[2019] UKFTT 222 (TC)

TC07069

Appeal number: TC/2017/08750

PROCEDURE – failure to co-operate with the Tribunal – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

PALANIVEL VIMALESWARAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 14 March 2019

Mr Kana Naheerathan, of MNP Accountants, for the Appellant

Mr Philip Oborne, of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. On 4 December 2017, the Appellant notified his appeal to the Tribunal against three "discovery" assessments made under Taxes Management Act 1970 ("TMA"), s 29, totalling £31,689.14, and against a penalty of £22,107.67 under Finance Act 2007, Sch 24. The assessments and the penalty were issued on the basis that the Appellant had deliberately under-reported his tax liabilities.

2. I decided to strike out his appeal under Rule 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") because of failures to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the proceedings fairly or justly.

The facts

3. The facts are based on the documents in the Bundle prepared by HMRC before the hearing, and on the Tribunal's own file of correspondence between the parties and the Tribunal.

The Appellant and the appeal

4. In the years 2011-12 and 2012-13, the Appellant leased a commercial property on Silbury Boulevard, Milton Keynes; he also owned two other properties on a freehold basis, and received rental income from all three. In 2013-14 he acquired a fourth property, which was also rented out. He has been in business since 2002.

5. In his 2011-12 self-assessment tax return, the Appellant stated that he rented out only one property, from which he received £6,000 of income. In the same tax return, he claimed rent a room relief, which is available only for residential properties, and wear and tear allowances of £600.

6. HMRC became aware that the monthly rent payable by the leaseholder of Silbury Boulevard had been £1,500 in April 2012, and that the Appellant's annual outgoings in 2011-12 were likely to have been at least £18,000.

7. On 1 February 2016, HMRC opened a check into the Appellant's tax position, but the Appellant did not reply. HMRC issued an information notice, followed by penalties. The Appellant did not respond, despite penalties of £1,800. On 27 September 2016, HMRC wrote again, giving estimated profit figures and an estimated penalty under FA 2007, Sch 24.

8. On 1 November 2016, the Appellant's accountant, Mr Naheerathan, wrote to HMRC, saying that there were no profits, but that rental accounts were being prepared. These did not materialise, despite a reminder from HMRC, and on 16 and 17 January 2017, HMRC issued the assessments and penalties which are under appeal.

9. Mr Naheerathan appealed on behalf of the Appellant, stating that he had sent rental accounts. HMRC said that none had been received; they were then sent on 24 April 2017, a year after HMRC had first asked for information. The rental accounts

stated that the Appellant's income for 2011-12 had been £16,871.80, compared to the £6,000 declared on the Appellant's tax returns. However, the accounts also stated that the related expenses were £33,916, giving a loss of £17,044.

10. According to the rental accounts, the income figures for the following two years were £42,800.04 and £46,785.76 respectively, but after expenses of £42,402.88 and £53,832.20, there were losses of £4,602.84 and £7,047.44.

11. On 25 May 2017, HMRC wrote to Mr Naheerathan asking questions about the figures in these rental accounts. No reply was received. On 10 July 2017 and again on 23 August 2017, HMRC sent enforcement officers to the Appellant's address to collect the outstanding tax and penalties. On 19 September 2017 HMRC informed the Appellant that they were commencing bankruptcy proceedings.

12. On the same day, Mr Naheerathan asked HMRC for a statutory review. The Review Officer upheld the assessments and the penalties, and the Appellant notified his appeal to the Tribunal.

The period before the postponement applications

13. On 7 March 2018, the Tribunals Service received the Appellant's signed authorisation appointing Mr Naheerathan to act as his representative. On 22 June 2018, the Tribunal issued directions to both parties.

Direction 1: list of documents

14. Direction 1 was as follows:

> "**List of documents**: Not later than 27 July 2018 each party shall:
>
> (a) send or deliver to the other party and the Tribunal a list of documents in its possession or control which that party intends to rely upon or produce in connection with the appeal ("documents list"); and
>
> (b) send or deliver to the other party copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so."

15. HMRC complied with that Direction on 11 July 2018. The Appellant complied on 27 July 2018, Mr Naheerathan accepted at the hearing that the covering letter to the Appellant's documents was included in the Bundle, and was dated 25 July 2018.

Directions 2 and 8: witness statements

16. Direction 2 was as follows:

> "**Witness statements:** Not later than 24 August 2019, each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be ('witness statements') and shall notify the Tribunal that they have done so.

17. Direction 8 read:

> **"Witness attendance at hearing**: At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

18. HMRC complied with Direction 3 on 11 July 2018. There was no compliance by the Appellant. On 22 October 2018, Mr Naheerathan sent HMRC a settlement proposal from the Appellant offering £10,000; this letter was copied to the Tribunal, as was HMRC's reply on 29 October 2018, refusing the offer. The Tribunal finds that both parties have waived privilege in relation to these settlement discussions.

19. On 21 November 2018, the Tribunal wrote to Mr Naheerathan saying that the Appellant "had not provided any witness statements, not even a statement by the Appellant himself although his case appears to depend at least in part on his own evidence as to what happened with his rental income". The Tribunal letter explained why it was important that each party to an appeal discloses in advance its witness evidence, so that both parties could properly prepare for the hearing. The Appellant was also warned by the Tribunal that if he did not remedy that failure to comply within 14 days, "a judge may issue a direction which may lead to the striking out of the appeal on the basis that your failure to disclose the evidence on which you rely is unfair to the other party".

20. On 5 December 2018, Mr Naheerathan emailed the Appellant's witness statement to the Tribunal. It included the following information about HMRC's enquiries, and whether HMRC had been satisfied with his explanations; and also about the settlement correspondence and the "issues with his business" which the Appellant was facing at the time he made the second settlement offer:

> "I have purchased a leasehold business [Silbury Boulevard]…I did not gain any profit from this rental transaction, so I did not prepare the rental account for this period…Mrs Gill from HMRC…her arguments were what were the financial benefits for me?...I understand my accountant MNP Accountants gave all the explanation to her with supporting documents. But she disbelieved and disallowed all expenses and treated that £1,500 per month as my income and charged me taxes and penalty…she did not accept my rental account, evidence and explanation but treated all rent received as my income and charged me tax bill…
>
> HMRC asked my accountant for an outside settlement. I was really under pressure because my father not well for a long time (sadly died on 29.11.2018) and issues with my business. So in order to avoid stress and extra fees payable to my accountant, I gave first offer of £5,000 outside settlement but it's rejected by HMRC. I gave maximum second offer to £10,000 but that also rejected on 29.10.2018."

21. Mr Naheerathan sent the witness statement with a covering letter which said that Mr Vimalaswaran's father had been "long term ill and died on 29.11.18" and that

he had been unable to contact Mr Vimalaswaran "during his difficult times". Mr Oborne responded the same day, saying that the witness statement did not answer the questions previously asked by HMRC.

Direction 3: Listing information

22. Direction 3 was to provide listing information by 7 September 2018. HMRC complied with this Direction on 11 July 2018. On 25 September 2018, the Tribunal wrote to Mr Naheerathan, asking again for listing information, and extending the deadline to 16 October 2018. No reply was received. In the letter of 21 November 2018 referred to above, the Tribunal reminded Mr Naheerathan that there had been no compliance with this Direction, and that the appeal was being listed for a hearing.

23. Mr Naheerathan provided the listing information on 7 December 2018. He said there were no dates to avoid in February and that he would represent Mr Vimalaswaran together with a "legal expert", but that it was "too early to say who will be as its depends on his/her availability [sic]".

Direction 4: Document Bundles

24. Direction 4 was that HMRC should provide the Appellant with Document Bundles by 21 September 2018. HMRC complied with that Direction. Mr Naheerathan subsequently contacted Mr Oborne and said that the Bundle had suffered "water damage" in his office; Mr Oborne sent Mr Naheerathan a second copy, which was delivered on 18 December 2018. At the hearing, Mr Naheerathan accepted that he had received both copies of the Bundle, and he had the second copy with him.

Directions 5 and 6: Skeleton arguments and Authorities Bundles

25. On 11 December 2018, the hearing was listed for 14 March 2019. Direction 5 was for the exchange of skeleton arguments 14 days before the hearing. On 26 February 2019, Mr Oborne filed and served HMRC's skeleton argument. No skeleton argument was filed or served by the Appellant, and no application was made for an extension of time to file that skeleton.

26. Direction 6 read:

> **"Authorities bundle:** Not later than 7 days before the hearing the appellant shall send or deliver to the respondents one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments)."

27. HMRC complied with that Direction, but because the Appellant had failed to file or serve a skeleton argument, the Authorities Bundle contained only the authorities referred to in their own skeleton.

The first postponement application

28. On Monday 11 March, Mr Naheerathan emailed the Tribunal saying:

> "Our representative on sick leave so cannot come to hearing. Can you please reschedule for some other day?"

29. HMRC objected to the postponement application. Mr Oborne said:

> "I note that their representative is on sick leave which indicates that this is not a sudden matter and may well explain why they have failed to submit a skeleton argument in accordance with the Tribunal's Directions [and] another person in the accountant's office could have been tasked with representing Mr Vimaleswaran at Thursday's hearing."

30. Judge Mosedale refused the application, saying that the Appellant:

> "has not specified (a) when its representative became sick and (b) whether the representative is still likely to be off work on the day of the hearing and (c) why another person in the same office is unable to take over the representation; and lastly it has not provided evidence of sickness (such as a doctor's note)."

The second postponement application

31. On Tuesday 12 March 2019 at 18.06, Mr Naheerathan emailed the Tribunal again, saying:

> "We heard yesterday that our legal representative not available for this Thursday. We have tried two other firms yesterday over the email by lunchtimes. They asked us to send hearing notices then one firm said £7,200.00 fees to represent but our client can not afford to pay that much fees. Other firm said not enough time to read reports."

32. Attached were three emails from Mr Naheerathan to different barristers, attaching documents and asking for representation and a fee quotation. Two of the emails were sent on Monday 11 March 2019, and one on Tuesday 12 March 2019.

33. Judge Mosedale refused this second application, saying:

> "…although the appellant has provided some evidence that it has made attempts to secure representation yesterday, the appellant has failed to provide any details about why it is without representation shortly before the hearing:
>
> - the appellant's accountant says its representative notified it yesterday of illness, but no evidence on the nature of the illness nor a medical certificate has been provided;
> - if the representative's illness is so recent it does not explain why no skeleton argument was provided in accordance with the Tribunal's directions. The judge is therefore concerned to know that the appellant's representative was appointed in good time and is actually unexpectedly too ill to represent the appellant at the last moment. More evidence of this is required.
>
> The hearing is not postponed and will therefore take place tomorrow but the appellant may renew the application for postponement at the start of the hearing, although should produce further evidence as indicated above should he choose to do so."

The hearing

34. Before the commencement of the hearing, HMRC provided, in accordance with the Directions, copies of the Documents Bundle and the Authorities Bundle for the use of the Tribunal. Mr Oborne attended to represent HMRC. Mr Naheerathan appeared on his own, without Mr Vimalaswaran.

Mr Vimalaswaran's failure to attend

35. I reminded Mr Naheerathan that Mr Vimalaswaran had filed and served a witness statement, and referred to Direction 8, which said that

> "At the hearing any party seeking to rely on a witness statement…must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

36. I asked Mr Oborne if HMRC had informed Mr Naheerathan or Mr Vimalaswaran that there was no need for him to attend. Mr Oborne said that, on the contrary, he had come prepared to ask Mr Vimalaswaran detailed questions about his rental income and expenses. Mr Naheerathan said that as Mr Vimalaswaran had provided a witness statement, he did not think it necessary to attend.

37. I pointed out that this was a breach of Direction 8. I added that I agreed with Mr Oborne that there were evidential issues about the amount of rental income Mr Vimalaswaran had received; that these were likely to be an important part of the hearing; and that the same point had been made by the Tribunal in its letter of 21 November 2018. Mr Naheerathan acknowledged that this was the position, but provided no further explanation.

Mr Naheerathan's witness statement

38. Mr Naheerathan then said that he was Mr Vimalaswaran's accountant and would give evidence. He handed up a witness statement which was dated 24 July 2018. I rechecked the Tribunal file and found no copy of that witness statement; Mr Oborne also had no record of having received it. I asked Mr Naheerathan when it had been sent, and he said it had been included with the documents delivered to the Tribunal and HMRC on 25 July 2018. Having been taken to the covering letter referred to at §21, he agreed that no witness statement was included in the list of documents.

39. He also accepted that:

(1) on 21 November 2018 the Tribunal had written to him saying (emphasis added) that the Appellant "had not provided any witness statements"; and

(2) on 5 December 2018, he had sent Mr Vimalaswaran's witness statement to the Tribunal and HMRC, but had not sent his own witness statement.

40. I find as a fact that Mr Naheerathan did not file and serve a witness statement before the hearing. I come to this conclusion because there is no reference to his witness statement in any of the earlier correspondence. Had Mr Naheerathan filed and served a witness statement setting out his own evidence, it is simply not credible

that he did not reference that fact in a letter or email; it is also not credible that, when he received the Tribunal's letter of 21 November 2018, he did not write back and say that in fact he had already filed and served his witness statement, and enclose a further copy. I explained my conclusion to Mr Naheerathan, and told him that I found his oral evidence on this point lacked credibility, and that in ordinary language, I was making a finding that he had not told the truth about his witness statement.

Application to adjourn

41. Mr Naheerathan then applied to adjourn the proceedings so he could instruct counsel. He said that in February 2018 he had instructed a barrister called "Janaka" to act for Mr Vimalaswaran. However, he had had no written communication with Janaka, and the instructions were given on the phone. I drew his attention to the emails he had attached to the second postponement application, and asked if he had sent similar documents to Janaka. He said no, there had been nothing in writing. I asked how he knew that the instructions had been accepted, and how Janaka could have been expected to prepare for the hearing, if he had never been sent the appeal documents or HMRC's Bundle.

42. He had no answer to this, but insisted that Janaka had been instructed, and had called at the end of the previous week and said he was sick. This reference to "the end of the previous week" was in conflict with his own email to the Tribunal, sent on Tuesday 12 March 2019, that he had "heard yesterday that our legal representative not available for this Thursday".

43. I drew Mr Naheerathan's attention to Judge Mosedale's two decisions, and asked if he had any written evidence that (a) Janaka was sick, or (b) Janaka had informed him that he was sick. Mr Naheerathan had neither. Mr Oborne added that Mr Naheerathan had never informed HMRC that a barrister had been instructed; the only reference to obtaining legal representation was Mr Naheerathan's letter of 7 December 2018 where he said it was "too early to say" which "legal expert" would attend with Mr Naheerathan.

44. I make the following findings of fact:

(1) Mr Naheerathan did not instruct a barrister for these proceedings. It is not credible that a barrister would accept purely oral instructions in February 2019 for a tax hearing on 14 March 2019, and would have had no written communication whatsoever with his instructing accountant;

(2) Janaka therefore did not call Mr Naheerathan either on Monday 11 March 2019, or at the end of the previous week, to say he would have to return his instructions because he was on sick leave;

(3) no attempt was made to instruct counsel until three days before the hearing; and

(4) at that stage, no barrister was able to meet Mr Vimalaswaran's timescale and cost limitations.

45. I informed Mr Naheerathan that I did not accept his evidence about (a) having instructed Janaka, or (b) about Janaka being unable to attend because of sickness, and that I was making a finding that his statements were untrue.

The skeleton argument and the Documents Bundle

46. Mr Naheerathan put forward no reason why the Tribunal's direction to provide a skeleton argument had not been complied with.

47. In relation to the Documents Bundle, Mr Naheerathan said that he had not looked at it before the commencement of the hearing, and was instead expecting to rely on evidence within his own lever arch file. He was unable to say whether all of that evidence was contained within the Documents Bundle, because he had not read any part of that Bundle.

The failures to comply with the Tribunal's directions

48. It is clear from the above that the Appellant complied with Direction 2 (witness statements) on 5 December 2018, over three months late, and complied with Direction 3 on 5 December 2018, almost three months after the required date of 7 September 2018, and then only after receiving two reminders from the Tribunal.

49. Although Mr Naheerathan said that these delays were caused by his inability to contact Mr Vimalaswaran because of his father's illness, followed by his bereavement on 29 November 2018, that is clearly not the position, because on 22 October 2018, two months after the date on which a witness statement should have been filed and served, Mr Naheerathan wrote to HMRC with a settlement proposal. That letter required contact with Mr Vimalaswaran, as he explicitly accepts was the position in his witness statement. Mr Vimalaswaran also said in his witness statement that during the period leading up to the settlement offer, he had been busy with "issues with my business".

50. As a result, Mr Vimalaswaran's father's illness does not explain the delay between 24 August 2018 (the date for compliance) and 22 October 2018, when Mr Naheerathan wrote to HMRC with the settlement offer. There is thus no good reason for two months of the delay in complying with the direction to file witness statements, and no good reason for six weeks of the delay in complying with the direction to provide listing information.

51. It is also clear that the Appellant:

(1) entirely failed to comply with Direction 5, the provision of a skeleton argument, without any reason; and

(2) failed to attend the hearing to be cross-examined on his witness statement, in clear breach of Direction 8, and without any good reason.

52. In addition, by the beginning of the hearing Mr Naheerathan had not even opened the Documents Bundle, which had been provided to him for the second time in December 2018, around three months previously.

Failures to co-operate with the Tribunal, and their consequences

53. The failures set out in the previous part of this Decision had the following consequences for the hearing which was listed to proceed on 14 March 2019:

(1) the Appellant's failure to attend the hearing meant that no cross-examination was possible.

(2) Mr Naheerathan's witness statement had not previously been seen by HMRC, so had it been admitted, Mr Oborne would have had no opportunity:

(a) to check any of the evidence in that statement to the Documents Bundle; or

(b) no opportunity to prepare his cross-examination of Mr Naheerathan;

(3) The lack of a skeleton argument meant that:

(a) there had been no clear expression of the Appellant's position, and in particular, no response to the details in HMRC's Statement of Case. The Appellant was also on notice that HMRC were unclear as to the Appellant's position: see Mr Oborne's letter of 5 December 2018 in which he said that there were unanswered questions despite Mr Vimalaswaran's witness statement; and

(b) a full Authorities Bundle could not be produced for the hearing.

(4) Mr Naheerathan's failure to read the Documents Bundle but instead to seek to rely on his own lever arch file, meant that it would be difficult and time-consuming to check whether he was referring to documents which had been included in that Bundle, or to new material; if there was new material in Mr Naheerathan's file which had not previously been put in evidence, the Tribunal would need to consider whether to admit or refuse that evidence, which would take time; if it was admitted, time would be needed for Mr Oborne to review and consider that evidence.

54. All of the above were significant failures to co-operate with the Tribunal in relation to these proceedings. There were also other serious failures:

(1) Mr Naheerathan claimed that he had filed and served a witness statement in advance of the hearing, and in compliance with the Directions; this evidence was not true; and

(2) he had sought a postponement on the basis that (a) counsel had been instructed in good time, but (b) was unexpectedly ill: neither of those statements was true.

Whether to strike out the appeal

55. I said that I was considering whether to strike out the appeal under Rule 8(3)(b), which reads:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if–
>
> (a) …;

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

(c) ….

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

56. I summarised the breaches of the directions and the further failures, and asked both parties for submissions.

Mr Naheerathan's submissions on behalf of the Appellant

57. Mr Naheerathan said that he wanted the appeal to be adjourned so that the Appellant could instruct counsel, and that the Appellant would agree to pay the costs of the hearing if it was adjourned. He had no further comments in relation to the breaches of the directions, his witness statement, or his evidence about having instructed counsel.

Mr Oborne's submissions on behalf of HMRC

58. Mr Oborne said that it was clearly very difficult to proceed today, as Mr Vimalaswaran's absence meant there could be no cross-examination; if Mr Naheerathan's witness statement were to be admitted by the Tribunal, he would need time to consider it; the Appellant had not filed or served a skeleton argument, and Mr Naheerathan had been working from a file of documents which might not correspond within the Bundle prepared for the hearing. Although an adjournment with a costs award against the Appellant would be one option, this would cause further delay in an appeal which had already been held up by the non-compliance with the directions. In his submission the Appellant's multiple failures to co-operate with the Tribunal should lead to the appeal being struck out under Rule 8(3)(b).

59. Mr Oborne a that the Appellant had similarly failed to co-operate with HMRC's questions. Despite penalties of £1,800 for the failure to comply with the Sch 36 Notice, and the issuance of discovery assessments and Sch 34 penalties, it was only the commencement of bankruptcy proceedings that made the Appellant ask for an HMRC review decision and then notify his appeal to the Tribunal.

The law

60. Rule 2 of the Tribunal Rules is headed "Overriding objective and parties' obligation to co-operate with the Tribunal". It reads:

"(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–

(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.

(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.

(4) Parties must–

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

(b) co-operate with the Tribunal generally."

61. Rule 11 is headed "Representatives" and reads:

"(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

(2) …

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement."

62. In *BPP Holdings Ltd v HMRC* [2017] UKSC 55 at [26] the Supreme Court said at [26]:

"In a nutshell, the cases on time limits and sanctions in the CPR [Civil Procedure Rules] do not apply directly, but the Tribunals should generally follow a similar approach."

63. The Supreme Court also endorsed this passage from the Court of Appeal judgment in *BPP,* where Ryder LJ said:

"[37] There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. 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."

64. In that passage, Ryder LJ referred to *Denton v TH White* [2014] EWCA Civ 906, in which the Court of Appeal set out the following three stage test to be used when deciding whether to give relief from sanctions under CPR r 3.9:

(1) identify and assess the seriousness and significance of the breach;

(2) consider why the default occurred; and

(3) evaluate all the circumstances of the case so as to deal justly with the application for relief from sanctions.

65. CPR r 3.9 itself reads as follows:

> "**Relief from sanctions**
>
> (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 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."

66. The Court of Appeal in *Denton* explained the third stage of the test in the context of factors (1)(a) and (b) above:

> "[34] Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.
>
> [35] Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been

> assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
>
> [36] But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed Mitchell, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance."

67. When *BPP* was decided by Judge Mosedale at first instance, she was not considering relief from sanctions, but, as in this case, the imposition of sanctions. She applied an approach based on the guidance given in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 (which was subsequently modified by Denton). The Court of Appeal and the Supreme Court agreed that she was correct to do so.

68. I therefore follow the guidance given in *Denton* when deciding whether or not to strike this case out under Rule 8(3)(b), or whether to impose a lesser sanction, such as a costs order to reimburse HMRC for the expenses related to this hearing.

69. In *Nata Lee v Abid* [2014] EWCA Civ 1652 ("*Lee*"), Briggs LJ said at [53]:

> "I make it clear at the outset that, in my view, the fact that a party (whether an individual or a corporate body) is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective which now places great value on the requirement that they be obeyed by litigants. In short, the CPR do not, at least at present, make specific or separate provision for litigants in person. There may be cases in which the fact that a party is a litigant in person has some consequence in the determination of applications for relief from sanctions, but this is likely to operate at the margins."

70. The Supreme Court recently endorsed that passage in *Barton v Wright Hassall LLP* [2018] UKSC 12 ("*Barton*") at [12]. In the same paragraph, Lord Sumption said that a lack of legal representation:

> "will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties…The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent...Unless the rules and practice directions are

> particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

71. In *Nutro v HMRC* [2014] UKFTT 971 ("*Nutro*"), Judge Berner decided to strike out the appellant's case because of a "persistent litany of defaults" in relation to compliance with directions, and also because Mr Sethi, a director of Nutro, had made two false statements in support of an application at the same hearing to admit further evidence. In relation to those falsehoods, Judge Berner said at [55]:

> "That is a matter which goes to the core of cooperation with the Tribunal. It is fundamental to the operation of the system of administration of justice, and enabling the Tribunal to deal with cases fairly and justly, that the Tribunal, and other parties to the proceedings, are able to rely on the truth of statements. That is as applicable to the conduct of case management as it is to the substantive appeals themselves. To attempt to obtain or resist a direction of the Tribunal by making false statements undermines the system of justice which the Tribunal embodies."

Discussion and decision

72. I have applied the three stage approach in *Denton* to the facts of this case.

The first stage

73. The failures to comply with the directions set out at §48ff were serious and significant; the consequences have already been summarised at §53ff. In addition, attempting to obtain an adjournment of the proceedings by falsely claiming to have instructed a barrister who had unexpectedly become ill at short notice, and falsely claiming to have filed and served a witness statement which was in fact produced for the first time at the hearing, are both fundamental breaches of the obligation to help the Tribunal deal with the case "fairly and justly", and self-evidently serious and significant.

The second stage

74. The second stage is why the failures occurred. No reason was given for the failure to file and serve a skeleton argument. As already discussed at §49-50 above, no good reason was given for two months of the delay in complying with the direction to file witness statements by 24 August 2018, or for six weeks of the delay in complying with the direction to provide listing information by 7 September 2018.

75. The reason given for Mr Vimalaswaran's failure to attend the hearing was that he thought it sufficient simply to send a witness statement. This was clearly incorrect, since Direction 8 explicitly required his attendance.

76. Mr Naheerathan gave no reason for his failure to prepare for the hearing by reading the Bundle prepared by Mr Oborne, which he had since at least December.

77. I infer that Mr Naheerathan's reason for saying that a barrister had been instructed was to obtain an adjournment and that his reason for saying he had

previously filed and served his witness evidence was belatedly to shore up the evidential position, given that Mr Vimalaswaran was not attending. Of course, neither is a good reason for putting forward as true something which is false.

The third stage

78. The third stage is all the circumstances of the case. I take into account the factors set out below.

Whether litigation could be conducted efficiently and at proportionate cost

79. The Court of Appeal in *Denton* stated that this was one of two factors to be given "particular weight" at this stage. It would clearly have been inefficient to allow Mr Naheerathan's application to adjourn and relist the case. The hearing had been in the list since 11 December 2018. The Tribunal Service had spent time organising the hearing, and HMRC had spent time preparing for the hearing. A new hearing date would require further expenditure of time and money by both the Tribunal and HMRC. As Judge Mosedale had already said in her response to the second postponement application:

> "hearings are not adjourned simply because a party makes the request: preparing for a hearing requires each party to invest time and money and therefore it is not appropriate to adjourn a hearing, particularly at short notice, unless there is very good reason to do so,"

80. An adjournment would not only have wasted HMRC's time and costs, but the time and costs of the Tribunal. As Ryder LJ said in *BPP,* "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 [a party] to comply with a procedural obligation". Relisting the Appellant's case was almost certain to mean that another litigant's hearing would be delayed, because the Appellant would take a second hearing slot which should properly have been used for that other litigant.

81. Although a costs order could have been made against the Appellant and in favour of HMRC, there is no mechanism to allow recovery of the costs incurred by the Tribunals Service.

82. The third possibility was simply to hear submissions from both representatives on the limited documentary evidence in the Bundle, and decide the appeal on that basis. The Appellant had already accepted that he had wrongly stated his 2011-12 turnover to be £6,000, when it was (on his own case) £16,871.80, so HMRC would have had no difficulty in meeting the burden of showing that they could raise discovery assessments. The burden would then have passed to Mr Naheerathan to displace those assessments, by reference only to the documents in the Bundle. However:

> (1) as Mr Naheerathan had prepared the Appellant's rental accounts, it was inevitable that his submissions would stray into the giving of evidence on those rental accounts. But as he had provided no witness statement before the

hearing, Mr Oborne had no information about the evidence Mr Naheerathan might give; and

(2) as there was no skeleton argument, Mr Oborne also had had no advance notice of the case which was to be put.

83. I decided that to go ahead with the hearing would be unfair to HMRC, who had acted entirely correctly throughout these proceedings.

84. Thus, in assessing whether litigation could be conducted efficiently and at proportionate cost, I decided that this factor weighed strongly against the Appellant.

Compliance with rules, practice directions and orders

85. Having assessed the Appellant's compliance with rules, practice directions and orders at the first and second stages, the Tribunal must also "give particular weight" to this factor at the third stage, see *Denton* at [35]. For the reasons already given, the Appellant's failures to comply were serious and significant, and there was either no reason, or no good reason for these failures. These factors weigh heavily against the Appellant.

The representative

86. I carefully considered whether it was fair or just to strike out Mr Vimalaswaran's case, when it was his representative, Mr Naheerathan, who had been present at the Tribunal, who had received the directions, and who had made the false statements at the hearing. This was, after all, Mr Vimalaswaran's appeal, and it was he, not Mr Naheerathan, who would have to pay the tax and penalties if the appeal was struck out.

87. However, I also took into account that:

(1) Mr Vimalaswaran had been aware of the hearing date: Mr Naheerathan had said that Mr Vimalaswaran did not think it necessary to come because he had provided a witness statement.

(2) Mr Vimalaswaran knew that the matters in issue before the Tribunal were the amount of his own income and expenses; he knew HMRC had questions on the rental accounts, because that is clear from his witness statement; his witness statement did not answer those questions, and HMRC had explicitly stated that this was the position in their letter of 29 October 2017. Even apart from his failure to comply with Direction 8, it was not reasonable of Mr Vimalaswaran to think that it was sufficient to rely on his witness statement and fail to attend the hearing.

(3) Mr Vimalaswaran is a businessman who has entered into a succession of property transactions, including both purchases and leases, so has a reasonable level of financial and commercial knowledge, including how to instruct professionals such as lawyers and accountants.

(4) He appointed Mr Naheerathan to act for him and had worked with him on the rental accounts.

(5) The courts have made it clear that litigants in person have the same obligation to comply with the rules, and the same obligation to comply with the overriding objective as represented parties, see *Lee* and *Barton* cited above. It must also follow that a person who appoints a representative cannot be excused from the consequences of non-compliance simply by hiding behind his representative. The litigant has a continuing responsibility to engage with his own appeal, he cannot simply abdicate that task.

(6) If I were to refuse to strike out the appeal simply because Mr Vimalaswaran had decided to act through a representative, this would treat him more generously than a litigant in person. In effect a person who appointed a representative who failed to comply with the rules, would thereby be afforded a second opportunity which was unavailable to those who acted for themselves. In *Barton* Lord Sumption said that an unrepresented litigant is not "entitled to greater indulgence in complying with [the rules] than his represented opponent", and the converse must also be true. The represented litigant cannot appoint a representative and then disavow all responsibility for his compliance failures.

88. I accept, however, that the false statements were made by Mr Naheerathan, not by Mr Vimalaswaran, and I do not know whether Mr Vimalaswaran approved Mr Naheerathan's actions in pretending to have instructed counsel in order to try and obtain a postponement of the hearing, and/or whether he knew that Mr Naheerathan was going to say that he had previously filed and served his witness statement. In coming to my decision on whether to strike out this appeal, I have therefore assumed that Mr Vimalaswaran neither knew nor approved of Mr Naheerathan's actions. I also noted that in *Nutro* the false statements had been made by the director of the appellant, not by a representative.

Other factors

89. I considered whether to take into account the merits of the appeal. These are poor. The Appellant has provided almost no documentary evidence of his costs and has given no credible explanation as to how or why he would run a loss-making property portfolio. However, in my judgment, the merits are of negligible relevance when considering a possible strike-out under Rule 8(3)(b), because the issue is whether the party "has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly". If that is the case, a meritorious case will not prevent the Rule from applying. I therefore place negligible weight on this factor.

90. Mr Oborne drew to my attention Mr Vimalaswaran's failure to co-operate with the HMRC enquiry in the period before the appeal was notified to the Tribunal. However, Rule 8(3)(b) refers only to an appellant's failure "to co-operate with the Tribunal". This is likely to encompass failures to co-operate with the other party once proceedings are under way, because they will have consequences for the Tribunal, but any earlier lack of co-operation is not a relevant factor, and I have therefore not taken them into account.

The balancing process

91. Having evaluated all the factors, and giving particular weight to those highlighted by *Denton,* but ignoring Mr Naheerathan false statements because I did not know whether they were made with Mr Vimalaswaran's approval, I find that Rule 8(3)(b) is satisfied.

Rule 8(4)

92. Rule 8(4) provides that the Tribunal may not strike an appeal under Rule 8(3)(b) "without first giving the appellant an opportunity to make representations in relation to the proposed striking out". In this hearing, I gave Mr Naheerathan the opportunity to make representations about the proposed striking out. However, Mr Naheerathan is not the Appellant, but the representative, and Mr Vimalaswaran did not attend the hearing.

93. Rule 11(3) states that "anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement". The Rules thus allow the Tribunal to give the representative the opportunity to make representations under Rule 8(4); there is no requirement that the appellant must personally be given that opportunity.

94. Nevertheless, all the Rules must be interpreted in the light of the overriding objective. I considered whether it was in the interests of justice to make a strike out decision, having only heard from Mr Naheerathan. The alternative was to adjourn the proceedings and direct a further hearing, and invite Mr Naheerathan to attend in person. I considered that option. However, Mr Vimalaswaran had already been explicitly directed to attend the hearing, and had failed to do so, without any good reason. Adjourning this appeal would also have required the Tribunal and HMRC to incur further time and costs, and this would in turn erode part of the basis for deciding that the appeal should be struck out, because an adjournment would prevent the litigation being conducted "efficiently and at proportionate cost". It would also mean treating a litigant who sends a representative to a hearing (and fails to attend himself despite an explicit direction) more generously than one who had attended in person, because the former would have a second chance to put his case, once via the representative and once in person. Taking all the above into account, I decided that it was not in the interests of justice to direct an adjournment to allow Mr Vimalaswaran to attend in person.

Decision

95. Having carried out the three-stage approach, balanced all the factors, and considered Rule 8(4), I find that it is in the interests of justice to strike out the Appellant's appeal under Rule 5(3)(b).

96. This document contains full findings of fact and reasons for the decision.

Right to apply for reinstatement, and appeal rights

97. The Appellant has the right under Rule 8(5) of the Tribunal Rules, to apply for the proceedings to be reinstated, but such an application must be (a) in writing, (b) supported by reasons and include an explanation for the non-compliance and (c) be received by the Tribunal within 28 days from the date of this letter.

98. The Appellant also has the right under Rule 39 of the Tribunal Rules, if he believes the decision striking out the appeal contains an error of law, to apply for permission to appeal, but such an application must be (a) in writing (b) identify the alleged error of law and (c) be received by the Tribunal no later than 56 days after the date this decision was sent to him. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 03 APRIL 2019