. On 29 November 2021, the Tribunal wrote to the Appellant at my request in response to his first application for wasted costs. In this letter I drew the Appellant's attention to paragraphs (3) and (4) of Rule 10. (The Appellant's earlier references to a Schedule of Costs showed that he was already aware of, at least, Paragraph 10 (3) of the Tribunal Rules but I had not, at that time, seen that part of the Appellant's correspondence.)

47. In the Tribunal's 29 November 2021 letter, I explained to the Appellant that an application for costs must be sent to the person against whom it was proposed that an order be made, and that, as more than 28 days had passed since the release of the 2021 Decision, the Appellant must also explain why his application was made late. I concluded that the application filed on 17 November 2021 could not be considered.

Appellant's second attempt to make a costs application

48. Later on 29 November 2021, the Tribunal received the Appellant's second attempt at an application for wasted costs. This application was redacted to such an extent that it was unintelligible. In a covering email with this application the Appellant explained his delay in making this application on the basis that it was not until 1 November 2021 that Judge Sinfield

had offered the response that it would be appropriate for the Appellant to make an application for costs. I do not accept that this is an accurate interpretation of the correspondence set out above.

49. The Tribunal clerks did not refer the Appellant's heavily redacted application to a judge but instead, on 3 December 2021, the Tribunal clerks asked HMRC to comment upon the redacted application filed by the Appellant.

50. The Appellant had made a parallel application for costs in the 2020 appeal with a similarly redacted application having been filed. However, in the 2020 appeal, the Tribunal clerks referred the Appellant's redacted application to me. On 13 December 2021, acting on my instructions, the Tribunal wrote to the Appellant in the 2020 appeal to inform him that the Tribunal Rules required the application for costs not to be redacted so that the person against whom it was proposed the order be made had the opportunity to fully respond.

51. On 16 December 2021, the First Respondent emailed the Tribunal with regard to the current proceedings and in response to the Tribunal's 3 December 2021 letter. The First Respondent asked that the Appellant be directed to provide an unredacted copy of this application, as had happened in the 2020 appeal, so that HMRC were able to respond properly.

52. On 29 December 2021, the Appellant emailed the Tribunal. In a lengthy statement, not copied to HMRC, the Appellant stated that "following disclosure" of the 2021 Decision he had noticed that the First and Second Respondents had made "untruthful and misleading statements in their tendered evidence" in respect of his liability to the HICBC and in respect of concealing evidence from him. I find that this sequence of events proposed by the Appellant cannot be correct given that the Appellant's report to the police must have pre-dated the release of the 2021 Decision.

53. The Appellant's email continued with the Appellant arguing that the untruthfulness he alleged was demonstrated by the Earing letter, which the Appellant said had been sent to him by the ICO on 25 November 2020. The Appellant continued:

> "The Appellant had never intended to disclose that evidence in TC/2021/00038 proceedings, but felt forced to at the point of the Decision against him, because it would in any case emerge later during proceedings for [the 2020 appeal] that Judge Bailey's Decision was (in retrospect) tainted by the same evidence. The Appellant was therefore put in an invidious position by a combination of the Decision against him and his possession of evidence to be used in separate (stayed) proceedings. The Appellant's failure to disclose the ICO's evidence immediately would therefore have made him liable to a later accusation in [the 2020 appeal] of perverting the course of justice (albeit in favour of the Respondent) by failing to disclose that evidence earlier in TC/2021/00038."

54. Pausing there, this explanation of why the Earing letter had not been produced to the Tribunal at an earlier date does not accord with the explanation provided by the Appellant on 21 September 2021. The Appellant continued:

> "The Appellant therefore took what he considered the safest decision at the time, which was to immediately submit that ICO evidence to the Tribunal for TC/2021/00038 the following day (very nearly as soon as the Decision was delivered to the Appellant), in order to assist Judge Bailey, before she had her Decision drawn up and perfected."

55. Tribunal decisions are not "perfected". As the 2021 Decision itself, and the Tribunal's covering letter both made clear, the decision issued on 14 September 2021 was the full decision issued by the Tribunal, and the proceedings were concluded at that point. But, even if Tribunal

decisions were subject to being perfected, the Appellant did not provide the Tribunal with a copy of the Earing letter until seven days after the 2021 Decision had been released to him, and after he had already spent time communicating with the Tribunal about an entirely separate point.

56. The Appellant's email continued with the Appellant arguing that the delay in making his application was attributable to Judge Sinfield. The Appellant wrote:

> "After some subsequent deliberation on effective remedies with the President of the First Tier Tax Tribunal (including an Application for Contempt served and rejected by the Tribunal), on 1st November 2021, Judge Greg Sinfield ultimately deemed that in respect of false evidence shown to be tendered in proceedings in TC/2021/00038 by [the first and Second Respondents] an application for Wasted Costs under S.29 of the Courts, Tribunals and Enforcement Act 2007 should be considered a valid route to legal redress for those false statements.
>
> Initially Judge Sinfield contemplated that an Upper Tier Tax Tribunal Appeal might be appropriate for legal redress. This was later found not to be the case, as that Appeal route is for Errors of Law only, and cannot be used to remedy improper or unreasonable conduct by a party in proceedings.
>
> It was therefore agreed that this Tribunal does have a legal duty under the Courts, Tribunals and Enforcement Act 2007 to offer legal remedy in the form of costs for any party's improper or unreasonable conduct during proceedings."

57. It is clear from the correspondence between the Appellant and the Tribunal in October and November 2021, set out above, that the Appellant's 29 December 2021 summary is not an accurate description of those communications. I consider the documents on the Tribunal file to be a more reliable record of what was communicated between the Tribunal and the Appellant and, insofar as the Appellant's recollection of events differs, I prefer those documents.

58. The redacted second application, the response from HMRC and the Appellant's 29 December 2021 statement were referred to me in early January 2022. On 12 January 2022, the Tribunal emailed the Appellant a letter dictated by me. In that letter I explained to the Appellant (in similar terms to the explanation provided in the 13 December 2021 letter in the 2020 appeal) that a person could not comment on an application if they had not been given the opportunity to see that application in full. Therefore, the letter concluded, if the Appellant wished to make an application for costs against any person then he must send a full and unredacted copy of that application to that person.

59. Later on 12 January 2022, the Appellant emailed the Tribunal to complain that I had accepted his application in late November 2021, and that "the process" had now run. The Appellant stated that he would refer the matter to the Attorney General's Office if I did not issue a decision on the basis of the representations already made.

60. Later still on 12 January 2022, the Appellant emailed the Tribunal again, this time to say that HMRC had not objected to not being given the reasons for the lateness of the redacted application, and so the redacted application was "valid and binding".

61. On 20 January 2022, the Appellant emailed the Tribunal to state that he was still awaiting my decision on his second application for costs.

62. On 1 February 2022, the Tribunal sent a letter to the parties that I had dictated. That letter contained a summary of the two applications thus far made in respect of the 2021 appeal, and the reasons why I considered that neither of those applications complied with the Tribunal Rules. I explained that the second, redacted application had not been referred to me until early

January 2022 but that, even if I had seen it at an earlier date, I still agreed with HMRC that it was not possible for a person to comment upon an application for costs that they could not see in full. I also noted that more than three months had now passed since the release of the 2021 Decision and that delay of that length was characterised as "serious and significant".

63. After receiving that email, and still on 1 February 2022, the Appellant made a complaint to the Tribunal President, alleging that I had:

(1) perfected the 2021 decision after being provided with a copy of the Earing letter;

(2) failed to action a valid application for costs; and

(3) tipped off the First and Second Respondents by providing them with a copy of the Earing letter in October 2021 that, in the Appellant's opinion, demonstrated that the First and Second Respondents had committed a criminal offence.

64. On 2 February 2022, Judge Sinfield noted the Appellant's complaint and stated that, in view of the Appellant's intention to refer the matter to the Judicial Conduct Investigation Office, the police and the Attorney General, it would be inappropriate for either him or the Tribunal staff to respond to any further complaints about the appeal.

Appellant's costs application

65. On 4 February 2022, the Appellant filed with the Tribunal what appeared to be a draft version of an application for a costs order to be made against the three Respondents. This application was neither redacted nor copied to any person but, in his covering email the Appellant asked that the Tribunal to confirm the application was made in the correct form. The Appellant stated that once he had received that confirmation from the Tribunal, he would serve a copy of the application on the Respondent.

66. On 11 February 2022, the Tribunal wrote to the Appellant on my instructions. That letter explained to the Appellant that the Tribunal could not give advice on whether a draft application complied with the Tribunal Rules but that costs applications were governed by Rule 10 of the Tribunal Rules which were publicly available. A link to those Rules was provided. The Appellant was reminded that if he chose to make an application then he must send a copy of that application to the person or persons against whom an order for costs was sought. The Appellant was also reminded that those persons would be given the opportunity to comment.

67. On 11 February 2022, the Appellant emailed the Tribunal to confirm that he had served an application for costs upon the three Respondents. By letter dated 16 February 2022, the Tribunal emailed the Appellant to ask him to provide a copy of the application that had been served, or to confirm that the application served was the draft sent to the Tribunal on 4 February 2022. By email sent later than day, the Appellant confirmed that the draft application provided to the Tribunal on 4 February 2022 was the version served on each of the three Respondents. (The detail of this application is set out below in Section 2 of this decision).

68. Following receipt of that confirmation, and still on 16 February 2022, the Tribunal emailed HMRC to require them to provide their representations within 14 days.

69. At 16:12 on 2 March 2022, the Tribunal received HMRC's representations on the Appellant's costs application. (Those representations are set out in Section 2 of this decision, below.)

70. On 3 March 2022, the Appellant emailed the Tribunal to ask if representations had been received from HMRC. On 4 March 2022, the Appellant emailed the Tribunal to state that he had received HMRC's representations that day, and so they were out of time. The Appellant stated that he would give a final response to the Tribunal in due course.

71. On 9 March 2022, the Tribunal emailed the Appellant in response to his emails of 3 and 4 March 2022. The Tribunal confirmed that HMRC's representations had been received at 16:12 on 2 March 2022 and so were received within time. The Appellant was asked to send any reply he wished to make within 14 days.

72. Later on 9 March 2022, the Appellant emailed the Tribunal to complain that he had not received the representations until 4 March 2022 because they had been posted to him, and so he asked that those representations should not be taken into account. On 11 March 2022, the Tribunal provided the Appellant with my further confirmation that I would take into account the representations that the Tribunal had received from HMRC on 2 March 2022.

73. On 14 March 2022, the Appellant again emailed the Tribunal. In this email the Appellant stated:

> "Unfortunately, the Respondent's Objection document is invalid and cannot be used in this Tribunal. It has a government classification marking of OFFICIAL SENSITIVE and must not be used outside of HMRC. If this document is shared anywhere outside the civil service, it is very likely that an offence has been committed under the Official Secrets Act 1989 and it is an offence for any member of staff within HMRC (or its representatives) to share this document beyond HMRC's internal staff.
>
> As a member of the public, it is also an offence for me to review or act upon anything in this document.
>
> The document will therefore be returned to the Respondent and I will await an unmarked copy."

74. As noted above, the Earing letter that the Appellant provided to the Tribunal on 21 September 2021 also bore the marking "Official-Sensitive".

75. The Appellant emailed the Tribunal again a few hours later, still on 14 March 2022. In this second email the Appellant stated that he had deleted a screenshot of HMRC's representations as he was not allowed to process such documents on his home IT system. The Appellant continued:

> "In the Appellant's previous submissions (and for the avoidance of doubt) the Information Commissioner in her wisdom declassified evidence [that] contained the same OFFICIAL SENSITIVE government classification protective marking from HMRC before making it available to me. This was because she considered the protective marking to be invalid in law and designed wholly to unlawfully prevent disclosure to a rightful data subject. I do not have that power over the Respondent's submissions making my acceptance of the document for service as potentially unlawful under Official Secrets Act 1989. I therefore do not and cannot accept the service of documents containing a government protective marking, as it exposes me to risk of an accusation of a criminal offence under the OSA 1989.
>
> I would be grateful if the Tribunal could confirm at its earliest convenience that the Respondent's objection document is indeed invalid as all pages are marked OFFICAL SENSITIVE.
>
> I note that any revised document would be submitted outside of the allowed time limit for the Respondent's objections to the Appellant's Application for Wasted Costs to be received by the Tribunal and would therefore be out of time."

76. There is nothing on the face of the Earing letter, or accompanying it, to indicate that its classification has been changed from "official". Unfortunately, the Appellant has proved

himself to be an unreliable interpreter of correspondence sent to him (as demonstrated by his description of Judge Sinfield's correspondence), and so I do not accept, without more, his assertion that the ICO considered it necessary for the letter that HMRC had sent to them to be de-classified before a copy could be provided to the Appellant. If that had happened, it is not credible that the Appellant would not have explained this de-classification at the time that he provided a copy of the Earing letter to the Tribunal.

77. There is also no obvious reason why the classification should be changed given the Earing letter is a document created by a person in the public sector and it is sufficiently routine not to require any higher security classification. Given the Earing letter contained data about the Appellant, I consider it appropriate that it also be marked "sensitive". Such markings accurately reflect the contents and make it clear that the document should be handled carefully by all those who see it. That does not mean that documents marked in this way cannot be used for their appropriate and intended purpose. Neither the "official" classification, nor the additional marker of "sensitive" prevent documents from being considered by the Tribunal. For example, the Statement of Case filed by HMRC in this appeal was marked as "official", and the Appellant – as a party to the proceedings – did not describe any difficulties in responding to that document at that time. The Respondents' representations received by the Tribunal on 2 March 2022 are no different.

78. On 21 March 2022, the Appellant emailed the Tribunal again to seek the confirmation requested in his second 14 March 2022 email.

79. On 22 March 2022, the Tribunal emailed the Appellant to repeat my confirmation that the Respondents representations had been received in time and would be taken into account. The Appellant was reminded that the deadline for any Reply he wished to make to those representations was 23 March 2022.

80. On 23 and 30 March 2022, the Tribunal received a number of emails from the Appellant, principally seeking the transfer of these proceedings. That application for transfer has been dealt with separately by Judge Sinfield and will not be considered as part of this decision.

81. Having set out that extensive history, it is now possible to begin consideration of whether the Appellant should be granted an extension of time to make his application for costs.

Tribunal's power to make an order for costs and the usual time limit for applying for such an order

82. The Tribunal's power to make an order for costs is set out in Rule 10 of the Tribunal Rules which, as the Appellant has noted, derives from the Tribunal Courts and Enforcement Act 2007. Rule 10 and the Tribunals Courts and Enforcement Act 2007 are both considered at greater length in the second section of this decision but, in this section, it is sufficient to refer to Paragraph 10(4).

83. Paragraph 10(4) of the Tribunal Rules provides:

> "(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—
>
> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
>
> (b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.
>
> The 2021 decision was released to the parties on 14 September 2021. That decision disposed of all the issues in the proceedings. Therefore, the deadline

> for either party to make an in-time application for costs was 12 October 2021. No application was received by the Tribunal by that date."

Tribunal's power to grant an extension of time

84. Rule 5 of the Tribunal Rules gives the Tribunal power to regulate its own procedure. In particular, Sub-paragraph 5(3)(a) provides:

> "(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;"

85. Therefore, the Tribunal has the power to grant a person an extension of time to make an application for costs. However, the Tribunal must decide, in each case, whether it would be appropriate to grant such an extension given the particular circumstances of the case. When a party is late in undertaking any action, the onus of proof is upon that party to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

Test for granting permission to make a late application

86. The Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 178 (TCC) provided guidance on what the First-tier Tribunal ("FTT") should consider when deciding whether an extension of time should be granted. This was in the context of a late appeal but the same principles apply to a late application. In *Martland*, the UT stated:

> "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."

87. In following that guidance as to how the FTT should proceed in considering whether to grant an extension of time to the Appellant to make his costs application, I shall consider the extent of the delay and whether there are reasons for all or part of that delay. I will then be able to weigh all the circumstances of the case.

Length of the delay

88. In calculating the length of the delay, it is necessary to express an opinion on when the Appellant's application was received by the FTT. Although it was uncertain until 16 February 2022 what the Appellant had served on the Respondents, I treat the Appellant's application for costs as being made on 11 February 2022, the date on which the Appellant confirmed that an application for costs had been served upon each of the Respondents.

89. As noted above, the 2021 decision was issued on 14 September 2021, and the last day on which an in-time application could have been made was 12 October 2021. The application was made on 11 February 2022. Therefore, the Appellant took 150 days to make his application – more than five times the time permitted – and 122 of those days were delay. A period of delay that is greater than 24 days is considered to be "serious" in the context of a 28 day time limit, and delay that is greater than three months is considered to be "significant".

Reasons for the delay

90. The Appellant's explanation for his delay is that the delay up until 17 November 2021 was due to his being engaged in communication with the Tribunal, and that:

> "The delay beyond the nominal 30 day deadline for an Application for Wasted Costs was not due to any tardiness on the part of the Appellant, but on the part of Judge Sinfield. The Respondent is free to take that matter up with Judge Sinfield if he wishes to."

91. The Appellant explains that the delay from that time onwards was due to his expectation that:

(1) a portion of the evidence would be needed for criminal investigation purposes; and

(2) it was on that basis that he did not send the first version to the Respondents, and then sent a heavily redacted version of the second application to the Respondents.

The Appellant then asserts that the Tribunal clerks are responsible for the delay caused by sending the heavily redacted version of the application to HMRC on 3 December 2021 (rather than referring it to me).

92. The Appellant's explanation concludes:

> "The Appellant accepts that the lateness of the submission is due primarily to the Appellant's lack of knowledge of the Tax Tribunal system, but secondarily the Tribunal's response times and clerical errors, particularly on and around 3rd December 2022. The Respondent may wish to quiz the Tribunal clerks on that matter.
>
> The Appellant observes that while he and the Respondents are both laypersons before the law (and in bringing this matter before the Tribunal), the Appellant should not forfeit his right to legal remedy for the Respondent's conduct during proceedings owing to his lack of understanding of the application of Tribunal Rules, especially considering the "serious and significant" nature of the Respondents conduct detailed here."

93. In their response to the issue of delay, prepared by the First Respondent, the Respondents oppose the granting of an extension of time. The Respondents note that the correspondence with Judge Sinfield concerned the Appellant's allegations of contempt, not costs, and that long periods passed between the correspondence sent by the Tribunal and the applications filed. The Respondents (who were not provided with the Appellant's first attempt at an application but were aware of it from the Tribunal letter of 12 January 2022) argue that there was no action by the Appellant between 1 and 29 November 2021, and no action between 12 January 2022 and 11 February 2022.

94. I start with the Appellant's final point: his assertion that he is a layperson. I agree that is correct; the Appellant is not legally qualified and he has chosen not to be represented in these proceedings. However, it is clear from the correspondence from the Appellant on the Tribunal file, from the events set out in the 2021 decision and from what has occurred since the release of the 2021 decision that the Appellant is more than capable of checking legislation, referring to legislative references and that he has long been aware of the Tribunal Rules. An example

of this long-standing familiarity with the Tribunal Rules is mentioned at paragraph gg) of the 2021 decision. The Appellant's email to the Tribunal on that occasion stated:

> "The current Statement of Case alleged to have been sent by HMRC on 2 March 2021 and the current SOC are both non-compliant with the 42 day time limit laid down in the First-tier Tax Tribunal Rule 25(1)(a)."

95. That email was sent as long ago as 29 April 2021. So, while I agree that the Appellant is a layperson, that does not mean I should treat the Appellant as if he was unaware of the existence of the Tribunal Rules or unaware that those Rules impose deadlines for the parties to undertake certain actions.

96. I also do not accept that Paragraph 10(4) is expressed in complex language or that the mandatory nature of the deadline is difficult to understand. Even if the Appellant did not think that he was required to send a copy of his costs application to HMRC (see further below), that does not mean that I accept that the Appellant was incapable of understanding that there was a deadline for him to file his application with the Tribunal.

97. Looking at the period that has elapsed, the Appellant has not offered any explanation for why he did not start to compile his costs application as soon as the 2021 Decision was released to him on 14 September 2021. The Appellant's explanations of what occurred and his thinking on events have changed from time to time but it seems reasonably clear that:

(1) in November 2020, and thus prior to the commencement of these appeal proceedings, the Appellant was provided with a copy of the Earing letter;

(2) on 16 April 2021, the Appellant became aware of the contents of the Statement of Case filed by HMRC in the penalty appeal (because a copy was provided to him by the Tribunal on that date); and

(3) the Appellant's case is that he considers the submissions in that Statement of Case to be inconsistent with the answers given in the Earing letter, and he must have reached this conclusion soon after 16 April 2021, and certainly before 14 September 2021 because, at some point prior to 14 September 2021, he reported the three Respondents to the police alleging contempt of court.

98. So, when the 2021 Decision was released, the Appellant knew that:

(1) he had been unsuccessful in his appeal; and

(2) he had already reported the contempt that he believed to have taken place, to the police and, according to his account, the police had opened an investigation.

99. However, the Appellant's first action on receiving the 2021 Decision was to complain to the Tribunal that the 2021 Decision was incorrect with regard to comments about the ICO's powers. A week passed before the Appellant provided the Tribunal with a copy of the Earing letter and expressed his current concerns.

100. It is evident from the reference to wasted costs in the Appellant's email of 21 September 2021 that the Appellant was aware by that date that the Tribunal had the power to award costs, and that he could apply for a wasted costs order. The Appellant was also able to refer to legislation under which the Tribunal derived its authority to award such costs. The Appellant has not provided any explanation of why he did not make a costs application to the Tribunal between 21 September and 14 October 2021. Throughout this period the Appellant was aware that an application for costs could be made, he believed that he was the victim of a contempt and he knew he had already reported that contempt to the police. But, instead of making an application for costs, it seems that the Appellant tried to engage in correspondence with the

Tribunal President about that alleged contempt (despite that apparently duplicating the investigation the Appellant stated had already been opened by the police).

101. It was not until 14 October 2021, and after the deadline for an in-time application had already passed, that the Appellant suggested to the Tribunal that an award of costs in his favour could cure the contempt he believed had occurred. By this date the Appellant had looked sufficiently closely at the Tribunal Rules to understand he needed to prepare a Schedule of Costs. I do not accept that the Appellant could have inspected the Tribunal Rules to that extent and not have noticed that there was a time limit for him to make an application, and that that time limit had already passed.

102. The Appellant has not provided a credible explanation of why he did not make his application to the Tribunal as soon as possible after he had emailed his proposed "two stage process" to Judge Sinfield on 14 October 2021. I do not accept that the Appellant was waiting for a response from Judge Sinfield because the Appellant cannot reasonably have believed that Judge Sinfield would provide any response other than the reply that was given on 1 November 2021.

103. The Appellant has also not provided a credible explanation of why he did not make his application to the Tribunal on 1 November 2021 after receiving Judge Sinfield's response. Whatever illusions the Appellant may have harboured until then, Judge Sinfield's response on 1 November 2021 was clear.

104. The Appellant made his first attempt at an application for costs on 17 November 2021. There is no explanation for the delay between 1 and 17 November. Although the Appellant chased the Tribunal for a further response from Judge Sinfield, he cannot have been reliant on such a response because his application was filed before any such response was received.

105. That first application was returned on my instructions because the Appellant had not served a copy on the Respondents. I do not accept that the Appellant could have referred to the Tribunal Rules sufficiently closely to know that Sub-paragraph 10(3)(b) required him to file a Schedule of Costs but not have noticed that Sub-paragraph 10(3)(a) required a copy of the application be sent to the person against whom it is proposed that an order be made. The Appellant has argued that he did not send a copy of his application to the Respondents because he thought that the evidence would be required for criminal investigation purposes. However, the only evidence provided in support of the Appellant's allegations is the Earing letter, and that letter had been provided to the Tribunal almost two months earlier. Not only was that letter written by the Third Respondent so the Appellant could not reasonably believe that she was not already aware of it, but the Appellant knew that a copy of the Earing letter had been provided to HMRC by the Tribunal on 1 October 2021 so it was likely that all three Respondents were aware of the Earing letter.

106. I will assume for the purposes of considering this application that the Appellant did not understand the difference between submissions made by a party in a document (such as an application or a Statement of Case), and evidence provided to support an assertion. Therefore, in the period between 17 and 29 November 2021, the Appellant would have known that his application did not comply with the Tribunal Rules because HMRC had not been sent a copy of the application, but it is possible that the Appellant believed that his non-compliance would be acceptable because he (incorrectly) believed that his submissions constituted evidence that he did not wish HMRC officers to see prior to disclosure in potential future criminal proceedings that might be brought. If that is the case, then the Appellant has an explanation for this period of time. This is a period of 12 days.

107. On 29 November 2021, the Appellant was informed that the other party must be sent a copy of the application and that the other party would have the opportunity to comment on that

application. The Appellant acted immediately by filing a heavily redacted application and sending a copy to HMRC.

108. On 3 December 2021, the Tribunal clerks asked HMRC to comment on the Appellant's heavily redacted application. I agree with the Appellant that, at this point, he could not have been expected to have any concerns that his heavily redacted application was not compliant with the Tribunal Rules. However, on 13 December 2021, the Appellant was informed that a parallel costs application made in very similar terms in the stayed 2020 appeal did not comply with the Tribunal Rules because it was heavily redacted. On 16 December 2021, the First Respondent objected to the redaction of the wasted costs application made in this appeal.

109. I do not consider that this difference in treatment between his two appeals could have gone unnoticed by the Appellant, or that it would not have prompted the Appellant to have some concern that the heavily redacted application he had filed in these proceedings might ultimately prove not to be compliant with the Tribunal Rules. However, the Appellant did not contact the Tribunal to check, or take any other action to clarify the discrepancy, even though it was clear from 16 December 2021 onwards that HMRC objected to the differing treatment, and (as the history demonstrates) the Appellant was accustomed to contacting the Tribunal frequently on other concerns. I consider that the Appellant does not have a good explanation for his delay from 16 December 2021 onwards but the Appellant does have an explanation for his delay in the period 29 November 2021 to 16 December 2021. This is a period of 18 days.

110. On 12 January 2022, the Appellant was informed by the Tribunal in these proceedings that any costs application filed should be un-redacted. That was the same information as given to the Appellant in the 2020 appeal. However, it was not until 11 February 2022 that such an application was received from the Appellant. There is no explanation for this period of delay, despite the Appellant having known since 14 October 2021 that any costs application he might make was already late, having known from 13 December 2021 that there was the possibility that the Tribunal would require an un-redacted application to be filed, and despite the Appellant having filed a (very similar) un-redacted application on the 2020 appeal on 17 December 2021. Whatever view the Appellant took about the outcome of his complaint to the Judicial Conduct Investigations Office, he must have been aware that further time was passing while that complaint was considered.

111. Therefore, the Appellant has an explanation for 30 days of the 150 day period, but not for the remainder of the period, and so the period of unexplained delay is reduced from 122 days to 92 days. That delay remains "serious" and "significant".

Evaluation of all the circumstances of the case

112. As explained above, the guidance by the UT in *Martland* is that my starting position should be that an extension of time should not be granted unless I am persuaded that it would be appropriate. The onus is on the Appellant to make that case. An extension of time should be the exception rather than the rule.

113. In weighing the circumstances of this case, I should not take into account the merits of the costs application unless I conclude that those merits are either very strong or very weak, and in this regard I should not conduct an in-depth investigation of the merits for this purpose. In this case I have briefly considered the application made for an award of costs, and I have concluded that Appellant's application is highly unlikely to succeed. This is explained further in the second section of this decision but, in brief, the named Respondents are not susceptible to an order for wasted costs and so, even if the Appellant could prove everything he asserted, no order would be made. Therefore, that lack of underlying merit to the substantive application counts against the Appellant being granted an extension of time to make his costs application.

114. If the Appellant is not granted an extension of time then he will lose the opportunity to argue his application for costs. That is some prejudice but it is limited in scope given the weakness of the Appellant's costs application. Moreover, it is prejudice that the Appellant will have brought upon himself by failing to act in time. Looking at matters from the other perspective, if the Appellant is granted an extension of time then the three Respondents will be obliged to respond to a costs application seeking an amount[1] that is far in excess of the £198 in penalties that were under appeal in these proceedings. That response distracts them from their usual duties and that causes an increase in the costs to the state and to all taxpayers. Granting an extension of time also causes prejudice to those Tribunal users who have respected the time limits prescribed in the Tribunal Rules by stretching scarce Tribunal resources and increasing the likelihood of delays in the Tribunal system.

115. In looking at this case, I have concluded that the Appellant has an explanation for 30 days of the delay but that there are a further 92 days of delay for which there is either no explanation or no credible explanation. The Appellant has argued that the allegations he has made about the Respondents behaviour are very serious and that he will forfeit his right to a legal remedy if his application for more time is not granted. I agree with the Appellant that the allegations he has made are extremely serious, but that was all the more reason for the Appellant to have given priority to making his application in good time.

116. As noted above, my starting point should be that the application for an extension of time should be granted only if the Appellant persuades me that an extension should be granted. The Appellant's underlying application is highly unlikely to succeed, and if I grant him an extension of time then that will further stretch Tribunal resources, at the expense of those who have complied with time limits, and it will also add to the costs to the Respondents of continuing to respond to a Basic appeal that was concluded on 14 September 2021. The onus is on the Appellant. I do not consider he has provided a satisfactory explanation for 92 days of his delay. The Appellant has taken 122 days in total to file an application that Parliament considered should take no more than 28 days. I agree with HMRC that I am required to pay regard to the importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected. Taking all of these matters into consideration, I have concluded that it is not in the interests of justice for the Appellant be given an extension of time in this matter.

117. For the reasons set out above, the Appellant's application for an extension of time to make an application for costs is dismissed.

SECTION 2 - APPLICATION FOR WASTED COSTS

118. As I have refused the Appellant's application for an extension of time, it is not necessary for me to consider the Appellant's application for costs.

119. However, in the interests of completeness, and in case the Appellant wishes to appeal further, I will now consider that wasted costs application. I have already set out in Section 1 that I consider the Appellant's application for wasted costs is highly unlikely to succeed, and this section of the decision will explain in more detail why I have reached this conclusion.

[1] The precise amount that the Appellant is seeking is unclear. In the copy of the application provided to the Tribunal the Appellant states he is seeking £2,750 which he calculates as 54 emails at £50 each (although 54 x £50 = £2,700). However, in his 23 March 2022 email to the Tribunal the Appellant has suggested he should be paid £3,250 in costs but he has not provided an updated Schedule showing how the difference of £550 has been calculated).

Relevant legislation

120. It is sensible to begin with the relevant parts of the Tribunal Rules and the Tribunals, Courts and Enforcement Act 2007.

121. The Appellant's application is expressed to be an application for wasted costs. Therefore, that application must be made under Sub-paragraph 10(1)(a) of the Tribunal Rules. That provides:

> "(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;"

122. Section 29 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act") provides:

> "(1) The costs of and incidental to
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) 'wasted costs' means any costs incurred by a party
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.
>
> (7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses."

Discussion of merits of costs application

123. As it is the Appellant's application, the onus is upon him to demonstrate, on the balance of probabilities, each aspect of his application. For the Appellant to be successful in his application for the costs of, and incidental to, the appeal that led to the 2021 Decision, he must establish that:

(1) he incurred costs;

(2) those costs were incurred in the proceedings or incidental to the appeal that led to the 2021 Decision;

(3) those costs were either as a result – i.e., that there is a causal nexus – of an improper, unreasonable or negligent act or omission, or that they are costs that it would be unreasonable for the Appellant to pay in light of a subsequent improper, unreasonable or negligent act or omission;

(4) that the act or omission occurred during the course of the 2021 appeal before the Tribunal; and

(5) that the act or omission was on the part of a person "exercising a right of audience or right to conduct the proceedings."

124. The Appellant needs to be able to prove each of those points in order to be successful in his application. If he is unable to prove any of these points then his application must fail. However, as it is within the Tribunal's discretion to award costs, even if the Appellant is able successfully to demonstrate every aspect, that does not lead to the inevitable conclusion that the Tribunal will make an award of costs in his favour. In considering an application for wasted costs the Tribunal is required to consider whether the decision to seek an order for costs, rather than invoking other remedies, was a proportionate response to the act or omission complained of bearing in mind the House of Lord's guidance in *Medcalf v Mardell* [2003] 1 AC 120 that an application for wasted costs brought after proceedings should be a last resort.

125. I shall consider the points set out above in reverse order, and so I look first at whether any of the three Respondents are a person "exercising a right of audience or right to conduct the proceedings", and so are susceptible to any wasted costs order.

126. The only persons who may be subject to a wasted costs order under Section 29 of the 2007 Act are those persons who have a right of audience or the right to conduct proceedings. That is consistent with a wasted costs order being possible only where a person has acted in breach of their duty to the court or tribunal, as explained in *Ridehalgh v Horsefield* [1994] Ch 205, the leading authority on wasted costs. This point was also emphasised by the House of Lords in *Medcalf*, from which the following paragraphs are relevant (emphasis added):

> "54 The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. … The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles.
>
> 55 The introduction of a wasted costs jurisdiction makes an inroad into this structure. It creates a risk of a conflict of interest for the advocate. It is intended and designed to affect the conduct of the advocate and to do so by penalising him economically. Ideally a conflict should not arise. The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court: *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 …
>
> 56 In my judgment, the jurisdiction must be approached with considerable caution and the relevant provisions of section 51 construed and applied so as not to impinge upon the constitutional position of the advocate and the

> contribution he is required to make on behalf of his client in the administration of civil justice. … **Secondly, the fault must, in the present context, relate clearly to a fault in relation to the advocate's duty to the court** not in relation to the opposing party, to whom he owes no duty. …"
>
> (Emphasis added)

127. The necessity for the representative to have a duty to the court or tribunal was also emphasised in *Awuah and others* [2017] UKFTT 555 (IAC), at paragraph 21 where the Tribunal stated:

> "The duties which the advocate, whether solicitor or barrister, owes to the court arise out of the distinctive role and position of the advocate in our legal system and the special relationship of between the advocate and the court. We consider it far from coincidental or casual that Lord Hobhouse, in his exposition of this subject, employed the phrase "professional advocates": see *Medcalf* at [52]. These duties, in one sense, represent the price which the professional advocate must pay for the privileges and immunities he enjoys. Furthermore the professional advocate is duty bound to honour the standards and obligations enshrined in the professional conduct code of his profession. Such codes impose ethical and professional duties of a high order."

128. The Tribunal in *Awuah* was considering the status of Home Office presenting officers, and concluded that those officers did not owe a professional duty to the Tribunal. That being the case, Home Office presenting officers did not fall within the definition of "legal or other representative" in Subsection 29(6) and therefore no order for wasted costs could be made against them.

129. The First Respondent has argued that the Respondents to this appeal do not fall within the definition of "legal or other representative" in section 29(6), and so no wasted costs order can be made in this case. The Appellant has not addressed this aspect, and it does not appear that the point has previously been considered in the Tax Chamber. In *Bedale Gold Club Limited v HMRC* [2014] UKUT 0099, the issue was not argued but, before dismissing an application for wasted costs on other grounds, Newey J (as he then was) commented:

> "28. It is not entirely clear which officers within HMRC are to be treated as a "legal or other representative" for the purposes of Section 29 of the 2007 Act. A solicitor or barrister within the Solicitor's Office is plainly capable of being a "legal or other representative", but an appeal before the FTT can (as I think was the case here) be conducted by an officer with no legal qualification. I am inclined to think that such an officer is to be viewed as "a person exercising a … right to conduct the proceedings on [HMRC's] behalf" in relation to the particular proceedings in question and, hence, a "legal or other representative" for the purposes of Section 29 in that context. On the other hand, it cannot, as it seems to me, be the case that every officer of HMRC who has been involved in a dispute that ends up before the FTT is a legal or other representative, even though all of them could have been (but were not) asked by HMRC to conduct the appeal proceedings."

130. Those comments in *Bedale Golf Club* are obiter and so I am not bound by them. It is clear that Newey J did not need to, and did not, consider in any depth the issue of which HMRC officers were within Section 29(6) and which were not. I conclude that the in-depth analysis of the House of Lords in *Medcalf* and of the Tribunal in *Awuah* is of far more assistance in this regard. Therefore, while I agree that not every HMRC officer can be a "legal or other representative" within the meaning of Subsection 29(6), I conclude that the dividing line must be drawn according to whether the HMRC officer in question is a member of a legal professional body and so, by reason of that membership, is entitled to exercise a right of

audience or the right to conduct litigation, and so also under a professional duty to the tribunal. I conclude that the only persons who can be liable for an order for wasted costs are those who are under a professional duty to the tribunal because – as the House of Lords made clear in *Medcalf* – an order for wasted costs can be made only in respect of a breach of such a professional duty. Whether an HMRC officer is under such a professional duty will be a question of fact in each case. All HMRC officers can be asked, in their capacity as an HMRC employee, to assist HMRC in the preparation of appeals to which HMRC is a party. It is only where an HMRC officer who is asked to assist is also a member of a legal professional body that they will owe a professional duty to the Tribunal, and it will be possible for a wasted costs order to be made against them if they are found to be in breach of that professional duty. Where an HMRC officer is not under a professional duty to the Tribunal, it follows that there can be no breach of that duty, and there can be no order for wasted costs.

131. So, turning to the present application, the First and Second Respondents are HMRC officers who were involved in preparing HMRC's case in the appeal that led to the 2021 Decision. The Third Respondent is also an HMRC officer but does not appear to have had any role at all in that appeal. There is no evidence before me that any of the three Respondents are members of a legal professional body that gives them personally a right of audience or the right to conduct litigation. The Appellant accepts that neither the First nor the Second Respondents are a member of a legal professional body because at Paragraph 67 of his application for wasted costs he states:

> "Neither [the First nor Second Respondent] are registered with the Solicitors' Regulation Authority or any other body of legal professional practice."

132. The Appellant has not commented on the Third Respondent's position but, as I remind myself, the onus is on the Appellant to demonstrate every aspect of his application, and there is no evidence that the Third Respondent is a member of a legal professional body. I find, on the balance of probabilities, that she is not.

133. As none of the Respondents are members of a legal professional body, none of them are under a professional duty to the Tribunal. As it is not possible to be in breach of a duty that is not held, none of the Respondents can be in breach of a professional duty to the Tribunal, and so none of the Respondents can be liable to a wasted costs order.

134. It follows that the Appellant's application for an order for wasted costs must be dismissed.

135. As I have reached that conclusion, it is not necessary for me to comment upon the remaining aspects of the Appellant's application although, as I have explained above in Section 1 of this Decision, a Statement of Case does not constitute evidence so any allegations of perjury based upon submissions made in a Statement of Case are misplaced. The Appellant has made a parallel application in the 2020 appeal, currently stayed, and so any further aspects of that application that remain by the conclusion of that appeal can be considered at that time.

CONCLUSION

136. For the reasons set out above:

(1) the Appellant's application for permission to make a costs application out of time is dismissed; and (in case I am wrong in my decision on the application for an extension of time)

(2) the Appellant's application for wasted costs is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

137. 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.

JUDGE JANE BAILEY
TRIBUNAL JUDGE

Release date: 05 APRIL 2022