



TC05320

Appeal number: TC/2014/02805 and TC/2016/01215

VAT – penalties – Schedule 24 FA 2007 strike out applications – failure to comply with directions – yes – failure to provide an address – yes – significant failure to co-operate – yes - reasonable prospects of success – no – strike out applications granted – application to admit appeal late – no reasonable excuse – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID CHARLES ALLEN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

**Sitting in public at George House, 126 George Street, Edinburgh on 13 and 22
June 2016**

David Charles Allen, the Appellant

**Elizabeth Roxburgh, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This was not a substantive hearing. Mr Allen has two appeals that are not
5 conjoined but were heard together. There were different preliminary applications by both parties and they fell to be decided together. The facts are essentially the same for both and the issues overlap.

Background

TC/2014/02805 (“the Work appeal”)

10 2. In regard to the appeal *TC/2014/02805* the issue was that on 16 March 2016 the respondents (“HMRC”) had sought an order under Rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) that the proceedings be struck out as a result of Mr Allen’s failure to comply with the Directions issued by the Tribunal on 29 February 2016. The Tribunal had also issued
15 further Directions on 19 May 2016 and there had not been full compliance with those Directions. In particular no witness statements had been lodged by Mr Allen.

3. On 5 May 2016, HMRC had lodged a further application for the appeal to be struck out in terms of Rule 8(3)(c) of the Rules on the grounds that the appeal had no reasonable prospect of success.

20 *TC/2016/01215* (“the Aberfoyle appeal”)

4. In regard to the appeal *TC/2016/01215* the sole issue at the outset was Mr Allen’s application for permission to appeal out-of-time against a decision of HMRC, communicated to Mr Allen by letter dated 27 May 2014 that he was liable to pay a penalty under Schedule 24 of the Finance Act 2001.

25 5. Mr Allen formally intimated his intention to lodge a late Notice of Appeal by email dated 11 February 2016. A Notice of Appeal, but not on the approved form, was lodged by email on 11 March 2016.

6. That application was vigorously opposed by HMRC. In the event that the application for the admission of the late appeal were to be granted HMRC sought
30 strike out in terms of Rule 8(3)(c) of the Rules on the same basis as in the Work appeal.

Preliminary Issues

Day One

7. Mr Allen applied to lodge a two page invoice (see paragraph 110 below) and a
35 letter dated 5 January 2015 to his then solicitor with copies of two email strings from his then tax adviser dated 19 and 31 December 2014. His Bundle of Documents had not been served timeously and there was neither an explanation of the delay or of what it was to which the documents related. HMRC did not object to the late lodgement but indicated very clearly that they would object to any other applications.
40 Mr Allen confirmed that he would make no further applications and I allowed the documents to be admitted in process.

Day Two

8. Notwithstanding his assertion on Day One about no further applications, the first issue to be considered on Day Two was the very late admission, or not, of Mr Allen's witness statement. It was made absolutely explicit to him that he had been told on the first day of the hearing that any attempt to lodge a witness statement would be vigorously opposed not least because the strike out application was in no small measure predicated on the entire lack of witness statements.

Witness Statement of Mr Allen

9. In the course of the first day of this hearing Mr Allen conceded that he had not submitted even his own witness statement in the Work appeal because he had "not got round to it". Counsel for HMRC stated that any application for late admission of a witness statement or witness statements at this juncture would be vigorously opposed. In the interval between the two dates of hearing, Mr Allen lodged his own witness statement with HMRC and the Tribunal.

15 *HMRC's arguments*

10. There were three principal grounds for opposition namely:-

- (1) there was no credible explanation as to why the witness statement was lodged late other than Mr Allen's acknowledged concession that he simply had not got round to it,
- 20 (2) the witness statement did not address in any detail the four issues in the appeal, and
- (3) the witness statement contradicts the position stated in the Grounds of Appeal previously lodged and accordingly was lacking in candour and did not relevantly address the issues.

25 *Mr Allen's argument*

11. Mr Allen's only argument was that he had not been able to afford representation since January 2016 albeit his former tax adviser had given him his file. He did concede that he "should have known better" than to have failed to lodge a witness statement earlier.

30 *The Law*

12. Mr Allen stated that he was not conversant with the law in respect of admission of evidence and I therefore explained the approach to be adopted. I referred to Judge Mosedale's analysis in *Masstech*¹ where she analysed *Mobile*² and also *O'Brien*³ where the House of Lords gave guidance on the approach and balancing exercise to take when considering admitting evidence generally. I agree entirely with Judge Mosedale's analysis where she said:-

¹ *Masstech Corporation Limited (In Administration) v HMRC* [2011] UKFTT 649

² *Mobile Export 365 Ltd (2) Shelford IT Ltd v Commissioners for Revenue and Customs* [2007] EWHC 1737 (Ch), STC 1794

³ *O'Brien v Chief Constable of South Wales Police* [2005] 2 WLR 1038 ("O'Brien")

“8 The conclusions I draw from these cases and from general considerations of fair hearings are as follows:

- 5
- Only relevant evidence should be admitted;
 - Such evidence should nevertheless be excluded where there is a compelling reason to do so;
 - Whether there is a compelling reason to do so will be a balancing exercise the object of which is to achieve a trial that reaches the correct decision by a process fair to all parties;
 - To conduct that balancing exercise the Tribunal must consider the likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor;
 - Unfair prejudice includes the factors listed by Lord Bingham which were particularly relevant in that case but in this case, not being a trial by jury, perhaps of less relevance. Unfair prejudice would include a party being ambushed so that it is strategically disadvantaged or put in a position that it has no time to bring evidence in rebuttal;
 - Considerations of good case management will include the need for a sanction against a party which adduces late evidence particularly where the evidence could have been produced earlier; it will recognise the desirability of adhering to trial dates and avoiding unnecessary costs.”
- 10
- 15
- 20

13. Of course, I also had in mind the provisions of Rule 2 of the Rules and that reads as follows:-

2.—Overriding objective and parties’ obligations to co-operate with the Tribunal

- 25
- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
- 30
- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- 35
- (3) The Tribunal must seek to give effect to the overriding objective when it—
- (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- 40
- (4) Parties must—
- (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.”

Discussion

14. Ms Roxburgh dissected the witness statement with admirable precision, as was acknowledged by Mr Allen.

45

“Outright inaccuracies”

15. In the first instance she pointed to two totally inaccurate paragraphs being paragraphs 1 and 12 pointing out that as Mr Allen had previously been a solicitor he should have understood that all information in a witness statement requires to be true and correct to the best of the deponent’s ability and it should set out clearly and fully the evidence which was to be adduced.

50

Paragraph 1

16. Paragraph 1 made it clear that following his bankruptcy in 2001 Mr Allen had lost his job and his legal practising certificate. That is indeed completely untrue since Mr Allen was struck off the Roll of Solicitors on 6 September 2000 for misuse of a client's funds. He was declared bankrupt on 14 March 2001. He then simply said that that description of the sequence of events in the witness statement was an error.

17. I noted that Mr Allen had argued before the Solicitor's Disciplinary Tribunal that his actions had been caused by a shortage of funds because the Legal Aid Board owed him in excess of 25%. That contrasted sharply with Mr Allen's argument in mitigation to the Tribunal during the first day of the hearing that he had not understood the importance of the Directions issued by the Tribunal because, although he had been a solicitor, his experience was in property law. When that was put to him he attempted to explain that his role in regard to legal aid funded litigation was simply preparation and then passing matters to Counsel. I remain of the view that he attempted to mislead me in regard to his knowledge of litigation. In that regard I had also pointed out to him that the Directions in regard to the production of witness statements and Lists of Documents were written in plain English and were in standard form understood by other party litigants.

Paragraph 12

18. In paragraph 12 of his witness statement he stated that a property was rented by Aberfoyle Services Limited ("Aberfoyle") in 2008. In fact Aberfoyle was only incorporated on 7 May 2009 so it was not, and could not have been, the tenant. Mr Allen conceded that that too was an error.

19. Ms Roxburgh's argument was that if such very basic points in what was a short and highly non-specific witness statement were incorrect then the probability was that much else would be incorrect. However, as there was a serious lack of specification it was not possible for HMRC to cross check other assertions for inaccuracy particularly in the limited time scale. The only reason that these two errors had been identified was because dates had been given.

30 Issues in the Work appeal

20. Ms Roxburgh pointed out that the tone and style of the witness statement was neither clear nor complete and, in particular, that the issues in the appeal had not been addressed.

21. The background to this appeal is that on 23 October 2012 HMRC issued an assessment of £22,741,593 to Work Legal-E Limited ("Work") in respect of under-declared VAT for the periods between 4 February 2010 to 30 April 2011. Thereafter on 21 November 2013, HMRC imposed a penalty on the company in respect of deliberate and concealed errors in the VAT returns for the periods between 4 February 2010 and 30 April 2011 which had led to the under-declaration of VAT. HMRC concluded that the errors in the VAT returns were attributable to Mr Allen and determined that he was personally liable for the penalty.

22. The issues in the Work appeal therefore are:-

- (1) Were there under-declarations in the VAT returns?

- (2) Were those under-declarations deliberate and concealed?
- (3) Were those under-declarations attributable to Mr Allen? And
- (4) Was there any reason why Mr Allen should be relieved of responsibility for the penalty?

5 23. Ms Roxburgh argued that Officer Reilly's extensive witness statement and exhibits (comprising four very large bundles) set out clearly all of the detail in regard to those issues and although Mr Allen had had sight of Officer Reilly's witness statement for some time it was nowhere referred to in his own witness statement. The only inference therefore was that it was not disputed.

10 24. Other than in respect of the return for 04/11 Mr Allen's witness statement did not directly address whether or not there were understatements nor whether any such understatements might have been deliberate.

15 25. In particular Mr Allen had not confirmed who had dealt with the VAT returns. He simply obliquely stated at paragraph 8 "I would have no knowledge of how the returns were calculated and a figure would be sent down ... and the return completed and filed electronically." Regrettably even that vague statement is not of any value since it refers to the period covered by the Aberfoyle appeal. The witness statement allegedly relates to, and was lodged in, the Work appeal but it loosely covers the period for both appeals. HMRC argued that he must have known who actually filed the returns yet he did not address that directly but inferred, with one exception, that it had not been him. That proved
20 not to be the case.

26. A primary cause for concern was that the witness statement now seemed to infer that Mr Allen had been under duress throughout the period covered by the appeal and also for periods covered by the Aberfoyle appeal. It had previously been argued that
25 duress was an issue only in respect of the return for 04/11.

27. The witness statement is largely concerned with suggestions of vague threats with little or no detail beyond suggesting that threats were being made as early as 2008.

30 28. In general, in any appeal, the first witness statements are prepared without the benefit of sight of HMRC's witness statements but in this instance Mr Allen has had all of the information but has not responded in any detail or indeed to almost any of the points directly. To the very limited extent that points were addressed in the witness statement, they overlap with the alleged inconsistencies. I therefore note them under that heading.

35 ***Inconsistency with stated Grounds of Appeal***

29. Ms Roxburgh detailed numerous inconsistencies with the stated Grounds of Appeal. The Grounds of Appeal, which were described as an "outline", were set out in an eight page letter from Mr Allen's then representative to the Tribunal dated 23 October 2014. I comment on the primary inconsistencies as follows:-

40 ***Submission of returns and control of Work***

30. The Grounds of Appeal state categorically that Mr Allen vehemently denied being responsible for submission of four of the five VAT returns for Work being

those for periods 04/10, 07/10, 10/10 and 01/11 as “he had no input or knowledge whatsoever in respect of the figures that were prepared by others for these VAT returns”. It was alleged that the responsibility lay entirely with five individuals namely Messrs N*****, M*****, C***, P***** and B***. The first three were described as influencing and ultimately controlling Work prior to the period covered by the four VAT returns. They had control of Work because Mr Allen had been seriously ill in November 2008 and had a major operation in July 2009. That control continued until Mr Allen “began to take control of Work” after the 01/11 return was submitted.

31. N***** had hired P***** who was responsible for all financial matters including the submission of all VAT returns up to and including the one for 01/11. P***** acted on the instructions of N***** and M*****.

32. In his witness statement Mr Allen makes no specific reference to the first four VAT returns, other than that he knew nothing about them, as I indicate at paragraph 25 above.

33. As opposed to the Grounds of Appeal he states that P***** left Work many months earlier in October 2010 and that M***** controlled all finances jointly with P***** whilst N***** and P***** controlled staff and in-house operations. At paragraph 32 of his witness statement he states that N***** and M***** left abruptly in October 2010 yet the Grounds of Appeal indicate that they had a disagreement with C**** and left in early 2011.

34. Officer Reilly’s exhibits show that the returns for 4/10 and 7/10 were in fact signed and filed by Mr Allen. In his witness statement, since he does not admit to signing or filing any returns, he does not make any explicit allegation as to why that might have happened.

35. The VAT return for the period 10/10 was submitted to HMRC on 2 December 2010, however, at paragraph 34 of his witness statement Mr Allen stated “I started the process of taking control of the company in or around October or November 2010”. The witness statement is further inconsistent in that at paragraph 22 Mr Allen states that he took “control in January 2011”. The return for the period 01/11 was submitted electronically on 7 March 2011.

36. Both the Grounds of Appeal and the witness statement were consistent in stating that Mr Allen did admit to being the responsible person for submitting the period 04/11 VAT Return. That was submitted on 8 June 2011.

37. Officer Reilly had exhibited an email dated 26 May 2011 from Mr Allen’s PA requesting a member of staff to check with Mr Allen before undertaking any on-line returns and the response was to the effect that “this is my common practise (*sic*)”. It is clear that therefore the previous returns had been cleared with Mr Allen.

38. At paragraph 26 of his witness statement, Mr Allen alleges that: “In late 2008 I was rushed to Hospital...and underwent major emergency surgery, doctors letter enclosed....The other individuals ...N***** and ... M***** removed any control or transparency from me whilst in hospital and recovery..”. That is inherently inconsistent insofar as

(a) The doctors letter which Mr Allen produced indicated that he was admitted on 4 November 2008, received treatment and was discharged within four days.

5 (b) Officer Reilly had produced the Company Notebook for flights and hotel accommodation and that showed that on 10 November 2008 a flight had been booked for Mr Allen to fly somewhere on 12 November 2008 returning five days later.

(c) There were a number of other flights booked for Mr Allen in the following weeks.

10 39. He did have major surgery but his doctor stated that that was a planned operation on 20 July 2009 and he was discharged within four days, convalesced for three weeks and then returned to work which would have been in mid-August 2009. The Grounds of Appeal stated that he returned to work in September 2009. The witness statement is silent on that point.

15 *Duress*

40. There was no suggestion in the Grounds of Appeal of any threats until C*** allegedly began intimidating Mr Allen in early 2011.

20 41. As far as duress is concerned the witness statement is very vague. At paragraphs 9-11 Mr Allen alleges that he had been threatened, bullied and manipulated even although he was ill and that following his collapse in November 2008 it became more sinister and controlling “to such an extent that I was completely traumatised and completely controlled”.

25 42. At paragraph 12 Mr Allen had said that following his collapse in November 2008 an apartment had been leased, that his “soon to be tormentors” had access to it and seeing his weakness after the collapse they “took the opportunity to increase the threats and control over me” yet Officer Reilly’s exhibit of the company Notebook showed that Mr Allen and Mr C*** both stayed in an expensive Edinburgh hotel on a number of occasions in November and December 2008. Mr Allen’s doctor stated that he only moved to Scotland in January 2009.

30 43. At paragraph 13 he said that the threats became heightened “before my operation” which was on 20 July 2009. Nevertheless, he had become the sole director of Aberfoyle on 7 May 2009 and remained such until the company was sold and he resigned on 14 September 2010. Work was incorporated on 23 November 2009 with Mr Allen as the sole director at all times until 26 July 2013 when it entered
35 liquidation. Ms Roxburgh argued that it was wholly inconsistent that he could have been under duress yet operated in such a manner for such a long period.

40 44. In relation to the return for 04/11, the Grounds of Appeal alleged that Mr Allen had submitted it because of threats of violence and a demand for £4 million from C***. It was stated that “he was acting under severe duress at the time”. He took the decision to divert monies from the 04/11 VAT liability in order to pay C***.

45. By contrast in the witness statement there is a suggestion that Mr Allen had been “in fear of my life at all times” (his paragraph 19) and that he had been subjected to threats since at least 2008. However, at paragraph 17 he states that he made reports to

5 the police “on every occasion” that C*** threatened him. At paragraph 31 he states that he “did report all matters to the police” and referred to two police reports dated 18 February 2011 and 7 May 2011 which he produced. There is no record of the detail beyond the fact that complaints were made. There is nothing prior to those dates.

10 46. Although Mr Allen made the allegation that he under-declared the return for 04/11 because he had had a demand for £4 million, there is no evidence of any payment of that £4 million to C*** or anyone else. By contrast on 18 May 2011, 13 June 2011 and 28 June 2011 there is evidence that Mr Allen received payments of £550,000 on each occasion.

15 47. Mr Allen denied that the Grounds of Appeal previously lodged and the witness statement were inconsistent but he argued that to the extent that there were differences, they were not material and they could be explained. There is neither acknowledgement, nor explanation of any discrepancies in the witness statement as lodged.

Decision on witness statement

20 48. Mr Allen had made it clear that he knew that the witness statement should have been lodged earlier and in that context pointed out that any sanctions in terms of costs (this is a complex case and there has been no opt out of the costs regime) would be ineffective since he had no assets.

25 49. It suffices to say in regard to the admission of the witness statement that, at the end of Ms Roxburgh’s submission, even Mr Allen conceded that his witness statement was vague but he tried to argue that it was far from complete. He stated that he would be submitting a new witness statement containing as much detail as possible and that that would address the issues in the appeal.

30 50. Ultimately Mr Allen conceded that he realised that the witness statement fell “way short of what I should have done”. He also stated that it was based on his COP9 Disclosure report lodged with HMRC on or about 2 September 2013 and exhibited by Officer Reilly. That runs to some 336 pages. The witness statement was nine pages and 37 paragraphs long.

35 51. I was referred to, and have read, the COP9 Disclosure which was produced by Officer Reilly. Two very clear inconsistencies can be found on the first page of the Statement therein included dated 18 January 2011 and which Mr Allen himself produced for this hearing. Firstly, in conflict with the medical evidence now tabled, it is suggested that Mr Allen became very ill “around November 2008 ... and spent a significant amount of time in hospital and then in recovery. Mr Allen returned to his role around April 2009. However, he also had major surgery around July 2009”. Secondly, in conflict with the Grounds of Appeal and part of the witness statement it states: “... in 2010 he managed to get M*****, N***** and C*** out of his business ...”. There are numerous other examples of inconsistencies both intrinsically and also with the Grounds of Appeal and this witness statement.

40 52. Given the lack of specification in the witness statement and the inherent inconsistencies and inaccuracies it is of very doubtful relevance and of limited probative value. Unfair prejudice would be caused to HMRC were it to be admitted

because based on that witness statement the probability would be that new and possibly different evidence would be elicited in cross-examination and HMRC would therefore be ambushed since they would have limited or no time to investigate any such evidence.

- 5 53. In all these circumstances, I decided that the witness statement should not be admitted.

The Chronology of the appeals

The Work appeal

- 10 54. On 28 April 2014 HMRC wrote to Mr Allen at Culter House, Coulter, Biggar, ML12 6BZ (“the House”) confirming that the review of the decision dated 21 November 2013 to impose a VAT penalty of £19,818,258 in respect of the VAT returns for Work had been amended leading to a reduction in the penalty by £3,092,731.68.

- 15 55. On 19 May 2014, that decision was appealed by Mr Allen’s representative. The Notice of Appeal described Mr Allen’s company as Work but gave the name, address and landline telephone number of Mr Allen, at the House. The email address was Mr Allen’s personal email. The covering letter stated that the Notice of Appeal form was submitted on behalf of Mr Allen and that the representative had recently been appointed by Mr Allen. Subsequent correspondence referred to “Mr Allen’s appeal”. I
20 note in passing that in subsequent correspondence the representative variously stated that he had “assisted Mr Allen since late April 2014” but also that he had only acted for Mr Allen since 25 June 2014.

- 25 56. On 14 July 2014, the Tribunal wrote two letters to Work at the House. Mr Allen concedes that he received and acted on those letters. That was less than three weeks after he alleges that the penalty Liability Notice in the Aberfoyle appeal was not received by him at the House.

- 30 57. On 22 July 2014, HMRC lodged the first of a number of strike out applications. That application was predicated on the basis that Work had no *locus* since the penalty had been imposed on Mr Allen personally and in any event it was in liquidation. Further, no ground of appeal had been stated and therefore there had not been compliance with Rule 20(2)(f) of the Rules.

- 35 58. On 8 September 2014, Mr Allen’s representative wrote to the Tribunal requesting that the name of the appellant be amended to Mr Allen as an individual and stating that the Ground of Appeal was that Mr Allen had not had financial control of the company at that time and was therefore not responsible for the submission of the VAT returns.

59. On 23 October 2014, Mr Allen’s representative sent an eight page letter to the Tribunal giving further detail of those grounds of appeal as I indicate above. He stated that Mr Allen was residing in Dubai.

- 40 60. On 3 November 2014, HMRC intimated that, provided the litigation proceeded in the name of Mr Allen only, they would withdraw the application for strike out. On 17 November 2014, Mr Allen was substituted as the appellant in the appeal and Directions issued. Pertinently, and in particular, those Directions provided that lists

of documents should be sent or delivered to the other party by 27 February 2015 and that by no later than 27 March 2015 both parties should send or deliver to the other party the witness statements on which it intended to rely at the hearing and notify the Tribunal that that had been done.

5 61. On 12 January 2015, the respondents lodged their Statement of Case. On
14 January 2015 HMRC lodged an application intimating that on 6 January 2015
Mr Allen had been sequestered at Lanark Sheriff Court. Therefore HMRC requested
the Tribunal to intimate the appeal to the Trustee of Mr Allen's estate, ascertain
whether the Trustee concurred with Mr Allen continuing the appeal and extend the
10 requirement to comply with the Directions of 17 November 2014.

62. On 15 January 2015, the Tribunal granted the application in part and intimated
the appeal. The request for an extension of time limits was not granted.

15 63. On 29 January 2015, the Trustee in the sequestration wrote to the Tribunal
stating that he had not received full cooperation from Mr Allen and was unable to
concur with Mr Allen in continuing this appeal. Mr Allen confirmed to the Tribunal
that at no stage had he co-operated with the Trustee.

64. On 26 February 2015, HMRC lodged an application to sist the appeal and on
16 March 2015 the Tribunal consented to HMRC's application. However, although
HMRC had complied with the Directions, Mr Allen had not complied.

20 65. On 20 October 2015, the sist having expired HMRC sought further Directions
and pointed out Mr Allen's ongoing failures in compliance.

25 66. That application was intimated to Mr Allen's representatives and only on
11 January 2016 did they respond stating that they had been able to take instructions
on the application of 20 October 2015 and awaited the Tribunal's Directions. They
made no submission on that application from HMRC.

67. That letter of 11 January 2016 also enclosed an application by Mr Allen relating
to what was to become the Aberfoyle appeal.

The Aberfoyle appeal

30 68. The Aberfoyle Penalty Liability Notice was dated 27 May 2014. It did not
appear out of the ether. On 1 August 2011, HMRC wrote to Mr Allen in regard to a
number of his businesses including Aberfoyle and Work, stating that they held
information suggesting that the returns and accounts submitted to HMRC might be
incorrect and for that reason an investigation of his own and businesses tax affairs
would commence.

35 69. On 6 March 2014 HMRC wrote to Mr Allen at the House enclosing a copy of
the proposed penalty and pointing out the deadline for his response. It confirmed that
it had been sent to the liquidator.

40 70. On 27 May 2014, HMRC sent the Notice of Liability to pay that penalty in the
sum of £6,092,207.62 to Mr Allen at the House. That Notice said that a payslip
would be sent to him shortly and that the amount payable was due within 30 days of
the date of issue of the Liability Notice.

71. On 20 August 2014, the Sheriff at Lanark granted a Summary Warrant to HMRC for the recovery of the sums payable not only in terms of VAT penalties relating to Aberfoyle but also in regard to Mr Allen’s personal tax affairs. The total amount due was £7,224,711.92.
- 5 72. On 16 September 2014, the Sheriff Officers executed the Charge by depositing a full copy of the Schedule of Charge together with a Debt Advice and Information Package at the House.
73. On 10 December 2014, the Sheriff Officers cited Mr Allen to answer a Petition at Lanark Sheriff Court on 23 December 2014. That citation was left at the House and a further copy sent to the House. Mr Allen denies receiving those yet, 10 inexplicably in that context, he certainly instructed solicitors. When that inconsistency was put to him he conceded only that he had known about it, but had not known the detail.
74. That Petition was for sequestration of Mr Allen and on 23 December 2014, on 15 the motion of Mr Allen’s then solicitor the case was continued to 6 January 2015 for further investigation. On 6 January 2015 Mr Allen was duly sequestered.
75. In the interim, on 22 December 2014 Mr Allen’s then solicitors had lodged a Petition of Suspension and Interdict seeking suspension of the Charge “purportedly 20 served upon him on 16 September 2014”. The charge in the sum of £7,224,711.92 was produced with that Petition and the bulk of it related to the subject matter of the Aberfoyle appeal. Mr Allen argued that he did not know how the solicitors had obtained the copy of the Charge but ultimately conceded that he “might” have received either or both of the Summary Warrant or the Execution of the Charge. He persisted in his denial of knowledge of any detail. He told the Tribunal that he “did not 25 doubt” that the Penalty Liability Notice and other documents had been sent to the House. He just averred that he did not receive them.
76. On 22 December 2014, Mr Allen’s tax representative, who acted for him in the Work appeal, wrote to HMRC referring to an earlier email from him to HMRC on 30 19 December 2014 in regard to the Aberfoyle penalty and requesting that HMRC “allow a belated appeal in respect of this penalty on the grounds that HMRC have never properly disclosed the actual details of the penalty to either Mr Allen or me ...”. It was argued that the grounds for the extension of the date for appeal was that Mr Allen had never been personally served with the Penalty Liability Notice. HMRC responded on 35 30 December 2014 enclosing copies of the Penalty Liability Notice and explanation and on 22 January 2015 told the representative that an application for a late appeal should be directed to the Tribunal.
77. Mr Allen’s application enclosed with the letter of 11 January 2016 stated that on 27 May 2014 HMRC had issued a Penalty Liability Notice in the sum of 40 £6,092,270.62 to Mr Allen in respect of allegedly incorrect VAT returns for Aberfoyle Services Limited (“the Aberfoyle penalty”). The application went on to state that the Aberfoyle penalty had not been served on Mr Allen. There was also a penalty in terms of self-assessment tax returns. It stated that HMRC had issued a Notice of Charge dated 16 September 2014 in respect of those two penalties and Mr Allen applied to the Tribunal to be given leave to appeal out-of-time and 45 conjoin the Aberfoyle appeal with the Work appeal. That undated application with its

covering letter was received at the former administrative office of the Tribunal in Edinburgh and had not been sent, as it should have been, to Birmingham.

5 78. On 15 January 2016, detailed Directions were signed pointing out that whilst Mr Allen's application was noted, and was thereby intimated to HMRC, it nevertheless appeared that the "appeals" to which Mr Allen referred had not been lodged with HMRC and that therefore in accordance with section 49D(1) Taxes Management Act 1970 ("TMA") there could be no appeal to the Tribunal and it was anticipated that HMRC would seek that any such application be struck out. Mr Allen was therefore directed to lodge with HMRC (and the Tribunal for information only) a
10 detailed application to HMRC with copies of the various decisions for which leave to appeal was sought.

15 79. Due to an administrative oversight those Directions were only issued on 1 February 2016 and in the interim, on 18 January 2016, Mr Allen's representative had withdrawn agency and stated that Mr Allen would be advising the Tribunal directly as to who would be acting for him. No contact was made by Mr Allen.

80. When the Directions were issued on 1 February 2016 Mr Allen was directed to provide "his most recent address" and details of his new representative or whether he would be representing himself and that within 14 days from the issue of the letter.

20 81. On 12 February 2016 Mr Allen emailed the Tribunal and HMRC enclosing a letter dated 11 February 2016 stating that he wished to formally appeal the two sets of penalties raised on him personally being the Aberfoyle Penalty and the penalty in relation to his self-assessment. There were seven appendices to that letter, the last of which was a copy of the Charge for payment which had been served at the House.

25 82. On 16 February 2016, HMRC responded to the Tribunal referring to those two emails stating, correctly, that "the appellant appears to be applying to appeal out of time". A Notice of Opposition was lodged together with an application by HMRC for procedural Directions. HMRC pointed out that Mr Allen had failed to identify the decisions relating to self-assessment and there was no decision extant thereon.

30 83. Further, HMRC stated that they were unable to communicate with Mr Allen as they did not have an address for him and he had not given express written consent to correspond with him by email. The House had been given as the address in legal proceedings before both the Court of Session and the Sheriff at Lanark but he did not reside there.

35 84. The Notice of Opposition simply stated that the alleged Notice of Appeal did not satisfy the requirements of Rule 20 of the Rules and further that there was neither a reasonable excuse for the late appeal and nor had Mr Allen proceeded with reasonable expedition. The application sought Directions and specifically that Mr Allen be directed to confirm his address which failing the appeal should be struck out.

40 85. On 18 February 2016 I issued Directions stating that Mr Allen's letter of 11 February 2016 should be treated as an application in terms of Section 49 Taxes Management Act 1970 and that Mr Allen should lodge a proper Notice of Appeal within 14 days of the issue of those Directions. Those Directions were issued on 29 February 2016.

5 86. On 11 March 2016 Mr Allen emailed both the Tribunal and HMRC enclosing what he described as a Notice of Appeal in respect of the Aberfoyle Penalty and a copy of a letter to HMRC largely dealing with the income tax penalty. That letter was dated the same day and again stated amongst other things that he did not have an address in the UK because he was a resident of the UAE.

10 87. Mr Allen stated that he did not have any address in the UK because he was a resident of the UAE but he had arranged for a c/o address which was Culter Mains Lodge, Coulter, Biggar ML12 6PR (“the Lodge”) and he consented to receiving correspondence by email. I note that the email address he offered was precisely the same email he had used until 17 September 2015 when, having failed in the litigation in the Sheriff Court, he emailed Officer Reilly stating “This email is no longer in use. To message please contact me on my Facebook page”.

15 88. The Notice of Appeal, which was not in the specified format, stated that the grounds of appeal were precisely the same as that articulated in a letter from his previous representative to HMRC dated 22 December 2014. In summary, the argument was that the Penalty Liability Notice had never been served on Mr Allen personally and that HMRC had not told the representative anything about it. Mr Allen also argued that he had pursued the recall of the sequestration based on the terms of a letter from HMRC.

20 89. That letter from HMRC was dated 22 January 2015 and was a letter from Officer Reilly to Mr Allen’s then representative and it read as follows:-

“Request for late appeal – Penalty Liability Notice

25 I referred your request for a late appeal to our Appeals and Review Team. Their response was that your request should have been directed to the First Tier Tribunal. I enclose a copy of HMRC’s internal guidance ARTG3160.

30 Since your initial communication Mr Allen has been sequestered (sic) and a Trustee appointed. My understanding is that the Trustee will consider what action is continued. Further you would require his explicit authority to lodge an action at Tribunal. The Trustee for Mr Allen is Keith Anderson of Baker Tilly. Baker Tilly is at First Floor, Quay 2, 139 Fountainbridge, Edinburgh, EH3 9QG.”

Both appeals

35 90. The Directions dated 15 January 2016 went on to make other Directions but, in particular, intimated that Mr Allen’s witness statements in the Work appeal should be lodged by no later than 29 April 2016 and that lists of documents and listing information should be lodged no later than nine weeks from the date of issue of those Directions.

40 91. On 11 March 2016, Mr Allen wrote to the Tribunal copied to HMRC stating that he had noted the Directions issued on 29 February 2016 and asking for confirmation of the dates for compliance. Those Directions made it explicit that lists of documents and listing information should be furnished no later than nine weeks from the date of issue of Directions (ie 2 May 2016) and that by no later than 27 May 2016 witness statements should be delivered for all witnesses on whose evidence the parties intended to rely at the hearing.

92. On 15 March 2016, the Tribunal wrote to Mr Allen by letter and email confirming that the dates for compliance with Directions were as specified in the Directions dated 29 February 2016.
- 5 93. HMRC did comply with the Directions. Mr Allen has lodged no witness statements and has only lodged a bundle of documents for this hearing and that was more than three weeks late on 26 May 2016. Some of these were incomplete and there was any explanation of any of them.
- 10 94. On 16 March 2016, HMRC lodged an application for strike out of the Work appeal in terms of Rule 8(3)(a) of the Rules based on Mr Allen’s continued failure to comply with the Direction in relation to address.
- 15 95. Mr Allen’s email response on 21 March 2016, was to oppose the application on the basis that “My position as to Residence in the UAE remains unchanged...”. He again referred to the Dubai address utilised in a Court of Session litigation stating that “The facts surrounding my residence are a matter of public record from the Decision of Lord Docherty...”.
- 20 96. HMRC responded on 6 April 2016 maintaining that Mr Allen had not given a current address in the UAE, that he did not reside at the previous address and they enclosed correspondence from the Foreign and Commonwealth Office proving that he did not reside there.
- 25 97. That prompted an immediate email response from Mr Allen that day stating that: “I would like to comment and clarify....
1. My country of residence is the United Arab Emirates....
 2. I do not at the moment have a permanent residential address in the UAE or anywhere else in the world. I am staying with friends in the UAE.”
- Up to and including this hearing he has refused to give any details of the friends or indeed the resident of the c/o address at the Lodge.
- 30 98. On 5 May 2016, HMRC lodged a further application for strike out of the Work appeal in terms of Rule 8(3)(c) of the Rules on the basis that the appeal had no reasonable prospects of success.
- 35 99. On 19 May 2016, I issued Directions which stated that the preliminary applications in both appeals would be heard on 13 June 2016, and that Mr Allen should lodge submissions with copies of documentation by no later than 6 June 2016.
- 40 100. I set out at paragraphs (b)—(f) of my Directions dated 19 May 2016 the following facts derived from the papers:-
- (b) On 21 March 2016 the appellant served a reply to the respondents application designing himself as care of Coulter Mains Lodge, Coulter, Biggar ML12 6PR. He stated that to obviate the problem of his residence in UAE “I have provided an address within the jurisdiction of the Tribunal where post may be sent and I will receive notice of it”. He therefore argued that the Tribunal and the respondents could use that address and he had therefore complied with the Directions.
 - (c) We observe that the address given in that reply is not quite the same as the address given in the Notice of Appeal. The Notice of Appeal gave the name of the property as “Culter” and the post code as ML12 6BZ. The Court of Session also used the spelling “Culter” and the post code

was ML12 6PZ. The Court of Session documentation all makes it absolutely explicit that Mr Allen is “erroneously designed as residing at Culter House, Coulter, Biggar ML16 6PZ”.

5 (d) Further at paragraph 7 of the appellant’s missive dated 11 February 2016 he requested that as part of his appeal “It would be unfair for HMRC to rely on ... service of the penalties at an address where I was no longer resident, and in fact, when I was at that time, a non-resident in the UK and domiciled elsewhere, as opinioned (*sic*) by the Court of Session”. On the face of it, that is not consistent if he now states that that is his address. In order to comply with the Directions the appellant is put on notice that he has to give an address at which he can be reached and where documents can be served.

10 (e) On 6 April 2016 HMRC wrote to the Tribunal and the appellant arguing that the appellant had still not complied with Direction A2 of the said Directions and therefore HMRC insisted on their strike out application of 16 March 2016.

15 (f) The appellant replied to both HMRC and the Tribunal stating that he resided in UAE staying with friends, he had no intention of purchasing a PO box facility to receive any mail, the Tribunal Rules do not require a residential address and that he had therefore complied with Direction A2.”

101. On 24 May 2016, Mr Allen lodged with HMRC and the Tribunal what he described as “Appellant’s Reply to Directions of 19th May 2016” stating as follows in regard to the UK:-

20 “I at all relevant times lived at Culter House, Coulter ML6 6PZ until my separation and departure. Whereas my friend still resides to (*sic*) The Lodge at Coulter Mains, which is addressed Coulter Mains Lodge, Coulter ML12 6PR. And so to confirm these are two quite separate properties in the same village with separate addresses. My c/o address of Coulter Mains Lodge ... is being used ... to receive mail on my behalf....”

25 102. In regard to the UAE he referred to the address in the UAE given in the Court of Session proceedings and stated:

“...My position as to Residence in the UAE remains unchanged”

30 103. He reiterated his reliance on Officer Reilly’s letter and argued that “...the misrepresentation of the law by HMRC, has presented a barrier to me obtaining proper representation and created inequality of access issues”.

104. He also advanced arguments as to why he should not be liable for the penalties primarily on the basis that he was “under complete Duress” during the whole period.

35 105. Lastly, he enclosed a list of documents and a list of 10 witnesses stating that some were likely to be hostile and seeking advice as to how their attendance could be enforced at the substantive hearing.

The Notices of Appeal and Mr Allen’s address

106. The issue of Mr Allen’s address arises in both appeals.

The Aberfoyle appeal

40 107. The Notice of Appeal in the Aberfoyle appeal was not on the prescribed form and the first issue for decision by the Tribunal was whether a competent Notice of Appeal had been lodged in terms of Rule 20 of the Rules. Rule 20 provides *inter alia* as follows:-

“The Notice of Appeal must include —

(b) the name and address of the appellant;

...

(c) an address where documents for the appellant may be sent or delivered.”

5 108. As is very obvious from the Chronology, it was been extremely difficult to obtain an address for Mr Allen other than an email address. Email addresses are notoriously insecure and of course the user could be anywhere in the world. Gmail (the address used by Mr Allen) has had well publicised problems.

10 109. More pertinently, in regard to Mr Allen’s email address, the Trustee in sequestration confirmed to the Tribunal and HMRC on 26 February 2016 that the only address that he held for Mr Allen (who had not co-operated with him), was the one furnished to the Tribunal and HMRC. He stated that the Court had granted warrant to serve documents on Mr Allen at that address but all subsequent attempts to contact that address had triggered what appeared to be an automated response stating that the
15 account was no longer in use and Facebook should be used for contact. However, Mr Allen is still using that address, including in the course of this hearing.

110. At the outset of the hearing, he lodged in process, with the consent of the Tribunal and HMRC, a statement from Culloden Estate and Spa in County Down, NI showing payment of some £12,842 for accommodation for the period June 2015 to
20 June 2016. He stated that it was for self-catering apartments managed by that hotel. At the end of the hearing he conceded that the cost of the apartment was paid by an unspecified person in the UAE. Clearly those payments might stop or he might give notice. He stated that he had the apartment on the basis of a one month notice period and that he would be prepared to give an undertaking to intimate any move from there
25 to both the Tribunal and HMRC. We have no detail beyond that.

The Work appeal

111. As noted above, the address given in the Notice of Appeal for the Work appeal was the House where Mr Allen does not reside and did not reside at that time. The Work appeal is a complex appeal and there is no opt out of the Costs regime. HMRC
30 have made explicit their concerns that Mr Allen’s repeated refusal to provide an address is linked to a desire to avoid the enforcement of any award of expenses which may be made against him. Has Mr Allen complied with the Directions and furnished an address?

Discussion

35 *Where did Mr Allen live?*

112. Mr Allen founded on the opinion of Lord Doherty where the action against Mr Allen at the instance of Work and the Liquidator was dismissed on the basis that the pursuers had failed to establish that Mr Allen was residing in Scotland for three months before the action was raised. At a minimum it appears to have been accepted
40 in that action that Mr Allen had utilised the House as a correspondence address in April 2014.

113. At the outset of this hearing he had said that he had left the House in August 2014 having separated from his wife. In closing submissions in regard to the

application for admission of the late appeal, Mr Allen then stated that he had made a mistake when giving the dates for leaving the House and that the relationship had deteriorated in August 2013, the couple had separated in November 2013 and by April 2014 he had left the House.

5 114. I put it to him that the Petition for Suspension of a Charge lodged in the Court
of Session stated that Mr Allen had been resident at an address in Dubai since
February or March 2014 and that Mr Allen and his wife had “separated in August 2013 but
he resided under the same roof in a different wing ... for a time ... He has not has (*sic*) an habitual
10 residence in Scotland since at least 27th April 2014 and in fact had temporary arrangements for some
time before that”.

115. Lord Doherty recorded that he had had sight of a Minute of Agreement dated
30 October and 4 November 2013 stating that the separation date was
26 August 2013.

116. Mr Allen had no explanation for these discrepancies.

15 *His ex-wife and evidence from the Schedules of Flights*

117. It can be seen from the schedule of flights to and from UAE lodged by HMRC,
to which no objection was taken, that Mr Allen certainly was not in UAE in January
and February 2016. He conceded that that was the case and on the second day of the
hearing he confirmed that he had not lived in UAE in 2016 notwithstanding the fact
20 that he had told the Tribunal on the first day that he was resident in UAE and that he
split his time between Dubai and Belfast. Clearly that has not been the case for some
six months. I note also therefore that his email to the Tribunal and HMRC dated
6 April 2016 (see paragraphs 96 and 97 above) is patently incorrect and designed to
mislead, as is much other correspondence in 2016. When that was put to him he said
25 he would like to live in UAE but could not afford to do so.

118. That schedule of flights makes interesting reading for a number of reasons.
Firstly, Mr Allen flew in and out of Dublin on a number of occasions and on one
occasion on 26 August 2015 he and his allegedly ex-wife (“wife”) flew to Dubai from
Dublin returning there together on 4 September 2015.

30 119. In the period covered by the schedule, Mr Allen’s wife travelled to Dubai and
she was with him for 16 days in September 2013, and in 2014 the only months when
there is no evidence that she travelled to Dubai were April, June and November. In
2015, she again travelled to Dubai on a number of occasions and the evidence is that
he spent significant periods outwith Dubai flying to and from Glasgow and Dublin.
35 As noted above his wife travelled with him in August and September 2015.

120. The relevance of his wife’s frequent flights to and from Dubai is that during the
hearing he suggested that the reason he might not have got mail if it had gone to the
former matrimonial home at the House was because he said that he had a very
traumatic time and his wife was “not always helpful”. The impression given was that
40 it had been an acrimonious divorce. That is in stark contrast to the evidence recorded
by Lord Doherty.

121. However, that was also inconsistent with his later evidence when referred to the
domain registration for mediprooptimum.com on 14 June 2014 where the name and
address given was his name and the House. He then said that his wife had registered

the domain as a favour for him as he was computer illiterate. He could not explain why she would have given the matrimonial home as an address at that date.

122. It was explicitly put to him that his evidence in regard to his wife was not credible given the schedule of flights. He then conceded that she had indeed visited him in Dubai and although, on occasion, she had been unhelpful, in general she had been very helpful.

123. Both Mr and Mrs Allen and their daughter flew to Dubai from 14-25 January 2014. That is not consistent with any of the accounts of lack of domestic harmony.

10 *Mr Allen's own evidence*

124. Mr Allen's evidence was riven with inconsistency. He had reiterated frequently that he considered and considers himself resident in UAE although he finally conceded that he no longer has an address there.

125. Mr Allen's evidence on his address lacks consistency in terms of detail. What it does not lack is consistency in apparent, and repeated, attempts to obfuscate matters.

Decisions in regard to provision of an address in terms of the Directions and of Rule 20 of the Rules

126. I do not accept that even now Mr Allen has provided an address where documents could reliably be served.

127. Mr Allen has repeatedly failed to comply with Directions including in regard to provision of an address. The law is very clear on that and set out clearly at paragraphs 37 and 38 of *BPP Holdings Limited v Revenue and Customs Commissioners*⁴

“37.....It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the Tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the Tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.”

128. In regard to the Work appeal I do not accept that there was compliance with Directions in regard to provision of an address. On the contrary, I find that up to and including the morning of the first day of the hearing there was a deliberate attempt to suggest that Mr Allen lived in the UAE. He does not. He has had no address there since at least May 2015 when he gave up the villa which had been leased there and since 17 December 2015 he has not even visited the country.

129. He was asked why he had repeatedly stated that he was not prepared to pay for a PO address in the UAE and he said that it was simply not convenient and he would

⁴ [2016] EWCA Civ 121

5 have to travel “miles” to uplift mail. He freely conceded that he had not told HMRC where “to find him” either at the time that he first went to UAE or subsequently. He suggested that he had only understood the significance of having a contactable address when he saw HMRC’s written submissions in regard to this hearing and it was for that reason that he had produced the Irish invoice/statement.

10 130. I place no reliance on the provision of the Dublin address or the c/o address in Scotland given the history of these appeals. For the reasons given the email address is patently unreliable. I therefore direct that given his failure to comply in regard to provision of an address where documents could be served the Work appeal should be struck out on that basis.

131. For the same reasons I do not consider that there has been compliance with Rule 20 of the Rules in the Aberfoyle appeal and for that reason strike out that appeal.

15 132. If I am wrong in regard to my Decisions to strike out the Work appeal for failure to comply with Directions on address or to admit the Aberfoyle appeal on the basis of failure to comply with Rule 20, I nevertheless proceeded to consider the other strike out applications predicated on reasonable prospects of success. I also looked at co-operation with the Tribunal.

Strike out applications

20 133. I pointed out to Mr Allen that quite apart from the question of compliance with Directions on provision of an address, the Tribunal had to look at compliance with other Directions such as provision of witness statements etc.

25 134. In terms of the Rules, Mr Allen is obliged to co-operate with the Tribunal and the other parties. The failure to produce witness statements or lists of documents in the Work appeal is persistent and unacceptable. HMRC have gone to considerable time, trouble and expense in putting together very detailed documentation for that appeal. The bundles at this hearing extended to two large boxes of bundles.

30 135. At paragraph 22 of his witness statement Mr Allen refers to an accountant whom he appointed in early 2011 and suggests that in hindsight that gentleman was “not really up to the job.” By contrast, Officer Reilly had exhibited an email dated 23 November 2012 from that accountant to Mr Allen which revealingly stated:

35 “Following a great deal of prevarication on my part I am now getting close to the point where we will need to start putting the report together. I think I will be able to delay matters to the end of March and possible (*sic*) a month or two later, but I think that will be it. It will be almost two years from the date you received the initial letter, so I do now feel I have succeeded in the delaying tactics so far”.

In my view that is entirely consistent with Mr Allen’s approach to the appeal(s) before the Tribunal where there has been minimal, if any, cooperation with either HMRC or the Tribunal.

40 136. In the Work appeal there has been almost no compliance by Mr Allen at any time even in the face of repeated strike out applications and repeated detailed case management Directions.

137. Shortly put, looking to the chronology of events in this matter, Mr Allen has done far too little, far too late. I am wholly unpersuaded by his assertion that he

would now embark upon compiling his own and other witness statements. As a former solicitor, he has not yet compiled a very basic or accurate statement of his own personal circumstances. It seems very unlikely that progress will be made.

5 138. He has indicated that he would wish witnesses to be cited since they would be unwilling to attend but, of course, he is in no position to pay for the cost thereof.

Strike Out Decision in the Work Appeal

10 139. I have no hesitation in finding that his failure to co-operate with the Tribunal and HMRC has been such that it is not possible to deal with the Work appeal fairly or justly. Fairly or justly means to both parties. The appellant does not have a monopoly. Although given the opportunity on both days of the hearing, Mr Allen was wholly unable to offer any explanation for his failures in compliance beyond the fact that he had not got round to doing anything. I therefore strike out the Work appeal in terms Rule 8(3)(b) of the Rules because of his repeated failure to comply with Directions and thereby co-operate with the Tribunal.

15 140. In case I am wrong in that, what then would be the prospects of success in any potential litigation? Mr Allen's most crucial failure to comply with Directions impacts on the possibility of success in any appeal and that is because of the lack of witness statements. The onus of proof is his. In the Work appeal, at best, he could rely on his COP9 Disclosure but close reading of that indicated numerous
20 inconsistencies and conflicts, greater than, but along the lines of, those outlined above in relation to the witness statement. In the absence of any witness statements Mr Allen is not in a position to challenge HMRC's evidence in regard to his original argument that four of the returns were not attributable to him.

25 *Is there a reasonable prospect of success in terms of Rule 8(3)(c) of the Tribunal Rules?*

30 141. Originally Mr Allen's stated "defence" as he called it was in two parts in regard to the Work appeal. In respect of the errors in the company's VAT returns for the quarters ending 04/10, 07/10, 10/10 and 01/11 his position was that those errors were attributable to other persons and he did not control the company. In regard to 04/11 he pleads that he acted under duress.

142. The witness statement of Officer Reilly provided a detailed account of the basis on which HMRC concluded that Mr Allen had been in control of Work throughout the relevant period and that evidence is supported by detailed references to productions which have been lodged in process.

35 143. His evidence did in fact cover some of the Aberfoyle appeal. The Aberfoyle appeal relates to under-declarations of VAT made by the company in the periods 24 June 2009 to 31 October 2010. The VAT return for the period 10/09 was signed by Mr Allen and dated 27 November 2009. The subsequent returns were submitted electronically.

40 144. Although Mr Allen alleges that he did not control Aberfoyle at the time that the under-declarations of VAT were made, nevertheless it is clear from the exhibits that:

(a) Between 20 August 2009 and 9 June 2010 he received payments in the region of £86,690 from Aberfoyle.

- (b) Legal-E LLP, an LLP in which Mr Allen was a member, issued invoices for approximately £70,350 to Aberfoyle.
- (c) A schedule prepared by Aberfoyle's former accountants shows total payments of £670,333.28 being made by Aberfoyle to Mr Allen during the period from June 2009 to August 2011.
- (d) Solicitors for Mr Allen in the purchase of the House confirmed that companies apparently controlled by Mr Allen, including Aberfoyle, had contributed £950,000 towards the purchase of that property.

10 145. In the course of this hearing Mr Allen conceded that he had been active in, and in day to day control of both companies throughout the period but he alleged that he was simply told what figures to put in to the VAT returns and that he had been "shut out" of financial matters. His oral evidence was that he did sign the VAT returns for both companies.

15 146. The onus of proof lies on Mr Allen. Even if one assumed in regard to the Aberfoyle appeal that he did lodge a witness statement, or more than one, vaguely along the lines of the COP9 Disclosure which is his assertion, what prospect would there be of success?

20 147. Currently, at the heart of Mr Allen's limited, and often conflicting evidence, is the assertion that all of the inaccurate VAT returns were submitted in the format that they were because he was under duress at all times. His oral evidence was that he was "groomed, used then abused". There is no detail and he told the Tribunal that he could not recall specific details even about "threats" referred to in his witness statement.

25 148. In order to establish a defence of duress or coercion it is necessary to establish that the actions complained of were undertaken to avoid imminent death or serious injury at the hands of the coercer. It is necessary to show that there was an immediate danger to the threat being implemented at the point when the decision had to be made and that threats of future harm are not sufficient. In those circumstances the law expects the person threatened to seek protection from the police.

30 149. At its very highest Mr Allen's position is that he was being threatened by a third party and he required to obtain money to remove that threat and in so doing chose to defraud HMRC in order to obtain that money. The under-declaration in the 04/11 return alone is in the order of £5 million and yet allegedly the funds sought from him only amounted to £4 million. At the time that Mr Allen first admitted responsibility for the under-declaration of those funds in April 2013 he had explained that the business had been short of money and that some of the funds went to him personally. There was no reference to a third party extorting funds from him.

40 150. Mr Allen relied on the commercial case of *Universe Tankships Inc of Monrovia v International Transport Workers Federation*⁵ at page 26 where "duress" was described in a context where there had been no protest at the time but an urgent need to release a ship. It is true to say that the reference to *Maskell v Horner*⁶ did describe urgent commercial necessity but that is not what we are dealing with in this instance.

⁵ 1983 1 AC 366

⁶ [1915] 3 KB 106

151. HMRC relied on *Thomson v HMA*⁷ where the Lord Justice Clerk stated at page 77 as follows:-

5 “... it is only where, following threats, there is an immediate danger of violence, in whatever form it takes, that the defence of coercion can be entertained, and even then only if there is an inability to seek and obtain the shield of law in a well regulation society, then recourse should be made to it, and if it is not then the defence of coercion is not open. It is a danger which has to be ‘immediate’ not just the threat ... Clearly if there is an opportunity to run away or to seek the protection of the forces of law and order before the crime is committed, then the accused cannot claim to have been coerced.”

10 152. It seems quite clear that the only approach to the police was in 2011. However, significantly, the 04/11 return was submitted by Mr Allen on 8 June 2011. Mr Allen has produced a letter dated 8 June 2011 from his then solicitors addressed to C*** stating that a potential fraud had been uncovered, that the police had been instructed and seeking immediate payment of £2,350,000 and threatening litigation. That is simply incompatible with him being in a state of terror because of C***’s alleged extortion threats. When that was put to him all he could say was that he had been scared.

15 153. If the most extreme threats were in regard to the 04/11 return and Mr Allen felt able to threaten legal action, then on the balance of probability, if there had been any previous alleged threats they could not have been unduly serious. In any event as I indicate above there is no detail available, nor likely to be, as to threats prior to 2011.

20 154. It is quite simply not credible that Mr Allen would have been exposed to any immediate danger when he submitted the 04/11 return or indeed for a sustained period of the previous two years given that he set up Work having allegedly experienced threats at Aberfoyle.

Strike out Decisions in both appeals

25 155. I do not accept that there is any reasonable prospect of success in either appeal, based on an argument that Mr Allen was subject to duress, and accordingly direct that the Work appeal is struck out on that basis and if the Aberfoyle appeal is admitted late then it too would be struck out in terms of Rule 8(3)(c) of the Rules.

Should the time limit for lodging the Aberfoyle Appeal be extended?

30 156. There is no doubt that at the very latest Mr Allen was aware of the Aberfoyle penalty in December 2014. In oral evidence he said that he thought that it had been appealed in January 2015. He could not explain why he thought that.

35 157. In the petition for Recall of Sequestration Mr Allen was represented not only by solicitors but also by counsel. On Monday 14 September 2015 counsel attempted to argue that a proof should be allowed on the issue of whether or not Mr Allen had appealed the Aberfoyle penalty. The Sheriff refused that motion and requested details of the appeal to the FTT with the reference number and correspondence from the Tribunal. After a recess counsel had to accept that no appeal had in fact been made and therefore there was no factual basis on which the argument could be sustained. He then moved for the Recall application to be sisted to allow an application to the

⁷ 1983 JC 69

FTT to appeal out-of-time. That motion was opposed vigorously by HMRC. The Sheriff refused to sist the Recall application and found Mr Allen liable for the expenses, not least because at a previous hearing some two months earlier, HMRC had informed the Court that there was no extant appeal. It had been expected that some action might have been taken in the intervening two months. None was taken. Indeed Mr Allen only intimated a wish to appeal a further five months later.

The Law

158. Section 83G(6) VATA 1994 provides:-

10 “An appeal may be made after the end of the period specified ... if the Tribunal gives permission to do so.”

159. The other relevant legislative provisions are Rules 2, 5 and 20(1) and (4) of the Rules and those are annexed at Appendix A.

15 160. HMRC relied on *Advocate General for Scotland v General Commissioners for Aberdeen City* 2005 SLT 1061 (“Aberdeen”), *Data Select Ltd v Commissioners for Her Majesty’s Revenue & Customs* 2012 STC 2195 and *BPP Holdings v The Commissioners for Her Majesty’s Revenue & Customs* 2016 EWCA Civ 121. In terms of onus of proof HMRC relied on *Smith v Brough* 2005 EWCA Civ 261.

161. The Tribunal has a wide discretion.

20 162. The general approach to such discretionary decisions is set out in *Aberdeen* which is authority at paragraph 23 for the proposition that considerations or circumstances which would be relevant to the question as to whether proceedings should be allowed beyond the time limit include:

(1) whether there was a reasonable excuse for not observing the time limit,

25 (2) whether matters had proceeded with reasonable diligence once the excuse had ceased to operate,

(3) whether there is prejudice to one or other party if the appeal proceeds or is refused,

(4) are there considerations affecting the public interest and

(5) has the delay affected the quality of available evidence.

30 Together with paragraphs 22 and 24, that paragraph is set out in full at Appendix B.

163. I was not referred to the case, albeit it was in the bundle, but I agree with the decision of Judge Berner at paragraph 36 in *O’Flaherty v HMRC*⁸ and that reads:-

35 “I was referred to ... where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should

⁸ 2013 UKUT 01619 (TCC)

not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances.”

164. He goes on to record at paragraph 37 that: -

5 “Time limits are prescribed by law, and as such should as a rule be respected”.

I agree entirely.

165. Paragraph 38 reads:-

10 “These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.”

15

That is the approach which I adopt.

Was there a reasonable excuse for not observing the time limit?

166. Even if Mr Allen had not been aware of the penalties when first served in May 2014, he was undoubtedly well aware of their existence later that year since he
20 instructed solicitors, counsel and a tax representative. I am not persuaded that he did not receive the original penalties since his evidence has been far from credible. Specifically the penalties were served at the house on 27 May 2014, by which time Mr Allen was in Ireland, but he had spent the earlier part of that month with his wife in Dubai. He and his wife flew together to Dubai from Dublin on 21 July 2014. He
25 was clearly on good terms with his wife for much of the rest of the year since he was with her in Dubai for large periods of July, August and October and approximately a week of September.

167. I find that on the balance of probability the Penalty Liability Notice will have been passed on to him like all the other mail including that from the Tribunal.

30 168. Further by his own admission Mr Allen made no attempt to give HMRC an address at which he could be reached. He was aware of the on-going enquiry into Aberfoyle and would have been expected to anticipate further correspondence. His own behaviour in failing to provide an address was not reasonable.

169. I find that there was no reasonable excuse.

35 *Did matters proceed with reasonable diligence?*

170. Undoubtedly Mr Allen and his tax representative, solicitors and counsel certainly knew about the penalty by the end of 2014 yet an appeal was only lodged in 2016 and even then at the last possible opportunity to do so. That Notice of Appeal was, and is, lacking in specification. He and his advisors could, and should, have
40 lodged a late appeal at any time after he became aware of it in December 2014. Further, they should have been in no doubt about the need to do so after each of the two hearings in the Sheriff Court in summer 2015. At best I find that there is no reasonable excuse for the delay from December 2014 to March 2016 and that he did not act with reasonable diligence.

Is there prejudice?

171. Clearly there is prejudice to Mr Allen if the appeal is not permitted to proceed. There are potentially large sums of money at stake albeit allegedly he has no assets in the event that the appeal did not succeed. In any event, although large sums of money are at stake, the Work appeal, which has now been struck out, involves even larger penalties.

172. There is considerable prejudice to HMRC if the appeal is allowed to proceed. There will then be litigation which would be at a considerable cost to the public purse. Mr Allen's history of an almost total lack of cooperation in the Work appeal would suggest that any such proceedings would be likely to be expensive and protracted.

173. It is in this context that the merits of the appeal fall to be considered. For the reasons set out above, I find that since both parties are agreed that the facts and arguments are largely identical in both appeals, there is no reasonable prospect of success in this appeal so the prejudice to HMRC is heightened.

Are there considerations affecting the public interests?

174. There are none.

Has the delay affected the quality of the available evidence?

175. That is a neutral factor given the extensive evidence served by HMRC and the conflicts in Mr Allen's own evidence be it the COP9 Disclosure, correspondence, documentation and oral evidence to the Tribunal.

Officer Reilly's letter of 22 January 2015

176. For completeness I refer to Mr Allen's argument that he was misled by that letter. Firstly, it was a letter to a professional tax advisor. Secondly it made it explicit that the appeal should go to the FTT. Although it did suggest that the Trustee would consider what action might be taken it did not opine on what would happen if the Trustee did not wish to be involved in an appeal. Mr Allen, or his advisors, chose not to consult the Trustee or, it appears to lodge an appeal. That is a matter for Mr Allen and his then advisors. In any event the Sheriff made it absolutely explicit that an appeal should be lodged by Mr Allen. It was not.

Decision on extending time limits

177. Looking at the totality of the evidence and the history of the Work appeal I find that on the balance of probability there is no good reason why the time limits for lodging an appeal in this matter should be extended. Accordingly I refuse Mr Allen's application.

Summary of Decisions

178. The application to admit the witness statement of Mr Allen in the Work appeal is refused.

179. I strike out the Work appeal on the basis of Mr Allen's failure to provide an address or to comply timeously with Directions so to do which failing the Work

appeal is struck out in terms of Rule 8(3)(b) of the Rules given Mr Allen's significant and enduring failure to co-operate.

180. I strike out the Aberfoyle appeal on the basis that there has been no compliance with Rule 20 of the Rules in regard to an address.

5 181. There is no reasonable prospect of success based on the allegation of duress and for the reasons stated both appeals fall to be struck out on that basis.

182. The application for late admission of the Aberfoyle appeal is refused.

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

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**ANNE SCOTT
TRIBUNAL JUDGE**

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RELEASE DATE: 12 AUGUST 2016

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

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2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

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(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

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(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

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(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

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(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

5.— Case Management powers

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(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

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

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(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may be direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);

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(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

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(f) hold a hearing to consider any matter, including a case management hearing;

- (g) decide the form of any hearing;
- (h) adjourn or postpone a hearing;
- (i) require a party to produce a bundle for a hearing;
- (j) stay (or, in Scotland, sist) proceedings;
- 5 (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—
 - (i) the Tribunal no longer has jurisdiction in relation to the proceedings;
 - or
 - 10 (ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;
- (l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.

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20.— Starting appeal proceedings

- (1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
- 20 (2) The notice of appeal must include—
 - (a) the name and address of the appellant;
 - (b) the name and address of the appellant’s representative (if any);
 - (c) an address where documents for the appellant may be sent or delivered;
 - 25 (d) details of the decision appealed against;
 - (e) the result the appellant is seeking; and
 - (f) the grounds for making the appeal.
- (3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.
- 30 (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal must be made or notified after that period with the permission of the Tribunal—
 - 35 (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
 - (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

**Her Majesty's Commissioners Of Revenue And Customs,
Petitioners**

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Outer House

18 October 2005

2005 S.L.T. 1061

Lord Drummond Young

18 October 2005

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[22] Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

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[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it

should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies.