[2021] UKFTT 0092 (TC)

TC08075

PROCEDURE - application to admit late documentary and witness evidence - application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01381

BETWEEN

MUMTAZ HUSSAIN **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted by way of a telephone hearing on 16 March 2021 with additional information being provided by the Appellant on 22 March 2021.

The Appellant in person

Miss Gemma Truelove, Officer of HMRC for the Respondents

DECISION

INTRODUCTION

1. This is a case management decision. The substantive appeal to which it relates concerns HMRC's decision that the appellant was not entitled to claim private residence relief to relieve the gains made on the sale of a property, the Old Mansfield Hospital, on 8 July 2013. The amount of capital gains tax at stake is £93,371.04.

2. On 2 December 2020 the appellant filed a witness statement for himself dated 1 December 2020 to which he exhibited a number of documents (the "**documentary evidence**") and also indicated that he might wish to call further oral evidence from someone to whom he may have mentioned that he intended to create a family seat or occupy the property for the long-term (the "**witness evidence**").

3. HMRC have treated this as an application to admit late evidence, given that case management directions made in March 2020 in this appeal directed the parties to exchange documents in April 2020 and witness statements in May 2020. And in an email dated 7 December 2020 they have formally objected to the admission of the documentary evidence and the witness evidence. I have to decide whether that evidence should be admitted.

RELEVANT LAW

4. It is clear that the Tribunal has the power to consider the application. This is set out in Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**Procedure Rules**") which provides:

> (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.

5. Rule 15 of the Procedure Rules deals with evidence and submissions and provides that

> "(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to -
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> (a) issues on which it requires evidence or submissions;
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> (b) the nature of the evidence or submissions it requires;
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> …
>
> (2) The Tribunal may -
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where -

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or practice direction; or

(ii) it would otherwise be unfair to admit the evidence."

6. Rule 2(3) of the Procedure Rules requires me to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> (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;
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> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

7. Although I will deal with this in more detail later in this decision, it is, in essence, HMRC's position that the Tribunal should not exercise its discretion to allow the appellant to adduce the documentary evidence and the witness evidence since he has had ample opportunity to comply with directions to provide documentary evidence and witness statements and has failed to do so. It is now too late for him to do so.

CASE LAW

8. In the case of *Sceptre Services Ltd v HMRC* [2010] UKFTT 315, Judge Berner was faced with an application by HMRC for permission to rely on a witness statement which HMRC wanted to admit in evidence some two months before the substantive hearing. When considering the application, the Judge said as follows:

> "9. Mr Black referred me to the often-cited extract from the judgment of Lightman J in *Mobile Export 365 Limited anor v Revenue and Customs Commissioners* [2007] 15 STC 1794. In giving guidance to the Tribunal in that case, Mr Justice Lightman said (at [20]): "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."
>
> 10. Accordingly, I should first decide if the evidence of Mr Henderson is relevant. If I decide that it is, and should therefore in an ordinary case be admitted, I need then to go on to determine if there is a compelling reason why it should not……..

17. In Revenue and Customs Commissioners v Brayfal Limited CH/2008/APP0082 (unreported), Lewison J referred to *Commissioners of Customs and Excise v* Neways *International (UK) Limited* [2003] STC 795 and to the requirement set out by Lloyd J in that case that in considering whether to extend time or otherwise deal with a default, the Tribunal should conduct a balancing exercise, weighing the consequences of the default for the innocent party against the possible consequences of any sanction for the party in default. That balancing exercise was held to be equally appropriate in Brayfal in a case where there was an application to admit additional documents."

9. And in the FTT decision in *First Class Communications Ltd V HMRC* [2013] UKFTT 342, a decision which was upheld on appeal by the Upper Tribunal, Judge Mosedale faced with an application by HMRC to admit late evidence and amend their statement of case, said that:

"44. The new evidence may be prejudicial to the appellant's case. They do not want it in. But that is not the issue. The issue is whether there is *procedural* prejudice: will the appellant be handicapped by the allegation being made now rather than when it should have been made in the Statement of Case? I have determined that I cannot see, for the reasons given above, any significant *procedural* prejudicial to the appellant for the allegation to be made, and the evidence to be admitted, now. And as I have also determined that the evidence and allegation may potentially be of real help to the Tribunal in reaching its conclusions, and that HMRC's delay by itself is not a reason to refuse to admit it, my decision on balance is to admit it."

10. It is clear from both of these decisions that once the relevance of the evidence has been established, the Tribunal must consider a number of other factors including the reason why the evidence is being submitted late and the balance of prejudice. Both of these decisions were made before the decision in *Martland v HMRC* [2018] UKUT 178 ("*Martland*") which in my view deals with the factors which should be taken into account once the relevance of the evidence has been established. Although *Martland* deals with the principles which should be considered on an application to admit a late appeal, they apply to any application which needs to consider relief from sanctions. In this case the appellant is seeking permission to adduce the documentary evidence and the witness evidence out of time since he has failed to comply with directions ordering him to disclose such evidence on or before a particular date; the sanction being not to permit the appellant to adduce the documentary evidence or the witness evidence. The relevant passage from *Martland* is set out below:

"44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

11. What I take from these decisions is that I must first consider whether the documentary evidence and the witness evidence is relevant. If it is not, then I will reject the appellant's application. If I decide that it is, to some degree, relevant I then need to consider whether or not it should be admitted, and when doing so I shall base my analysis on the *Martland* criteria. However, when considering the final evaluation, I shall consider the relevance of the evidence since the greater the degree of relevance, the more heavily it will weigh in the appellant's favour when considering the balance of prejudice.

THE RELEVANT FACTS

12. I was provided with a bundle of documents for the hearing (the "**case management bundle**"). The appellant provided further information, orally, and supplemented this by sending to the Tribunal, on 22 March 2021, a document which had been included in a paper bundle sent to him by HMRC on 6 August 2020. The appellant struck me as literate and eloquent and capable of following the proceedings and understanding the issues involved. From this evidence I make the following findings of fact:

(1) On 2 December 2020 the appellant filed a witness statement for himself. That witness statement was dated 1 December 2020. There were five documents exhibited to that statement. The first comprises the appellant's answers to questions posed by a case management Judge regarding the possibility of a video or telephone hearing of the substantive issue. At the end of that document the appellant indicated that "If I am able to think of any persons that I may have mentioned that I intended to create a family seat/occupy the ex-hospital for the long-term-I request that I be allowed to therefore be allowed additional time between now and the hearing".

(2) The appellant has a friend who is currently in Pakistan who he thinks might be able to provide witness evidence which will assist him. He said that he has not asked this person to do so to date and has not asked that friend for a witness statement. He said that this was due to a lack of foresight on his part.

(3) The documentary evidence which is at pages 327-330 of the case management bundle was also annexed to the witness statement. Page 327 comprises a letter dated 21 May 2003 from John Smallwood the valuation officer of the East Midlands Group to the Council Taxpayer, Flat Mansfield General Hospital and is headed "**COUNCIL TAX: NOTICE OF MAKING A NEW ENTRY IN THE VALUATION LIST".**

(4) Page 328 is a table setting out Council Tax bands and values for a number of years between 1993 and 2004. Page 329 is an undated letter from Phil Scotney, Technical Officer, of Mansfield District Council to Mr Adams concerning the Old Hospital Site. And page 330 is a letter dated 26 November 2003 from Mansfield District Council to the Occupiers of the Flat at Mansfield General Hospital and concerns the Register of Electors for 2004.

(5) Case management directions in this appeal were made on 13 March 2020. List of documents in the documents themselves were directed to be submitted by each party to the other no later than 3 April 2020. The Tribunal also directed exchange of witness statements by not later than 1 May 2020. HMRC complied with these directions. The appellant did not.

(6) On 6 August 2020 the Tribunal wrote to the appellant indicating that the Tribunal did not appear to have received the appellant's list of documents nor his witness statements and asking that those should be provided immediately.

(7) On 6 August 2020 HMRC sent a paper bundle to the appellant, that bundle comprising the respondents bundle of documents (the "**August bundle**"). The August bundle included the document at page 329 of the case management bundle. It also included a copy of a handwritten letter which is undated (the "**August 2017 Letter**"). Paragraph 5 of of that letter states that "HMRC have requested my plans for the property as a single residence which I present to them today 22 August 2017 so that they can photocopy them and return to me today……." The August 2017 Letter goes on to say at paragraph 6 "I also present notice of making a new entry in the valuation list dated 21 May 2003. Effective date of alteration 19 December 2002."

(8) On 9 September 2020 the Tribunal wrote to the appellant directing that on or before 30 September 2020 the appellant should tell HMRC which documents in addition to those in the August bundle he intended to rely on at the hearing and on or before that date should send HMRC and the Tribunal copies of any witness statements for persons on whose evidence he wished to rely at the hearing.

(9) Further directions were made on 2 October 2020. Direction 1 provided that unless the appellant served his witness statements within 14 days from the release of those directions, he would be debarred from relying on any evidence in support of his appeal. The Tribunal also directed that the parties submit listing information to the Tribunal since it was considering whether to list the hearing as a video hearing.

(10) On 19 November 2020 the Tribunal released further directions directing that unless the appellant provided that listing information within 14 days from the date of release of those directions, his appeal would be struck out.

(11) The appellant supplied that listing information at the same time as submitting his witness statement, on 2 December 2020.

SUBMISSIONS

13. As regards the documentary evidence, Miss Truelove submits that the appellant should not be able to adduce it given that the facts show that he has been given ample opportunity to do so before now; he has been serially non-compliant with directions to provide his documents; he was told by the Tribunal in September 2020 to provide any additional

documents over and above those which HMRC had included in the August bundle, but failed to do so at that time; HMRC have prepared their case and the bundle and they will be prejudiced if these additional documents have to be included.

14. As regards the witness evidence, Miss Truelove submits that the appellant has been directed on a number of occasions to provide his witness statements and has failed to do so; whilst, strictly speaking, failure to comply with these directions means that the appellant's own witness statement of 1 December 2020 should be disregarded and that he should be debarred from providing oral evidence himself, HMRC are not taking that point and accept that the appellant may give oral evidence along the lines of his statement; but he should not be permitted to adduce further witness evidence; if he were permitted to do so, this would cause additional prejudice to HMRC given that HMRC have already prepared their case and they might have to call rebuttal evidence.

15. As regards the documentary evidence, the appellant submits that HMRC already have documents numbereO 327 and 328 in the case management bundle. Document 328 was included with the August 2017 Letter which clearly refers to the document at page 327; he accepts that the respondents do not have copies of the documents at pages 329 and 330 of the case management bundle; he should be entitled to rely on any relevant evidence at the hearing.

16. As regards the witness evidence, the appellant reiterates that he should be entitled to rely on any relevant evidence and so if, between now and the hearing, that evidence comes to light, he should be permitted to adduce it; at the moment he does not have any further witness evidence, but he has a friend who is overseas and who he believes lives in Pakistan, and who might be able to give evidence concerning his intentions regarding the property; he accepts however that he has not to date asked that friend to provide evidence.

DISCUSSION

17. I start by considering the relevance of the documentary evidence.

18. The issue in this case is whether the appellant is entitled to claim private residence relief on the sale of the property comprising the Old Mansfield Hospital. To decide this the Tribunal must firstly decide whether the property was a dwelling house and secondly whether it was wholly or partly occupied by the appellant as his only or main residence during the relevant period. HMRC submit that neither of these criteria are met by the appellant.

19. In my view three of the four documents comprising the documentary evidence are relevant to these issues. Document 327 deals with Council Tax which is clearly relevant to whether the property is a dwelling and indeed in that letter Mr Smallwood indicates that he has altered the valuation list "because your property comprises a dwelling for council tax purposes". Clearly the basis of this alteration is something which will be scrutinised at the hearing since if it is based on evidence given by the appellant to Mr Smallwood, that may have been deliberately self-serving. But that is something which goes to the weight of the evidence rather than its relevance, and needs to be considered by the trial judge at the hearing. Document 328, which, during the hearing, Miss Truelove indicated that she would not oppose, comprises a table of Council Tax Bands which are also, for the same reasons, relevant. Document 329 seems to me not to be of relevance since it simply indicates that a pest control officer could find no evidence of rodent infestation at the premises. Indeed, there is an indication that there is an "on-site caretaker" which might be a point in HMRC's favour. That letter goes on to say that as far as the author is concerned, there are no current

environmental health issues within the site and no evidence of pest infestation. That conclusion is just as relevant to non-residential premises as to residential premises. Finally document 330 deals with the register of electors and evidences an understanding that the occupiers of the flat at the property may no longer be resident or the property may have been empty. The letter records that attempts had been made for two years before the date of the letter (26 November 2003) to obtain an electoral registration form but no response had been received. This suggests to me that the appellant may not have been living at the premises since had he been doing so, it is likely he would have responded to the overtures made by Mansfield District Council to obtain an electoral registration form. But it could just about be interpreted as suggesting that as far as the Council was concerned, there might have been individual residents occupying the flat prior to November 2003.

20. It is therefore my view that whilst documents 327, 328 and 330 are relevant to some degree to the issues in this appeal, the document at 329 is not. I reject the appellant's application for its late admission.

21. I now consider whether there are reasons why I should not admit documents 327, 328 and 330. I remind myself that the *Martland* guidance makes clear that allowing the appellant to adduce this evidence when he has failed to comply with directions that it should be provided on or before a certain date, should not be granted unless on balance I think it should be. And in considering that I need to consider the length of any delay in complying, the reasons for it, and an evaluation of all the circumstances which takes into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and that statutory time limits, and time limits imposed by directions, should be respected.

22. I would also observe that as a matter of principle and in the interests of justice, it is not appropriate for a party to be ambushed at a hearing by the attempted introduction of documents which have not previously been provided or witnesses whose evidence has not previously been set out in written witness statements. It is for this reason that such matters are dealt with by the Tribunal giving directions, and it is important that the parties comply with any such directions. And that obligation is heightened when the consequences of failure to comply are spelt out to a defaulting party as is the case with this appellant.

23. HMRC raised no objection to document 328 of the case management bundle. They do however object to the documents at pages 327 and 330. I find, as a fact, that the document at page 327 was submitted to HMRC in August 2017.

24. But I fully appreciate the point made by Miss Truelove that if it was not included in the August bundle, the appellant has had ample opportunity to point that out and to submit that document (as he was invited to by the Tribunal in September 2020) to HMRC, for inclusion in the bundle.

25. And simply because the appellant had previously sent it to HMRC does not exonerate him from the duty to submit it to them again in accordance with the relevant direction.

26. The directions of 13 March 2020 direct that the appellant should have provided a copy of this document to the respondents no later than 3 April 2020. Its provision on 2 December 2020, therefore, is very late. This lateness is serious and significant.

27. Although the appellant did not express it in this way, my understanding is that his reason for not submitting it is that he thought HMRC already had a copy of it, and it had been

provided in August 2017, as had document 328, as an attachment to the August 2017 Letter. Miss Truelove's cogent observation on this is that if he had genuinely thought this, then why did he not raise the point that it was not included in the August bundle, nor send it to HMRC in response to the Tribunal's invitation to do so in September 2020. I am sympathetic to this observation. It is my view that the appellant failed to focus on the documentary evidence until the unless order of 19 November 2020, and that he had not genuinely considered the August bundle until shortly before the case management hearing in March 2021. I am not therefore wholly convinced by the appellant's explanation as to why he did not send document 327 to HMRC in response to the March 2020 directions.

28. HMRC consider that they will be prejudiced if this document were allowed in as evidence in that they have already provided their bundle and prepared their case. But equally, the appellant considers this to be evidence of considerable probative value. My view is that it is perhaps of less probative value than the appellant suggests, but when weighing up the balance of prejudice, I take into account the fact that HMRC have had this document in their possession since August 2017 and would, I suspect, have included it in the August bundle had it not gone astray internally. They had included document 328, and HMRC, for this reason I believe, have not objected to that document's late disclosure and accepted that the appellant may admit it in evidence.

29. Any relevant evidence should be admitted unless there are good grounds for not doing so. I am conscious that the submission of this document as one of the appellant's documents is late and that the reasons for having failed to supply the document until December 2020 are not persuasive. But at this final evaluation stage it is my view that the appellant would be prejudiced if he is not able to adduce this evidence. And that prejudice outweighs the prejudice caused to HMRC by admitting that evidence. I do not see that the inclusion of an additional page in the hearing bundle will cause prejudice from a practical perspective, nor can I see that the contents of the document will require HMRC to amend any previously filed documents such as their statement of case. This is very finely balanced, but I come down, just, on the side of the appellant.

30. However the same cannot be said for document 330, which was submitted very late and no good reason has been given for that lateness. On the basis that time limits should be respected and that this document is of limited relevance, (and had not been sent to HMRC before December 2020 which distinguishes it from document 327), my view is that the balance of prejudice favours HMRC. I say this notwithstanding that the inclusion of a single document, as is the case for document 327, is unlikely to be an issue for HMRC. But this is, to my mind, outweighed by the particular importance of statutory time limits (including time limits imposed by Tribunal directions) to be respected. The appellant has clearly not respected those time limits, he is the author of his own misfortune, and I reject his application for the admission of document 330 as evidence in these proceedings.

31. I turn now to the witness evidence. The appellant's witness statement was submitted very late and, strictly speaking, HMRC could rely on the direction of 2 October 2020 to the effect that he should be debarred from relying on his own evidence in this appeal. But, as I have said, HMRC have not gone this far. They do however object to the appellant's vague application that if he finds someone who might be prepared to testify for his benefit, he should be allowed to call that person to give oral evidence. This seems to me to be a somewhat speculative punt by the appellant.

32. At the first part of the analysis I am required to consider the relevance of any evidence which a party seeks to admit out of time. It is impossible for me to come to any conclusion on the relevance of the witness evidence proposed by the appellant since I do not have a witness statement, and the broad parameters of the evidence which the appellant has suggested might be given by a friend are woefully inadequate to allow me to undertake the necessary analysis.

33. I therefore reject the appellant's application to admit any further witness evidence on the basis that I cannot say that it is relevant. And even if he considers that the broad parameters do suggest that the evidence might be relevant, the *Martland* criteria are against him. The lateness is serious and significant (indeed we do not know when an additional witness statement might be forthcoming). The appellant has accepted that his failure to obtain a witness statement from his friend was due to a lack of foresight on his part. This is a poor reason. And it is likely that if I admit additional witness evidence, HMRC will be prejudiced in that they will have to consider it and perhaps apply to produce rebuttal evidence. The appellant has been told that he would be debarred from relying on any witness evidence which was not supplied within 14 days from the date of the release of the 2 October 2020 directions. He failed to do so. Once again he is the author of his own misfortune. It is my view that the appellant should not be entitled to rely on any witness evidence other than his own at the substantive hearing of his appeal.

DECISION

34. It is my decision therefore that:

(1) The appellant shall be entitled to rely on the documentary evidence at pages 327 and 328 of the case management bundle, but not on the documents at pages 329 and 330 of that bundle.

(2) The only witness evidence on which the appellant may rely in support of his appeal is his own witness evidence and he shall not be entitled to rely on any other witness evidence at the hearing of that appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 06 APRIL 2021