Neutral Citation: [2025] UKFTT 00095 (TC)

Case Number: TC09421

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2023/08741

LATE APPEAL - Inheritance Tax - Martland considered - length of delay - whether serious or significant - yes - whether good or understandable reasons for delay – no - whether late appeal is appropriate in all the circumstances - no - Application refused and Appeal dismissed -Section 221 Inheritance Tax Act 1984.

Heard on: 09 January 2025
Judgment date: 3 February 2025

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS

Between

THE EXECUTORS OF THE ESTATE OF THE LATE WILLIAM EDWARD COOK
Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants: Calypso Blaj, Counsel, instructed by Shakespeare Martineau, Solicitors, ("Counsel for the Appellants")

For the Respondents: Chris Thompson-Jones, Litigator, of HM Revenue and Customs' Solicitor's Office ("Counsel for the Respondents/ HMRC")

DECISION

INTRODUCTION

1. The form of the hearing was by video on 'Teams' and all parties attended remotely.

2. The documents to which the tribunal was referred comprised of a Hearing Bundle of a total of 460 pages, and Authorities Bundle of 414 pages and the Appellants' Skeleton Argument of 18 pages.

3. At the hearing the Appellants' application to admit further documents relating to a proposed claim before the High Court was allowed.

4. These included a Witness Statement by Edward Vincent Cook in his capacity (a) as an executor ("Edward Cook") of the estate of the late William Edward Cook ("William Cook") and (b) as a shareholder ("Edward Cook as shareholder") in W E Cook (Farmers) Limited ("the company"); and a Deed of Rectification ("DoR"), drafted on 15 March 2023 and referred to in a High Court Claim Form Part 8 ("Claim Form") dated 09 October 2024 and a High Court Order by Master Kaye both dated 03 December 2024.

5. 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 to observe the proceedings. As such, the hearing was held in public.

6. This is an appeal by Edward Cook and his sister Joyce Matilda Priddle as executors of the late William Cook, ("the Appellants/executors"), who were also the surviving executors of Ruby Lillian Cook ("Ruby Cook") who was the wife of William Cook and who had predeceased him in 2012, against a decision of His Majesty's Revenue and Customs ("the Respondents/HMRC") in a formal Notice of Determination ("NoD"), under section 221 of the Inheritance Tax Act 1984 ("IHTA"), dated 17 May 2022 which determined that Business Property Relief ("BPR") was not available in respect of 242,192 shares which formed part of the holding of 675,193 shares in the company belonging to William Cook who died on 16 June 2016.

EVIDENCE AND FINDINGS OF FACT

7. The tribunal heard evidence from Lucas Harding-Cox, ("LHC"), chief Technical Officer of WBR Group Ltd, trading as WBR Tax, ("WBR") who was involved in providing advice to Haines Watts Bedford ("HW") who were the accountants advising William Cook and the company on the tax consequences of a rights issue which was the subject of HMRC's determination that BPR was not available.

8. WBR had an ongoing engagement with HW to provide 'ad hoc support' and in time replaced HW as advisers to the Appellants. The Appellants are pursuing a professional negligence claim against HW within the limitation period and their respective solicitors have agreed a standstill agreement pending rectification proceedings based on the DoR which may have an impact on the negligence claim.

9. LHC carried out a review and identified that the rights issue and the partial renunciation of the rights not only failed to achieve its tax objectives but also that there was "a significant commercial effect on the members of the company in terms of an unexpected shift of value out of the shares held by the minority shareholders". LHC believe that neither HW nor the minority shareholders seem "to appreciate the effect of the value shift and there was no indication that this commercial effect was expected or that they had received advice in relation to this at the time".

10. LHC in turn received legal advice about the matters under dispute, from approximately late 2022, from a corporate lawyer, Roy Botterill, of Shakespeare Martineau LLP, Solicitors

("Shakespeares") on an informal basis as there was no formal engagement letter setting out the scope of advice. LHC stated that Roy Botterill was not a tax specialist.

11. The DoR which LHR "did not realise would not be effective for tax purposes too, as well as the value shift between the shareholders of the company" was drafted in March 2023. LHC took further legal advice and discovered that "a deed of rectification can rectify the mistake between the parties (i.e., the value shift in shares) but in order to have retrospective effect for inheritance tax purposes", he was then advised (following the corporate solicitor's discussion with litigation colleagues) that a court application for rectification would be necessary.

The Rights Issue

12. William Cook's initial holding in the company was 193 shares, which included 40 shares that he had inherited from Ruby Cook. The issued share capital totalled 301 shares and, accordingly, William Cook was beneficially entitled to approximately 64.12% of the share capital and a collection of other shareholders, including Edward Cook as shareholder, (collectively "the minority shareholders") were beneficially entitled to 108 shares or approximately 35.88% of the share capital of the share capital.

13. The company was incorporated on 27 August 1962 and William Cook and Ruby Cook were the original directors and shareholders. The company carried on farming activities at Wootton, Bedfordshire and at Edgecott, Aylesbury.

14. In 2013 or 2014, William Cook made a director's loan to the company of £1.5 million to fund the purchase of land at Vine Farm, Wotton. There was no formal loan agreement between William Cook and the company, but the loan was shown in the company's annual accounts as owing to William Cook.

15. On 25 April 2014, the company repaid £825,000 of the loan leaving a balance outstanding of £675,000. It is believed that William Cook appreciated that when he died, the sum outstanding to him from the company would form part of the assets of his estate and would be liable to a charge for Inheritance Tax ("IHT"). At that time, William Cook's estate did not have sufficient cash to pay the potential IHT liability, if the loan remained as part of his estate on death.

16. Roger Hammond, who died in 2022, an accountant with HW proposed a way of keeping the director's loan account in the company in the hope that this would avoid a charge to IHT.

17. In his undated email to Iain Codrington, a consultant to Palmers Solicitors LLP, he stated "the idea is to undertake a rights issue…. the reason is that William Cook is owed £675,000 by the company…. he wants to turn it into shares by way of a rights issue so that it immediately qualifies for IHT relief…. we need the relevant paperwork prepared to confirm the rights issue".

18. The rights issue was made to all shareholders and the mechanics of this were set out by Palmers Solicitors LLP in an email of 18 January 2016, who noted that they were not giving tax advice but only their corporate legal advice for putting in place the rights issue.

19. By letter dated 24 February 2016, the shareholders were informed that the directors of the company had provisionally issued a further 675,000 ordinary shares of £1 each at par. The shares were offered pro rata to the shareholders in the proportion of 2,245.5 new ordinary shares of £1 each for each one ordinary share of £1 registered in each shareholder's name at the close of business on 1 January 2016. The entitlement to the new shares was as follows:

343,107 shares held by William Cook

89,701 shares held by the executors of Ruby Cook's estate for William Cook

186,128 shares held by Edward Cook as Shareholder

53,821 shares held by Richard Cook

2,243 shares held by Caroline Cook.

20. The ordinary written resolution giving effect to the rights issue was dated 24 February 2016. Edward Cook as Shareholder, Richard Cook and Caroline Cook renounced their entitlement to the new shares in favour of William Cook

21. The shares were allotted to William Cook on 10 March 2016. At that date, the issued share capital in the company was 675,301 shares of £1 of which William Cook held 675,193. His shareholding, therefore, represented 99.98% of the issued share capital in the company.

The IHT position following William Cook's death

22. William Cook died on 16 June 2016 and his Will appointed Edward Cook, Joyce Priddle and Andrew Evans as executors, but currently only Edward Cook and Joyce Priddle act as such.

23. An IHT400, which at that time would have been signed by all executors, dated 22 March 2017, was sent to HMRC as well as a valuation report of the company (as at 16 June 2016) carried out by HW. The report valued the company at £15,511,791 and William Cook's shareholding at £15,509,310. The IHT400 claimed business property relief ("BPR") / agricultural property relief in respect of William Cook's shareholding.

24. The accompanying IHT412, which asks personal representatives whether shareholdings have been owned by the deceased for 2 years prior to the date of death, was incomplete and so gave no indication as to whether the 675,193 shares had been owned throughout this period.

25. HMRC wrote to Edward Cook on 17 November 2017 informing him that they would be carrying out a check of the IHT400 and wrote a further letter to the Appellants' then representative on 22 July 2019. HMRC accepted that the new and old shares held by William Cook and the executors of Ruby Cook qualified for BPR by virtue of the IHTA s 108(b) (i.e. the shares owned by William Cook immediately before his death could be identified with other shares previously owned by him under s 107(4) IHTA and given that William Cook became entitled to Ruby Cook's shareholding on her death, he was deemed by s108(b) to have owned her shareholding for the period in which she owned it).

26. HMRC, therefore, accepted that BPR applied to 433,001 shares out of a total of 675,301 shares or 64.1% in the company. However, HMRC did not accept that BPR applied to the 242,192 shares or 35.9% which had been allotted to and renounced by the minority shareholders in favour of William Cook on 10 March 2016. HMRC stated that these shares were not referable to shares which had been held by William Cook for more than 2 years. The chargeable value of these shares was stated to be £5,563,196.

27. HMRC's position remained the same over ensuing correspondence. The NoD under section 221 IHTA was issued to Edward Cook on 17 May 2022. HW requested HMRC's view of the matter, and raised the issue of an application for rectification, on 15 June 2022, which was made on time.

28. HMRC sent a 'view of the matter' letter dated 17 August 2022 in which their position had not changed and HW sought a review, in time, on 16 September 2022. HMRC replied on 22 September 2022 confirming that (i) a review would take place, and (ii) unless and until an

application for rectification was made to the court, HMRC were obliged to determine the correct IHT liability based on the transactions that actually took place and as they currently stood.

29. On 26 September 2022, LHC emailed Philip Gurney ("PG") of HW stating his understanding that, following legal advice which he had received, a court order was not needed to rectify the allotment of shares with retrospective effect as "the documentation can be rectified by way of a deed of rectification between the parties".

Events following the issue of the Conclusion Letter upholding the NoD.

30. HMRC upheld the NoD in their Conclusion Letter dated 26 October 2022 and correspondence subsequently ensued between LHC and PG in relation to the proposed DoR.

31. On 19 December 2022, HMRC emailed PG asking whether an appeal had been made to the Tribunal, (the Respondents refer to this as the "first warning"). PG replied the following day setting out his view that the NoD did not need to be appealed to the Tribunal on the basis that the parties could simply agree the historic share valuation.

32. HMRC did not agree with this view and replied on 24 January 2023 suggesting that a late appeal be filed with the Tribunal and an application made to stay it pending resolution of a rectification/rescission claim (the Respondents refer to this as the "second warning") and asked for a copy of the draft application once it was prepared.

33. HMRC noted that should the Court decline to rectify or set aside (a) interest would continue to accrue on any outstanding IHT and (b) that should their clients wish "to pursue their appeal to the FTT, as they were now outside the statutory 30 day referral period, they may want to now lodge a late referral with the tribunal and request that it be stayed pending resolution of the rectification/recission claim".

34. The second warning email ended with: "I look forward to hearing from you in due course."

35. On 16 March 2023, PG emailed HMRC a copy of the signed DoR which reflected the intention of the Company to issue 14 ordinary shares to William Cook of £1 each at a premium of £48,214.29 per new share (payment for which would be acknowledged by extinguishing the debt of £675,000 owed by the Company to William Cook). In that email PG asked HMRC to "consider the impact of this agreement to the analysis as set out in your determination taking into account the reduced number of shares that will be issued".

36. LHC stated that he believed all 14 shares issued in this way would qualify for BPR as the allotment was based on William Cook's shareholding and had no reference to the other shareholders. He also stated that there was concern that the rights issue had also substantially devalued the shares retained by all the minority shareholders who had renounced their rights.

37. LHC stated that he had only spoken to Edward Cook after the late appeal had been filed and LHC was unaware why there was a delay between 3 April 2023, when the NoA had been signed, and 22 May 2023, the date it had been filed with the tribunal.

38. LHC stated that he did not consider the DoR was changing the tax treatment with hindsight and he did not discuss the timing of the submission of the NoA with Shakespeares.

39. HMRC replied on 20 March 2023, re-stating their position that, without an order from the court approving the DoR, the deed would not have retrospective effect for inheritance tax purposes and asked for clarification of how the Appellants intended to respond to the NoD (the Respondents refer to this as the "third warning").

40. HMRC also sought progress with agreeing the value of the 242,192 shares, on which they believed BPR was not available, and suggested the Appellants make arrangements to place on deposit a suitable sum of money to cover the additional IHT due as a result of HMRC's NoD having become conclusive following what HMRC regarded as the decision not to refer an appeal to the Tribunal within the statutory time limit of 30 days from the date of the Conclusion Letter.

41. This 'third warning' email also ended with the words; "I look forward to your reply clarifying the Executors' position and intentions as soon as possible."

42. PG consulted LHC who advised on 21 March 2023 that the view received from "the lawyers" was that a court order was unnecessary and that HMRC's practice may be being a little stricter than was necessary. LHC stated that the court route could be pursued but that his clients were hoping to avoid this, and it may be worth challenging the necessity of this.

43. LHC sent a further email to PG on 22 March 2023 in which he advised for the first time that an appeal should be filed with the Tribunal "as back-up" in case the dialogue with HMRC proved unsuccessful as he said there seemed to be some debate "about whether a court order is needed or not in this situation". "HMRC's guidance acknowledges that there are exceptions to the general rule that a court order is needed for retrospective effect but suggests that HMRC practice may be to resist accepting any alternative."

44. On 2 April 2023, LHC wrote to PG mentioning that the late appeal documents had been sent on 27 March 2023. He also included a draft reply to HMRC seeking to "push back" on the need for a court order, but which noted a late appeal would be filed "to keep this decision open while we agree the bigger picture".

45. On 3 April 2023, the notice of appeal was signed by Edward Cook.

46. On 5 May 2023, LHC forwarded to PG an update from "the lawyers" as to potential costs and stating that HMRC had not " really been clear about what kind of court order they require and so we would probably want to clarify that so that we are going after the right thing" and "I understand though that HMRC is not really the biggest issue here for the clients, the issue is rectifying the present position in terms of the shares of the company."

47. On 22 May 2023, the NoA was filed, and PG wrote to HMRC stating that HW understood that "the deed of rectification meant that an appeal of the decision to the Tribunal would not be necessary as this would change the facts on which a decision was based. However, given your comments we have today filed a late appeal in order to keep this decision open while we agree the bigger picture".

48. WBR emailed HMRC on 18 December 2023 seeking clarification on whether they considered that a court order was still needed and HMRC replied the same day referring back to their earlier correspondence dated 20 June 2023 in which they had outlined their position that a court order was necessary.

49. On 11 January 2024, Gill Thomson of WBR confirmed to HMRC that the Appellants were prepared to go down the route of an application to the court and on 16 January 2024, HMRC sought an extension of time to object to the late appeal / file a Statement of Case on the basis that the Appellants confirmed an order for rectification would be sought.

50. Following subsequent correspondence between the parties and the Tribunal, HMRC filed a notice of objection to the late appeal on 2 May 2024.

51. On 10 May 2024, the Tribunal directed the Appellants to confirm by 16 May 2024 whether proceedings had begun in the High Court (and if not, why not). In a letter dated 14 May 2024, the Appellants' representative stated that whilst a claim for professional

negligence had been issued, the claim for rectification was yet to be issued due to delays, amongst other things, in sourcing the original paperwork.

52. On 28 June 2024, the Tribunal directed a hearing to be held to decide whether permission should be granted for the late appeal. The Tribunal noted that that it could not "stay an appeal indefinitely when there is very limited evidence of any progress in parallel proceedings, and in any event, it may assist the appellant to know in advance whether or not there is a valid Tribunal appeal as this may assist the appellant in deciding on the focus of that rectification claim if and when it is made".

53. The Claim for rectification was sealed by the High Court on 14 October 2024 and was accompanied by witness statements of Edward Cook and Richard Cook.

54. The witness statement of Edward Cook was written in his capacity as a personal shareholder and as an executor of both the estate of William Cook and Ruby Cook. He was also authorised by the company to make his statement.

55. Edward Cook believed that the rights issue was "solely intended by William Cook to save IHT and had no other purpose". The advice in relation to the rights issue was given by Roger Hammond of HW and the necessary paperwork for a rights issue was prepared by Palmers Solicitors.

56. The existing shareholders, with the exception of the William Cook and also in respect of the shares he had inherited from Ruby Cook, would renounce their shares in favour of William Cook who would accept the cancellation of his director's loan account as payment for the new shares which would qualify for BPR.

57. Letters of fully paid allotment dated 24 February 2016 were sent to each of the existing shareholders and where applicable a form of renunciation. A draft shareholders resolution was prepared and signed by the Board of Directors although the minute of the relevant board meeting was undated and unsigned.

58. Edward Cook received HMRC's letter of 26 September 2022 acknowledging the review of the disputed decision. On 26 October 2022, the Conclusion Letter indicated that the Appellants had a right of appeal to the tribunal.

59. Edward Cook stated that the consequences of the mistake had resulted in the exposure of William Cook's estate to HMRC of a liability of £2,225 189 and that if William Cook's estate had to bear the liability for IHT, each residual beneficiary would suffer a reduction in the amount available to him or to her. In the event the rights issue agreement is not rectified the estate would have to pursue professional negligence proceedings against HW.

60. The proposed rectification of the issue was that 14 new shares at a premium of £48, 214.29 per share would be allotted to William Cook and financed by extinguishing his directors loan account of £675,000. This Edward Cook stated would be "effective to achieve the purpose of the agreement which was to avoid IHT on the directors loan account."

POINTS AT ISSUE

61. The matter in dispute is whether the Appellants are entitled to BPR on 100% of the shares held by William Cook. The Respondents decided that the Appellants were not entitled to 100% BPR and the decision was upheld in the Conclusion Letter dated 26 October 2022.

62. The Appellants had 30 days until 25 November 2022 to appeal the decision to the First-Tier Tribunal ("FTT") by way of a notice of appeal. The Conclusion Letter stated that if the Appellants failed to appeal to the FTT within 30 days of the date of that letter, the appeal would become determined in accordance with the Conclusion Letter by virtue of section 223F IHTA.

63. The Appellants submitted a Notice of Appeal, dated 03 April 202, on 22 May 2023, 5 months and 27 days late.

LEGISLATION

IHTA Sections 221 -225A

IHTA Sections 105 – 108 and Part VII

CASELAW LISTED BY THE PARTIES

64. *Swainland Builders Ltd v Freehold Properties* Ltd [2002] EWCA Civ 560 ("*Swainland"*)

65. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 28 30

66. *R (on the application of Hysaj) v Secretary of State [*2015] 1 WLR 2472 ("*Hysaj*")

67. *Lobler v HMRC [2015]* STC 1893 74 ("*Lobler*")

68. *Secretary of State for the Home Department v SS (Congo*) [2015] EWCA Civ 387 102 ("*Congo*")

69. *Martland v HMRC* [2018] UKUT 178 (TCC) 135 ("*Martland*")

70. *Hymanson v HMRC* [2018] UKFTT 667 (TC) 155

71. *HMRC v Katib* [2019] STC 2106 174 ("*Katib"*)

72. *MV Promotions Ltd v Telegraph Media Group Ltd* [2020] STC 1652 192

73. *HMRC v BMW Shipping Agents Ltd* [2021] STC 1020 222 ("*BMW*")

74. *Guerlain-Desai v HMRC* [2023] UKFTT 374 (TC) 238

75. *Uddin v HMRC* [2023] UKUT 99 (TCC) 245 ("*Uddin*")

76. *People Service Solutions Ltd v HMRC* [2023] UKFTT 786 (TC) 258

77. *Cooke v HMRC* [2024] UKFTT 272 (TC) 275 ("*Cooke*")

78. *Cranham Sports LLP v HMRC* [2024] STC 1459 287

79. *Meter Squared Ltd (In Liquidation) v HMRC* [2024] UKFTT 884 (TC) 307

80. *Lefort v HMRC* [2024] UKFTT 926 (TC) 313

MARTLAND - THE THREE STAGE APPROACH

81. The Appellants and Respondents referred to the test to be applied when considering an application for permission to appeal out of time as set out in *Martland v HMRC* [2018] UKUT 178 (TCC) at [44- 46]:

> "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.

…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."

APPELLANTS' CONTENTIONS

Stage 1 – Length of the delay

82. The Appellants accept that the delay in this case (5 months and 27 days) was serious but submit that it was not significant.

83. The distinction between "serious" and "significant" was set out by in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 at [51]:

"51. The first question for consideration is whether the delay was serious and significant. *It was certainly serious in terms of its length, but I do not think that was significant in the sense of having an effect on the proceedings*. Apart from the period between 2nd May 2014 (when the judge determined the application for permission to appeal in the appellant's favour) and 27th May 2014 (when the notice of appeal was filed) the proceedings were effectively at a standstill. Part of that delay was caused by the failure of the Secretary of State to file submissions in response to the application. It was then necessary for the appellant to obtain an extension to his public funding

certificate, but that took only three days. *There was delay between 2nd and 19th May 2014 and between 22nd and 27th May which could have been avoided, but there is no reason to think that it significantly affected the progress of the appeal in the longer term and the respondent was well aware that the judge's decision would be challenged.* I do not think that the delay in this rather unusual case was significant and since there are no other factors militating against the grant of relief, I would allow the application and extend time on this ground alone. However, it may be of assistance to consider how the matter stands in relation to the other two stages of the enquiry."

[*Appellants' emphasis added*]

84. Moore-Bick LJ went on to acknowledge at [54] that the longer the delay, the less likely the applicant would be able to satisfy the court that delay did not have any practical effect on the course of the proceedings.

85. Whilst the Court of Appeal in *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387 at [105] considered that the delay in *Hysaj* was not significant because of the particular circumstances of the case, the Appellants submit that the principle derived from *Hysaj* is nevertheless relevant and binding on the Tribunal. Further, the Tribunal is referred *to People Service Solutions Ltd v HMRC* [2023] UKFTT 786 (TC) at [111] – [115] [AB/18/270] in which the Tribunal accepted that "serious" and "significant" were not synonyms and that different tests applied to each.

86. The Appellants say that the delay in this case was not significant given it had no practical effect on the course of the proceedings and the correspondence shows that, plainly, HMRC did not regard the matter as closed following the review conclusion letter on 26 October 2022:

1) On 20 December 2022, 23 days after the deadline to file a notice of appeal, HMRC sent an unprompted email to HW asking whether a notice of appeal had been filed with the Tribunal.

2) On 24 January 2023, HMRC emailed HW suggesting that the Appellants file a late notice of appeal if they intended to pursue the matter before the Tribunal.

3) On 20 March 2023, HMRC emailed HW asking how the Appellants intended to respond to the notice of determination going forward.

87. HMRC were alert to the fact the NoD would not necessarily be final and conclusive. It is clear that HMRC were well aware that the NoD would likely be challenged in this case and for that reason they were regularly, and proactively, seeking updates as to the appeal position. On that basis it is submitted that the delay did not significantly affect the progress of the appeal in the longer term.

Stage 2 – Reason why the default occurred

88. The delay occurred because the Appellants' advisers made a genuine mistake as to the retrospective effect of a deed of rectification for tax purposes. They mistakenly believed that the deed could be signed, and the historic inheritance tax position simply agreed with HMRC. What the advisers should have done is to appeal the Conclusion Letter to the Tribunal in time (so as to keep the notice of determination "live") and apply to stay the appeal behind the proposed claim for rectification

89. The Appellants accept that the explanation given for the delay, namely reliance on advisers, will not amount to a "good" reason such that the Tribunal need not address stage 3 of the *Martland* analysis in detail. However, the Appellants rely on *HMRC v BMW Shipping Agents Ltd* [2021] STC 1020 to argue that the reason was "understandable".

90. *BMW* was a case in which the UT set aside the decision of the FTT but remade it in favour of the applicant. The UT recognised at [42] that merely because there was no "good" reason at stage 2 of the Martland test did not mean that it was "poor". Rather, the UT used an intermediate classification of "understandable".

91. The Appellants say that *Uddin v HMRC* [2023] UKUT 99 (TCC) at [30], considering why the accountant adviser failed and how he led his client to continue to rely on him, is relevant to the *Martland* analysis where the client can show that they did whatever a reasonable taxpayer in that situation would have done.

92. The Appellants contend that they behaved entirely reasonably by relying on WBR and HW to advise them on the effect of entering into a deed of rectification for tax purposes. LHC's witness statement is clear that Edward Cook (i) relied upon advice from WBR Tax and HW, and (ii) did not appreciate that an appeal was required due to his advisers' failure to understand that a court order was required for a deed of rectification to have retrospective effect. It would be inappropriate to suggest that the Appellants ought reasonably to have gone behind their advisers' repeated legal advice and form their own (correct) view on the law that a notice of appeal should be protectively filed to keep the determination "open".

93. This was not a situation where the Appellants had warning signs on factual points which could have been addressed had they been more proactive with their advisers (e.g. by chasing to find out whether a notice to appeal had in fact been filed). Instead, the advisers were plainly locked in a dispute with HMRC about the legal significance of a notice of determination following a deed of rectification. On that basis, it is submitted that whilst the reason for the delay was not "good", it was "understandable" in the circumstances.

94. On this the Appellants also refer to *Meter Squared Ltd (In Liquidation) v HMRC* [2024] UKFTT 884 (TC) at [17] and *Guerlain-Desai v HMRC [2023] UKFTT 374 (TC)* at [16].

Stage 3 – Evaluation of all the circumstances of the case

95. The key consideration in this case is stage 3 of the *Martland* analysis. It is submitted that an evaluation of all the circumstances of the case is sufficient to tip the balancing exercise in favour of the Appellants.

96. The factors that the Tribunal should bear in mind are:

1) Need to enforce compliance with statutory time limits

2) Appellants misled by advisers

3) Merits of the case

4) Prejudice to the Appellants

5) Prejudice to HMRC

Need to enforce compliance

97. There is no doubt that the 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. Nonetheless, the Tribunal is referred to the UT's commentary in *BMW* at [52]:

> "52. We will approach the third Martland stage by performing, as Martland requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites,

among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated."

98. If the need to enforce compliance was always a dominant factor at the third stage, permission for late appeals would never be granted if the analysis went no further.

Appellants misled by advisers

99. *HMRC v Katib* [2019] STC 2106 at [56] states that whether a taxpayer is misled by his advisers is a relevant consideration when carrying out the third stage of the Martland evaluation. As noted in *Uddin* at [58], many of the factors relevant to the second stage of the Martland analysis will also be relevant to the third stage. The Appellants submit that they could not reasonably have done more to protect their inheritance tax position given that they relied on their advisers to tell them whether a NoA was needed.

Merits

100. The Appellants' underlying case is obviously strong. To that end the Tribunal has been provided with a copy of the Claim Form, witness statements, and DoR that have been filed with the High Court. Following *Lobler v HMRC* [2015] STC 1893 at [47] and [74] (which is binding on this Tribunal), whilst the Tribunal does not itself have power to order rectification, it can determine that if rectification "would" be granted by the High Court, the taxpayer's position would follow as if rectification had been granted.

101. *Lobler* concerned a taxpayer making partial withdrawals from a life assurance policy in such a manner as to incur a liability which was likely to lead to his own bankruptcy. He did so without the benefit of legal or other advice.

102. The word "would" means that the Tribunal has to have a high degree of certainty about what the High Court would do (*Cooke v HMRC* [2024] UKFTT 272 (TC) at [57]. In *Cooke* the issue was that to obtain Entrepreneurs Relief a holding of 5% a company's ordinary share capital was required. Mr Cooke's holding of shares was 4.99998% or one share short due to a mistake that occurred due to the fact that a spreadsheet was used to calculate the number of shares in question, and this rounded the percentages to two decimal places.

103. There are four requirements in *Cooke* that must be met before rectification can be granted on the basis of common mistake. These were summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560 at [33] and subsequently cited by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009a] UKHL 28 at [48]:

> "33. The party seeking rectification must show that:
>
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2) there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake the instrument did not reflect that common intention."

104. The Appellants also rely on *Hymanson v HMRC* [2018] UKFTT 667 (TC) at [79] – [92] in which *Lobler* was applied albeit that was in the case of recission and not rectification.

105. The Appellants acknowledged that the Tribunal in *Lefort v HMRC* [2024] UKFTT 926 (TC) considered at [173] that the Tribunal did not have jurisdiction to apply the tax

legislation as if the High Court had ordered recission but say this was a decision of the FTT (which is not binding) and was a case in the context of rescission not rectification.

106. Whilst the Tribunal should not descend into a detailed analysis of the underlying merits of the appeal when considering the third *Martland* stage, the Appellants submit that the strength of their case is plain from (i) the witness statements evidencing the parties' intentions at the time of the 10 March 2016 rights issue by reference to contemporaneous documentation, and (ii) the unintended and disastrous consequences that arose as a result of the share allotment i.e. the huge inheritance tax liability (resulting from planning designed to achieve the opposite) and the vast dilution of the shareholdings of Edward Cook as shareholder, Richard Cook and Caroline Cook.

Prejudice to the Appellants

107. The prejudice that would be caused to the Appellants if permission is refused is great. The main reason for issuing the claim for rectification in the High Court (and incurring the related costs) was to seek to retrospectively remedy the historic inheritance tax position. If permission to appeal is refused, the NoD becomes conclusive against the Appellants section 221(5) IHTA. This means that even if rectification is granted by the High Court in due course, the executors will still be liable to pay inheritance tax of £2,225,189.

108. The Tribunal is referred to *BMW* at [54] in which the UT held that the fact that a large sum of money was at stake should form part of the balancing exercise. In that case, the sum owed to HMRC was £3m. The amount in this case is comparable. It can only be challenged if permission is granted to pursue the appeal before the Tribunal.

Prejudice to HMRC

109. By contrast, the prejudice that would result to HMRC if permission is granted is minimal. HMRC have stated that they should not normally be required to defend appeals where there has been a delay in filing the notice of appeal. However, as stated earlier, the evidence shows that HMRC's working assumption since at least December 2022 was that the NoD would be appealed.

110. The fact that the DoR was signed prior to an application to the court will not prevent there from being a live issue capable of being contested between the parties, since the allotment of shares was motivated by the achievement of a specific tax advantage as set out in *MV Promotions Ltd v Telegraph Media Group Ltd [*2020] STC 1652 at [61] – [62].

HMRC'S CONTENTIONS

Stage 1 Length if Delay

111. The Tribunal should consider the length of the delay by reference to the period which is permitted for lodging of an appeal. This was confirmed by the Upper Tribunal in the case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) ("*Romasave*"). The Upper Tribunal in *Romasave* considered a delay of three months against a 30-day appeal window and held at [96] that:

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

112. On 22 May 2023, the Appellant made an appeal to the Tribunal which was 5 months and 27 days after the expiration of the statutory time limit at section 223G IHTA (deadline 25 November 2022).

113. It is therefore submitted that in the context of an appeal right which must be exercised within 30 days, the delay in this case is serious and significant.

114. HW and WBR and the Appellants were aware of the deadlines and the Appellants are not appealing on the grounds that they made an uninformed choice.

115. The failure of advisers should be treated as failures of the taxpayers, and that failure should not be used to improve the taxpayers' chance of success. Making an appeal to the tribunal is a simple matter.

116. The Respondents distinguish *Congo* as it related to a permission to appeal about immigration whereas the facts in this case are quite different and refer to *Congo* at [105] concerning the application of the principles in these cases:

> "As to the first stage, the time limit for filing and appellant's notice in the Court of Appeal is 28 days from the date when the Upper Tribunal's decision on permission to appeal is given… It seems to us that to exceed the time limit by 24 days as in *AC (Canada),* was at least a significant breach; and to breach it by well over 3 months as in *KG (India),* was on any view a serious beach. In *Hysaj* a delay of 42 days in filing an appellant's notice was not considered to be significant in the sense of having effect on the proceedings, but that was because of the particular circumstances of the case as explained in paragraph [51] of the judgement of Moore-Bick L J, including the fact that the part of the period of the parties were awaiting a decision by the first instance judge who in fact then granted permission to appeal. A party who delays by several weeks or months in applying to this court for permission to appeal can generally expect to have the delay treated as significant or serious. Although the court in *Hysaj* placed weight on the extent to which the delay could be said in the particular circumstances of the case to have affected the progress of the appeal, that may not be a matter capable of ready assessment, whereas a point made by Moore-Bick LJ in paragraph [54] is applicable to every case:
>
> > "one reason for limiting the time for filing a notice of appeal is to promote finality litigation. The parties need to know where they stand".

117. The consequence for HMRC was that progress in assessing and obtaining payment of IHT was seriously affected as HMRC did not know what the Appellants were going to do. They repeatedly asked them by sending three 'warning letters' to ascertain progress but the delays continued.

118. The seriousness of the NoD, which was sent to the Appellants and their agents is acknowledged by the Appellants.

119. HMRC say that the delay is also significant because the NoD was issued in 2022 and it is now 2025, with the BPR issue still outstanding.

120. In October 2024, the Appellants finally made a decision to file a rectification claim which also impacts on HMRC's ability to progress matters. HMRC cannot proceed to value the shares to ascertain the correct IHT. HMRC do not know where they stand and there is no finality.

Stage Two: The Reason (or reasons) Why the Default Occurred

121. The next factor which the Tribunal must consider are the reasons why the default occurred.

122. The Appellant's explanations as to why the appeal was late are:

a. It was understood "that the DoR meant that any appeal of the [Respondents'] decision to the Tribunal would not be necessary as this would change the facts on which the decision was based".

b. A Deed of Rectification was prepared to correct the returned transaction since it was clearly not what the parties intended and indeed gave a ridiculous outcome.

c. It is requested that the case be stayed pending resolution of the rectification/rescission claim.

123. The Respondents argue that the Deed cannot have any retrospective effect for IHT purposes without approval from the High Court and given that no approval has been received and the appeal to the Tribunal was late, the Notice of Determination to restrict the BPR claim is now conclusive.

124. Consequently, it is submitted, that there is no 'good reason' why the default occurred.

Stage Three: Evaluation of "All the Circumstances of the Case"

125. In *Martland* at [45] and [46] above, the Upper Tribunal provides guidance on how the evaluation of "all the circumstances of the case" should be carried out by this Tribunal.

i. The Need to Enforce Compliance with Statutory Time Limits/ Finality

126. The importance of finality is well established by the Tribunal. For example, in *Martland* at [34], the Upper Tribunal confirmed:

> "…the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

127. In *HMRC v Hafeez Katib* [2019] 0189 UKUT (TCC), the Upper Tribunal held at [17], that the First tier Tax Tribunal had made an error of law "in failing to...give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise it its discretion".

128. The Court of Appeal in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 also found that compliance ought to be expected unless there was "good reason to the contrary."

129. The Appellants have failed to comply with the relevant statutory time limit and the appeal is 5 months and 27 days late.

130. The Respondents set put their position and reminded the Appellants of their obligation to file an appeal on at least three occasions:

131. The phrase that the Respondents used in their 'warning letters' that HMRC "look forward to hearing" from the Appellants' agents should not be taken as an inference that HMRC were happy and willing to continue the enquiry and the litigation process.

132. HMRC were keen to close the matter, and the Appellants could have asked for the shares to be valued and HMRC could have pursued the recovery of tax.

133. HMRC knew of the likelihood of the challenge and the reminders were to assist the Appellants and should not count against HMRC as continuing a discussion but should be seen as an attempt to close the matter.

134. HMRC say that their 'warning letters' are a double-edged sword as they are being interpreted by the Appellants against them but on the other hand if they had not been sent taxpayers are likely to accuse HMRC of not reminding them. To this extent HMRC cannot win.

135. The obligation was on the Appellants to file an appeal. HMRC's email of 20 March 2023 to PG being the third 'warning letter' clearly asked if the Appellants still intended to seek court permission to rectify the original transaction and if so, asked for a copy of the application once it had been lodged with the court.

136. This email also stated, if a deed of rectification had been executed that had no retrospective application for IHT purposes and if there was no longer any intention to make an application to court:

> "…presumably you are now happy to enter into discussions with my colleague Mike Wilson (Shares and Assets) to agree the value of 242,192 shares in the company in which BPR is not available under section 106 IHTA and in the meantime make arrangements to place on deposit a suitable sum of money to cover the additional IHT liability due as a result of HMRC's notice of determination having become conclusive, following the decision not to refer your appeal to the tribunal within the statutory time limit of 30 days from the independent review conclusion"

137. The Appellants were asked for their intentions and what their position was in March 2023, but the NoA was dated 3rd of April 2023 and not submitted until 22 May 2023.

138. HMRC refer to *Subway London v HMRC* [2019] UKFTT 579 at [64] summarising the reasoning of the Upper Tribunal in *Katib* as follows:

> "The core point is that the taxpayer would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that could be propounded by large numbers of taxpayers, and it does not have sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

139. The Respondents say that the Appellants were not misled by their advisers. This was not a case of an adviser saying that they had done something which had not been done. The advisers failed to protect their client with an in time appeal about which they had received multiple warnings which means that their failure to lodge an appeal on time was not understandable.

140. There is no evidence of what the Appellants did or did not know or do except that they did receive the Conclusion Letter and the NoD both of which were clear.

141. The Respondents say that no evidence has been submitted that the means of the Appellants are limited. Unlike the circumstances in *Katib,* it is not a question of the Appellants losing their homes.

142. The financial consequences of missing time limits affect a large number of taxpayers. This is a case of lowering a tax bill not losing a family home. The Respondents believe that insurers are supporting HW in their negligence claim which may cover any liability.

143. The Respondents refer to *BMW* at [49] which they say relates to an understandable error and where reinstatement followed a failure as a result of an incorrect email address being used so that no correspondence was received by the taxpayer, and which can be clearly distinguished from the circumstances in this case:

> "[49] Putting all that together, we would evaluate the reasons for the breach of directions as consisting of an unfortunate combination of two events. The first was the clerical slip with the email address which meant that Mr Gibbon was not aware that a list of documents needed to be filed. Having contacted the FTT in May 2017 he could reasonably expect to receive correspondence from the FTT at his .com address. However, he did not receive the usual reminders that follow from non-compliance

(some of which are summarised at para [10] above). The second was Mr Gibbon's failure to diarise the appeal for follow-up. On its own that was an oversight which might normally have no consequence because a Statement of Case would have followed in the ordinary run of things. Here it did not follow because both HMRC and the FTT were, as a result of the clerical slip, sending documents to the wrong address. Certainly, Mr Gibbon could, and should, have done more to follow up. However, since he was not receiving any correspondence from the FTT or from HMRC, the failure to follow up became more protracted and in the end, partly because of his wife's accident, there was no follow-up until September 2018. The combination of these various factors served to make the consequences of Mr Gibbon's mistakes much more serious than they would otherwise have been."

144. The Respondents say that they sent the Appellants the Conclusion Letter and the NoD and refer to *Uddin* at [30]. Mr Uddin had a late appeal as he had left the matter of the timing of the appeal in the hands of the advisers and the general and cursory enquiries he made were held as insufficient to displace the general rule that the taxpayer should bear the consequences of a representative's failings.

145. The burden of proof is on the Appellants to show what a reasonable taxpayer should have done but there is no evidence to show what they did or what they did not do or for that matter whether they were in any way misled.

146. Although LHC contacted Edward Cook after May 2022 and discussed rectification, LHC says he does not know anything about discussions relating to the late appeal.

147. LHC in his witness statement said that Edward Cook relied upon advice from WBR and HW and did not appreciate that an appeal was required at the time even though the valuation of the share issue was not resolved on the basis of both LHC's and HW's shared misunderstanding.

148. LHC, however, was not clear in his evidence if the Appellants asked for advice or questioned time limits until it was far too late, after the appeal had been submitted. Edward Cook in his witness statement stated that he was aware of a right to appeal to the tribunal against the decision on 26 October 2022 on the issue of BPR being not granted on 242,192 shares.

149. The Appellants' advisers were made sufficiently aware of the deadlines and failed to adhere to them. The Respondents say it is tenuous to say that that failure to appeal in time was "understandable". The advisers misunderstood the position. It is unclear whether the Appellants questioned this or sought or received advice especially considering the serious tax consequences that flowed from HMRC's decision in the NoD.

ii. The Need for Litigation to be Conducted Efficiently and at Proportionate Cost

150. The Upper Tribunal has also confirmed the importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory deadlines to be respected in the decision of *Websons (8)* [2020] UKUT 154 (TCC).

151. It is submitted that, should the late appeal be allowed, the Respondents would be prejudiced in that they will have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay.

152. Further, the Respondents submit that other taxpayers will be prejudiced as the Respondents' and this Tribunal's resources, which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits, will be diverted to consider the Appellants' appeal.

153. Allowing a late appeal in this instance is inconsistent with the principles of good administration of justice which require litigation to be conducted efficiently and at proportionate cost.

ii. All other circumstances

154. The Respondents submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal.

155. The Respondents acknowledge that, should the late appeal be denied, the Appellants will be prevented from challenging the amounts in dispute. However, the Respondents respectfully submit that this consideration alone is not sufficient to warrant granting permission for the appeal to be brought out of time when balanced against the factors above.

156. To the limited extent that the merits of the case should be considered, it is submitted that the Appellant's case is weak. It is common ground that, based on the present facts, BPR is not available on the 242,192 shares. The shares were not acquired as part of a "reorganisation" within the meaning of Section 126 Taxation of Chargeable Gains Act 1992 and were not acquired in a proportion to the deceased's shareholding. Therefore, the shares did not meet the minimum period of ownership (Sections 106 and 107(4) IHTA 1984).

157. The Appellants are reliant on the High Court granting rectification and there has been a significant delay in the Appellants seeking rectification as no application was made to the High Court until December 2024. Notwithstanding this, there is no guarantee that the High Court would grant rectification to the Appellants (as the required result is a fiscal benefit).

158. Due to the passage of time, there is unlikely to be contemporaneous evidence (on or around 2016) available to demonstrate that the intentions of the parties were contrary to the right issue that actually occurred.

159. The Respondent say there is no evidence of the Appellants being misled or given false information and it is not clear what conversations were held. HMRC say there is a difference between a mistake and something misleading. HMRC say that the Appellants erred in not following warnings and making an appeal as set out in the NoD which they did receive.

160. There were no written instructions in relation to advice from Roy Botterill of Shakespeares just informal conversations and the Respondents say that WBR treated the tax planning as a lesser priority which was not as important as the professional negligence claim which was a top priority and the 'shift in value' of the minority shareholders, as confirmed by LHC in his evidence.

161. The Respondents say that the Appellants do not have a strong case. The issue will revolve around the true intention which was, in terms of Palmer's email of 18 January 2016, a rights issue and renunciation in order to extinguish a director's loan account and obtain BPR and avoid IHT.

162. The Respondents say that they are aware of one case seeking a deed of rectification, for which no citation was provided, in the High Court which was refused on the basis of obtaining a fiscal benefit. The Respondents say that the DoR does not concern a matter of a transposition error or are missing zero off a number. It is an application for a new scheme being to issue to William Cook 14 ordinary shares of £1 each in the capital of the company, each issued at the premium.

163. Accordingly, the Respondent say that they do not believe the High Court "would" approve the DoR especially as there are few contemporaneous documents to advance of this

and the mistake was only noted after HMRC opened their enquiries and the fiscal impact was realised. The case will be reliant on statements from the Cook family, either beneficiaries or shareholders, which will "be slanted in their favour".

164. Although the Respondents accept there will be prejudice to the Appellants if the appeal is refused this has to be weighed up with the question of finality.

165. HMRC say that there that there are additional costs for them, and they will have to contest the case in the High Court and are already taking suitable instructions. They also have still to arrange the valuation of any shares that do not qualify for BPR.

166. They refer to *Vinton (executors of Duggan-Chapman (decd)) v Revenue and Customs Commissioners* [2008] STC which they say has comparable facts.

167. In this case there was an unsuccessful tax planning arrangement. Mrs Duggan Chapman ("DC") was allotted 1 million shares of a company two days before she died. The shares would only qualify for BPR if they had been held for a period of two years immediately preceding the transfer. This could be achieved if the provisions related to a reorganisation of share capital under the Taxation of Chargeable Gains Act 1992.

168. The Revenue and Customs Commissioners contended that DC had acquired the shares by subscription and that there was no reorganisation, and the evidence did not establish that the shares were issued as part of any rights issue. They were not issued in proportion to beneficial holdings of all the shareholders in the company and there was never any offer of shares to all the shareholders. Mr Vinton and another, the executors of DC, contended there was a reorganisation. The appeal was dismissed.

169. The Respondents refer to paragraphs [62] and [64]:

> [62] … the loan account of £300,000 could only have been capitalised into shares that fully qualified for BPR by a rights issue of 300,000 shares to DC if the 300,000 shares represented her pro rata entitlement as a holder of shares that qualified for BPR. The assumption seems to have been that any shares acquired by Mrs DC as part of a rights issue would qualify for BPR which is not correct."
>
> [64] Mr Stanton, who signed the allotment letter in favour of DC and who was acting for her and the estate and dealing with IHT, explained that he was not involved in the documentation, but signed it "in the belief and understanding that we were carrying out the same exercise as for the first rights issue" and that the subscription for a further 1 million shares would attract BPR….

Conclusion

170. The Respondents respectfully invite the Tribunal to refuse the Appellant's late appeal.

DECISION AND REASONS

Applying Martland

Stage 1-serious and significant delay

171. I consider that there were two parts to delay in relation to the late appeal. The first part of the delay was from the date of the Conclusion Letter on 26 October 2022 until 03 April 2023 when the notice of appeal was signed and the second part of the delay from 03 April until 22 May 2023 when the NoA was filed with the tribunal. Combined these amounted to a delay of 5 months and 27 days, which it was plain from the relevant authorities and was agreed by the parties was a serious delay in the context of a 30 day time limit.

172. Counsel for the Respondents contend that the delay is significant in the context of their Conclusion Letter and their three warning letters. The Appellants say the delay was not

significant on the grounds that it did not have "an effect on proceedings" and refer to *Hysaj* and the statements of Moore-Bick L J.

173. I was not persuaded that there had been no effect on proceedings in this case and consider that the circumstances in *Hysaj* are substantially different. In that case, part of the delay was caused by the failure of the Secretary of State to file submissions, and the overall delay was less than one month.

174. More-Bick L J acknowledged that the longer the delay, the less likely the applicant would be able to satisfy the court that the delay did not have a practical effect on proceedings. The delay in this case is a few days short of 6 months.

175. Furthermore, the tribunal in *People Service Solutions Ltd* (Judge Anne Scott), while stating that 'serious' and 'significant' are not synonyms and that there are two tests, was considering a delay which that tribunal considered was comparatively short in the context of a 30 day time limit and concluded, echoing Moore-Bick LJ's comments on the length of the delay, that there was no significant delay in any of the three appeals under consideration which were delayed by 16,15 and 15 days respectively.

176. I agree with the Respondents' submission on *Congo,* again where the circumstances are different to those before this tribunal.

177. The delay has meant that progress in assessing and obtaining payment of IHT due on William Cook's estate has been seriously affected. HMRC did not know what the Appellants were going to do and sent three warning letters to ascertain progress, but the delays continued.

178. William Cook died in 2016, and the NoD was issued in 2022. It is now 2025 and the BPR issue is still outstanding. HMRC have been unable to carry out a valuation and assess the amount of IHT payable on the basis of their belief that BPR is not available in relation to 242,192 shares which they believe were not owned for the requisite period of time.

179. The Conclusion Letter and the NoD were explicit and were sent to the Appellants as well as to their agents. As Moore-Bick LJ stated "one reason for limiting the time for filing a notice of appeal is to promote finality litigation. The parties know where they need to stand".

180. Accordingly, I consider the total delay of 5 months and 27 days late was serious and significant but nevertheless believe it appropriate to consider the second and third stages of *Martland*.

Stage 2-the reason/reasons why the default occurred.

181. It is clear from the evidence that the Appellants received notification that there was a period in which an appeal should be made, 30 days from the date of the Conclusion Letter.

182. HW and WBR believed that an appeal to the tribunal was not necessary until late March 2023, 4 months from the date of the Conclusion Letter, when legal advice was obtained that in order for the DoR to have retrospective effect for IHT purposes, as well as rectifying the commercial mistake between the parties in relation to the value shift in shares, a court application would be necessary. This was the first part of the delay and prior to this time the agents' advice and decisions in relation to the appeal time limits were incorrect.

183. The NoA was then drawn up and signed on 3 April 2023 but was not submitted for a further 48 days on 21 May 2023. LHC stated that he did not know the reasons for the delay and no other evidence was produced. There was no explained reason, other than it was simply not acted upon or followed up, for this second part of the delay, and which I, therefore, consider is in itself serious and significant in the context of a 30 day time limit.

184. Counsel for the Appellants suggested that the Appellants' reliance on their own advisers, whom they say made a genuine mistake as to the retrospective effect of the DoR for tax purposes, was not a good reason but instead was an understandable reason, relying on Uddin because the Appellants did whatever a reasonable taxpayer and that situation would have done.

185. There was, however, no evidence as to what the Appellants had or had not done in relation to their interaction with their advisers.

186. However, as reasonable taxpayers, especially in their position as executors, they should have ensured that they obtained updates as to the progress of the executry administration, including its tax position. The Appellants had completed an IHT 400 form to confirm the value of William Cook's estate and the issue over BPR was clearly a "live issue" with HMRC that might or might not be relevant to the payment of IHT, which in any event would normally be due within 6 months of William Cook's death.

187. The Appellants, as executors, had warning signs in the form of the Conclusion Letter and the NOD and there was also no evidence provided as to whether the advisers kept the Appellants up to date with the claim and their belief that an appeal was not necessary.

188. The Appellants are responsible for the failures of their advisers and appear to be aware of this as they have consequently brought an action of professional negligence against them. On the evidence, there were no exceptional circumstances and/or failures of the representatives that can reasonably excused in terms of *Katib.*

189. I am not persuaded that there was an understandable reason for the first part of the delay. The Appellants' advisers made an error and responsibility for that error rests with the Appellants in circumstances where there was no evidence that they did what a reasonable taxpayer in that situation would have done.

190. In any event, there was no good or even understandable reasons for the second delay and no evidence of what the Appellants, as reasonable taxpayers, did in relation to that delay.

191. Cumulatively, I consider the combined first and second parts of the delay were both serious and significant and that there were no good or understandable reasons for the delay.

Stage 3-evaluation of all the circumstances

192. This stage involves a balancing exercise which assesses the merits of the reasons given for the failure to comply with the statutory time limit and the prejudice which would be caused to both parties by granting or refusing a late appeal.

193. Following *Katib*, the need for statutory time limits to be respected is matter of particular importance in the exercise of my discretion, and following *BPP,* compliance ought to be expected unless there is good reason to the contrary.

194. As stated above, I have concluded that the delay was serious and significant. I have also concluded that there were no good or even understandable reasons for the failure to appeal in time and these are strong factors in favour of refusing a late appeal.

195. In every case where permission to bring a late appeal is not granted, there will be inevitable consequences that the applicant does not have the opportunity to test whether HMRC's position on taxes is correct. Similarly, HMRC will, if permission is granted be put to the effort and cost of defending an appeal which they were, by operation of law, entitled to consider was not being brought.

196. I must balance the prejudice of these inevitable outcomes having regard to the requirement to enforce time limits and ensure efficient litigation.

197. There is no question that there is a significant prejudice to the Appellants if permission to appeal is refused as the NoD becomes conclusive and the executors will be liable to pay a large amount of IHT of £2,225,189 and I have taken this into account in the balancing exercise.

198. I have also considered that a claim for professional negligence is being brought against the professional advisers and that William Cook's share in shares in the company alone, which form part of his estate, were valued at over £15 million.

199. Accordingly, I do not find that the financial consequences to the Appellants of not being able to appeal amount to a serious financial hardship, given the value of William Cook's financial interest in the company which form part of his estate, such as whereby taxpayers may be at risk of losing their homes.

200. I do not believe that the financial consequences of the Appellants not being able to appeal have sufficient weight to overcome the difficulties posed by the fact that the delays are serious and significant and that there were no good or even understandable reasons for them.

201. The prejudice to HMRC, if permission for a late appeal is granted, will be that they will be put to the effort and cost of defending an appeal, which given the expiration of the time limit they considered was now closed. They will need to allocate resources to this, after such an excessive gap between the expiration of the time limit and the appeal notification, which would normally be required to defend other appeals.

202. I do not accept that the Appellants were 'misled' by their advisers as this was not a case of the adviser advisers saying to the Appellants that they had done something which they had not done.

203. The Appellants had received notice of the need to consider making an appeal to the tribunal and the Appellants' advisers received multiple warnings so that the failure to lodge an appeal on time was not understandable.

204. Failures by the advisers should generally be treated as failures of the taxpayers who have to bear the consequence of their advisers' failings.

205. I considered the fact that the Appellants did not have the expertise to deal with the dispute with HMRC but that does not weigh greatly in the balance since most people who instruct representatives to deal with litigation do so because of their own lack of expertise.

206. There was no evidence of the Appellants making any enquiries of their advisers let alone general or cursory enquiries to displace the general rule that the taxpayer should bear the consequences of their representatives' failings. The circumstances in *BMW* and *Uddin* are significantly different and in *BMW* there was simply no correspondence from the tribunal or HMRC because of an incorrect email address and that was not the case here.

207. To the limited extent that the merits of the case should be considered, this involves consideration not only of the challenge to the NoD but also the consequence of the claim before the High Court based on the DoR.

208. I asked both parties to provide references to cases where the High Court had approved a DoR which, as HMRC put it, had a fiscal benefit and effectively allowed retrospective tax planning. Counsel for the Appellants provided no cases and Counsel for the Respondents mentioned a case where such a rectification had been refused but could not produce a case reference.

209. The DoR, attached to the claim forms submitted to the High Court of Justice, on 14 October 2024 states that "the intention of the directors, the company and allottee was to issue

to the allottee [William Cook] 14 ordinary shares of £1 each in the capital of the company, each issued at a premium. It also stated that "the share allotment was incorrectly carried out" and "by mistake the parties intended that the company should issue to the allottee, 14 ordinary shares of £1 in the capital of the company each at a premium".

210. These statements are not supported by the documentary evidence submitted to the tribunal including the undated email from Roger Hammond to Iain Codrington and Palmer Solicitors' email of 18 January 2016. This clearly refers to a rights issue to all shareholders and to an eventual outcome of 675 ordinary shares of £1 each in the capital of the company being allotted to William Cook, the subscription price being satisfied by offset against his existing directors loan account.

211. The DoR makes no mention of the rights issue and the renunciation of the shares.

212. It is clear that the motivation behind both schemes is to avoid inheritance tax, as Richard Hammond stated at the outset, by converting the director's loan account into shares that would qualify for BPR. The intention, however, in 2016 was to achieve this by means of a rights issue followed by a renunciation of shares and this was confirmed in Edward Cook's witness statement.

213. I have considered and distinguish the circumstances in *Lobe*r where the taxpayer was making partial withdrawals which were likely to lead to his bankruptcy because of the method he chose to do so. He made his decision without the benefit of legal or other advice. That was not the case here.

214. I am not persuaded that the court would grant the DoR in the circumstances of this case which are also different to those in *Cook*e, which concerned the failure to reach a statutory holding limit by one share and which was found in favour of the taxpayer.

215. The requirements that must be met for a rectification as summarised in *Swainland,* include that "the parties must have common continuing intention, whether or not amounting to an agreement, of a particular matter in the instrument to be rectified". The DoR does not "rectify a matter in the instrument" but seeks to implement an entirely different scheme; that is to say an allotment to one shareholder of shares at a premium rather than a rights issue to all shareholders with the choice for the minority shareholders to renounce their shares (which they did).

216. I do not consider that the Appellants have a strong case for a successful application to the High Court, based on the evidence before the tribunal as this seems to be an entirely new scheme and is not the rectification of an instrument in terms of *Swainland*.

217. I am also not persuaded that the High Court would allow retrospective tax planning in the circumstances of this case. The rights issue scheme failed in part because William Cook acquired shares not referrable to his original proportionate holding which sadly he did not survive long enough to hold for two years. That is a circumstance which, regrettably for a taxpayer, arises on many occasions as do other time limits such as the seven year survivorship rule for Potentially Exempt Transfers from IHT.

218. In addition, the allocation of shares to one shareholder at a premium as opposed to a share issue to all shareholders by means of a rights issue does not, in terms of *Vintner,* appear to constitute a "reorganisation" which would allow those shares to benefit from BPR, which is the relevant consideration for a substantive appeal to the tribunal.

219. Taking all these reasons into account, the application for a late appeal is refused and the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

220. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for this 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.

WILLIAM RUTHVEN GEMMELL
TRIBUNAL JUDGE

Release date: 03rd FEBRUARY 2025