Neutral Citation: [2024] UKFTT 00517 (TC)

Case Number: TC09205

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2020/04494

PROCEDURE-appeal struck out following UNLESS Order- reinstatement request-appeal reinstated-application for adjournment to instruct counsel-refused-late appeal-whether to grant permission for late appeal- Martland *and* Katib *considered- application refused.*

Heard on: 29 September 2023
Judgment date: 13 June 2024

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

CANDIDO PEREIRA RODRIGUES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: in person

For the Respondents: Ben Blakeley, Litigator of HM Revenue and Customs, Solicitor's Office

DECISION

INTRODUCTION

1. This was an application to make a late appeal in respect of two Personal Liability Notices ("PLNs") totalling £737,124.73 issued on 27 July 2018. The PLN for the VAT penalty was in the sum of £464,909.87 and the PLN for the corporation tax penalty amounted to £272,214.86.

2. The appeals for both were lodged with the Tribunal in one Notice of Appeal on 18 December 2020. In that notice the appellant stated that he had no representative. There had been a computer error that prevented the appeal being lodged properly and it referred only to the VAT PLN but HMRC accept that that was the date of appeal.

3. There was some confusion about what had been appealed and when because there were multiple appeals, but on 24 May 2021, the appellant's agent, Reliance Associates ("Reliance") confirmed that the appellant wished to appeal the PLNs and lodge a late appeal.

4. On 14 June 2021, the Tribunal directed that HMRC provide a response to the correspondence and on 29 June 2021, HMRC lodged a Notice of Objections ("the Objection") to the late appeals.

5. The hearing was listed solely to consider the application for late appeals but ultimately the issue of reinstatement of the appeals, because they had been struck out, was a preliminary issue.

6. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system on 29 September 2023. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

7. The documents to which I was referred comprised a Hearing Bundle consisting of 466 pages, an Application from HMRC to admit evidence with appendices and Directions issued by the Tribunal with the correspondence relating thereto. I also had HMRC's original Bundle extending to 214 pages and the appellant's Late Appeal Submission ("the Submission") with supporting documentation extending to 178 pages. The Submission Bundle had been incorporated into the Hearing Bundle.

Preliminary Issues

8. The first issue for determination is whether this Decision including full findings and facts should be produced and for that, and other matters, the procedural history is relevant both for context and for the facts.

Procedural History

9. For ease of reference, hereinafter I refer to the appeals of both PLNs as "the Appeal". The Appeal has had a complex procedural history. Quite apart from any other issues, multiple appeals on the same issues were generated. Ultimately there are only two live appeals involving this appellant being the Appeal which relates to the PLNs and an appeal which relates to Income Tax Discovery Assessments with which this Decision is not concerned. That position was accepted at the first hearing in this matter on 21 November 2022 when the appellant was professionally represented by Mr Shahid of Reliance. For the avoidance of doubt Judge Fairpo had issued Directions on 12 January 2022 confirming that the Appeal relates solely to the PLNs. A duplicate appeal that had been lodged on 24 June 2021 was struck out.

10. The Tribunal had issued numerous Directions prior to this hearing. The first formal Directions that I issued followed that hearing on 21 November 2022 and were of consent. That hearing was adjourned part heard.

11. Those Directions record that although the Submission Bundle had been lodged with HMRC and the Tribunal, it had not been delivered to me. In the course of the hearing it was sent to me because Mr Shahid had relied upon it in relation to an argument about *HMRC v Katib* [2019] UKUT 0189 ("Katib"). The Submission extends to 15 pages and 74 paragraphs and it addresses *Martland v HMRC* [2018] UKUT 178 (TCC) ("Martland") in some detail.

12. The Directions also record that the appellant's application for adjournment and disclosure dated 11 November 2022 had been refused.

13. Following the hearing, HMRC complied with the first Direction and provided dates to avoid for the adjourned hearing. The appellant's due date for compliance was 12 December 2022 and on 9 December 2022 the appellant's representative sought a variation of the Directions on the basis that Mr Shahid required more time to take instructions. HMRC thereafter intimated that they were neutral on the subject.

14. On 9 January 2023, I subsequently issued a minor amendment to those Directions adjusting the timescales. The second and third Directions read:

> "2. By no later than noon on 19 January 2023, the Appellant shall lodge with the Tribunal and HMRC a Reply in response thereto [HMRC's application and witness statements] if so desired, together with any application which is deemed to be appropriate.
>
> 3. By no later than noon on 19 January 2023, the parties shall lodge with each other and the Tribunal, a Statement of Agreed Facts and, to the extent if any, that they disagree, each party shall lodge with the other and the Tribunal a Statement of Facts that are not agreed."

15. The parties were also directed to lodge with the Tribunal dates to avoid in the period February to May 2023. There was no compliance by the appellant.

16. No Reply was lodged with the Tribunal and nor had it been indicated whether or not the appellant wished to respond. On 10 February 2023, the Tribunal sent a reminder about compliance with the Directions. On 22 February 2023, HMRC lodged a "Notice of Agreed Facts" and copied that to Reliance stating that they believed that the facts were not in dispute.

17. On 9 March 2023, Reliance replied stating that they no longer acted for the appellant but Facts 2 and 4 were not agreed, ie the PLNs were not issued to the appellant's home address and the appellant's wife had not signed for certain documents at that address at a specified date and time.

18. On 10 May 2023, the Tribunal asked the appellant to confirm whether he wished to proceed with the appeal and, if so, to provide dates for a video hearing in August 2023. There was no response.

19. On 21 June 2023, the appellant's new representative, Mr Sykes, lodged with the Tribunal (but not HMRC) an Application for Further and Better Particulars of HMRC's case. That Application requested that a Direction by Judge Fairpo in relation to the struck out appeal be set aside and requested a six month stay in this matter.

20. On 25 July 2023, since it was premature to consider the substantive appeal because the issue before the Tribunal was whether a late appeal would be admitted, I issued further Directions confirming that:

(1) The appellant's previous agents had resigned. Although there was no formal authorisation in place it was understood that Joe Sykes, Advocate was now representing the appellant.

(2) The appeal had already been subject to considerable delay and in any event the original hearing listed in this matter was only in relation to an application to extend the time limit for the Appeal as it was late.

(3) I issued an UNLESS Order to the effect that parties should provide dates to avoid for a hearing.

21. On 26 July 2023, Mr Sykes emailed the Tribunal providing dates to avoid and requesting a video hearing, if there were to be one. However, pertinently, he requested that the Direction that there should be a hearing of an application for a late appeal "be set aside". He also requested that I should direct that the appellant should file and serve an application for further and better particulars within 28 days.

22. On 27 July 2023, Mr Sykes lodged a letter of authorisation and stated that he was still taking instructions. He referred to his email to the Tribunal dated 15 June 2023; that has not been produced.

23. On 2 August 2023, HMRC replied to my Directions of 25 July 2023 enclosing a summary of the procedural background in this matter. They also included an Application to lodge evidence in relation to the substantive appeal in the context of the requirement for the Tribunal to consider all of the circumstances of the case (the third stage in *Martland*). Lastly, they objected to what they described as the "unusual application" made by Mr Sykes.

24. On 15 August 2023, I issued Directions indicating that I had decided that Mr Sykes' application, insofar as it related to the details of the substantive case, was premature. There was currently no appeal. Judge Fairpo's decision about TC/2021/02441 had not been appealed and formed no part of the Appeal. That part of the application was therefore rejected in terms of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"). HMRC's application in relation to evidence was granted *de bene esse.* The application for a stay was refused.

25. On 16 August 2023, the Tribunal listed the application for hearing by video on 29 September 2023 and emailed Mr Sykes requesting completion of an attendance form within seven days.

26. In response to the issue of a reminder, on 24 August 2023, Mr Sykes resigned from representation "for want of instructions" and requested that any further communications be with the appellant "directly".

27. The Tribunal emailed the appellant on 25 August 2023 enclosing the email from Mr Sykes and requested completion of an attendance form within seven days. There was no response.

28. On 4 September 2023, the Tribunal emailed the appellant stating that they had not received the form and could not send the links to the video hearing without the information. They asked for a response within seven days.

29. On 8 September 2023, the appellant responded stating:- "Mr Joe Sykes remains instructed and he will deal with this matter. He was spoken to on 24/08/2023 and necessary instructions were given. He will appear in the hearing accordingly".

30. On Tuesday 12 September 2023, the Tribunal asked Mr Sykes to confirm the position by 14 September 2023 but there was no response.

31. On 19 September 2023, I issued further Directions requiring the appellant to lodge an attendance form for the video hearing by 22 September 2023, which failing, the appeal would be struck out.

32. The appellant did not lodge an attendance form.

33. I therefore drafted a strike out Decision which was due for issue.

34. At 21:23 on Monday 25 September 2023, which is obviously out of hours, the appellant sent an application for a brief adjournment to the Tribunal administration ("the Application"). He did not copy it to HMRC as he was required to do. He did not explain why he had not complied with the Directions. It was described as a witness statement in support of his application and explained his problems with representation. It was forwarded to me the following day and I assumed that it was an application for reinstatement, albeit not stated as being such.

35. That Application had patently been drafted by a professional adviser and the appellant subsequently confirmed that Mr Shahid had drafted it (described in the Application as being of "NR legal solicitors"). It explained that Mr Shahid had referred the appellant to Mr Sykes once NR Legal had resigned because Mr Sykes was more experienced for "tax tribunal cases". Attached to the Application were the following emails:

(a) An email from Mr Sykes to Mr Shahid dated 15 August 2023 enclosing a copy of my Directions dated 15 August 2023 stating that he would require £200 to reply to the Directions and £450 to appeal the refusal of the Application for Further and Better Particulars to the Upper Tribunal.

(b) A further copy of that email was enclosed with an email from Mr Sykes to Mr Shahid dated 24 August 2023 which simply read "£650".

(c) An e-mail from Mr Sykes to Mr Shahid on 16 August 2023 enclosing the notice of hearing stating that he would attend the Tribunal but the fees which would have be paid in advance by 8 September 2023 would be £1,600 for attendance and a Skeleton Argument and £600 for "authorities".

(d) An email from Mr Sykes to the Tribunal and forwarded to Mr Shahid dated 24 August 2023, resigning agency and timed at 12:31 whereas the email in sub-paragraph (b) above was timed at 13:59 and again at 15:59.

(e) An email from Mr Shahid on the same day saying: "OK. Please confirm the work will include you sending an email to carry on representation and also try to seek adjournment on medical grounds from the hearing". The response from Mr Sykes at 15:44 on 28 August 2023 simply said "You can't have both". (The Application said that, by that, Mr Sykes meant the appeal of my Directions or the Tribunal.)

(f) Emails from NR Legal dated 13 September 2023 to two different sets of Chambers making enquiries about the availability of Counsel one of which said that it was with a view to seeking an adjournment and emails dated 18 September 2023 with one set of Chambers arranging a TEAMs meeting for that day.

36. It was argued that:

(a) On 24 August 2023, fees were agreed but Mr Sykes was only prepared either to appeal my Directions or to deal with the Tribunal, seeking an adjournment if necessary.

(b) As at 28 August 2023, Mr Sykes had agreed to do some work commencing the following week but only on one issue. There was no detail.

(c) Since 10 September 2023, the appellant and Mr Shahid had been trying to contact Mr Sykes but failed.

(d) NR Legal had then approached five different Chambers to see if they could act in the matter but due to the short notice none could.

(e) It stated that a witness statement for the appellant which dealt with the HMRC officers' witness statements could not be found.

(f) The appellant sought an adjournment for a period of one month.

37. On 26 September 2023, HMRC contacted the Tribunal administration to ask if the proceedings had been struck out and they were informed of that Application and the supporting emails. HMRC indicated that if that Application were to be treated as a request for reinstatement of the proceedings and for the hearing to be adjourned, then HMRC strenuously objected. They invited the Tribunal to "leave the proceedings struck out and to confirm that the hearing on Friday is vacated".

38. I issued Directions the following day stating *inter alia* that the position was as follows:-

(i) "In terms of the Rules the appeal has been automatically struck out, although the formal decision has not yet been issued.

(ii) In terms of Rules 8(5) and (6) of the Rules, the appellant does have the right to seek reinstatement but he has to explain why he has not completed the attendance form. He has not.

(iii) I have had regard to Rule 2 of the Rules and am prepared to consider the Application for reinstatement at the hearing on Friday 29 September 2023 at 10.00am PROVIDED that the appellant completes the attendance form so that he can be given the link to attend the video hearing.

(iv) He does not require a representative. The Tribunal is designed to be used by taxpayers who do not have solicitors or counsel. All the appellant needs to do is to join the hearing. What is required is completion of the form which we have partially completed for him and is attached to these Directions. As can be seen the appellant needs to provide his direct telephone number and confirm that he can access the hearing. At worst if he does not have a reliable broadband connection then the Tribunal can arrange for him to telephone the hearing BUT the telephone number is required."

39. He was directed to respond by no later than 2 pm and at 13:14 he emailed the Tribunal and HMRC. He complied with those Directions and confirmed that he would attend the hearing. He reiterated his request for an adjournment in order to instruct counsel. It seemed that he thought that the hearing related to the substantive appeal. That long email had clearly been written with the benefit of professional advice and in the hearing the appellant confirmed that Mr Shahid had drafted it for him.

40. That afternoon my Clerk emailed the appellant, with a copy to HMRC, indicating that because of the urgency no further Directions would be issued. It was confirmed that the hearing was <u>not</u> the actual appeal and that only two matters could be considered at the hearing.

41. The first would be for the appellant to explain why he had not completed the attendance form but the working assumption was that he was asking for the Appeal not to be struck out

(ie reinstated because it had been struck out) because he had not understood the urgency and was trying to find reasons for postponement.

42. The second was that in terms of the law, the Appeal had been lodged late with the Tribunal and could only go further if he could explain to the Tribunal and HMRC, why the appeal was late. That was the reason why the hearing was scheduled. It was explained that the Tribunal would look at three things, namely:-

> "(1) The length of the delay (the time limit is 30 days from the date of the decision) so that is straightforward.
>
> (1) The reasons for the delay. That is your opportunity to explain why the appeal was late.
>
> (2) The Tribunal would then look at anything else that you would ask it to consider such as how important this is to you and the amounts of money involved etc".

43. Lastly, it was explained that the actual appeal would certainly not take place on that date and that Judge Scott would help the appellant to put forward any arguments that might assist him and to explain anything that HMRC might put forward.

44. That letter was issued because HMRC had previously made it abundantly clear that they would oppose any further application for postponement because:-

> (a) Following the resignation of Mr Sykes for "want of instructions" the appellant had had more than 30 days to instruct other counsel.
>
> (b) It would appear that the appellant has a law firm acting for him to instruct counsel and it was not clear why Mr Shahid could not appear for the appellant.
>
> (c) The appellant had had sufficient time to find representation and has access to representatives.
>
> (d) In accordance with Rule 2(2)(c) of the Tribunal Rules if the appellant as a litigant in person required assistance to make his arguments, the Tribunal would be able to assist the appellant as required; "in short, there is no need for the appellant to be represented".

45. He did attend the hearing where we had the benefit of an interpreter.

46. He requested that the appeals be reinstated. HMRC initially maintained their objection. I had regard to Rules 2 and 5 of the Rules and reinstated the appeals for the reasons articulated at paragraph 37 above.

47. The request for an adjournment was refused and the late appeal application was considered and dismissed. The appellant requested that the decision be issued in summary form.

48. On 8 November 2023, Mr Abbas of NR Legal lodged with the Tribunal a request for re-instatement of the "court proceedings" in compliance with a "the court order dated 11 October 2023".

49. On 23 November 2023, HMRC lodged an objection to the re-instatement application, described the hearing in some detail and pointed out that the appellant's only possible further course of action would be to make an application in terms of Rule 35(4) of the Rules, ie request full reasons for the Decision.

50. On 28 November 2023, I issued Directions narrating the history and stating:

> "16. The Application to reinstate is not competent since the appeal had already been reinstated and subsequently dismissed. The only further procedure that is open to an appellant when an appeal has been dismissed is a further appeal to the Upper Tribunal if there is an error of law in a decision.
>
> 17. An application for such an appeal can only be made once full findings and reasons for the decision have been issued. It is a matter for the appellant and his advisers to decide whether to request that."

51. In those Directions I had recorded that, on 2 October 2023, I had drafted a summary decision which I had understood to have been issued but it transpired that due to an oversight it had not been issued. I annexed a copy to the Directions, on an embargoed basis, and confirmed that I had asked the administration to issue it as soon as possible. (It seems that what had happened was that the original strike out decision had been issued rather than the summary decision.)

52. The summary decision was issued on 29 November 2023. It recorded at paragraph 2 that it related to an application to make a late appeal in respect of two PLNs, at paragraph 3 that the appeals for both had been lodged with the Tribunal in one Notice of Appeal and at paragraph 7 that the appeals having been struck out, they were reinstated. The application for permission to notify the appeals late was refused and the appeals were therefore not admitted.

53. On 11 January 2024, Mr Abbas (who was now with Dyson Solicitors) wrote to the Tribunal, copied to my clerk, requesting full findings and reasons for the Decision. However, he also wrote to the Tribunal and my clerk on the same day referring to documentation issued by the Tribunal and stating that the appellant "intends to proceed with this appeal to a hearing". It transpired that that was the appeal relating to the Discovery Assessments and one with which I had no involvement.

54. The application for full reasons was out of time since the application should have been made within 28 days of the issue of the Decision. No explanation was offered for the delay and there was no application for an extension of time. The 28 day time limit was clearly stated in the Decision.

55. On 9 February 2024, Mr Abbas lodged an application for leave to appeal to the Upper Tribunal ("the PTA") which was drafted by Counsel. The PTA did not reference the fact that the application for full reasons was out of time and it did not request an extension of time but it did explain that:

> (a) Mr Shahid was the appellant's solicitor and had recognised the need for full reasons in early December and had sought instructions from the appellant.
>
> (b) Mr Shahid had been abroad from mid-December 2023 and had returned to the UK on 7 January 2023 (assumed to mean 2024), returned to work on 9 January 2024 and obtained instructions. The request was sent to the Tribunal on 11 January 2024.

56. The PTA was only forwarded to me in March 2024.

Decision on the First Preliminary issue: whether to extend the time limit for an application for full reasons

57. I have had regard to Rules 2 and 5 of the Rules.

58. Given Mr Abbas' involvement since 8 November 2023, it is far from clear why Mr Shahid's overseas visit meant that instructions could not be taken from the appellant.

59. Paragraph 69 of the Summary Decision makes it explicit that there can only be an appeal if a request is made for findings in fact and reasons within 28 days of the release of the

Decision. However, as can be seen, quite apart from that, in November 2023, both HMRC and I had pointed out to the appellant's representatives that the only option open to them if they wished to pursue matters further, was to request full reasons. They should have been in no doubt about the position.

60. There is no explanation as to why instructions were not taken before Mr Shahid went abroad in mid-December 2023.

61. The request for full reasons was only four sentences long but there was no explanation for the further two day delay. There was no reference in the PTA to Mr Abbas. There has been no explanation of his role in Dysons solicitors.

62. If the delay is attributable to the representatives they should have been in no doubt about the implications of *Katib* since that was a live issue in the application relating to the Appeal.

63. Clearly, Counsel noted that there was a delay but it is not known why that was not addressed with an appropriate application to the Tribunal to extend the time limit and a more full explanation. Quite why, in those circumstances, the limited explanation was included in an application for leave to appeal to the Upper Tribunal is a mystery. The terms of Rule 39 of the Rules are very clear.

64. I find that the appellant has not provided adequate reasons for an extension of time for requesting full findings.

65. However, Rule 2 of the Rules means that I must avoid delay and expense, approach matters proportionately and, crucially, be fair and just to <u>both</u> parties. At point 8.3 of the PTA *et seq* Counsel argues that the Summary Decision did not refer to, or address, the Submission and goes on to quote from it and argues that I either failed to take account of the Submission or I gave it insufficient weight.

66. HMRC are very well aware that the primary reason for the adjournment of the first hearing in December 2022 was the content of the Submission Bundle; the terms of the Directions that I issued then make that clear. The adjournment was not simply because of the late delivery of the Submission Bundle to me. Those Directions also make it clear that Mr Shahid intended to "tailor" the Submission in light of the arguments advanced by HMRC. I can only assume that Counsel had not had sight of those Directions. If the Appeal goes any further, HMRC would want to rely on my Findings in Fact since they were aware that the Submission contained at least one material inaccuracy relating to the appellant's knowledge of the PLNs.

67. It would not be a good use of Tribunal, or HMRC, resources to refuse the PTA on the basis of non-compliance with Rule 39 of the Rules; presumably that might trigger a recognition that an application for an extension of time for a request for full reasons should be lodged. If done, that may or may not be successful but it is a possibility.

68. In summary, although the appellant and those acting for him have not complied with the Rules and have not advanced adequate reasons for the failure to apply timeously, I have decided to produce a Decision with full Findings of Fact and reasons.

Decision on the Second Preliminary issue: Reinstatement of the Appeal

69. Although, HMRC initially objected to the reinstatement application, as they fairly record in the Objection, I made it clear that I would reinstate the proceedings so they "effectively withdrew their objection". As I have indicated at paragraph 46, I reinstated the appeals.

Decision on the Third Preliminary issue: Should the adjournment request be granted?

70. The next issue was whether the hearing should be another case management hearing or whether the application for an extension of time should be considered.

71. Mr Blakeley explained that HMRC maintained their opposition to any further adjournment. I have set out at paragraph 44 above a summary of their arguments. The appellant relied on the Application (see paragraphs 34 to 36 above) and the email.

72. I asked about Mr Shahid's involvement. Unlike what is said in the Application, the appellant's oral evidence was that he had stopped using Mr Shahid at some point after the hearing because it had appeared to the appellant that Mr Shahid had been confused or had not understood the issues. I did not explore that in any detail with the appellant since, at the previous hearing Mr Shahid had indicated that he wished to revisit his Submission in the context of *Katib.*

73. The appellant explained that when he had been unable to contact Mr Sykes he had decided to go back to Mr Shahid in mid-August 2023. As can be seen that is not consistent with what was written in the Application.

74. He confirmed that Mr Shahid had drafted the documentation that he had lodged with the Tribunal including the Application and the email.

75. As I have indicated the email was lengthy and argued that the appellant was entitled to use Counsel and that was a Human Rights issue. He did not have access to whatever Mr Sykes had done or to his papers. He had been unable to instruct new Counsel.

76. No case law was cited to me but I am aware that in *Teinaz v Wandsworth London Borough Council* [2002] I.C.R. 1471, Gibson LJ, commenting on Article 6 of the European Convention on Human Rights, states at paragraphs 21 and 22:

> "But the tribunal or court is entitled to be satisfied that the inability of the litigant…is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment…All must depend on the particular circumstances of the case."

What then are the particular circumstances of this case?

77. Firstly, I return to Mr Shahid's involvement. I was aware from the hearing in December 2021, that

> (a) When the appellant lodged the Notice of Appeal in December 2020, he stated thereon that he had no representative,
>
> (b) However, Mr Shahid was not only his representative but had been corresponding with HMRC about the PLNs since August 2020. Reliance had been appointed as agents on 29 July 2020.

78. The terms of the Notice of Appeal are such that I find that it was drafted by Mr Shahid. I say that because the duplicate Notice of Appeal lodged by Reliance in 2021 (in appeal TC/2021/02241which was struck out) is in identical terms including spelling mistakes and grammar.

79. What is clear is that the appellant's argument that he instructed Mr Shahid in August 2023 when he could not contact Mr Sykes is not credible since that is contradicted by the emails detailed at paragraph 35 above and in particular 35(a). It is obvious that Mr Shahid was instructing Mr Sykes at that time.

80. There was no explanation for the delays after the December hearing, at which the appellant had been present, with the assistance of an interpreter, and he knew or most

certainly should have known that matters had to be taken forward following that hearing. They were not.

81. A prudent taxpayer would have wanted to know that action had been taken. Whilst the appellant suggested that he had dismissed Mr Shahid at some stage after that hearing, there is no clarity at all as to what happened and when or, indeed, why nothing happened in the Appeal. The appellant was clear that Mr Shahid had introduced him to Mr Sykes.

82. I know that Mr Sykes died on 31 August 2023 because his brother, as executor, wrote to NR Legal on 10 October 2023 stating that and demanding payment of outstanding fees due in respect of five clients of NR Legal including the appellant. That letter was produced with the reinstatement application. The sums of money due by the appellant far exceed the sums quoted in the emails and it is clear that it was NR Legal that was instructing Mr Sykes. It is inherently unlikely that Mr Shahid's involvement recommenced in August 2023.

83. It seems that HMRC are correct in their argument that the appellant was represented by Mr Shahid. On the balance of probability, as in December 2022, it is also likely that the reality was that Mr Shahid was advising throughout but left Mr Sykes and the appellant to "front" matters with the Tribunal.

84. Quite why the Application should state that it was only after 10 September 2023 (which was a Sunday) that Mr Shahid and the appellant had attempted to contact Mr Sykes, without success, is a mystery because I also know that Mr Sykes had requested payment in advance by 8 September 2023 if he was to attend the Tribunal. Despite the terms of the Application there is no evidence that Mr Sykes was paid or that he undertook to attend the hearing. There is a further inconsistency in that, as I have indicated at paragraph 29, the appellant argued that, on 24 August 2023 Mr Sykes had agreed to represent the appellant at the Tribunal but the emails tell a different story.

85. If there ever was a witness statement, and if it related to the application for a late appeal rather than to the Appeal itself, then it would have been expected that the Reply, in terms of the original and amended Directions, would have been lodged. Nothing has been produced of that nature. As can be seen, Mr Sykes did not appear to have been working toward a hearing about a late appeal (see paragraph 19).

86. I was not persuaded that the appellant was prejudiced by a lack of access to anything Mr Sykes might have done or documents that he might have had. The application from Mr Sykes was, in my view, kindly described by HMRC as "unusual". It was apparent that he had not understood the implications of the fact that this hearing related to an application for an extension of time in relation to the Appeal and that in the absence of leave to make a late appeal no other procedure was possible.

87. Neither the supporting emails lodged by the appellant, nor the previous history with Mr Sykes led me to think that any documents held by Mr Sykes would assist the appellant.

88. As can be seen, the email described at paragraph 35(e) makes it clear that by 24 August 2023, the objective was to seek an adjournment but no approach to the Tribunal was made in that regard.

89. For these reasons alone I attach little weight to the accuracy of what is stated in the Application.

90. The appellant was unable to explain his repeated lack of response to the Tribunal. Giving him the benefit of the doubt, in summary, it seemed likely that he just felt lost and did not know what to do or he relied on Mr Shahid.

91. HMRC's email dated Tuesday 26 September 2023 made it clear that HMRC would be opposing any postponement and explained why. It was copied to the appellant. The hearing was on the Friday but there was no further communication from the appellant in the interim.

92. Lastly, it was argued that the hearing would involve complicated issues of law and fact. As I indicated in the correspondence with the appellant prior to the hearing, the issue for the Tribunal was simply whether there was a reasonable excuse for delay and I would explain both the law and HMRC's arguments to him. The legal issues, beyond their applications to the facts, are peripheral and relate, for example, to the third stage of *Martland* which includes assessing the obvious strengths or weakness of the underlying case.

93. As is made clear, at paragraph 21 in *Transport for London v O'Cathail* [2013] EWCA Civ 21 the overarching fairness factor must be taken into account in assessing the effect of the decision as to whether or not to adjourn on <u>both</u> sides. *Dhillon v Asiedu* [2012] EWCA Civ 1020 confirms that the decision as to whether or not to adjourn is a balancing exercise.

94. Both parties are entitled to have the cases dealt with fairly and justly. The appellant does not have a monopoly of the fairness factors. He has failed to advance credible or indeed consistent arguments in support of the Application. He has repeatedly failed to co-operate with the Tribunal.

95. The Submission Bundle addresses the issue of an application for a late appeal at some length and most of the documentary evidence that has been produced emanates from that. It was prepared by Mr Shahid and rightly accepts that the test in *Martland* should be applied.

96. *Terluk v Berezovsky* [2010] EWCA Civ 1345 correctly identified that a late adjournment involves a significant loss of time and money. If this hearing were to be adjourned there would undoubtedly be a waste of scarce Tribunal time, little or no possibility of recovery of costs for this Hearing from the appellant (if HMRC were to make an application for wasted costs) and a further delay in access to justice for the parties. I accept that an adjournment would result in significant prejudice to HMRC, the administration of justice and the public purse.

97. For all these reasons, I refused the application to adjourn the hearing.

The application for a late appeal

The Legal Framework

98. The Upper Tribunal in *Martland* has given guidance on the correct test to be applied when considering an application for permission to make a late appeal and paragraphs 43 to 47 read:

> "43. The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".
>
> 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."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will

have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Approach to the evidence

99. The appellant frankly conceded that he did not have a good memory and he could not recall dates. He also appeared to have difficulty with names. He had very little recollection of any detail. The issues with which the Appeal is concerned happened many years ago.

100. Whilst, of course, it deals with a completely different part of the tax legislation, nevertheless, we agree with Judge Amanda Brown QC and Member Duncan McBride in *Cry Me A River Limited v HMRC*[1] ("Cry Me") where they state at paragraphs 11 to 14 as follows:-

"11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.

12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:

"26 …

• memories are fluid and malleable, being constantly rewritten whenever they are retrieved …

• the process of … litigation … subjects the memories of witnesses to powerful bias …

• witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …".

13. The judgments summarised by Judge Brooks conclude that:

'The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral

[1] [2022] UKFTT 182 (TC)

testimony serves no useful purpose … But its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth." '

14. This approach is particularly relevant in the present appeal."

101. It is very relevant in this appeal and therefore where there are contemporaneous documents the Findings in Fact are predicated thereon rather than on the later submissions or oral evidence. Furthermore, almost all of that documentation was originally produced in the Submission Bundle.

Findings in Fact

102. The appellant was the sole registered director and shareholder of Pazzia Limited ("the Company") which operated an Italian restaurant. On 14 September 2016, HMRC visited the premises and thereafter opened an enquiry into the Company's tax affairs. They believed that the Company had not declared all of its income as there were significant sales identified with the Merchant Acquirer data which were not included in the sales figures.

103. The Company ceased trading on 28 February 2017. On 9 June 2017, the Company changed its registered office from c/o ATS Business Solutions Limited in Graham Road, London to an address at Merton Road London. The latter address had been used prior to 27 July 2012. On 9 November 2018, it was changed to the liquidator's address.

104. The Company was placed into creditors' voluntary liquidation on 18 October 2018.

105. On 20 June 2018, Officer Moore wrote to the Company issuing penalty factsheets and enclosing VAT Assessments in the sum of £579,988 in order to recover the lost revenue.

106. Corporation Tax Assessments in the sum of £709,005.63 were issued on 26 July 2018 in order to recover the lost revenue.

107. The assessments were never appealed.

108. On 20 July 2018, Officer Moore received a telephone call from Martin Armstrong of Turpin Barker Armstrong ("Turpin") who said that he was with the appellant and that he was a licensed insolvency practitioner. During the telephone call he forwarded to HMRC a mandate signed by the appellant authorising him to act on behalf of the Company. It was his first meeting with the appellant.

109. He said that:

(a) He had HMRC's letter of 20 June 2018 and the VAT assessments.

(b) The Company did not have the funds to pay the assessments and it was the appellant's intention to liquidate the Company.

(c) On the advice of the appellant's previous accountants, who were no longer acting, the Company had ceased trading on 28 February 2017 and the business had been transferred to another company on 1 March 2017. The appellant had then been advised by the former accountant to set up a third company and that entity had taken over the business with effect from 1 March 2018.

(d) The appellant had operated the business at all times in each of the entities.

(e) It was possible that the appellant would face disqualification as a director.

110. On 27 July 2018, on the basis of deliberate behaviour, HMRC issued the Company with VAT penalties in the sum of £272,214.86 and Corporation Tax penalties in the sum of £464,909.87. Those were not paid by the Company.

111. The assessments and the penalties were all sent to the Merton Road address.

112. On the same day the two PLNs were sent to the appellant's home address and those were intimated to the Company at the Merton Road address.

113. A Code of Practice 9 ("COP9") investigation was opened by HMRC on 26 July 2018. The appellant was advised that HMRC had reason to suspect him of tax fraud and he was offered the opportunity to enter the Contractual Disclosure Facility ("CDF"). That letter was sent to the appellant's home address with a copy to ATS, whom HMRC referred to as Accountancy and Taxation Services.

114. On 11 September 2018, Mr Armstrong contacted Officer Moore by telephone intimating that the liquidation would proceed and the insolvency notices would be issued that week. He said that the appellant had received the PLNs. He asked if the PLNs would form part of the COP9 procedure and the officer referred him to the colleague dealing with COP9.

115. On 12 September 2018, Azed and Co notified HMRC that they had been appointed to act for the appellant.

116. On 2 October 2018, Turpin wrote to HMRC intimating that they had been appointed as tax advisers for the COP9 investigation.

117. On 11 October 2018 Turpin lodged with HMRC the appellant's Outline Disclosure ("Disclosure") in terms of the CDF.

118. At the opening meeting for COP9 on 30 January 2019, which was held at Turpin and where the appellant was represented by both Mr Clark of Turpin and by Mr Azed, the terms of the Disclosure were read out to the appellant. He agreed that it was accurate. There were 11 bullet points. He had confirmed that, amongst other things, he had been responsible for (a) the suppression of business profits, and therefore the understatement of corporation tax liabilities, and (b) the submission of inaccurate VAT returns leading to the under-declaration of output VAT. In the full copy of the Disclosure in the Bundle, I observe that whilst the appellant accepted responsibility for all of the omissions, he also attributed blame to ATS.

119. It is clear from paragraph 48 of those notes that that was not the first meeting between the appellant and HMRC since a conflict in the information provided at a previous meeting was identified. In the course of the meeting the appellant is recorded as having attributed blame to his previous accountant. It was agreed that Turpin would provide a complete report for HMRC on behalf of the appellant and his wife within nine months.

120. Correspondence ensued and Turpin requested an extension of time to allow the appellant to sell an investment property to make a payment on account.

121. In November 2019, Azed & Co provided some computations in relation to personal tax.

122. Following a meeting on 28 November 2019, at Turpin's offices, where HMRC had requested a Statement of Assets and Liabilities, on 23 December 2019, Azed & Co furnished that to HMRC.

123. On 11 May 2020, Turpin resigned agency but Azed & Co continued.

124. On 15 May 2020, HMRC emailed Mr Azed advising that the intention was to raise Income Tax assessments and, on 31 May 2020, Mr Azed furnished information that they had given to Turpin.

125. On 12 June 2020, Income Tax Discovery Assessments for the years 2001/02 to 2016/17 were issued to the appellant and copied to Azed and Co. On 23 and 29 July 2020, penalty determinations and assessments were issued to the appellant covering the same years and copied to Azed & Co.

126. On 29 July 2020, Reliance wrote to HMRC intimating that they had been appointed to act for the appellant.

127. On 14 August 2020, HMRC wrote to Reliance narrating the history at some length detailing exactly what had happened and when (including what I have outlined above). Pertinently they enclosed copies of all of the correspondence that they had identified. That included the PLNs.

128. The letter concluded by noting that Reliance had said to them that:- "After receiving and reviewing all documents, we will make a formal appeal which will not be within the statutory period…". HMRC therefore referred Reliance to their published guidance ARTG2240 and quoted the relevant part that dealt with late appeals. HMRC pointed out that an application would have to be made to the Tribunal.

129. On 20 August 2020, HMRC wrote to Reliance referring to a letter from them dated 14 August 2020 (which is not in the Bundles). They quoted from that letter saying:

> "You state:
>
> *"<u>We have been passed documents by the previous adviser Azed & Co which shows that personal penalty notices were issued against our client.</u> We confirm that we do not have any documents in our possession which show how and why any tax liability is due by the client and in consequence of which penalty notices were issued.*
>
> *Therefore we write to confirm that all such notices which specify personal tax liability against our client are appealed against. Furthermore, any penalty notices issued as a corollary to the tax notices are also being vigorously challenged.*
>
> *We request that you provide all liability notices to us immediately and explain on what grounds or basis these notices were issued. We intend to challenge any such calculations."* (Emphasis added)

130. HMRC replied confirming that the copy correspondence referred to in HMRC's letter of 14 August had been sent to Reliance in:

> "eight letters to you, containing various correspondence including all of the Discovery assessments of Income Tax, assessment of penalties and determination of penalties, together with the Personal Liability Notices issued to Candido Rodrigues, in respect of the Corporation Tax and VAT penalties assessed on Pazzia Ltd".

131. On 10 September 2020, HMRC replied to a letter of 24 August 2020 from Reliance (which is not in the Bundles.) After dealing with the Discovery Assessments and postponement of tax, under headings in bold referring to the PLNs, the officer quoted section 49 Taxes Management Act 1970 ("TMA") and went on to point out that:

> (a) No reasonable excuse had been offered for the failure to appeal the PLNs timeously.
>
> (b) No mention of either the PLNs or any excuse for a failure to appeal had been offered at the COP9 meeting on 30 January 2019.

(c) If there was an excuse, evidence should be provided including documentary evidence.

(d) In the absence of a reasonable excuse being offered, a late appeal would not be accepted and therefore in terms of section 49(2) TMA the only possible action would be to take the matter to the Tribunal.

132. On 3 November 2020, Reliance wrote to HMRC referring to that letter with the writer, stating that although the letter had been received in his office on 15 September 2020, he was abroad and only returned at the beginning of October 2020 and had self-isolated for 14 days. He stated that an appeal to the Tribunal in relation to the PLNs had been prepared but had not been submitted pending confirmation that payment would not be a prerequisite for an appeal.

133. He went on to argue that the first meeting between the appellant, his wife and Turpin was the COP9 meeting in January 2019 and the appellant had a reasonable excuse in that it was alleged that Turpin had worked at the behest of HMRC and there had been a conflict of interest. He said that the "reasonable excuse only ended once we were hired to review the outstanding matters and now advising of the appeals (sic)".

134. On 10 June 2022, Womble Bond Dickinson (UK) LLP, acting for the Liquidator of the Company, wrote to the appellant pointing out that, with effect from 8 August 2019, the appellant had given a disqualification undertaking to the Secretary of State for Business, Energy and Industrial Strategy under the Company Directors Disqualification Act 1986 ("CDDA") that he would not act as a director for a period of 10 years. The matters of unfitness which, solely for the purposes of the CDDA, were not disputed by the appellant were:

> "I deliberately caused Pazzia Limited … to file inaccurate Value Added Tax ("VAT") and Corporation Tax ("CT") returns in the period 10 June 2011 to 24 March 2017 which resulted in the under-declaration of Value Added Tax of £579,988 and Corporation Tax of £1,225,434 and a liability to HM Revenue & Customs ("HMRC") of £2,826,084 including interest, charges and penalties."

135. They confirmed that HMRC had submitted a proof of debt in the liquidation in the total sum of £2,826,083.78 reflecting the unpaid VAT, Corporation Tax/Section 455 tax plus penalties surcharges and interest. They confirmed that Azed & Co had made various representations to the Liquidator on the appellant's behalf to the effect that that was overstated but they maintained their claim in that sum of the debt.

Discussion

136. In deciding whether to give permission, I have adopted, as I must, the three stage approach in *Martland*. However, in the particular circumstances of the Appeal the first two stages are inextricably linked.

The first and second stages – the length of the delay and the reasons for the delay

137. The delay in this case is some 27 months after the time limit for appealing had expired. In the context of a 30 day time limit the delay in this case cannot be described as anything other than serious and significant. That is acknowledged in the Submission.

138. However, in the Submission, it was argued at paragraph 3 that the PLNs only came to the "knowledge" of the appellant in September 2020 and "thereafter Reliance" requested copies so they were appealed timeously (given Covid-19). That is quite simply inaccurate as can be seen from the Findings in Fact.

139. In paragraph 129 I have added emphasis because that makes it clear that not only did Reliance know about the PLNs in August 2020, but that knowledge was derived from Azed & Co who have been involved since 2018. The Submission states that they were appointed in June 2018, which is before the PLNs were issued. Whilst that is possible, that is unlikely since their mandate was only lodged with HMRC on 12 September 2018.

140. That raises another issue. The Submission states that it was the appellant's original advisers, ATS, who referred the appellant to Turpin as the appellant's "tax advisers". It goes on to say that they were initially hired as tax advisers and enquiry specialists. HMRC's contemporary record is that Mr Armstrong of Turpin first contacted them in July 2018 but as an insolvency practitioner, and that on 11 September 2018 he contacted them to say the liquidation would proceed.

141. It was only on 2 October 2018, that Turpin confirmed that they had been appointed as tax advisers in the COP9 enquiry. It was a different individual in Turpin who acted in that capacity. Mr Armstrong is an insolvency practitioner and was ultimately appointed as Liquidator. Turpin are Insolvency Practitioners but they are also Chartered Accountants. It was a Mr Clark, who is no doubt an accountant and tax adviser, who acted in the COP9 enquiry.

142. I endeavoured to explore that in the hearing but there was a total lack of clarity. In oral evidence, the appellant said that it was Azed & Co who appointed Turpin. The appellant thought that they had been tax advisers in the first instance and then they had acted in the insolvency. I do not think that that is an accurate recollection.

143. On balance, it seems unlikely that the Submission is correct in saying that it was ATS who involved Mr Armstrong of Turpin. The HMRC note of call states that Mr Armstrong told them that ATS were no longer acting for the Company in July 2018 although they were still on the record as advisers.

144. The Submission argues that ATS passed no files to Azed & Co and therefore the appellant can have had no knowledge of the PLNs (or anything else).

145. Mr Azed attended the COP9 meeting and was therefore aware of the Disclosure. He worked closely with Turpin. Leaving to one side, the appellant's assertion that he did not receive the PLNs and HMRC's tracked delivery note and the note of call with Mr Armstrong which records that he did, it is clear that Turpin were aware of the PLNs and that Azed & Co also were aware of them. Azed & Co prepared the appellant's Statement of Assets and Liabilities and, on the balance of probability, since it was accepted by HMRC, it must have included the PLNs. It was a liability and not a small one.

146. As can be seen, on request, HMRC promptly provided very full information to Reliance. They clearly corresponded with Azed & Co at some length.

147. Even if ATS did not provide information, on the balance of probability, HMRC will have done so. In any event, I consider it to be extremely unlikely that Turpin would not provide full details to Azed & Co given that they both worked on the information required for the COP9 investigation.

148. I find that on the balance of probabilities, Azed & Co will have been aware of the PLNs from a very early stage.

149. The reasons given by the appellant for the delay are interesting.

150. At paragraph 78, I have explained that the Notice of Appeal appears to have been drafted by Mr Shahid. The reason given for the late appeal was stated to be:

> "The appeal is late because I never received the notices on time and when the notices arrived, I had an adviser who worked for HMRC and actively colluded with them to deny me any appeal rights. He never explained the implications of the notices issued and consequently it was not until I hired the new representative and both HMRC and my ex-adviser brought personal bankruptcy litigation against me that I realised the implication of the notices issued".

151. In the Grounds of Appeal it was argued that there had been collusion between Turpin and HMRC because from the beginning they had actively advised against appealing the assessments and had failed to "protect my legal rights…they failed to explain the tax implications of personal liability notices to me".

152. In Reliance's letter of 3 November 2020 to HMRC it stated that:

> "In our view, the client has a reasonable excuse for not filing this appeal earlier. This excuse is based on ineffective and negligence assistance of tax adviser and possible collusion of the tax adviser and the HMRC inspector to the extent that the client's article 6 rights may have been violated"

It went on to justify that assertion, which was accepted to be "an enormous allegation", by arguing that at the COP9 meeting Mr Clark of Turpin had stated that he would not be recommending that the case went to a Tribunal.

153. In the Submission, as I have indicated, it was argued that the appellant had not known about the PLNs until September 2018. ATS had referred the appellant to Turpin. He had relied upon Turpin who had never discussed or showed the PLNs to him. The allegation of collusion was reiterated and reliance was again placed on the suggestion that Mr Clark advised against Tribunal proceedings. It was further argued that Turpin had either wilfully suppressed the PLNs or they had treated the PLNs as non-appealable and failed to inform the appellant.

154. There are a number of problems with all three of these arguments.

155. In relation to the reasons given in the Notice of Appeal, firstly, as HMRC have pointed out, on the one hand the appellant states that he never received the PLNs and then he states that they did arrive. Neither argument is consistent with the Submission which stated that Reliance obtained copies (albeit, as I have pointed out that was not in September 2018).

156. Secondly, the clear implication is that they "arrived" before Reliance were appointed on 29 July 2020 or bankruptcy litigation commenced. However, I observe that the Statutory Demand in the Bankruptcy was served on the appellant on 11 May 2020. The covering letter that was served with it stated that at a meeting on 26 February 2020 the appellant had agreed that bankruptcy was appropriate. Furthermore, the Creditor's Bankruptcy Petition was served in the High Court on 25 June 2020. On 7 August 2020, NR Legal Solicitors Limited filed the opposition to the Petition. (The petition was ultimately dismissed). Clearly, bankruptcy loomed long before Reliance were appointed.

157. The arguments about Turpin in the letter from Reliance and the Submission are not for me to adjudicate upon but HMRC's note of telephone call is long and clear. Firstly, Mr Armstrong made it explicit that he was acting for the Company. That is not the same as acting for the appellant. The assessments were assessments on the Company and not the appellant. Mr Armstrong's duties were to the Company.

158. Secondly, the argument advanced by Reliance about Mr Clark, who did act for the appellant, is noted. I simply observe that this is a specialist Tribunal. I am not surprised to see

it recorded in one sentence in a 206 paragraph note that one of the professional advisers present (Mr Azed was also there) had indicated that he would not be recommending tribunal proceedings. It must be read in context. The appellant had lodged a Disclosure covering significant omissions in relation to a wide number of tax issues. The purpose of a COP9 meeting is to negotiate, if possible, a way forward to avoid criminal proceedings. The objective is settlement. If that fails, both Alternative Dispute Resolution and Tribunal proceedings become a possibility. Furthermore, the PLNs formed no part of the COP9 meeting which was concerned with suspected tax fraud by the appellant.

159. Lastly in that regard, for the avoidance of doubt, in both the letter from Reliance and the Submission, arguments are advanced in relation to another taxpayer who is a client of Reliance. I will not refer to those as that taxpayer is entitled to confidentiality and, in any event, I can only consider what happened in the appellant's case.

160. For obvious reasons HMRC argue that any suggestion of collusion is completely unfounded. HMRC point out that the PLNs are short, which they are, are couched in plain English and make the appeal rights explicit. They do.

161. In the Submission, it is argued that "inherent in the appeal is the appeal against the penalty notices issued to the Company" and the appellant wishes to challenge the penalty amounts etc. Since it is accepted that those were served on the Company, it is then argued that :

> "Under section 83G of VAT Act 1994 at (ii) *in case where person other than P is the appellant, the date that person becomes aware of the decision*. The
> Appellant is a person other than the Company and therefore, the time limit should commence from the time the Appellant became aware of the decision to charge penalty and their subsequent transfer on him."

162. Although it is not very clear, I think that what is being argued for the appellant is that the usual time limit of 30 days in section 83 VATA does not apply because the underlying penalties were not served on the appellant and he only became aware of them when he received the PLNs.

163. That is not a tenable argument. Only the Company or the Liquidator could appeal the penalties. Neither chose to do so. The appellant has no standing to appeal the penalties himself.

164. The assessments to which the penalties relate were not appealed so the tax due, which is the basis for the penalty calculations, is treated as being finally agreed. HMRC pointed out to Azed & Co in a letter to them dated 12 June 2020 that, in that situation, if the appellant disagreed with the assessments then he could, and should, quantify different figures in the Disclosure Report for COP9. That has not been done.

165. As the PLNs themselves make explicit, PLNs are issued in terms of paragraph 19, Schedule 24, Finance Act 2007 ("FA 07"). That reads:

> "19 (1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company—
>
> (a) the officer as well as the company shall be liable to pay the penalty, and
>
> (b) HMRC may pursue the officer for such portion of the penalty (which may be 100%) as they may specify by written notice to the officer.

Paragraph 19(3) states that where that sub-paragraph applies to a body corporate "officer" means a director, shadow director or secretary. Paragraph 19(4) states that in any other case,

"officer" means director, manager, secretary or any other person managing or purporting to manage the company's affairs.

166. The only person who can appeal a PLN issued under those provisions is the officer of the company. In any appeal of the PLN, as the case law demonstrates, that officer, whilst unable to appeal the penalties issued to the company, can challenge the basis for, and the quantum of, the penalties. If the appellant wished to do that he would require to produce the relevant information.

167. In this case that officer of the company is the appellant. Section 83G(1)(ii) is not relevant. The time limit is the default time limit of 30 days.

168. The Submission accepts that a delay of more than three months is both significant and serious as the Upper Tribunal found in *Romasave (Property Services) Limited v HMRC* [2015] UKUT (TCC).

169. On the balance of probability the delay in this case is well in excess of that. I also observe that Reliance cannot be described as having acted promptly since HMRC repeatedly pointed out that late appeals would have to be lodged.

170. The appellant blames ATS and then Turpin. Unfortunately for the appellant, it is well established that "when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant" as the Upper Tribunal's decision in *Katib* makes clear at paragraph 54. In *Katib*, the Upper Tribunal had to consider the extent to which reliance on an adviser was a justifiable reason for failing to make an appeal in time. In that case, the adviser did not provide competent advice to Mr Katib, misled him as to what steps were being taken to appeal and failed to appeal on Mr Katib's behalf. On the facts of the case, the Upper Tribunal concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis.

171. The Upper Tribunal observed at paragraph 56 that: "… the correct approach in this case is to start with the general rule that the failure of [the adviser] to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a 'good reason' for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

172. In paragraphs 58 and 59 the Upper Tribunal said:

> "58. … the core of Mr Katib's complaint is that [the adviser] was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.
>
> 173. [Counsel for Mr Katib] urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against [the adviser] or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the

consequences of [the adviser's] failings and, if he wishes, pursue a claim in damages against him or [the adviser's firm] for any loss he suffers as a result."

1. I note that the appellant attributes any delay to ATS and then to Turpin. He argued that he had been charged a lot of money to ATS and they had not done much for him. He said that he then used Azed & Co but they too had not helped him and referred him to Turpin. I explained to him that I understood that he believed that he had received poor advice but that that cannot assist him in terms of a reason for the delay given and what the Upper Tribunal has said in *Katib*.

The third stage – evaluation of all the circumstances of the case

2. This evaluation proceeds from the starting point that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected (see *Martland* at paragraph 45). I must undertake a balancing exercise, assessing the reasons for the delay and the prejudice which may be caused to both parties by granting or refusing permission.

3. I have already pointed to some factual inaccuracies in the Submission but there are some other issues. It is argued at paragraph 34 that because of the sums of money involved the PLNs "merited a prompt action and response. There is no way he would sit down and relax, having received such liability notices." I am afraid that the procedural history of the Appeal certainly belies that. There has been considerable delay, actual strike out of the Appeal and a number of failures to respond to the Tribunal. I do not accept that argument.

4. It is also argued that the appellant was not living at his home address when the PLNs were issued. The Submission states that he was living at Dungeness House. That is a property referred to in the Disclosure as being an investment property which produced rental income. The Notes of the meeting (at paragraph 57) disclose that it was rented out privately for £700 per calendar month and that at that time there was a rental agreement in place. At paragraph 150 the appellant is recorded as saying that he received £700 or £800 in rental income per month and that although he had lived in the property at one point, he had been renting it out ever since. HMRC's letters to Reliance pointed out that Azed & Co had produced detail of the rental income. Production of a water bill does not assist me.

5. The appellant's oral evidence did not assist because it just was not credible. He said that for six or seven months in 2018/19, because he had water damage in his own home and builders were working, he had "rented elsewhere". He could not confirm when that had been the case or where he had stayed but the fact is that that is not consistent with living in his own property, which was in his name alone and for which he would not be paying rent.

6. He said that he would pass HMRC letters that he had received to Mr Shahid but I accept that that is after the date of delivery of the PLNs.

7. The appellant appears to have received the letter from HMRC about the COP9 enquiry which was addressed to his home address and copied to ATS and issued on 26 July 2018.

8. I had other difficulties with the appellant's evidence, which, in general, could best be described as vague and lacking in detail. For example, he could not remember who had acted for him and when. He argued that he was simply a chef and had been naïve. That was why he had paid professional advisers.

9. A particular issue was that he said that Turpin had told him that they had spoken with HMRC and HMRC had agreed that he could continue in business after the liquidation of the Company; ie that he could have a "phoenix" company. It is not credible that HMRC would ever have said anything of the sort since the primary focus of the PLN legislation is to put a stop to phoenix companies. The suggestion was that Turpin had deceived him by saying that.

10. Officer Moore's evidence was short, straightforward and credible. The notes of the telephone calls are detailed contemporaneous evidence, and do not simply cover the point that HMRC made, which was that when Mr Armstrong called Officer Moore on the second occasion he said that the appellant had received the PLNs. Pertinently it is recorded that during the first phone call when the appellant was allegedly sitting with him, quite apart from discussing the VAT assessments, the possibility of liquidation of the Company and the mandate from the Company, Mr Armstrong had "talked about the director's behaviour and mentioned disqualification, but I did not comment on this".

11. Of course, as I have indicated, the appellant was duly disqualified.

12. As the Upper Tribunal indicates at paragraph 46 in *Martland,* one of the factors that I must consider, without looking at the merits in detail, is the strength or weakness of the challenge to the PLNs.

13. The Submission is incorrect in stating that the enquiry into the Company was opened "around early 2018". The enquiry started on 16 September 2016. I do not have records of the enquiry but, as I have identified at paragraph 119, thereafter HMRC had pursued their enquiries and at least one other meeting had taken place. The Company had ceased trading on 28 February 2017. HMRC had Merchant Acquirer data which showed significant card sales well in excess of the declared turnover. They were in a position to, and did, issue the VAT assessments on 20 June 2018.

14. On 20 July 2018, before the penalties were issued on 27 July 2018, Mr Armstrong, acting for the Company and authorised to do so by the appellant, had told them that the Company was on the point of liquidation and that the appellant's behaviour was such that disqualification as a director was a possibility.

15. I do not know or need to know the detail. I reiterate these facts since the Submission argues that there may be "serious procedural errors" in relation to the assessments and penalties and that strengthens the appellant's case.

16. On the face of it, at the point that the penalties were issued to the Company, and the PLNs to the appellant, HMRC appear to have had grounds to do what they had done.

17. Further, although they were at a later date, the terms of the CDDA and the Disclosure for COP9, do not suggest that, in light of Mr Armstrong's disclosures, HMRC's arguments on penalties would be particularly weak.

18. Whilst I accept that the appellant states that he intends to sue Turpin, at this stage that is simply an argument put forward by him. The most that could be said at this juncture would be that if he were here to appeal the PLNs he would advance the same arguments as he has done here in regard to his advisers.

19. The Submission also argues that the appellant has an argument that the PLNs imposed the full amount of the penalties on the appellant, whereas there is an argument that HMRC should have considered whether or not a manager might bear some part of the liability. As I have indicated at paragraph 164, a manager would only be considered if the Company was not a body corporate. All the indications are that it was.

20. I find that the appellant's case does not appear to be strong; in the words of *Martland* the merits of the appeal are not overwhelmingly in his favour.

21. Of course, the appellant will be prejudiced if I refuse to grant him permission to notify the appeals late, in that he will have lost the opportunity to contest the PLNs and will be liable to pay a substantial sum of money. That, however, is a consequence of the failure to notify the appeals in time and it cannot be right that a delay which is significant and for

which there was no good reason should be overlooked, simply because the amount at stake is very large or significant to the would-be appellant. If that were so, there would be no point in having a time limit for notifying high value appeals, or appeals of lower value by poorer taxpayers.

22. As I pointed out in the course of the hearing, the Upper Tribunal made it clear at paragraph 60 in *Katib* that a taxpayer:-

> "…would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

23. Against that prejudice to the appellant, I balance the prejudice to HMRC and the public interest if the appeals are allowed to proceed after such a long period of delay and the need for statutory time limits to be respected. As the Submission recognises, if the Appeal is permitted to proceed, HMRC would be required to divert resources, time and costs for a matter that had been considered to be final a long time ago.

24. I consider that the appellant has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs and, in all the circumstances, it is not appropriate to give permission for the appellant to make late appeals in this case.

Decision

25. For all of the reasons set out above, the appellant's application for permission to notify the Appeal late is refused and, accordingly, the Appeal is not admitted.

Right to apply for permission to appeal

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

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th JUNE 2024