Appeal number: PTA/88/2011

PROCEDURE – application to reinstate appeal struck out for failure to co-operate with the Upper Tribunal – Rule 8(3)(a) Tribunal Procedure (Upper Tribunal) Rules 2008 – whether special circumstances justify reinstatement – no – application refused

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CLEAR PLC (IN LIQUIDATION) **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 20 February 2014

Valentina Sloane, Counsel, instructed by The Khan Partnership LLP, for the Appellant

Rupert Jones, Counsel, instructed by the General Counsel and Solicitor to The Director of Border Revenue, for the Respondents.

DECISION

Introduction

1. This decision relates to an application made on behalf of the Appellant ("Clear"), a company which is now in liquidation, to reinstate its appeal against a decision of the First-tier Tribunal released on 16 December 2010 in relation to the seizure of Platinum Sponge (the "FTT's Decision").

2. Permission to appeal against the FTT's Decision was given on limited grounds by Judge Wallace on 13 May 2011. An application was made by the Respondents to strike out the appeal in view of a lack of progress on the appeal because Clear's liquidator had not decided whether to continue with it. After a hearing before me on 3 May 2012 the appeal was struck out the next day under Rule 8(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). This Rule permits the Upper Tribunal to strike out proceedings where the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly. Clear's liquidator did not resist the application.

3. On 9 October 2013 Mr Justice Birss, sitting in the Companies Court, ordered that Mr Timothy Branston, the liquidator of Clear ("the Liquidator") cede to Mr Imran Kara ("Mr Kara") and others (together "the Applicants") conduct of various appeals, including this one, subject to certain conditions.

4. On 23 October 2013 the Applicants applied to the Upper Tribunal to reinstate the appeal. That application, which is contested by the Respondents, is the subject of this Decision.

The facts

5. The facts as to the sequence of events since the FTT's Decision are largely undisputed. The main area of factual dispute concerns whether the facts show that there are good reasons why an application was made to reinstate the appeal nearly two years after it was struck out such that taking into account all other relevant factors, it would be in the interests of justice to reinstate the appeal.

6. I heard no oral evidence. A witness statement from Ms Michelle Sloane, a partner in The Khan Partnership, who are instructed by the Applicants in relation to this application was filed but Ms Sloane was not called to give oral evidence. Her statement largely served the purpose of introducing the bundle of correspondence and other documents that were before me and accordingly I have based my findings entirely on the underlying documentation. The Respondents submitted a copy of a witness statement filed by Mr Philip Collins, a solicitor with Blake Lapthorn, the Liquidator's solicitors, in other proceedings brought by the Liquidator against the Applicants. The relevant part of this witness statement contains Mr Collins' narrative on the events relevant to this application, but again I have made no reference to it and have referred simply to the relevant underlying documentation in making my findings.

7. The FTT's Decision concerned an appeal made by Clear against the decision of the Respondents dated 15 January 2010 not to restore 40.8kg of Platinum Sponge seized by the Respondents on the grounds that there had been an attempt to smuggle it into the UK without payment of relevant taxes. I was told that the Platinum Sponge would currently have a value of £800,000, but in view of the time elapsed since its seizure in accordance with the Respondents' procedures it has now been disposed of.

8. The FTT dismissed Clear's appeal in its decision, released on 16 December 2010.

9. On 2 March 2011 Clear was wound up by the High Court. Mr Branston was appointed Liquidator of Clear with effect from 11 March 2011.

10. On 1 March 2011 Clear purported to assign this appeal to AQDC International Limited ("AQDC"), a company controlled by Mr Kara, who was also a director of Clear prior to its liquidation. The Liquidator has consistently taken the position that this assignment was void as a result of the operation of Section 127 of the Insolvency Act 1986, which provides that unless the Court orders otherwise any disposition of a company's property is void after commencement of the winding up (in this instance being the date of the presentation of the petition to wind up: see section 129(2) Insolvency Act 1986). The presentation of the petition in this case pre-dated the purported assignment. I have not taken Clear to dispute this position now and no attempts have been made to have the court validate the assignment or execute fresh valid assignments through the Liquidator, although the possibility of this was aired in correspondence between the Liquidator and The Khan Partnership in March 2012, which is referred to further below.

11. Nevertheless on 15 April 2011 AQDC purported to file with the Upper Tribunal an application for permission to appeal the FTT's Decision in its own name. The grounds of appeal disclosed that on 1 March 2011 the benefit of and title to bring the appeal was assigned to AQDC.

12. On 11 May 2011 Judge Wallace granted AQDC permission to appeal on some of the grounds sought, primarily on the question as to whether the FTT had considered the issue whether it was proportionate to refuse to restore the Platinum Sponge properly.

13. On 26 May 2011 Zatman & Co, on behalf of AQDC, applied to the Upper Tribunal for an oral hearing to reconsider the grounds on which Judge Wallace had refused permission. It would appear that this application was listed to be heard on 15 July 2011.

14. In the meantime, on 17 July 2011 Blake Lapthorn, acting for the Liquidator, wrote to Zatman & Co having received from the Liquidator a copy of the purported assignment which had been sent to the Liquidator on 7 July 2011. There was no evidence before me to suggest that the Liquidator was aware of the purported assignment before that time. Blake Lapthorn contended in this letter that the purported assignment was void, and notified Zatman & Co that they had written to the

Tribunal on the basis that the appeal remained the property of Clear, under the control of the Liquidator. In its response on 12 July 2011, Zatman & Co acknowledged that the assignment may require validation by the Court, or the execution of a new assignment of the Liquidator, on the basis, they contended, that it was in the best interests of Clear that the appeal should be funded by a third party. Blake Lapthorn also asked Zatman & Co for contact details of Mr Kara who the Liquidator wished to speak to about the liquidation; Zatman & Co responded that communications could be made through themselves but Blake Lapthorn, in its response of 14 July 2011, stated that the Liquidator required direct contact with Mr Kara, who, as a director of Clear, was obliged to assist him with his investigations.

15. As a result of Blake Lapthorn having raised the issue of the validity of the assignment, the hearing listed for 15 July 2011 was vacated, pending the Liquidator giving further consideration as to whether an assignment or ceding of conduct of the appeal to AQDC was appropriate. Blake Lapthorn also pointed out in its letter of 14 July 2011 that the Liquidator would need to be provided with copies of all the documents in relation to the appeal together with copies of any advice obtained from Counsel or Zatman & Co in relation to it. The letter finished as follows:

> "Furthermore, our client is almost certain to wish to interview Mr Kara to obtain information about the circumstances giving rise to the appeals. This is particularly so given your comment to us that you considered certain evidence from the UK Border Agency was fabricated. Additionally our client will wish to interview Mr Kara concerning the Company's affairs generally.
>
> At the moment, it appears that the only appropriate course of action is to request a stay of appeal … possibly for 3 months. We will liaise with the UK Border Agency in this regard."

16. On 3 August 2011 Blake Lapthorn asked Zatman for all the files it held relating to Clear and reiterated its request that Mr Kara attend for interview, stating that it was only possible for the information they requested to be provided face to face.

17. On 24 August 2011, Zatman & Co responded that it was unlikely that Mr Kara would return to the UK for some time, but if questions were raised in writing they could be put to him. They also contended that any discontinuance of the appeal would be detrimental to Clear's creditors, and reiterated their view that there would be merit in an assignment to AQDC. In response, on 25 October 2011, Blake Lapthorn repeated their request that they be provided with documents relating to the appeal so they could assess whether there was merit in it being pursued by Clear, and also repeated its request that Mr Kara be made available for interview regarding the appeal.

18. By 21 February 2012 there had been no further progress, the appeal having been stood over by the Upper Tribunal until 28 February 2012, and Blake Lapthorn wrote to Zatman & Co on that date, pointing out that Mr Kara had still not attended for interview and that the documentation provided by Zatman & Co related purely to HMRC's position. In those circumstances, Blake Lapthorn notified Zatman & Co that the Liquidator would shortly be discontinuing the appeal.

19. Zatman & Co responded on 24 February 2012 reiterating AQDC's willingness to pursue and fund the appeal, and requesting agreement to stand over the appeal pending further discussions as to the terms of a new assignment. By this time the Upper Tribunal had taken the view that the correct Appellant in the proceedings was Clear and not AQDC, because of the circumstances in which the purported assignment had been made.

20. Blake Lapthorn reiterated in its letter of 27 February 2012 that it had received no indications of the advice given to Clear on the merits of the appeal, and their attempts to interview Mr Kara had failed. Blake Lapthorn also repeated concerns they had previously aired as to whether AQDC was an appropriate assignee, bearing in mind Mr Kara, who was a director of both Clear and AQDC, had executed the purported assignment and AQDC appeared to be dormant without assets. In those circumstances, Blake Lapthorn reiterated the Liquidator's intention to discontinue the appeal.

21. On 1 March 2012 the Respondents made an application to the Upper Tribunal to strike out the appeal on the basis that it did not appear that it was being pursued.

22. On 8 March 2012 the Khan Partnership were instructed by AQDC and Mr Kara in place of Zatman & Co and asked that no steps be taken to discontinue the appeal without notice to them. Blake Lapthorn responded to this letter on 9 March stating that they could not give consideration to the assignment proposal without the detailed information that had previously been requested a number of times, most recently on 27 February 2012, pointing out that Mr Kara had not co-operated with the Liquidator. They also pointed out that Mr Kara had met with Zatman & Co on 6 March but had now left the country, asking for an explanation as to why when he was in the UK he made no contact with the Liquidator. Blake Lapthorn did not mention the strike out application in this letter.

23. The Khan Partnership wrote a lengthy letter on 19 March 2012 to Blake Lapthorn in which it responded to the information requests. In this letter it confirmed that AQDC had not received written advice from Counsel in respect of prospect of success of the appeal but they understood that its previous solicitor believed there were reasonable prospects of success. The letter also stated that they would have expected the Liquidator to take its own advice on the prospects of success before discontinuing the appeals. With regard to Mr Kara they reiterated the position that he was based abroad and was not in a position to personally attend an interview with the Liquidator. The letter also indicated that they hoped the matter would be resolved by the Liquidator accepting the assignment was valid or agreeing to execute a new assignment.

24. Blake Lapthorn replied on 3 April 2012, repeating that by operation of the Insolvency Act 1986 the assignment was void. The letter also sought clarification as to why AQDC's previous solicitors had come to a view that the appeal had reasonable prospects of success, and responded to the contention that the Liquidator should have taken its own legal advice on the position and the proposal to assign the appeal to AQDC as follows:

> "You ask us to provide you with confirmation as to whether our client has sought and received legal advice in respect of the prospects of success of the appeals. Of course, due to your client's lack of co-operation and non-attendance for interview, it has simply not been possible for our client to fully assess the merits of the Appeals. You, we presume, have at least had the benefit of meeting Mr Imran Kara in person. Our client has not been afforded that opportunity. This issue arises only as a result of your client's obstructive approach.
>
> In short, our client will not blindly assign the Appeals to a person or entity that we have never met or have no knowledge of. Your other client AQDC, is as far as we know, simply a vehicle of which Mr Kara is the sole director and shareholder. None of the issues raised in your letter provides us with any assurance as to the bona fides of AQDC as a proper party to pursue such appeals.
>
> Your client's approach appears to be (i) not to co-operate and not attend for interview, (ii) thereby prevent our client from fully assessing the merits of the Appeals, (iii) maintain the bare request that our client assigns the Appeals, (iv) then express concern/surprise when our client suggests he would have to discontinue the Appeals because of your client's approach, and (v) to threaten our client with a claim if we do not assign the Appeals. This approach is your client trying to benefit from his own intransigence."

25. The letter concluded by referring to the fact that the Khan Partnership LLP may already have been aware of the fact that the hearing of the Respondents' strike out application in the appeal had been scheduled for 3 May 2012.

26. Representatives of The Khan Partnership did attend the hearing on 3 May 2012 but I took the view that they had no locus to make submissions on the basis that the correct party to the appeal was Clear. Mr Jones, for the Respondents, at the hearing of the application submitted that as the Liquidator had not indicated that he wished to continue with the appeal since the stay expired on 28 February 2012, nor asked for a further stay and had not objected to the strike-out application then the appeal should be struck out.

27. The transcript of the hearing shows that Miss Shuvra Deb, Counsel for the Liquidator explained why the appeal had not been pursued as follows:

> "Sir, as you no doubt will be very familiar with this; of course the duties of the liquidator include ascertaining whether any course of action vesting in a company he is liquidating are meritorious. The position is simply his; as much as the liquidator would like to look into the merits of this appeal and, indeed, is obliged to properly investigate the claim, the liquidator has been rendered utterly unable to do so or to do anything due to a lack of evidence. As my learned friend points out, it has been around about eight or nine months since the liquidator's appointment. In that time he has sent via his solicitors – my instructing solicitor – to Mr Kara sent letters and emails and made telephone calls to his respective solicitors at the time chasing him for an appointment to interview. However, Mr Kara throughout this period has refused to co-operate. He has refused to attend for interview and as far as it is understood he remains outside the UK."

She also dealt with the assignment question as follows:

> "…, it reasonably appears to the liquidator that AQDC is, like Clear, under the control of Mr Kara and without evidence of its independence the liquidator cannot simply just agree to an assignment. Which brings me back, sir, to my initial point, which is that as much as the liquidator would like to and is obliged to investigate the merits of the appeal being brought or as it was brought by Clear prior to the winding up as a result of that company's directors complete failure to co-operate and provide any evidence, the liquidator is unable currently to pursue the appeal. It follows from that that the liquidator for the same reasons stated is in a position where he is unable to oppose the strike out application on any meritorious grounds whatsoever due to the lack of evidence and co-operation from Mr Kara. So the liquidator is simply in great difficulties and is unable to oppose."

28. My decision on the application, released on 4 May 2012, records these submissions and concluded:

> "It is clear to me that the liquidator is not currently minded to pursue the appeal and there is currently no prospect that he will be able to do so in the reasonably foreseeable future. I make no criticism of the liquidator in not being able to make a firm decision whether to proceed or not but it is clear that the liquidator is not in a position to give the Tribunal the necessary co-operation to enable matters to progress to a hearing of the appeal. In the circumstances, it is in the interests of justice that the Tribunal strike out the proceedings pursuant to Rule 8(3)(b)."

29. The transcript of the hearing records me saying at the end of the hearing:

> "You will be aware of course, there is a power to reinstate if there is good reason to do so".

This comment is not reflected in my written decision.

30. The Khan Partnership in a letter dated 4 May 2012 to Blake Lapthorn blamed the result of the hearing on the Liquidator, stating somewhat inaccurately that the appeal had been struck out due to the Liquidator failing to comply with Directions, and that I had indicated that "if progress is made in respect of the assignment of the appeal the Tribunal would consider an application to reinstate the appeal". The correct position is that I struck out the appeal on the grounds of non-co-operation; there had been no failure to comply with specific directions and I gave no detail as to the basis on which an application to reinstate might be based.

31. The question of reinstatement was not pursued actively between May and October 2012. In the meantime, the Liquidator issued proceedings against Mr Kara and others on 14 May 2012, alleging, *inter alia*, serious breaches of fiduciary duty and breaches of trust, misfeasance and fraudulent trading on the part of Mr Kara in his capacity as a director of Clear, in respect of alleged payments under a Commission Agreement. These proceedings are referred to as "the Commission Agreement proceedings". It is fair to say that this appears to have resulted in a complete breakdown of the relationship between Mr Kara and the Liquidator, no doubt exacerbated by the fact that the Liquidator obtained a worldwide freezing order against Mr Kara on 1 June 2012 which was not lifted until 27 July 2012.

32. Mr Kara would undoubtedly having been working on a response to the Commission Agreement proceedings during this period and he filed a defence to them on 28 September 2012.

33. Nevertheless, The Khan Partnership revived the issue in a letter of 19 October 2012 to Blake Lapthorn, in which they stated that they had now been instructed to apply to the High Court for directions requiring the Liquidator to take steps to assign or alternatively apply to reinstate and pursue the appeal on behalf of the creditors of Clear, including Mr Kara.

34. After further correspondence on the issue of an assignment, it would appear that attempts were made to advance these discussions as quickly as possible, culminating in an application being made to the Companies court on 31 January 2013 by the Liquidator for an order, *inter alia*, that the Liquidator assign the appeal to AQDC. It appears that this application was refined because the order that was made on 9 October 2013 was for the Applicants to be ceded conduct of all appeals previously brought before this Tribunal and the First-tier Tribunal. The order required the Applicants to do the following:

(1) provide an indemnity for the Liquidator in respect of any costs arising out of the reinstatement to be secured by a deposit of £25,000 in an escrow account maintained by The Khan Partnership;

(2) provide promptly to the First Respondent:

  (a) copies of all documents filed in the relevant tribunal and all inter-partes correspondence;

  (b) quarterly reports on the progress of the appeals from The Khan Partnership LLP;

  (c) such further information concerning the conduct of the appeals as the Liquidator may reasonably require; and

  (d) copies of all documents, including attendance notes, containing opinions and advices as to the prospects of success of the appeals.

35. Accordingly, on 23 October 2013 The Khan Partnership made an application to reinstate the appeal.

The Law

36. The application is unusual in that the Rules do not make specific provision for reinstatement of proceedings which have been struck out under Rule 8(3)(b) of the Rules. The relevant provisions of Rule 8 provide:

> "(3) The Upper Tribunal may strike out the whole or the part of the proceedings if:
>
> …

(b) the appellant or applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly;

…

(5) If the proceedings have been struck out under paragraph (1) or (3)(a), the appellant or applicant may apply for the proceedings, or part of them, to be reinstated.

37. It is perhaps understandable that there is no specific power to reinstate an appeal struck out under Rule 8(3)(b); failure to co-operate will have arisen as a result of a course of conduct over a significant period of time and will usually be more egregious than simply failing to comply with time limits on a direction, often involving a failure to engage with the Tribunal at all in order to progress the appeal. In this case, the circumstances were somewhat different to the usual scenario in that my findings of lack of co-operation were based on my acceptance of the Liquidator's submissions that despite his best efforts he did not receive the co-operation he needed to assess the merits of the appeal and decide whether to pursue it, rather than a conscious decision to ignore the need to progress matters.

38. I therefore need to consider whether I have jurisdiction to consider the application. Mr Jones submitted that I did not in the absence of any specific provision to that effect in the Rules. He naturally pointed out that Rule 8(5), quoted in paragraph 36 above, specifically allows an application for reinstatement if a matter has been struck out for failure to comply with a direction under Rule 8(3)(a) or rule 8(1) but does not do so in respect of a matter struck out under Rule 8(3)(b).

39. However, in that context it is necessary to consider Rules 5(2), 6(5) and 43(1) to (3) which provide as follows:

Rule 5(2):

"The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

Rule 6(5)

"If a party or any other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Upper Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction."

Rule 43(1) to (3):

"(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –

(a) the Upper Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are –

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or party's representative;

(b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

(3) Except where paragraph (4) applies, a party applying for a decision or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Tribunal sent notice of the decision to the party."

40. Mr Jones submits that Rule 5(2) cannot apply where proceedings have been struck out otherwise it would render the requirements of Rule 43 completely otiose. He submits that Rule 5(2) can only apply to extant proceedings rather than ones disposed of, otherwise there could be no finality to any proceedings and they would be set aside at any time with no requirement or test to be satisfied. He observed that the heading of Rule 5(2) is "Case Management Powers" in contrast to Rule 43 "setting aside a decision which disposes of proceedings". He submits that reference to "disposal" in Rule 5(2) is reference to the Tribunal's power to make a direction disposing of the case rather than dealing with an appeal which has already been disposed of; earlier directions can be set aside so long as they are not directions disposing of the case, in which case Rule 43 applies.

41. I reject Mr Jones's submission on the relationship between Rule 5(2) and Rule 43. It appears to me that Rule 43 is dealing only with the limited situation where there have in effect been procedural irregularities; it does not in my view provide an exhaustive code to deal with all situations in which a previous decision may be set aside. There is no suggestion of procedural irregularities in relation to the hearing held on 3 May 2012; although Miss Sloane suggested that was the case because AQDC was not given notice of the proceedings. I reject that because AQDC had at that time no locus in relation to the proceedings. It also appears that rule 43 is primarily concerned with substantive decisions rather than disposals arising out of the making of a direction. It is therefore my view that Rules 5(2) and 43 operate in parallel and it is open to the Tribunal to set aside a previous direction which has had the effect of disposing of proceedings on the application of a party.

42. However, the process for dong so would in effect have to be a challenge under Rule 6(5) in the absence of a specific provision allowing reinstatement.

43. The scope of Rule 6(5) must be regarded as being limited, otherwise a party who did not like a particular direction could simply challenge it by asking the Tribunal to think again rather than taking the course of appealing the direction.

44. This issue was considered by Judge Mosedale in the First-tier Tribunal, (where there are equivalent rules) in *DDR Distributions Limited v HMRC* [2012] UKFTT 443 (TC). Judge Mosedale recognised that Rule 6(5) operated in parallel with the relevant rule providing for the setting side of substantive decisions. She set out the circumstances in which in her view Rule 6(5) could apply in paragraphs 19 to 23 of her decision as follows:

> "19. It seems likely Parliament intended Rule 6(5) to be used in similar situations and therefore it may be appropriate to make an application for a direction to be set aside where a party did not attend, there was procedural irregularity or there was an obvious error of law in the direction. Whether the judge would order the set aside would of course depend on whether he considered it to be in the interests of justice to do so.
>
> 20. It also seems to me, although not by any parallel with hearings of substantive matters, that Parliament must also have intended Rule 6(5) to be used in one other circumstance, and that is where there has been a change in circumstances. Indeed, it is commonplace for earlier directions to be set aside and displaced by later directions where the situation has changed, such as where parties have proved unable to keep to the directed timetable. After all, the objective of directions is to get the appeal on for hearing in the shortest possible time commensurate with fairness and ensuring in so far as possible that both parties are fully prepared. Failing to take account of changing circumstances would not achieve such an objective.
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> 21. I note that the White Book (Civil Procedure in the High Court) states, in respect of the High Court's power to "vary or revoke" any earlier order, that this does not include a power to reverse itself simply because it had changed its mind. On the contrary, either an erroneous basis would have to be shown for the original order or a change in circumstances. See Section A 3.1.9. The court cannot act as an appellate court from its own orders. I consider that a similar state of affairs exists in this Tribunal.
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> 22. In conclusion, in my view, Parliament only intended rule 6(5) to be used in limited circumstances, and in particular where:
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> - Circumstances have changed;
> - Obvious error of law in direction;
> - Procedural irregularity in relation to the hearing at which direction made; or
> - A party did not appear and was not represented at the directions hearing.
>
> A judge would of course only grant the set-aside where it was in the interests of justice to do so.
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> 23. The above may not be an exclusive list of all the circumstances in which Rule 6(5) may be used: there may be some additional circumstances in which Rule 6(5) would be appropriate, but such circumstances would be exceptional and would not include an application on the grounds simply that a party considers the original direction was wrong. To avoid an anomalous and absurd

> result Parliament cannot have intended rule 6(5) to apply simply where a party considers that a direction is wrong: the only proper course of action in such a case would be for the party to apply to appeal it."

45. I accept this reasoning. It is consistent with the judgment of Lord Dyson MR in the Court of Appeal's decision, *Mitchell v News Group Newspapers Limited* [2013] EWCA 1537, when referring to the possibility of the sanction applied in that case being revoked, he said at paragraph 44:

> "… An application for relief from a sanction presupposes that the sanction has in principle been properly imposed. If a party wishes to contend that it was not appropriate to make the order, that should be by way of appeal or, exceptionally, by asking the court which imposed the order to vary or revoke it under CPR 3.1(7). The circumstances in which the latter discretion can be exercised were considered by this court in *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies*) [2012] EWCA Civ 518, 2012] 4 All ER 259, [2012] 1 WLR 2591. The court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under CPR 3.9."

On that basis it is open to me to consider setting aside my directions of 4 May 2012 provided I am satisfied that there is a change of circumstances or some other exceptional circumstances, although I should only do so if I am satisfied that in accordance with the overriding objective in Rule 2 of the Rules it is in the interests of justice to do so. In that regard, I must regard the burden on the Applicants as being a heavier one to discharge than in other reinstatement applications, bearing in mind that there is no specific power to reinstate, and the application is made after the lapse of a substantial period of time since the appeal was struck out, that is nearly two years. In other words, there must be truly exceptional circumstances.

46. In my view the change of circumstances that may be considered in this case is the agreement of the Liquidators to the ceding of the conduct of the appeals to the Applicants. The question as to whether the strike out application was made on a false premise may also be regarded as exceptional circumstances.

47. I therefore turn to the question of what principles I should apply to this case in determining whether it is in the interests of justice to set aside my directions of 4 May 2012. The paragraph from *Mitchell* quoted above indicates that the principles to be applied should be those applied in considering an application for relief from sanctions imposed for failure to comply, *inter alia*, with a rule or direction under CPR 3.9. Although the appeal was struck out for failure to co-operate rather than failure to

comply with a rule or direction, in my view this is an analogous situation and therefore the same principles should be applied.

48. As Miss Sloane observed, although the CPRs are not directly applicable in the Tribunals, the FTT has proceeded on the basis that the factors set out in CPR 3.9 provide the Tribunals with non-binding guidance on matters to be taken into account when deciding what is fair and just in the circumstances. In my view those considerations would have applied equally to the Upper Tribunal as they would have to the FTT. Miss Sloane referred me to the decision of the FTT in *Foneshops Limited* [2013] UKFTT 675 TC where Judge Berner considered the position in the context of the changes recently made to CPR 3.9; and set out the full text of both versions of the Rule in paragraphs 65 to 67 of his judgment as follows:

> "65. In my view, the correct approach to an application to reinstate an appeal is to consider what is fair and just in all the circumstances, having regard to the reasons for the striking out of the appeal and the reasons for any non-compliance by the relevant party. That, in essence, is nothing more than an application of the overriding objective in rule 2 of the Tribunal Procedure Rules. But some guidance on matters to be taken into account can be found in the Civil Procedure Rules. It has been held by the Upper Tribunal, in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), that the factors formerly referred to in CPR rule 3.9 are relevant to consideration of an application to make a late appeal. However, as rule 3.9 is concerned primarily with relief from sanctions, it is even more apt in the case of an application to reinstate.
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> 66. The current version of CPR rule 3.9 is expressed in general terms, as follows:
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> > (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
> >
> > (a) for the litigation to be conducted efficiently and at proportionate cost; and
> >
> > (b) to enforce compliance with rules, practice directions and orders.
> >
> > (2) An application for relief must be supported by evidence.
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> 67. That is essentially the same approach as the one I regard as applicable to reinstatement applications in this Tribunal. But, although CPR rule 3.9 is no longer expressed in terms of particular factors to take into account, those factors remain appropriate to any consideration of the question of fairness and justice. Those factors are as follows:
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> > (a) the interests of the administration of justice;
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> > (b) whether the application for relief has been made promptly;
> >
> > (c) whether the failure to comply was intentional;
> >
> > (d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party."

49. More recently the Upper Tribunal in *McCarthy & Stone (Developments) Limited and others (*PTA/345/2013) has indicated that in the light of the decision in *Mitchell* new CPR 3.9 should be applied with more emphasis on the need for litigation to be conducted efficiently and there should be less emphasis on the factors in the old CPR 3.9. The Upper Tribunal set out its reasoning in paragraphs 45 to 47 of its decision as follows:

"45. The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules.

46. The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at appropriate cost and to enforce compliance with rules, practice directions and orders.

47. As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders."

50. Taking all these recent developments into account and bearing in mind the particularly unusual circumstances of this case, in my view Miss Sloane has correctly identified the relevant factors that I should consider in this case when applying the overriding objective and I can summarise them as follows:

(1) The circumstances which led to the making of the strike-out direction and in particular, whether the Tribunal did so on a fully informed basis;

(2) The fact that the Applicants were not sent a copy of the strike-out application and were not permitted to make representations at the hearing of it;

(3) Whether the Applicants acted promptly in seeking to reinstate the appeal at the first available opportunity and diligently in seeking to regain conduct of the appeal;

(4) The prejudice to Clear if the appeal is not restored;

(5) The prejudice to the Respondents if the appeal is restored, including the costs and resource implications.

In addition, I must consider a sixth factor, bearing in mind the emphasis as recognised in *McCarthy and Stone* on the need for litigation to be conducted efficiently, namely the lapse of time since the appeal was struck out.

51. Before turning to consider these factors, I should deal with two further jurisdictional points raised by Mr Jones.

52. First, Mr Jones questions whether there was ever a valid appeal in the first place. He submits that Judge Wallace granted permission to appeal to AQDC and Clear had itself never sought to appeal. This permission was granted on a false premise, he submits, as there had been no valid assignment to AQDC of the rights relating to the appeal.

53. In my view it would have been perfectly possible for the Respondents to have made its application for a strike out on that basis, relying on the fact that the timing of the purported assignment meant that it was void under section 127 Insolvency Act 1986 and if the Liquidator had indicated at that time that he did not wish to adopt the appeal, it must have been highly likely that the appeal would have been struck out on that basis.

54. However, neither the Respondents nor the Liquidator raised the issue at the time and I must regard the fact that the Liquidator did participate in the hearing on 3 May 2012 to indicate an adoption of the appeal, if only to indicate that he was not in a position to progress it. Although therefore the documentation was not regularised, as I have previously indicated, once the Tribunal was informed of the Section 127 issue it proceeded on the basis that Clear acting through its Liquidator was the correct party to the appeal and bearing in mind the need for flexibility, and the avoidance of undue formality, in my view it is appropriate to proceed on the basis that Clear did adopt the appeal prior to the hearing on 3 May 2012 and the Tribunal should be regarded as having so directed. On this basis Mr Jones's submission on this point must fail.

55. Secondly, as noted in paragraph 34 above, the order of Mr Justice Birss ceding conduct of the appeal to the Applicants was subject to certain conditions and Mr Jones submitted that some of these had been breached, notably the reporting requirements

set out in paragraph 34(2) above, with the result that the Applicants' authority to deal with the appeal had ceased.

56. The Tribunal had no evidence from the Liquidator as to whether it contended that the position was as Mr Jones presented it, and there is no evidence that the Liquidator had taken the point and was seeking to proceed as if the authority had been terminated. In the absence of such evidence I should proceed, as I do, on the basis that the order concerned remains in full force and effect.

Discussion

57. I now turn to my consideration of the factors identified in paragraph 50 above, the purpose being to carry out a balancing exercise in respect of those factors in order to decide whether in all the circumstances I should agree to reinstate the appeal.

The basis of the strike-out direction

58. Miss Sloane submits that I made the strike out direction on an incorrect basis because I was not made aware of all the material facts. Miss Sloane submits that Miss Deb's submission to the effect that the Liquidator had not been able to progress the appeal because of Mr Kara's lack of co-operation is not borne out by the evidence. The true position she submits, is that the Liquidator could properly have come to a decision on whether to progress the appeal on the basis of the documentation that had been provided and without the need to interview Mr Kara. She drew a distinction between the desire to interview Mr Kara more generally about the liquidation and the offer by Mr Kara to respond to any questions from the Liquidator in email or by video link was sufficient co-operation on Mr Kara's part.

59. In my view the evidence shows that the Liquidator acted perfectly reasonably in the stance that he took. He wished to see the basis on which the appeal could be said to have merit and in that context, sight of any legal advice given on that point and the documents relating to the appeal is highly relevant; before embarking on obtaining his own legal advice it was sensible to review the advice that had already been given. A response to this request was never satisfactorily given. Blake Lapthorn pressed for it repeatedly, notably in their letter of 14 July 2011 referred to in paragraph 15 above, and its letters of 3 August 2011, 25 October 2011, 21 and 27 February 2012 referred to in paragraphs 17 and 20 above. It was only on 19 March 2012 that The Khan Partnership confirmed that there was no written advice from Counsel, but that the previous solicitor had confirmed the appeal had a good prospect of success which, not surprisingly, prompted the Liquidator to ask what the basis of this was in its letter of 3 April 2012.

60. With regard to the question of meeting Mr Kara, it is undoubtedly true that the Liquidator wished to interview Mr Kara about the liquidation more generally as he was perfectly entitled to do. It was also clear that Mr Kara wished to avoid being interviewed and this is not entirely explained by his residence outside the UK. As Blake Lapthorn pointed out in their letter of 8 March 2012, Mr Kara had been in the

UK on 6 March 2012 and met his then solicitors but did not contact the Liquidator, a point which has never answered in correspondence.

61. In my view it was perfectly reasonable for the Liquidator to have taken the position that he wished a face to face interview with Mr Kara, for the reasons they stated in Blake Lapthorn's letter of 14 July 2011, quoted in paragraph 15 above. The issue on the appeal was a question of proportionality; the conduct of Mr Kara would be highly relevant to that issue so it was not unreasonable for the Liquidator to wish to meet him in order to assess the matter fully. I therefore find that the Liquidator was not given the co-operation he was entitled to expect from Mr Kara in relation to making an assessment as to the prospects of the appeal and find that Miss Deb's description of the position of the Liquidator found himself in at the time of the hearing on 3 May 2012 was accurate. This is therefore a factor which weighs heavily in the balance against reinstatement.

The Applicants inability to engage with the strike-out application

62. I do not regard this as a material factor in the balancing exercise. Whilst I accept that it would have been appropriate for AQDC to have been made aware of the strike-out application at the earliest opportunity, it is clear that they were aware of the hearing on 3 May 2012 some time in advance of it and sought to obtain permission to participate in the hearing. The reason they could not was because they had no standing to do so, a situation which was brought about as a result of them having entered into an assignment which on the evidence before me was ineffective by operation of law. At no time did either Zatman & Co or The Khan Partnership seriously challenge the position that the assignment was void but they did not formally accept it. When AQDC attempted to participate in the hearing on 3 May 2012, they had for some months been aware that the Liquidator had maintained that the assignment was void and Zatman & Co in their letter of 12 July 2011 accepted that it may require validation of the Court. Yet at that stage they took no steps to progress the assignment issue or propose a ceding of the conduct of the appeal, an approach that would have been open to them at that stage. In those circumstances, in my view, the Applicants can have no legitimate complaint that AQDC was precluded from participating in the hearing.

Whether the Applicants acted promptly in seeking to reinstate the appeal at the earliest possible opportunity and diligently in seeking to regain conduct of the appeal

63. Miss Sloane submits that the correspondence shows tireless efforts being made by Mr Kara's legal representatives which was met with obstruction by the Liquidator, and that although no application was made to the Court to cede conduct of the appeal until January 2013, there had been engagement on the issue since the strike-out order in May 2012, and in particular, the Liquidator had indicated that he was willing to consider an assignment in that period. The Applicants proceeded to act swiftly and diligently in seeking to restore the appeal; the application was made within a few days of the order ceding conduct of the appeal.

64. Whilst I accept that the Applicants acted diligently once the order had been made, I do not accept that they acted as diligently as they might have done before that time. The failure to accept the invalidity of the original assignment undoubtedly caused delay and the Liquidator having raised legitimate issues about the connection between Mr Kara and AQDC, the question of ceding conduct of the appeal through an application to the High Court could have been made at a much earlier stage. Had Mr Kara been more co-operative with the Liquidator over the holding of a meeting, matters might well have progressed more smoothly.

65. I have also found (see paragraph 31 above) that the question of reinstatement was not pursued actively between May and October 2012. This coincides with the issue of proceedings regarding the Commission Agreement and whilst Mr Kara and his legal representatives were engaged on that issue, no explanation has been given as to why the matters could not have been progressed in parallel. However, it was clear that priority was given to the Commission Agreement proceedings. It was undoubtedly the case that relations between Mr Kara and the Liquidator effectively broke down as a result of the issue of the proceedings but there was nothing to have stopped an application being made to the High Court for ceding of conduct of the appeal nevertheless. I therefore find overall that the delay in bringing the application after the strike out direction in May 2012 is a factor weighing against Clear in the balance.

The prejudice to Clear if the appeal is not restored

66. It is undoubtedly the case that Clear will be prejudiced if the appeal is not restored. I accept Miss Sloane's submission that in view of the fact that permission to appeal has been granted Clear's case must be regarded as arguable so potentially it loses the opportunity of arguing for restoration of goods with a value in excess of £800,000, a significant sum in the context of the liquidation. This factor is a strong one in favour of reinstatement.

The prejudice to the Respondents if the appeal is restored, including the costs and resource implications

67. Miss Sloane submits that there is no injustice in the Respondents having to face the costs and resource implications of a meritorious appeal. In any event, there should not be a significant cost and resource implication as the appeal is on limited points of law only and would require only a short hearing.

68. There is however, a strong public interest in the finality of litigation. For almost two years the Respondents have been entitled to proceed on the basis that the appeal had been determined and would have been able to devote their resources to other matters. The length of time that has elapsed since that time is a significant point in strengthening the force of the Respondents position on this issue. In addition, if the appeal were successful in the Upper Tribunal, the likely outcome is that the Upper Tribunal would direct the Respondents to carry out a further review of the original decision not to restore. The Upper Tribunal has no greater powers than the FTT had,

and the powers of the FTT are limited, by virtue of Section 16(4) Finance Act 1994 to ordering the carrying out of a further review, it cannot make an order to restore.

69. In these circumstances the Respondents would have to revisit the evidence many years after the relevant events occurred and significant resources may need to be devoted to that exercise. I therefore do not accept Miss Sloane's submission that the matter would ultimately be determined solely on an issue of law; ultimate determination may involve a revisiting of the original decision.

70. In the circumstances of this case, the question of prejudice to the Respondents is therefore a stronger factor than in other cases.

The lapse of time since the strike-out

71. A period of almost two years since the appeal was struck out, even where there are special circumstances, is a significant factor weighing in the balance against reinstatement, bearing in mind the recent emphasis on the need for litigation to be conducted efficiently.

Conclusion

72. In my view the result of the balancing exercise points strongly in favour of refusing the application. The factors that lead me to that conclusion are:

(1) The lack of co-operation shown by Mr Kara to the Liquidator;

(2) The overall lapse of time since the strike out application, a particularly strong factor in the light of the emphasis now put on the need for litigation to be conducted effectively as recognised in *McCarthy & Stone*, regardless as to whether any party is particularly at fault in that regard. For example, the fact that the application for an order in the High Court was delayed because of the attention needed to be given to the Commission Proceedings and that was not entirely because of fault on the Applicants part (although as indicated above in my view they were not completely blameless), does not mean that the delay ensuing should not be taken into account, particularly where it is the Respondents, who are clearly blameless in this regard, who are prejudiced as a result.

(3) The delay in pursuing the ceding of the conduct of the appeal, exacerbated by the failure to recognise the invalidity of the purported assignment; and

(4) The absence of a specific provision in the Rules permitting reinstatement meaning that the burden is a heavy one on the Applicants to show special circumstances justifying the setting aside of the strike-out direction.

73. In my view it would not be in the interests of justice that the appeal be reinstated unless there are reasons that are so compelling that to fail to do so would cause demonstrable injustice to Clear. The prejudice to Clear caused by not reinstating the appeal is not so strong that it outweighs the factors set out in paragraph 72 above.

74. I therefore dismiss the application.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE: 10 April 2014