UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – PROCEDURE – refusal of VTE to reinstate NDR appeals struck out for failure to comply with procedural directions and practice statements – approach to be taken by VTE to non-compliance – approach to be taken by Upper Tribunal to appeals against VTE case management decisions – appeals allowed

IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

(1) SIMPSONS MALT LIMITED

(2) NORTON MOTORCYCLES LIMITED

(3) FIRST COLOUR LIMITED

(4) PORTLAND LIGHTING LIMITED

(5) DP REALTY LIMITED

Appellants

and

MR CRAIG JONES AND OTHERS

(VALUATION OFFICERS)

Respondents

Re: Tweed Valley Maltings and other hereditaments

Before: Sir David Holgate, Chamber President
and Martin Rodger QC, Deputy Chamber President

Sitting at: The Royal Courts of Justice, Strand, London, WC2A
on 24 July 2017

Austin Marshall of Conneely Tribe, Chartered Surveyors, for the second appellant

Andrew Bacon, of JMA Chartered Surveyors, for the third appellant

Peter Gould, of Colliers International, for the fourth and fifth appellants

Sarabjit Singh, instructed by the Solicitor to HM Revenue and Customs, for the respondents

The appeal of the first appellant was determined on written representations

The following cases are referred to in this decision:

BPP Holdings v Commissioners for Her Majesty's Revenue and Customs [2017] 1 WLR 2945; [2017] UKSC 55

Caroopen v Secretary of State for the Home Department [2017] 1 W.L.R. 2339

Denton v TH White Ltd [2014] 1 WLR 3926

English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409

Johnson (VO) v H & B Foods Ltd [2013] UKUT 539 (LC)

Maltavini Ltd v Commissioners for HMRC [2016] UKFTT 267 (TC)

Marcan Shipping (London) Ltd v Kefalas [2007] 1 WLR 1864

R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48

R (Nash) v Chelsea College of Art and Design [2001] EWHC Admin 538

R (Yusuf) v Parole Board [2011] 1 WLR 63

Re London & Winchester Properties Ltd's Appeal [1983] 2 E.G.L.R. 201

South Bucks DC v Porter (No. 2) [2004] 1 WLR 1953

Verkan & Co Ltd v Byland Close (Winchmore Hill) Ltd [1998] 2 E.G.L.R. 139

Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427

Willow Court Management Company (1985) Limited v Alexander [2016] UKUT 290 (LC)

Wonder Investments Ltd v Jackson (VO) [2015] UKUT 649 (LC)

Woolway v Mazaars [2015] AC 1862; [2015] UKSC 53

Introduction

1. These appeals are against decisions of the Valuation Tribunal for England (the VTE) by which it refused applications to reinstate eleven separate appeals which it had struck out on the grounds of alleged failures by the appellants to comply with procedural directions. The appeals have been selected from a larger number of broadly similar appeals received by this Tribunal and have been heard together to enable consideration to be given to the approach taken by the VTE to the regulation and enforcement of its procedural rules and directions, and the approach which should be taken by this Tribunal to appeals by parties whose cases have been struck out.

2. The background to the appeals is the continuing focus of the VTE on improving the management of its very substantial caseload. The burden on the VTE's resources of unnecessary or precautionary appeals is formidable. In a recent evaluation of new procedures the VTE reported that before the introduction of the 2017 rating list in April there were 250,000 live non-domestic rating appeals waiting to be determined. Overwhelmingly those appeals are likely to be withdrawn or resolved by agreement. In 2015-16 statements of case were received in only 22% of listed appeals against entries in the 2010 list, and the VTE was required to issue a substantive decision in only 1.5% of 2010 list appeals. The identification, progression and determination of appeals which require active consideration by a panel, and the efficient disposal of the much more numerous appeals which do not, has been the subject of a number of initiatives by the VTE. These initiatives have included the publication of a series of practice statements and an increasingly rigorous approach to compliance with the requirements of those statements and with the VTE's procedural rules.

3. We will consider the individual appeals in detail later in this decision. At this stage it is sufficient to record that each of the five appellants is the occupier of

unconnected commercial premises (a "relevant non-domestic hereditament" in rating parlance) for which it is liable to pay business rates. Acting with the benefit of professional assistance each ratepayer sought a variation in the rateable value of its premises shown in the 2010 rating list.

4. In each case the ratepayer's proposal was not accepted by the Valuation Officer (VO) and was referred to the VTE as an appeal. The conduct of such appeals was regulated by rules of procedure contained in Practice Statements or standard directions made by the VTE. In each case the ratepayer was considered by the VTE to have breached those rules or directions in some respect. In each case the sanction imposed was that the appeal to the VTE was struck out and a subsequent application (or deemed application) for the reinstatement of the appeal was dismissed by the VTE.

5. Four of the appellants were represented at the hearing of the appeals by a chartered surveyor experienced in rating matters. The Valuation Officers were represented in all but one appeal by counsel, Mr Singh. At the hearing Mr Singh was instructed to take a "neutral stance", neither opposing nor supporting the appeals (although in their statements of case the VOs' case had been that the appeals should all be dismissed).

6. Shortly after the hearing the Supreme Court delivered its decision in the important case of *BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55 on which we invited and received additional submissions in writing. We are grateful for the assistance of all of those who participated in the appeals.

The statutory framework

7. The VTE was created under powers conferred by Schedule 11 of the Local Government Finance Act 1988 ("the 1988 Act") and lies outside of the unified tribunal structure created by the Tribunals, Courts and Enforcement Act 2007. Its relevant procedures are governed by the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 ("the 2009 Regulations").

8. The general principles which apply to the discharge of its functions by the VTE are described in regulation 3:

> "3. In giving effect to these Regulations and in exercising any of its functions under these Regulations, the VTE must have regard to—
>
> (a) dealing with appeals in ways which are proportionate to the importance of the appeal, 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 VTE effectively; and

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

9. Under regulation 5 it is the duty of the VTE President to ensure that arrangements are made for appeals to be determined in accordance with the provisions of the Procedure Regulations.

10. A number of specific "appeal management powers" are conferred on the VTE by regulation 6(3), including a power to adjourn or postpone any proceedings. These are supplemented by a general power to give directions in regulation 8(1) and by an even more flexible provision in paragraph 6(1):

"Subject to the provisions of Part 1 of Schedule 11 to the 1988 Act and of these Regulations, the VTE may regulate its own procedure."

11. The consequences of procedural non-compliance are first considered in regulation 9(1). This provides that an irregularity resulting from failure to comply with any requirement of the Procedure Regulations or a direction does not of itself render the proceedings, or any step taken in them, void. By regulation 9(2), where a party has failed to comply with such a requirement, "the VTE may take such action as it considers just" which may include waiving the requirement, requiring the failure to be remedied, or exercising the power to give directions under regulation 8.

12. Provision for striking out appeals is contained in regulation 10(1)-(3). Although these are expressed in terms of default by an appellant, they apply equally to infractions by any other party to an appeal, against whom the relevant sanction is the imposition of a bar on further participation (see regulation 10(7)). The operative provisions are as follows:

"10.(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The VTE must strike out the whole or part of the proceedings if the VTE does not have jurisdiction in relation to the proceedings or that part of them.

(3) The VTE may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or that part of them;

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

(c) the VTE considers there is no reasonable prospect of the appellant's appeal, or part of it, succeeding."

13. The different modes of operation of paragraphs (1) and (3) of regulation 10 should be noted.

14. Regulation 10(1) contemplates the making of orders which state explicitly that the consequence of non-compliance will be that the proceedings or some part of them will be struck out. The exercise of judicial discretion is involved in the decision whether it is appropriate to make such an order in the first place. Where such an order is made, and is broken, the striking out of proceedings, or the relevant part of them, occurs automatically, without any further judicial decision or the exercise of judicial discretion.

15. Regulation 10(3), in contrast, allows the VTE a discretion to strike out an appeal in the situations described in sub-paragraphs (a) to (c). There is nothing automatic or inevitable in the exercise of such a discretion, which is a judicial act and requires consideration of all relevant factors. Being a judicial act, a decision to strike out an appeal under this power must be explained by sufficient reasoning, and is amenable to an appeal.

16. Where the VTE is contemplating striking out the whole or part of an appeal under regulations 10(2) or 10(3)(b) or (c) it must first give the appellant an opportunity to make representations (regulation 10(4)). No such opportunity is provided for where proceedings are struck out automatically under regulations 10(1), or by the VTE in the exercise of its discretion under regulation 10(3)(a), but in those instances an alternative protection is provided by regulation 10(5).

17. Regulations 10(5)-(6) are concerned with the reinstatement of proceedings which have been struck out automatically, or under regulation 10(3)(a), and provide as follows:

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

(6) An application under paragraph (5) must be made in writing and received by the VTE within one month after the date on which the VTE sent notification of the striking out to the appellant."

18. It should be appreciated that an application for reinstatement is not an appeal in its own right. It is a further application in the same proceedings, made to the VTE as the original decision-making tribunal. A request for reinstatement need not involve

any suggestion that the decision itself was wrong (although it may sometimes be necessary to consider the correctness of the original decision in order to determine whether there were grounds for striking the appeal out). A decision to strike out an appeal may have been an entirely proper one, made for good reason and on the basis of an impeccable exercise of judicial discretion, but regulation 10(5) nevertheless allows the appellant the opportunity to seek relief from the VTE against that sanction. We will consider later what principles apply to the granting of such relief.

19. The limited application of the power of reinstatement is also significant. Where an appeal has been struck out because of an absence of jurisdiction under paragraph (2), or for an egregious failure of cooperation under paragraph (3)(b), or under paragraph (3)(c) because the appeal is hopeless, the appellant has no right to seek relief against the sanction by an application for reinstatement under paragraph (5). The only generally available means of restoring an appeal in such circumstances is by a successful appeal to this Tribunal.

20. Reference was also made in one of the appeals to the power of the VTE under regulation 40 to review and set aside its own decisions. The process of review is not an appeal against a decision, and is undertaken by the VTE itself, but it may lead to a decision being set aside in whole or in part if it is adjudged to be in the interests of justice to do so. The circumstances under which a decision may be reviewed are strictly limited.

21. Any party may apply under regulation 40(1) for the review of the whole or part of a decision which disposes of proceedings on an appeal (a decision to strike out an appeal is clearly such a decision). The application must be made within 28 days of the date on which notice of the decision was sent, and is required by regulation 40(3) to be considered by the VTE President who will either direct that a review take place or refuse the application. The President may not grant an application for a review unless he is satisfied that at least one of the conditions in paragraph (5) is satisfied. Those conditions are:

> "(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the VTE at an appropriate time;
>
> (c) a party or its representative was not present at a hearing relating to the proceedings and the party shows reasonable cause for its or its representative's absence;
>
> (d) there has been some other procedural irregularity in the proceedings;
>
> (e) the decision is affected by a decision of, or on appeal from, the Upper Tribunal or the High Court;
>
> (f) where the decision relates to an appeal against a completion notice, new evidence, whose existence could not have been discovered

> by reasonable inquiry or could not have been foreseen, has become available since the conclusion of the proceedings."

If, having undertaken a review, the VTE concludes that one of these conditions is satisfied and, additionally, that it is in the interest of justice to do so, it is required by regulation 40(6) to set aside the decision in whole or in part.

22. The availability of different remedies which must be sought by different procedures, either in the VTE itself or in this Tribunal depending on the grounds on which an appeal has been struck out, makes it essential that the basis of any decision to strike out should be clear.

23. Finally, regulation 42 provides for "Appeals to the Upper Tribunal":

> "(1) An appeal shall lie to the Upper Tribunal in respect of a decision or order given or made by the VTE on an appeal under the NDR Regulations … .
>
> …
>
> (5) The Upper Tribunal may confirm, vary, set aside, revoke or remit the decision or order, and may make any order the VTE could have made.
> …".

We will consider later the approach which this Tribunal should take to appeals against decisions of the VTE striking out proceedings for non-compliance with its directions or orders.

The VTE's Practice Statements

24. In March 2010 the President of the VTE issued a number of Practice Statements containing specific instructions to parties intended to assist the VTE in efficiently managing its very substantial caseload. Neither the 1988 Act nor the Procedure Regulations contains any express reference to the VTE's power to promulgate such Practice Statements. These appeals do not involve any challenge to the power to make such statements, the procedure by which they were made or their content. No doubt the duty imposed on the President by regulation 5 to make arrangements for appeals and the general power to regulate its own procedure vested in the VTE by regulation 6(1) (subject to Part 1 of Schedule 11 to the 1988 Act and to the Procedure Regulations) provide sufficient authority.

25. The 2010 (and subsequent) Practice Statements are central to these appeals and it is necessary to describe the more important of them in some detail. Each Practice Statement went through a number of editions but in each case we will refer to the final iteration of the document. With effect from 1 July 2017 the Practice Statements were consolidated, with significant amendments, into a single document (The Consolidated Practice Statement) to which we will also refer.

Practice Statement PS/A2 – Listing of appeals

26. Practice Statement PS/A2 explained the VTE's approach to the listing and management of rating appeals (PS/A2). In particular, it contained directions designed to inform the VTE in advance of a hearing date how many of the cases which had been identified as potentially to be heard on that date were still contentious and would require active consideration by a panel.

27. PS/A2 included a listing timetable together with instructions and warnings which feature in several of these appeals. We therefore set out the relevant provisions in full:

> "14. In the case of appellants with professional representatives, the representative must make contact with the Tribunal between 7 and 14 days before the hearing date indicating whether the proceedings are still active.
>
> 15. A hearing will be considered necessary even if the parties are in discussion or there are matters outstanding, such as measurements, unless a postponement has been applied for and granted in accordance with Practice Statement A4.
>
> 16. (1) Where an appellant's representative fails to make contact as required under para. 14 above, it will be assumed that the proceedings are no longer active and they may be struck out either before or at the hearing.
>
> (2) Where contact is made less than 7 days before the hearing, a postponement will not normally be granted unless circumstances have arisen since the deadline given in para. 14 above which justify the granting of a postponement.
>
> (3) A representative refused a postponement prior to the hearing may appear in person at the hearing to apply for a postponement or adjournment but if that application is refused, the appeal will be heard.
>
> 17. Following contact under para. 14, the parties will be informed whether they have been included on the provisional hearing list for the date in question.
>
> 18. Parties on the provisional list will normally be informed at least 3 clear working days before the hearing date whether or not they have been placed on the final hearing list. But the Tribunal reserves the right to confirm a hearing where only 2 clear working days notice is possible.
>
> 19. An application for a postponement or adjournment at the hearing on the grounds that discussions are incomplete, measurements remain to be agreed

or the relevant case worker is not present will normally be rejected and the hearing of the appeal will proceed.

20. Where an appellant's representative fails to appear at the hearing of a listed appeal, the appeal may be struck out.

21. A party who has made contact in accordance with para. 14 should not appear at the hearing unless confirmation has been given that the appeal will be heard."

Practice Statement A4 - Postponement and Adjournment

28. Reference was made in paragraph 15 of PS/A2 to Practice Statement A4 (PS/A4) which dealt with the VTE's approach to the exercise of its power under regulation 6(3)(h) of the Procedure Regulations to adjourn or postpone the hearing of appeals. *Postponement* referred to the removal of an appeal from the hearing list before the date for hearing had arrived, and a request to postpone was treated by the VTE as an administrative matter to be dealt with initially by a member of its staff. The applicant could ask for a refusal to be referred to a senior member of the Tribunal if there was sufficient time before the hearing to do so (otherwise an adjournment could be sought at the hearing before the panel). Paragraph 4 of PS/A4 explained that there was a presumption against the granting of postponements and that these would only be granted for good reasons and if it was in the interests of justice to do so. Other paragraphs explained that the fact that the parties had failed to enter into meaningful negotiations, or that negotiations were incomplete, were not good reasons for a postponement.

29. The *adjournment* of a listed appeal is treated by the VTE as a judicial function in all instances. A decision to adjourn is a decision taken by the panel at the hearing of the appeal that it should not proceed but should be adjourned to a later date. While a party might make an application for the adjournment of a hearing, paragraph 11 of PS/A4 made clear what would happen if such an application was unsuccessful:

> "Parties should be aware that if an application for an adjournment is not granted, the panel will continue the hearing and the parties must be prepared to present their case."

PS/A7 – Disclosure and Exchange

30. Practice Statement A7-1 (PS/A7) was first introduced in November 2011 and dealt generally with the subject of pre-hearing disclosure of information and the exchange of evidence. It included standard directions which applied to all appeals listed to be heard from 1 January 2012, and required the parties to communicate with each other and with the VTE according to a strict timetable.

31. The standard directions required that not later than 6 weeks before the date of the hearing the appellant must serve on the VTE and all other parties to the appeal a statement of case including a summary of the evidence and any legal argument it

wished to rely on. The appellant was required to specify how and when its statement of case was served on the other parties and failure to comply with this direction was to "result in the automatic striking out of the proceedings."

32. Not later than 4 weeks before the date of the hearing the respondent was required to serve a statement of case on the VTE and send a copy to the appellant. The statement was to include a response to the appellant's case together with the evidence relied on by the respondent. The VTE was to be told how and when the respondent's statement of case had been served on the appellant and, once again, a failure to comply with any part of the direction was to result in the automatic barring of the respondent from taking further part in the proceedings.

33. Paragraphs 9 and 10 of PS/A7 explained the consequences (for appellants and respondents respectively) of what was referred to as a "substantial failure" to comply with the standard directions. In the case of an appellant the appeal would be "automatically struck" out, whereas a respondent would be barred from taking any further part in the proceedings. Paragraph 11 sought to explain what was regarded as "substantial failure", namely, either a complete failure to provide the required statement or "the provision of a statement that fails (in the opinion of the panel) to a significant extent to meet the requirements …". Paragraphs 9 and 10 referred to regulations 10(1) and 10(7) as the source of the power by which appeals would automatically be struck out in the event of such a degree of default.

34. Where a party had *completely* failed to provide *any* statement of case at all we consider that the Practice Statement was entitled to lay down the draconian sanction of automatic striking out. That is for a combination of three reasons. First, the question whether there has been a complete failure is judged by an objective criterion which does not require the application of judgment or discretion. Second, the failure is so serious as to merit that sanction. Third, it is possible to apply for and obtain relief against sanction by making an application for reinstatement. However, there is a problem with the second part of the definition of "substantial failure" in paragraph 11, because it raises an issue of degree (failure "to a significant extent") requiring assessment by a panel in a judicial determination. Such an issue involves the application of judgment and cannot be resolved by any objective criterion. It was therefore inappropriate for the Practice Statement to specify an "automatic" sanction under regulations 10(1) and 10(7) for cases where non-compliance was significant rather than complete. That second type of case could only properly have been dealt with under regulation 10(3)(a) as a discretionary order for striking out an appeal or barring a respondent from participation).

35. A case-specific order specifying the draconian sanction of striking out as the automatic consequence of non-compliance could never be made without proper judicial discretion being exercised *when that order was made.*

36. A party who had good reason to do so could apply for an extension of the time limit before it expired under paragraph 9 of the Standard Directions. If the extension

was refused the standard requirement would have to be complied with. If an automatic sanction was applied for non-compliance the party in default could apply for reinstatement, at which stage judicial discretion would have to be applied. We will consider the principles to be applied in the exercise of that discretion later in this decision.

PS/C2 - Reinstatement

37. It is also necessary to refer to Practice Statement PS/C2 (PS/C2) which came into effect in March 2013 and concerned applications for reinstatement following the striking out of an appeal or the imposition of a bar on participation.

38. Under PS/C2 an appellant whose appeal had been struck out was entitled to apply within 1 month for it to be reinstated. Paragraph 2 explained that such an application might be made either on the grounds that there had been compliance with the relevant direction so that the decision to strike out was made in error, or on the basis that there were reasons to excuse the non-compliance "which justified relief from the sanction of striking out/barring". Applications for reinstatement were to be determined by a "senior member" of the VTE's judiciary who was required to give written reasons for the decision.

39. The following information provided by PS/C2 about the VTE's practice in relation to reinstatement is relevant to these appeals:

> "3. Reasons to explain or excuse non-compliance may include illness, compassionate circumstances, or any other reasons or circumstances judged to be compelling and reasonable. Relevant considerations include the interests of the administration of justice, whether the application has been made promptly, whether the failure to comply was intentional, accidental or negligent, whether there is a good explanation for the failure, and the effect on the parties of granting the application.
>
> 4. It is for the applicant to satisfy the senior member that the reasons are such that it is in the interests of justice to reinstate the appeal or lift the bar. There is no presumption in favour of doing so and reinstatement will not be ordered merely because the striking out will deprive the appellant of having the appeal determined on its merits.
>
> …..
>
> 6. An application for reinstatement must give the reasons, together with any supporting documentation. It is for the appellant to provide adequate reasons and proof and it is not for the Tribunal to seek amplification or explanation."

40. PS/A7, to which we have already referred and which included the VTE's standard directions dealing with the exchange of statements of case and evidence, also touched on the postponement, adjournment and reinstatement of appeals. It provided, in particular, that where an appeal had been postponed before the submission of the appellant's statement of case, a new timetable would be provided, but that where the

appellant had already served a statement of case the original timetable would continue to apply and the document already submitted "will remain in place" (paragraph 4(2)).

The Consolidated Practice Statement

41. We note finally, as an important part of the background to these appeals, that with effect from 1 July 2017 the VTE's Practice Statements were consolidated into a single document in two parts (CPS 2017). Part 1 records that the document is to apply to all appeals made or listed on or after 1 April 2017. Paragraph 4, warns that a breach of any direction *may* lead to an appeal being struck out or a respondent being barred from participation. Part 2 of CPS 2017 contains 16 individual chapters dealing with much the same range of topics as had the original Practice Statements. These chapters included PS4 dealing with postponements and adjournments and PS14 dealing with reinstatement.

42. So far as postponement is concerned, PS4 makes it clear at paragraph 4 that the former presumption against the granting of postponement remains in place. But the previous language of PS/A4 has been modified to provide that postponements will now only be granted "if there are (exceptional) good and sufficient reasons for doing so and it is in the interest of justice to do so"; (the word "exceptional" was not included in the earlier formulation).

43. Reinstatement is dealt with in CPS 2017 at PS14. Once again the intention appears to be that the practice of the VTE should become more rigorous than under PS/C2. Thus paragraph 1 now records that the VTE will *only* exercise its discretion to reinstate a case struck out for default if it is satisfied "that there was an exceptional reason(s) for any failure, [or] non-compliance with any direction, practice statement or order made by the Tribunal."

44. The same emphasis on reinstatement being an exceptional remedy is carried through to paragraph 2 of PS14. An application for reinstatement is now required to be on grounds either that there had in fact been compliance with the relevant direction, or that "there are reasons to excuse the non-compliance which are exceptional and justify relief from the sanction of striking out/barring." Given the absolute language in paragraph 1 of PS14 it is confusing then to find that paragraph 3 restates, in terms identical to those previously found in paragraph 3 of PS/C2, the range of considerations which may be relevant to a decision to reinstate, including the interests of the administration of justice and the circumstances of the failure which led to the sanction being imposed.

45. Although the reference to "exceptional" in CPS 2017 is new, in practice the VTE had been insisting for some time that parties comply strictly with its rules, orders and Practice Statements, or face the consequences illustrated by the facts of these appeals.

As will become apparent when we consider those facts in detail, even before CPS 2017 the VTE has gone significantly further than its Practice Statements indicated when dealing with the striking out or reinstatement of appeals. The VTE appears to have followed an unwritten, or at least unannounced, policy of granting relief against sanctions *only* where it was satisfied that "exceptional reasons" or "exceptional circumstances" existed. In certain of the appeals before us the VTE used the "exceptional circumstances" criterion as the sole test of whether relief should be granted and refused to grant relief on that basis. For the reasons given below such an approach was not lawful. It is therefore important that the effect of CPS 2017 should be properly understood.

46. Paragraphs 1 to 4 of CPS 2017 incorporate a statement of the VTE's overriding objective to deal with cases fairly and justly, which (as far as we are aware) had been absent from the original suite of documents. The statement records the VTE's intention to "have regard to the developing jurisprudence of the Court of Appeal and in particular the decision of *BPP Holdings v HMRC* [2016] EWCA Civ 121". We will refer shortly to *BPP Holdings* and to the significance of this alignment by the VTE of its own culture with the new norms of civil litigation. But in a footnote the VTE summarised its understanding of the new approach as making clear that parties are expected to comply with rules and orders of Tribunals, before warning that "flexibility of process does not mean a shoddy attitude to delay or non-compliance by any party."

47. As we have noted, PS14 states that the discretion to reinstate an appeal or to set aside a barring order will only be exercised if "exceptional reasons" are demonstrated. The evidence before us shows that the VTE had started to use "exceptional circumstances" as the sole criterion by which to determine whether this discretion should, or should not, be exercised. Such an approach was and remains impermissible. The 1988 Act read together with the 2009 Regulations does not allow the VTE to lay down or apply any such "exceptional circumstances" test" as the sole basis for determining whether its powers to strike out, or to bar participation, or to refuse reinstatement should be exercised. Furthermore, this practice is inconsistent with the approach explained in the Practice Statements with which this appeal is concerned (especially with paragraph 3 of PS/C2). For the future, it is also inconsistent with the approach required by *BPP Holdings*, which the VTE has now expressly adopted in CPS 2017 and which we endorse. We explain that approach below.

48. It is common for statutory decision-makers, including tribunals, to adopt policies or practice statements to provide guidance on what matters they expect to influence their decisions on the exercise of their powers. Such statements are expected to promote transparency, coherence and consistency in decision-making. But they must not be formulated or applied so as to prevent the decision-maker from exercising its discretion in individual cases; they must not "fetter" the exercise of discretion. Consequently, it is said that such a statement must be not applied in a "blanket" manner. The formulation and adoption of such a statement needs to be considered in the context of the relevant powers and principles (see e.g. the discussion in *De Smith's Judicial Review* (7th ed.) at paragraphs 9-001 to 9-021). Those principles may include

the principles of procedural fairness, which may sometimes be incompatible with the imposition of a test which requires "exceptional circumstances" to be shown before a specific power may be exercised (see e.g. *R (Yusuf) v Parole Board* [2011] 1 WLR 63 at paragraph 25). Our decisions in these appeals are only concerned with the approach taken by the VTE to decisions on striking out and reinstatement of appeals (which also applies to the barring of participation).

The appropriate response to non-compliance with VTE directions

49. The principle laid down clearly by regulation 6(1) of the Procedure Regulations is that, subject to Schedule 11 of the 1988 Act and to the Procedure Regulations themselves, the VTE may regulate its own procedure. The various Practice Statements are the means by which it has chosen to regulate and standardise that procedure. It is not for this Tribunal to interfere with those arrangements, unless we were to conclude that they were not within the VTE's powers, or conflicted with relevant legal principles. It is our function, through the determination of appeals, to give guidance on the implementation of the VTE's rules and practices and to ensure that they are lawful and are applied fairly and consistently.

50. In designing and policing its procedural code the VTE has aimed (explicitly in CPS 2017, but in practice for some time before) to adopt the approach now taken by the courts to the enforcement of the Civil Procedure Rules (CPR), and has moved decisively away from its former relatively relaxed attitude. The modern emphasis is on the importance of compliance and on the need, in the interests of the parties and in the wider public interest, for litigation to be conducted efficiently and at proportionate cost. With that in mind the courts have developed a stricter, systematic approach to the consequences of non-compliance by the imposition of appropriate sanctions, from which relief is made available only after consideration of the causes and consequences of the relevant default.

51. The basis of procedural enforcement in the civil courts is now CPR 3.9(1) which provides that 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, directions and orders. An application for reinstatement of proceedings which have been struck out for non-compliance is treated as an application for relief to which rule 3.9(1) applies.

52. In applying CPR 3.9(1) the civil courts have adopted a relatively strict approach. In *Denton v TH White Ltd* [2014] 1 WLR 3926 the Court of Appeal reviewed the relevant authorities and gave guidance recommending a three stage approach to applications for relief against sanctions. It is clear from that guidance that there is no room for a requirement of "exceptional circumstances" at any stage of the *Denton* principles.

53. At its first stage the *Denton* guidance requires an assessment of the seriousness or significance of the breach in respect of which relief from sanctions is sought. If, after considering its effect on the particular litigation and on litigation generally, a judge concludes that a breach is not serious or significant, relief from sanctions will usually be granted. If, however, the tribunal considers that the breach is serious or significant, the second and third stages assume greater importance.

54. The second stage is to consider why the failure or default occurred. The burden is on the defaulting party to persuade the court to grant relief and it must therefore explain what happened and why. If there is a good reason, such as illness or accident, relief against sanctions is likely to be granted, but merely overlooking a deadline, for whatever reason, is unlikely to be a good reason. That is not to say that, in the absence of a good reason for default, an application for relief will inevitably fail, as the Court of Appeal emphasised in explaining its third stage (paragraphs [12], [29-30] and [38]).

55. At the third stage the court must consider all the circumstances of the case, so as to enable it to deal justly with the application. Rule 3.9(1) itself expressly so requires, but it also emphasises the particular weight to be given to two important factors, namely, the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, directions and orders (paragraphs [32] and [35]). In looking at all the circumstances, the court may take into account the promptness of the application for relief against sanction and any other past or current breaches by the parties of the rules, practice directions and orders (paragraph [36]).

56. In *Denton,* at paragraph [37], the Court of Appeal warned against an unduly draconian approach to relief and emphasised that compliance was not to be regarded as an end in itself; rules and rule compliance were the handmaids not the mistresses of justice and could never be allowed to assume a greater importance than doing justice in any case.

57. The 2009 Regulations contain no equivalent of CPR 3.9(1), but a similar approach to compliance has influenced the drafting and application of PS/C2 and CPS 2017. As we have already seen, CPS 2017 refers explicitly to the developing jurisprudence of the Court of Appeal in relation to compliance (in which *Denton* represents the current end-state as far as civil litigation is concerned). The previous Practice Statements did not say so in terms, but the same spirit was clearly their inspiration. We were invited in these appeals to consider the applicability of this approach in the context of non-domestic rating.

58. A number of the appellants submitted that the law and practice of rating was unique and that nothing could therefore be learned from the approach taken by courts and tribunals in other fields to policing compliance with procedural orders and directions. We do not accept that submission.

59. Following the decision of the Supreme Court in *BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] 1 WLR 2945, [2017] UKSC 55 it is now clearly established that although the CPR do not apply to tribunals constituted under the Tribunals, Court and Enforcement Act 2007 (in that case the First-tier Tribunal (Tax Chamber) (the FTT)), such tribunals should follow a similar approach to procedural non-compliance and relief against sanctions. At paragraph [24] of *BPP*, Lord Neuberger PSC described decisions of the courts on the application of the Civil Procedure Rules as providing "a salutary reminder as to the importance that is now attached in all courts and tribunals throughout the UK to observing rules in contentious proceedings generally." Those decisions were directed to, and only strictly applicable to, the courts of England and Wales, "save to the extent that the approach in those cases is adopted by the UT, or, even more, by the Court of Appeal when giving guidance to the Ft-T."

60. *BPP Holdings* concerned an application by a taxpayer to debar HMRC for further participation in a tax appeal following their failure to comply with an order which included a warning that non-compliance might result in the making of a debarring order. At paragraphs [14]-[15] the Supreme Court considered that the FTT had correctly proceeded on the basis that the application was for the imposition of a sanction, and not an application to be relieved from an automatic debarring order. Although not directly relevant to an application to impose a barring order, the FTT had nevertheless treated the CPR cases, culminating in *Denton*, as providing useful guidance as part of its consideration of the overriding objective of "dealing with cases fairly and justly". The Supreme Court approved the FTT's adoption of an approach based on *Denton* and CPR 3.9 (1) and found that it had been entitled to determine the application by taking into account all relevant factors, while giving significant weight to factors (a) and (b) in CPR 3.9 as part of the consideration of the overriding objective to deal with cases fairly and justly (*BPP Holdings*, paras. [20], [27]–[28]). Plainly the approach in *Denton* also applies where a tribunal is considering whether to grant an application to be relieved from a sanction, for example, an application for reinstatement.

61. As we have already noted, the VTE is not within the unified tribunal structure governed by the 2007 Act. Nevertheless, the VTE's procedural rules, including the guiding principles of fairness and justice described in regulation 3, are substantially the same as those of other tribunals. An important function of the Upper Tribunal is to ensure consistency of approach amongst FTT judges (*BPP Holdings* paras. [26] and [34] and *R (Jones) v Ft-T (Social Entitlement Chamber)* [2013] 2 AC 48 paras 41 - 46). The Upper Tribunal discharges the same important function in relation to the VTE. The fact that the VTE is constituted under the 1988 Act rather than the 2007 Act is not of practical significance, and the guidance given by the Supreme Court in *BPP Holdings*, and indirectly by the Court of Appeal in *Denton*, is equally applicable to it.

62. We consider that, while rating clearly has some features which are absent from other jurisdictions, those provide no reason for a different approach to compliance or to relief from sanctions. The VTE itself clearly does not take that view. Like other tribunals the VTE is afforded considerable autonomy in regulating its own procedure

so long as it remains within the ambit of its statutory powers. The VTE has decided that its practices should be consistent with those of the civil courts and other tribunals as explained in *Denton* and *BPP Holdings*. That is not to say that the special features of rating are irrelevant, including in particular the need, in the public interest, to ensure that the rating list is accurate. On the contrary, the fact that the striking out of an appeal may leave an inaccuracy in the list uncorrected is a factor which may be taken into consideration at the third stage of a *Denton* assessment.

The scope of appeals against discretionary decisions of the VTE

63. The second issue of principle which arises in these appeals concerns the approach to be taken by this Tribunal to appeals against discretionary case management decisions of the VTE, including a decision to strike out an appeal under regulation 10(3)(a) or (b) or to refuse an application for reinstatement under regulation 10(5).

64. As the Supreme Court has explained in *BPP Holdings*, the grounds on which an appellate tribunal may interfere with a debarring order made by the FTT are strictly limited. The issue of whether to make a debarring order is very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified. An appellate tribunal should not interfere with a case management decision by a judge who has applied correct principles and taken into account matters which should be taken into account and not taken into account irrelevant matters, unless it is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the FTT judge (*BPP Holdings*, paras [25], [33]).

65. This restrained approach to appeals against discretionary case management decisions does not mean that an appellate tribunal can never interfere where a debarring order has been made or relief against sanctions has been refused. Unlike case management decisions of a more routine nature, a debarring order can often have the effect of determining the substantive case and, as it was put by Lord Neuberger PSC at paragraph [34], "there must be a limit to the permissible harshness (or indeed the permissible generosity) of a decision relating to the imposition or confirmation (or discharge) of a debarring order".

66. These principles are very well established features of the relationship between inferior and appellate courts, and between the FTT and the Upper Tribunal in the unified tribunal structure. In *Wonder Investments Ltd v Jackson (VO)* [2015] UKUT 0649 (LC) at paragraphs [6] to [17] the Tribunal explained why it considered the same principles were equally applicable to its consideration of appeals against case management decisions of the VTE. Notwithstanding that explanation the adoption of those principles remains contentious. In his written submissions Mr Singh said that the VOs "would caution against" adopting the same approach as courts and other appellate tribunals. However, Mr Singh made no attempt to justify that caution in his oral argument. In written submissions made on behalf of the second appellant by Mr

Luke Wilcox of counsel, after the publication of the Supreme Court's decision in *BPP Holdings*, we were invited to take a quite different approach and to determine the application for relief against sanction without regard to the decision of the VTE and as if it was being made afresh to this Tribunal.

67. Mr Wilcox submitted that, in determining appeals against decisions of the VTE, including discretionary decisions, the Tribunal "is not an appellate court in the sense used by Lord Neuberger" in *BPP Holdings*. It was said to be well-established that, in hearing appeals against decisions of the VTE, the Tribunal conducts a full "*de novo"* hearing, and we were referred to the decision of the Tribunal (Sir Keith Lindblom, President and Mr A J Trott FRICS) to that effect in *Johnson (VO) v H&B Foods Ltd* [2013] UKUT 0539 (LC) at paragraphs [62] to [75]. In contrast to appeals against decisions of the FTT (Tax Chamber), which are restricted by section 11 of the 2007 Act to points of law only, Mr Wilcox pointed out that the Upper Tribunal was not limited to reviewing a VTE decision for errors of law, and was entitled to substitute its own conclusions both on matters of fact and exercises of discretion.

68. Mr Wilcox's submissions made no reference to the Tribunal's decision in *Wonder Investments Ltd v Jackson* and, in our judgment, they took the discussion of the Tribunal's practice in *Johnson (VO) v H&B Foods* out of context.

69. The manner in which the Tribunal conducts an appeal in any particular case is not prescribed by statute or regulation, but is a matter of practice. The Tribunal's own Practice Direction makes no separate mention of appeals from the VTE but at paragraph 5.1(3) it makes clear that the nature of each appeal is to be determined by the Tribunal itself. The Tribunal will take into consideration any views the parties have expressed on the type of appeal proceedings but may direct that the appeal or any of the issues in the appeal are to be dealt with by review rather than by rehearing.

70. The right of appeal to the Tribunal from the VTE is very widely expressed in regulation 42(1) ("an appeal shall lie to the Upper Tribunal in respect of a decision or order given or made by the VTE under the NDR Regulations"). The powers of the Tribunal under regulation 42(5) are also widely expressed, as the Tribunal noted in *Johnson* (the Tribunal "may confirm, vary, set aside, revoke or remit the decision or order, and may make any order the VTE could have made"). But, the breadth of this power does not *require* or *mandate* that an appeal be conducted as a rehearing rather than as a review. The broad powers of the civil appeal courts in CPR 52.10(2) are similar to those conferred on the Tribunal by regulation 42(5), but compatibly with that language the courts have decided to exercise restraint in the handling of appeals against case management decisions (see e.g. *Walbrook Trustee (Jersey) limited v Fattal* [2008] EWCA Civ 427 approved in *BPP Holdings* paragraph [33]). That restraint would not permit an appeal against a case management decision, even a decision on striking out, or barring, or reinstatement, to be treated as a re-hearing *de novo.*

71. As the Lands Tribunal (HHJ Marder QC, President) explained in *Verkan & Co Ltd v Byland Close (Winchmore Hill) Ltd* [1998] 2 EGLR 139 the Lands Tribunal's practice of conducting appeals against decisions on issues of valuation (whether from the VTE or the leasehold valuation tribunal) as re-hearings was not based on any statutory provision which bound the Tribunal to proceed in that way, or indeed in any particular way. It was, rather, a matter of practicality, reflecting the nature of the issues, the difficulty of reviewing evidence given orally and sparsely recorded in the decisions of lay tribunals, and the importance of the Tribunal's role in providing guidance on issues of valuation principle. In *Re London & Winchester Properties Ltd's Appeal* [1983] 2 E.G.L.R. 201, an appeal against a leasehold valuation tribunal's determination of a freehold price under section 9 of the Leasehold Reform Act 1967, the Lands Tribunal (V.G. Wellings QC) explained at p.201H-J:

> "Appeals from leasehold valuation tribunals are not limited to appeals on points of law and where the questions in issue are questions of fact or valuation the only practicable course seem to be for there to be a rehearing with evidence. …"

72. Appeals against case management decisions are not concerned with the sort of "questions of fact or valuation" which the Lands Tribunal had in mind in *Re London & Winchester Properties*. The authorities reviewed by the Tribunal in *Johnson (VO) v H&B Foods* were concerned with appeals on issues of valuation, and it was to appeals of that nature that its observations were directed (see *Wonder Investments Ltd v Jackson* at paragraph [13]). Nor are the same difficulties encountered in reviewing the decisions of professional judges, required to give proper reasons for their decisions, as were formerly encountered in the case of lay panels or tribunals. No example was cited of any occasion on which this Tribunal, or its predecessor, had approached an appeal against a case management decision of the VTE or local valuation panel on the basis suggested by Mr Wilcox. Such appeals were previously either extremely rare, or non-existent, perhaps because of the relaxed approach to case management which prevailed in the VTE until recently. There is certainly no material before us to suggest the existence of an established practice in relation to such appeals.

73. Nor are we persuaded that the Tribunal would be justified in now adopting a fundamentally different approach to appeals against case management decisions, by the distinction between appeals on points of law under section 11 of the 2007 Act (such as in *BPP Holdings*) and appeals from the VTE on an unrestricted basis under regulation 42 of the 2009 Regulations. Appeals to the Tribunal from case management decisions of the FTT (Property Chamber) in its residential property and leasehold valuation jurisdictions are equally unrestricted, being governed by section 176B, Commonhold and Leasehold Reform Act 2002 rather than by section 11 of the 2007 Act, yet in those appeals the Tribunal will only consider the matter afresh and substitute its own decision if it is satisfied that the FTT's decision was not a proper exercise of its discretion (the *BPP Holdings* approach) (see *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC) at [44]).

74. We therefore reaffirm what was said in this Tribunal in *Wonder Investments Ltd v Jackson* at paragraph [15], when it rejected the VO's submission that appeals against case management decisions of the VTE should be proceed as re-hearings.

75. Before leaving issues of principle and turning to the facts of the individual appeals, we should refer briefly to a submission made by Mr Singh in his written argument, but which he abandoned after further research. That submission was to the effect that, when considering an application for reinstatement of an appeal which has been struck out automatically under regulation 10(1) for failure to comply with a direction which stated that non-compliance would result in striking out, the only question for the VTE was "whether the decision to strike out automatically was right or wrong".

76. That submission was wrong for two reasons. First, because in such a case the striking out is not the result of a decision, but is the consequence of the failure by the party to comply with the "unless" order. More importantly, the suggested approach is wrong because it mistakes the nature of an application for reinstatement under regulation 10(5), which is not an appeal against the striking out, but is a request for relief against sanction the fair determination of which requires consideration of all material circumstances. In a helpful supplementary note Mr Singh referred the Tribunal to the decision of the Court of Appeal in *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864 which concerned the consequences of non-compliance with an "unless" order. Moore-Bick LJ explained (at para. 35) that where an application was made for relief from sanctions by a party whose case had been struck out for breach of an unless order the court would reach a decision after considering all the material circumstances in accordance with CPR r.3.9. Mr Singh's researches also disclosed that the same practice is adopted in the Tax Chamber of the First-tier Tribunal (*Maltavini Ltd v Commissioners for HMRC* [2016] UKFTT 0267 (TC)). We are satisfied that that is the correct approach.

77. We can now consider the individual appeals.

Simpson's Malt Ltd

78. The four consolidated appeals brought by Simpson's Malt Ltd concern hereditaments at its Tweed Valley Maltings at Berwick-Upon-Tweed. The appeals are not opposed by the VO and were consolidated and assigned to the Tribunal's written representations procedure. When the other appeals were listed together for hearing, the parties in the consolidated appeal were also given the opportunity to attend and make oral submissions, but neither chose to do so.

The relevant facts

79. The hereditament with which this appeal is concerned is used by the appellant for the malting of barley for use in brewing and distilling. The property occupies a site of over 20 acres and comprises more than 80 individual buildings. It was originally entered in the 2010 compiled valuation list as "maltings and premises" with

a rateable value of £1,325,000. Following a series of changes of circumstances the rateable value was subsequently increased to £1,380,000 with effect from 1 April 2012 and then to £1,470,000 with effect from 7 October 2013.

80. The appellant made proposals challenging each of these valuations, and these were referred by the VO to the VTE as appeals.

81. The appeals were first listed to be heard on 13 July 2016. The VTE's standard directions annexed to PS/A7 applied to the appeals and both the appellant and the VO complied with the requirement to serve statements of case on the VTE and each other in accordance with the prescribed timetable.

82. The hearing due to take place on 13 July 2016 was postponed at the request of the parties to allow them to consider the impact of the decision of the Supreme Court in *Woolway v Mazaars* [2015] AC 1862; [2015] UKSC 53. The appeals were subsequently relisted and a notice of hearing was issued on 27 September informing the parties that arrangements had been made for the appeal to be heard on 6 December 2016.

83. Under paragraph 14 of PS/A2 a professionally represented appellant was required to make contact with the VTE between 7 and 14 days before the hearing date indicating whether the proceedings "are still active". The appellant's representative, Mr Turton of BNP Paribas, complied with this requirement by email on 28 November when he informed the VTE that the appeals remained active, but that he intended to meet the VO in a few days to discuss them. For that reason Mr Turton informed the VTE that "hearing slots are not requested."

84. Paragraph 17 of PS/A2 informs parties that, after making contact as required by paragraph 14, they "will be informed whether they had been placed on the provisional hearing list for the date in question." No such information appears to have been provided by the VTE.

85. Mr Turton subsequently met the VO and felt able to inform the VTE by email on 2 December (the Friday before the hearing due on the following Tuesday) that the parties were optimistic that the appeals would be resolved by agreement without a hearing and that they would seek to achieve that before the hearing date. Mr Turton warned the VTE that if settlement was not achieved neither party would be able to present its case on the following Tuesday because of the complexity of the valuation and added that "in those circumstances we would not require hearing slots and request postponement of the hearing."

86. Paragraph 18 of PS/A2 creates an expectation that parties who have been placed on the provisional hearing list "will normally be informed at least 3 clear working days before the hearing date whether or not they have been placed on the final hearing list." For appeals listed for hearing on 6 December the last day for such notice to be

given was Wednesday 30 November. Notice had not been given that these appeals were on the provisional list and no notice was given by the VTE that they were on the final list. The VTE reserved the right to confirm a hearing where only 2 clear working days' notice was possible, which would have allowed notice to be given by the end of Thursday, 1 December, but once again no notice was given.

87. In the event a settlement was not achieved before the hearing date. Mr Turton informed the VTE by email in the early afternoon of Monday, 5 December that the parties' expectation was that with further time the appeals were capable of resolution without the need for a hearing and he inquired whether in those circumstances the clerk was able to postpone the hearing due to take place the next morning.

88. In an email timed at 16:35 on the same day the VTE issued a notice of intention to strike out the appeals. This informed Mr Turton, incorrectly, that the appellant had failed to make contact with the VTE between 7 and 14 days before the hearing date as required by PS/A2; this was said to have caused the VTE to be "unable to make the necessary arrangements for the appeal." The notice went on to state that the appellant had made an application to postpone the hearing and that the application was refused. As a result, the appellant's supposed failure to comply with PS/A2 would be dealt with by the panel at the hearing the next day, and that it might exercise its power to strike the appeal out under regulation 10(3)(b) of the 2009 Regulations (i.e. on the basis that the appellant had failed to cooperate with the VTE to such an extent that it could not deal fairly and justly with the proceedings).

89. On receipt of the notice of intention to strike out Mr Turton promptly replied informing the VTE of its error concerning compliance with PS/A2. He also explained that while he had no grounds on which to request a postponement of the appeals it was now conceded in principle by the VO that all three assessments were too high and that in those circumstances it would not be fair or just for the appeals to be struck out. He would therefore attend the hearing to request an adjournment. Mr Turton was supported in his request by the VO who confirmed by email that he expected the appeals to be concluded by agreement by the end of the same week and did not anticipate any further need for a hearing.

90. At the hearing on 6 December Mr Turton explained the position to the panel, including the parties' joint expectation that the appeals would shortly be settled with an agreed reduction in assessments, and requested that they be adjourned. The request was supported by the VO's representative in attendance. The panel withdrew to consider the application but, on returning, indicated that it was refused and that the appeals were struck out.

91. The parties were given written notice of the VTE's decision on 12 December. The notice stated only that the proceedings had been struck out owing to a failure to comply with a direction issued by the VTE with the notice of hearing, without identifying the particular direction which was said to have been breached; on the face of it, therefore, the decision was made under regulation 10(3)(a) not 10(3)(b) .

The application for reinstatement and the VTE's decision

92. On 19 December Mr Turton applied for the appeals to be reinstated. The application was made on alternative grounds, the first being that the appeals ought not to have been struck out at all, and the second that, if properly struck out, they should nevertheless be reinstated in the interests of justice.

93. In support of the first ground of application Mr Turton pointed out that the reason given in the VTE's notice of intention to strike out the appeals was factually incorrect, and that the direction to inform the tribunal if the appeal was still active had been complied with in good time. He called into question the VTE's power to strike out an appeal for non-compliance with a Practice Statement, unless the non-compliance was sufficient to fall within regulation 10(3)(b). He also complained that for the VTE to give notice of an intention to strike out at 16:35 on the afternoon before a 10:30 hearing was procedurally unfair.

94. In the alternative, if the appeal had been properly struck out Mr Turton asked that it be reinstated. He relied on the fact that the appeals were complex and the parties had been close to agreement, the VO having offered to reduce all three assessments significantly. For the appeals to be struck out would deprive the ratepayer of an accurate assessment and prevent the VO from complying with his statutory duty to maintain an accurate list. To strike the appeals out in those circumstances would be contrary to the requirement for the VTE to have regard to the matters listed in regulation 3 of the 2009 Regulations.

95. Mr Turton's application for reinstatement was careful and considered. The VTE's decision refusing the application, which was given by one of its Vice-Presidents on 6 January 2017, was rather cursory, saying only this:

> "The appeals were rightly struck out by the panel at the hearing. The appellant's representative had failed to properly comply with [PS/A2] (stating on 28 November 2016 that no hearing slots were required, before subsequently having an application for the postponement of the appeals refused.)
>
> The appellant's representative's compliance with the Standard Direction as regards the submission of statements of case are of no relevance given the subsequent actions taken.
>
> As such there are no grounds to authorise the application."

The appeal

96. Although formally this is an appeal against the decision of the Vice-President made on 6 January 2017 not to reinstate the appeal ("the reinstatement refusal"), the appellant's main challenge is to the decision of the VTE on 6 December 2016 to strike the appeal out at all ("the strike-out decision"). The appellant contends that there were no grounds on which the appeal could properly be struck out, and that the strike-out decision was wrong. The determination of that issue does not involve any

question of discretion. There either were grounds capable of justifying the striking out of the appeals or there were not, and if there were not the VTE had no power to make the strike-out decision and the Vice-President should have reinstated the appeals as a matter of right.

97. It is not obvious to us on what basis the strike-out decision was taken.

98. The strike-out decision itself refers to an unspecified "failure to comply with a direction issued by the VTE with the notice of hearing" i.e. the VTE's standard directions contained in PS/A7 which were issued to parties as a matter of routine together with notices of hearing from January 2012 to April 2017. The substance of the standard directions was the timetable for the exchange of statements of case. If the VTE's decision was based on a supposed failure by the appellant to file a statement of case, it was made on a mistaken basis; there had been no such failure, as the Vice-President acknowledged in the reinstatement refusal.

99. The Vice-President nevertheless took the view that the appeals had been properly struck out because the appellant had failed to comply with PS/A2. The relevant failure is said to have been "stating on 28 November 2016 that no hearing slots were required, before subsequently having an application for the postponement of the appeals refused." The suggestion that there had been a breach of the timetable laid down by PS/A2 is also consistent with the notice of intention to strike out issued by the VTE late on the afternoon before the hearing.

100. We are satisfied that there was no such breach.

101. Mr Turton complied with paragraph 14 of PS/A2 when he informed the VTE on 28 November 2016 that the appeals remained active. He was obliged to do no more than that, and it was unnecessary for him to inform the VTE additionally that the parties were in discussion and that "hearing slots are not requested." No doubt that information was intended to be, and was, of assistance to the VTE in gauging the number of appeals which might require to be considered on 6 December. It should also have been useful in determining how many cases ought to have been notified that they had been entered in the provisional hearing list, as contemplated by paragraph 17, but it appears not to have been used for that purpose. Whatever use the VTE made of the information, the appellant was certainly not at fault in providing it.

102. The Vice-President coupled the suggested breach of PS/A2 with the refusal of an application for the postponement of the hearing. We do not think that provided grounds for striking out the appeals. There ought to have been no need for an application to postpone the hearing as the appellant was not informed that the appeals were on a provisional list and was not given either three or two clear working days' notice that they had been included in the final list. PS/A2 does not say in terms what will happen to an active appeal which is not included in the provisional hearing list or the final hearing list, but a party who has made contact as required by paragraph 14 and who has not received confirmation that the appeal will be heard is directed by

paragraph 21 not to appear at the hearing. Since postponement is treated by the VTE as an administrative decision the inference to be drawn from these directions would seem to us to be that where notice has not been received at least two clear working days in advance of the hearing date the appeal has been postponed and will not be considered. Not having been informed that the appeal had been placed on the final hearing list by the end of the day on 1 December at the latest, the appellant was therefore entitled to assume that it had been postponed and would not be considered.

103. In any event, the appellant did not apply for a postponement of the hearing. On 5 December Mr Turton explained the state which the parties had reached, approaching settlement, and inquired whether in those circumstances the clerk was able to postpone the hearing. The clerk treated that inquiry as a request for postponement and rejected it. We do not consider that the Vice-President was entitled subsequently to treat that as evidence of a breach on the part of the appellant without putting it in its proper context, which was that the parties had not been told they were on a provisional or a final hearing list. Had they been informed on 28 or 29 November that they might be heard, or on 30 November or 1 December that they would be heard, the parties might either have achieved the settlement they clearly anticipated, or made a more substantial application for postponement, or prepared for the hearing.

104. Finally, if the VTE had applied its own Practice Statements, the refusal of a request to postpone or adjourn ought to have led to the appeal being heard, not struck out. That is explicitly stated in paragraph 16 of PS/A2 to be the consequence of an unsuccessful application.

105. We are therefore satisfied that there were no grounds on which the VTE could properly strike out the appeals on 6 December and that both the strike-out decision and the reinstatement refusal were both wrong.

106. Had we taken the view that there was a breach of PS/A2 we think it likely that we would have set aside the Vice-President's refusal of reinstatement in any event. The decision did not address the alternative ground of application, namely that the sanction of striking out was not a just or proportionate response to such default as had occurred. That omission, by itself, would have provided sufficient grounds for setting aside the refusal of reinstatement and remaking the decision. We think it very likely that had we been required to consider all of the relevant factors afresh and to make an assessment of our own on *Denton* principles, we would have concluded that this was an appropriate case for reinstatement. As the appeals ought never to have been struck out, however, it is unnecessary for us to undertake that exercise.

107. For these reasons we allow the Simpson's Malt appeals and remit these matters to the VTE for consideration of the substantive issues. The parties may well be in a position now to resolve those issues by agreement, but we nevertheless direct that the appellant apply to the VTE for further directions within one month of the date of this decision.

Norton Motorcycles

108. The appeal by Norton Motorcycles Ltd concerns two separate hereditaments comprising the ground floor and the first and second floors of the Hastings Building at Donington Park, Castle Donington. The following facts are taken from the appellant's statement of case and supporting documents, and are not disputed by the VO.

The relevant facts

109. Following a change of use, and with effect from 16 September 2013, the ground floor of the Hastings Building was entered in the valuation list as office and premises with a rateable value of £169,000. We assume a separate entry was also made for the first and second floors, which were used for educational purposes.

110. On 27 October 2014 Mr Marshall of Conneely Tribe, the ratepayer's agent, proposed changes to the entries to reduce the listed values. These proposals were not accepted by the VO who referred them to the VTE as appeals, which were subsequently listed to be heard on 16 October 2015.

111. In accordance with the VTE's standard directions Mr Marshall and the VO each filed statements of case in September 2015 from which it was clear that there was a disagreement over the measurement of the hereditaments. The first hearing of the appeals was postponed. A second hearing was also subsequently postponed.

112. On 1 July 2016 the VTE introduced a six month non-domestic rating appeal pilot project ("the Pilot") which applied to the Castle Donington area. The Pilot was based on a new set of standard directions and listing arrangements which were to take the place of the VTE's existing Practice Statements. The explanatory note which accompanied the Pilot directions stated specifically that PS/A7 and paragraphs 13 to 21 of PS/A2 were suspended for appeals in the Pilot. The note then explained:

> "If standard directions under Practice Statement A7-1 have already been issued in respect of this appeal, but the hearing has been postponed or adjourned and a new notice of hearing issued after 1 July 2016, these pilot standard directions will apply even though the parties may already have produced statements of case."

113. The Pilot directions are similar to the directions subsequently contained in VTE CPS 2017, as they involved less continuous supervision by the VTE of the steps the parties were required to take to prepare for a hearing. The explanatory note made it clear, nevertheless, that the directions were formal orders of the VTE and must be complied with. The parties were warned that in the event of a failure to comply the VTE might exercise its power to strike out the appeal or response at the hearing.

114. The Pilot pre-hearing timetable required the appellant to initiate discussions with the VO so that, no later than 10 weeks before the date of the hearing of the appeal, the parties would have identified agreed facts and issues in dispute and exchanged valuations (para 1). Not later than 6 weeks before the date of the hearing the appellant was to serve its statement of case on the VO (but was not, at that stage, to file it with the VTE) (para 3). Not later than 2 weeks before the date of the hearing the appellant was required to file with the VTE and serve on the VO a copy of all of the documents disclosed by both parties in accordance with the directions (para 7).

115. On 22 August 2016 the VTE gave notice that the appeals would be heard on 29 November. The notice of hearing was accompanied by the Pilot directions and explanatory note and their significance was emphasised in an email sent on 24 August which reminded Mr Marshall of the need to initiate contact with the VO and exchange valuations by 20 September. Mr Marshall made a note of that date in his electronic diary and telephoned the VO's representative, Mr Ward, for a preliminary discussion.

116. Mr Marshall again spoke to Mr Ward on the telephone on 20 September and asked for more time to submit his valuation. Mr Ward appears to have been relaxed about the need for compliance with the directions.

117. Shortly before 18 October Mr Marshall was reminded that the appellant's statement of case was due to be served in accordance with paragraph 3 of the Pilot directions. Having submitted his statement of case in September 2015, he assumed that it was not expected that he would serve another copy and believed that there was nothing further which he ought to do.

118. Nor did the VO submit a new statement of case. It is not clear whether this was because, like Mr Marshall, he understood that the document submitted in September 2015 was all that was required or whether he considered that he was only required to submit a statement of case in response if the ratepayer had done so.

119. Two weeks before the hearing date Mr Marshall submitted a hearing bundle in compliance with paragraph 7 of the Pilot directions.

120. By 29 November, the date fixed for the hearing, Mr Marshall had come to believe that he had failed to comply with the direction to serve a statement of case and was at risk of the appeals being struck out. We assume that some notice to that effect was given by the VTE, but it is not in evidence.

121. Mr Marshall prepared a detailed written application for an adjournment of the hearing and for new directions. This document is dated 29 November and we assume it was presented to the VTE at the hearing which took place on that date. In it Mr Marshall explained difficulties his firm had experienced with a diary software package it used to alert it to tribunal deadlines. He said that he had not disregarded the Pilot directions but had misunderstood what was expected of him, in particular in

relation to the submission of statements of case, because he had not appreciated that the statements of case filed in September 2015 might be regarded as insufficient.

122. Mr Marshall's application was supported by the VO's representative at the hearing.

123. The VTE struck out the appeal. The panel gave its reasons in writing on 5 December 2016, recording that Mr Marshall had admitted a failure to comply with directions and stating that paragraphs 1, 3 and 7 of the Pilot directions had been breached. Its substantive reasons for striking out the appeal were contained in paragraph 6 of its decision, as follows:

> "Unfortunately for the appellant, there were no exceptional reasons to justify its representative's non-compliance with the Pilot directions. There was no dispute that the notices of hearing with the Pilot directions were received, unfortunately they were disregarded. In the panel's opinion, IT issues did not qualify as exceptional circumstances to excuse non-compliance with tribunal directions. The panel therefore decided that it was not in the interest of justice to adjourn these appeals. There was a cost to the public purse of adjourning and re-listing appeals and therefore adjournments should only be given sparingly and only where there were exceptional circumstances, which was not the case here. Consequently, the appeals were struck out."

124. The VTE did not explain in its decision what behaviour constituted breaches of paragraphs 1, 3 and 7, presumably because it understood that Mr Marshall had accepted that they had occurred. It must nevertheless have been satisfied that he had failed to make contact with the VO not later than 10 weeks before the date of the hearing, failed to serve a statement of case on the VO not later than 6 weeks before, and failed to file a hearing bundle not later than 2 weeks before that date.

The application for reinstatement and the VTE's decision

125. On 23 December 2016 Mr Marshall applied for the reinstatement of the appeals in accordance with regulations 6(3)(a) and 10(5). In his application he took issue with the suggestion that he had failed to comply with paragraphs 1 and 7 of the Pilot directions. He acknowledged that he had not complied with paragraph 3, and once again submitted that, although he had not fully understood the directions, he had not disregarded them.

126. The application for reinstatement was determined by the President of the VTE Mr G J R Garland, on 30 January 2017. The President refused the application and gave the following reasons for his decision:

> "The representative in both cases accepts that there was a failure by them to comply with the Directions of the Tribunal in particular Standard Direction 3. When the matter came before a panel on 29 November 2016 the panel carefully considered the representations made to explain away the failures to comply

> which rested mainly in the representatives' [failure] to appreciate the more robust nature of the process and the failures of their internal administrative processes to recognise and deal with the changes. However, there were no exceptional reasons for the failures to comply that I can see and whilst it is unfortunate that the firm had these difficulties, those matters are not of a nature which would allow this appeal to succeed. It is in the interests of justice that cases proceed expeditiously and are not frustrated by the failure of the representative to have appropriate systems in place to deal with cases and the new procedures. Therefore there being no exceptional reasons to explain the failures this appeal must fail and the application dismissed."

127. In his decision the President described the circumstances relied on by the appellant as being "not of a nature which would allow this *appeal* to succeed" and concluded by saying that "this *appeal* must fail". That suggests to us that the President treated the application for reinstatement as an appeal against the panel's decision to strike out the substantive appeals. If that is indeed the case, it was a mischaracterisation of the application. There is an important difference between an application for relief against the sanction of striking out, the determination of which is a self-contained exercise of discretion by the decision maker, and an appeal against a decision to strike out, which involves a review of the correctness of a decision made by someone else. We may be reading too much into the President's choice of words but we are left uncertain as to the exercise he believed himself to be undertaking.

The appeal

128. In his statement of case in support of the appeal Mr Marshall accepted that there had been a failure to comply with paragraph 3 of the Pilot directions (service of a statement of case on the VO not later than 6 weeks before the date of the hearing) and sought to explain it. He had been influenced in his conduct by the previous practice of the VTE, which did not require that a statement of case be filed or exchanged again if an appeal was postponed. He had been under "a genuine misunderstanding" that the statement of case he had provided to the VO in September 2015 was sufficient compliance with the Pilot directions which, he suggested, were ambiguous.

129. Mr Marshall also relied on the consequences for the ratepayer and for the integrity of the rating list if the appeals were not reinstated. It was now common ground with the VO that the floor areas on which the original valuation had been based were overstated and that the list entries needed to be reduced. Due to the passage of time, absent the appeal succeeding, the earliest date from which the list could be altered to reflect this consensus was 1 April 2015. That, Mr Marshall suggested, would be not be fair to the ratepayer.

130. The VO did not take issue with any of these factual submissions in his own statement of case, but nevertheless resisted the appeal in a respondent notice. In a written argument delivered shortly before the hearing of the appeal the VO's position was that the VTE had been correct to strike out the appeals and to refuse to reinstate them. Having supported Mr Marshall's original application to the VTE for an

adjournment, for the VO to seek the dismissal of this appeal might be regarded as unattractive, and perhaps for that reason Mr Singh retracted the VO's previous opposition to the appeal and instead took what he described as a neutral stance.

131. Mr Marshall was willing to concede before us, as he had before the VTE, that he had failed to comply with paragraph 3 of the Pilot directions, but with some prompting from the bench he was persuaded to place greater weight on his submission that the directions themselves were, at best, ambiguous (as we explain below) and that on a fair reading the course he had taken was entirely in accordance with their requirements. Unless there was some breach of the directions the VTE had no grounds for its decision to strike the appeals out, and we therefore begin by considering that question.

132. There was clearly no breach of paragraph 7, which required that a hearing bundle be filed two weeks before the hearing date. It is agreed that Mr Marshall complied with that direction.

133. Paragraph 1 required the appellant to initiate discussion so that, no later than 10 weeks before the date of hearing the parties had discussed and identified the agreed facts and issues in dispute and exchanged valuations. Mr Marshall had been in contact with a number of different valuation officers in connection with the appeal in anticipation of the two previously listed hearings, and had had what he described in his application as "dead-end discussions." In his September 2015 statement of case he had put forward his own account of the relevant facts including his own measurements, had identified the comparable properties he relied on and had provided his own valuation. The VO had not taken issue with Mr Marshall's measurements in his own statement of case, saying only that the survey data would be checked prior to the hearing "subject to time constraints and available resources" but that if this had not been possible the VO might seek an adjournment on the day of the hearing.

134. We do not see how it can be said in these circumstances that there was any breach of paragraph 1 by Mr Marshall. He had done what was required of him by initiating discussions and setting out his own case, and faced with the VO's non-committal approach it is difficult to see what further steps he could have taken.

135. The only possible basis on which paragraph 1 could be said to have been breached would be if the allocation of the appeals to the Pilot on 1 July 2016 had the effect that steps taken before that date were now to be ignored and required to be re-taken in accordance with the new Pilot directions. Mr Marshall's reluctant acceptance that that was indeed the effect of the Pilot directions was also the basis of his admission of a supposed breach of paragraph 3. With respect to Mr Marshall, and to the VTE, we do not regard that as a fair reading of the Pilot directions.

136. It is obvious that discussions initiated, and valuation provided, in September 2015 were steps taken more than 10 weeks before an appeal eventually listed to be heard on 29 November 2016. So too, a statement of case provided on 15 September

2015 was undoubtedly provided more than 6 weeks before that hearing date. For those steps to be treated as not having been taken could only be on the basis that something in the Pilot directions required them to be ignored. Was that their effect?

137. The position before the Pilot directions were introduced on 1 July 2016 was clear. Under PS/A7 if an appeal was postponed, as happened twice to these appeals, a statement of case already submitted by the appellant was to "remain in place." That can only mean that the statement of case did not need to be filed for a second time.

138. PS/A7 was suspended by the Pilot and the effect of that suspension on existing appeals was explained in an explanatory note. If standard directions under PS/A7 had already been issued but the hearing has been postponed and a new notice of hearing issued, "these pilot standard directions will apply even though the parties may already have produced statements of case."

139. It would have been clear to any party who read the explanatory note that, if their appeal had been postponed, they were no longer to comply with the standard directions but were now to comply only with the Pilot directions. It would not have been clear that the VTE expected such a party to proceed as if steps already taken had not been taken, and indeed we do not believe that the explanatory note is fairly capable of that interpretation. The relevant directions required procedural steps to be taken *not later than* a stipulated time before a hearing. It did not require steps to be repeated, or to be taken within a fixed window before a hearing. In short the Pilot did not undo what had already been done.

140. Mr Singh suggested that it would be beneficial to the VTE, where there had been a postponement of an appeal for which statements of case had already been submitted, for those statements to be up-dated shortly before the rescheduled hearing so that the current state of dispute was clear. That may well be so in some, but not necessarily all, cases, but it is not what the Pilot directions required. Nor without a warning in the clearest possible terms would it justify treating an appellant as being in default for failing to give the VO a further copy of a document which remained unchanged (under paragraphs 3 and 7 of the Pilot there was, of course, no requirement to file the statement of case with the VTE until it was supplied with the hearing bundle two weeks before the hearing).

141. We are therefore satisfied that the VTE's view of the effect of the Pilot directions was mistaken. There was no breach by the appellant of any of those directions.

142. Mr Marshall's reluctant acquiescence in the VTE's mistaken interpretation, and his concession of a breach of paragraph 3 when he made his application for an adjournment and his request for reinstatement should not be held against him. He was, it might be thought, entitled to regard the VTE as a reliable guide to the meaning of its own directions although he personally regarded them as ambiguous. More importantly the VTE's jurisdiction to strike out an appeal under regulation 10(3)(a) arises only where the appellant has failed to comply with a direction which stated that

non-compliance might lead to the striking out of the proceedings. There is no question of any failure of co-operation in this case, nor were the original appeals without any reasonable prospect of success, so the power in regulations 10(3)(b) and (c) were not engaged. The existence of a breach was therefore a prerequisite to the striking out of the appeals, and as there was no breach the appeals must be reinstated whatever Mr Marshall's mistaken view in this regard.

143. Because there was no breach by the appellant of any direction the appeal must be allowed. There is therefore no need to consider the exercise by the VTE of the discretion to strike out and the refusal of reinstatement. We are nevertheless troubled by the VTE's use of its powers in this case, even if it is assumed to have been correct in considering that there had been a breach of paragraph 3 (we do not see how it could possibly have found a breach of paragraphs 1 and 7). No real attempt appears to have been made by the panel to identify the material facts or to weigh up the factors relevant to the exercise of its discretion as the VTE's own statement of its practice on applications for reinstatement, PS/C2, required it to do. Instead it considered whether there were "exceptional reasons" to justify the non-compliance which had occurred. Neither the 1988 Act and the 2009 Regulations, nor the VTE's own policy expressed in PS/C2 permitted an "exceptional circumstances" test to be used as the sole criterion for determining whether to strike out an appeal or bar a party from participation, or whether to allow an application for reinstatement. (We would add that such an approach is also barred by the *BPP/Denton* principles which the VTE has now expressly adopted in CPS 2017, see paragraphs 45 to 47 above).

144. The President's decision refusing to reinstate the appeals also focussed on the absence of exceptional reasons for the supposed failures of compliance, and, strikingly, did not refer at all to the criteria identified in PS/C2. Some of the considerations identified in that document as relevant to such applications were particularly important in these appeals including the interests of the administration of justice, whether the failure to comply had been intentional, accidental or negligent, whether there was a sufficiently good explanation for the failure, and the effect of granting the application.

145. As the appeals ought not to have been struck out, it is unnecessary for us to consider these issues further. We allow the Norton Motorcycles appeals and remit these matters to the VTE for consideration of the substantive appeals. The appellant must apply to the VTE for further directions within one month of this decision.

First Colour Ltd

146. The appeal by First Colour Ltd concerns shop premises on the ground floor and basement at 15 Newman Street, London W1.

The relevant facts

147. The premises adjoin the site of a Royal Mail depot which began undergoing demolition and redevelopment in March 2014. The disturbance caused by the work

led the appellant's agents, JMA Chartered Surveyors ("JMA"), to seek a reduction in the rateable value of the premises on the grounds that there had been a material change of circumstances. A proposal submitted on 12 June 2014 was not accepted by the VO and was referred to the VTE as an appeal. The appeal was one of a number concerning the effect of the works on premises in the locality of the development site.

148. The parties were given notice by the VTE that the appeal would be heard on 22 November 2016 and that the standard directions applied.

149. The parties exchanged statements of case in accordance with the standard directions' timetable. The appellant sought a reduction in rateable value of 20% during the redevelopment works. The VO's case stated that there was no dispute regarding factual matters, but suggested that he had been given no detailed information on the extent of the disruption caused by the works.

150. In response to the VO's complaint of lack of information Mr Ellis of JMA sent photographs and a video of the site to Mr Pain, the VO's representative, on 8 November. That day was also the opening of the 7 day window within which Mr Ellis was required by paragraph 14 of PS/A2 to inform the VTE whether the appeal was still live. The window closed on 14 October without Mr Ellis having done so.

151. On Thursday 17 November, two clear working days before the hearing was due to take place on the following Tuesday, Mr Ellis contacted the VTE by email, informing it that he had been able only briefly to discuss the matter with Mr Pain but felt that it was capable of being agreed without the need for a hearing. He added that to the best of his knowledge the appeal had not been given a hearing slot, and requested that it be postponed for a short period.

152. Mr Ellis was no doubt correct that the appeal had not been given a hearing slot because, applying paragraph 14 of PS/A2, the VTE was entitled to assume that it was not active and was liable to be struck out either before or at the hearing.

153. The VTE responded in a standard form by return of email on 17 November. It informed Mr Ellis of his non-compliance with PS/A2 and that his application for a postponement was refused, and gave notice of the VTE's intention to strike out the appeal in accordance with regulation 10(3)(b) unless he was able to demonstrate at the hearing "that there had been an exceptional reason for not complying with the Practice Statement." It will be remembered that regulation 10(3)(b) allows the VTE to strike out an appeal if there has been such a failure of co-operation by an appellant that the VTE cannot deal with the proceedings fairly and justly. Where an appellant's representative failed to give notice under paragraph 14 of PS/A2, paragraph 16 simply warned that the appeal *might* be struck out, a matter dealt with under regulation 10(3)(a). We have previously pointed out that neither the legislation governing the VTE nor its own Practice Statements permitted the use of an "exceptional reasons" test as the sole criterion for determining whether to exercise the power to strike out or

as a substitute for the proper exercise of judicial discretion (paragraphs 45 to 47 above).

154. In a witness statement provided for the purpose of this appeal Mr Ellis stated that he had not previously been aware of regulation 10(3)(b) but that on receiving the notice of intention to strike out he had consulted PS/A2 and had been reassured by the statement in paragraph 16(3) that a representative refused a postponement prior to a hearing may appear in person to apply for an adjournment "but if that application is refused, the appeal will be heard." Mr Ellis therefore attended the hearing on 22 November, as he put it, "ready to present, but suggesting a postponement."

155. Because PS/A2 had not been complied with, the appeal had not been placed in the final hearing list for 22 November. As a result Mr Pain did not attend the hearing on behalf of the VO, who instead was represented by a member of his staff who had no detailed knowledge of the appeal. When Mr Ellis made his application for the appeal to be adjourned, the VO's representative supported him.

156. In his witness statement Mr Ellis stated that he was informed by the VTE's clerk at the hearing, before the panel retired to consider its decision on his application, that the panel had recently received instructions from the President of the VTE that anyone applying for a postponement less than 7 clear days prior to the hearing would have his case struck out unless there were exceptional circumstances.

157. The VTE communicated its decision to strike out the appeal at the hearing but the only written record is a statement placed on the VTE's website on 5 December stating simply "appeal struck out." No formal decision notice or record of the panel's reasons for its decision have been provided to JMA.

The application for reinstatement and the VTE's decision

158. Within hours of the appeal having been struck out, Mr Bacon, a director of JMA, took issue with the decision in an email to the VTE in which he requested that it be rescinded. Mr Bacon contended that the VTE had no power to strike out an appeal for non-compliance with the notification requirement in paragraph 14 of PS/A2 and asserted that the only available course of action open to it after refusing the application to adjourn was to hear the appeal. After a further email exchange Mr Bacon's communications were referred to the President of the VTE on 23 November as an application for the reinstatement of the appeal.

159. These exchanges took place almost immediately after the VTE had announced its decision and at a time when no written record had been produced. The decision to treat Mr Bacon's protests as an application for reinstatement was made by the VTE itself and may explain why no steps were taken to issue a decision notice or give reasons for the decision.

160. The President refused the application for reinstatement in a decision made on 8 March 2017, for which he gave the following reasons:

> "A Notice of intention to Strike Out for non-compliance with Practice Statement PS/A2 was issued on 17/11/16. A representative of JMA (Richard Ellis) attended the hearing to seek a postponement as a possible reduction by agreement with the VOA was pending (temporary reduction for building works) but not yet concluded. The clerk reports that no submission was made at the hearing in response to the notice of intention to strike out by way of mitigation and the panel decided to strike out the appeal at the hearing for failure to comply with PS/A2.
>
> A challenge to the panel's decision to strike out was received 22/11/16 from Andrew Bacon at JMA on the grounds that such decision was not in accordance with the contents of para 16, PS/A2 (and PS/A4).
>
> However, Mr Bacon has incorrectly read PS/A2. He looks to avoid the strike out by reading into the PS matters which are not relevant as there was a failure to comply and an intention to strike out notice."

161. Although the appeal was struck out by the VTE, the expectation that the parties would reach a consensus on an appropriate allowance to reflect the impact of the redevelopment work on the value of the appellant's premises proved to be correct. We were informed that on 28 June 2017 the VO altered the 2010 list to reduce the rateable value by 20%. The appellant's proposal of 12 June 2014 and subsequent appeal had sought a reduction from the date of the proposal, but the earliest date from which such an alteration could be made by the VO was 1 April 2015.

The appeal

162. The appeal was conducted on behalf of First Colour by Mr Bacon of JMA.

163. In his written case Mr Bacon explained that he had regarded the VTE's original decision as a procedural error on its part, which at first he had sought to have corrected informally. When it became clear that this would not succeed he had sought written reasons for the original decision to strike out the appeal, but these had never been provided.

164. It is a notable feature of this appeal that it was presented with very little attempt to explain, excuse or mitigate the omission by Mr Ellis of JMA to comply with paragraph 14 of PS/A2 by contacting the VTE within the prescribed pre-hearing window. The same was true of the exchanges which were treated by the VTE as an application for reinstatement: in his email of 22 November Mr Bacon had acknowledged that there had been a failure to comply with paragraph 14, which he described as "an oversight", but he had not offered what the President later described as "mitigation". Nor had Mr Ellis done so at the hearing on 22 November. At each stage after the decision to strike out was made the main thrust of the ratepayer's case has been that the VTE had exceeded its jurisdiction and that, having decided not to

adjourn the matter, the only course properly open to it on 22 November was to hear the appeal. That argument was supported by a large number of supporting points, but we will deal with Mr Bacon's central point first.

165. Mr Bacon began by drawing attention to the powers of the VTE to strike out appeals contained in regulation 10. He correctly submitted that an appeal could not be struck out automatically under regulation 10(1) except for failure to comply with a direction which stated that non-compliance would result in that sanction. Examples of directions of that nature could be found in paragraphs 2, 4 and 6 of the standard directions. But in our judgment this was not such a case, as the basis on which the appeal was struck out was non-compliance with PS/A2, which does not include any warning that non-compliance would *automatically* result in strike out.

166. Mr Bacon then argued that the striking out of an appeal was not permissible where the breach complained of was a breach of PS/A2. This was for two reasons.

167. The first was that regulation 10(3)(a) gives the VTE a discretion to strike out an appeal only where the appellant has "failed to comply with a direction" containing the necessary warning. Only the breach of a direction could provide grounds for striking out and, Mr Bacon submitted, a Practice Statement, in particular PS/A2, was not a direction. He accepted that a serious or repeated failure to comply with a Practice Statement could provide grounds for striking out, but only under regulations 10(3)(b), where it amounted to such a failure of cooperation as to make it impossible for the VTE to deal fairly and justly with the proceedings. Mr Bacon noted that the VTE had appeared to take the same approach in its notice of intention to strike out on 17 November, which had referred only to the power to strike out under regulation 10(3)(b).

168. We do not accept that the VTE's powers are as limited as Mr Bacon contended.

169. First, and as a matter of language, the Practice Statements contain instructions, or directions, and it would be clear to any reader that these were not optional but were intended to be complied with, and that specific sanctions for non-compliance were provided for. There was no ambiguity as to the consequence of a failure to take the steps required by PS/A2: paragraph 14 made it clear that a professional representative "must make contact with the Tribunal between 7 and 14 days before the hearing date", and paragraph 16(1) said that in the event of a failure to do so "it will be assumed that the proceedings are no longer active and they may be struck out either before or at the hearing". We are satisfied that is a sufficient statement for the purpose of regulation 10(3)(a) that non-compliance "could lead to the striking out of the proceedings".

170. All parties therefore knew the consequences of a failure to comply and, while we note the contrast between PS/A2 and the 2016 Pilot directions which came with an explicit statement in their explanatory note that "these directions are formal orders and must be complied with", we do not consider that the absence of such a statement in the previous Practice Statements deprived them of the same force.

171. The next question is whether a direction contained in a Practice Statement addressed to parties in all proceedings, rather than in an order addressed to one specific party in particular proceedings, is nevertheless a "direction" for the purpose of regulation 10(3)(a). As we have previously noted, despite there being no mention in the 2009 Regulations of Practice Statements or of any express power to issue them, the breadth of the VTE's power in procedural matters is spelled out by regulation 6(1). This provides that "the VTE may regulate its own procedure" subject only to the relevant provisions of the 1988 Act and the 2009 Regulations themselves.

172. The 2009 Regulations do not restrict the exercise of the VTE's power to regulate its own procedure in relation to the form in which directions are issued. The VTE is specifically empowered by regulation 8(1) to give directions on its own initiative. It is required by regulation 8(4) to send written notice of directions to each party "unless the VTE considers that there is good reason not to do so". We do not know if a copy of PS/A2 was sent to the parties in this appeal but, assuming it was not, the fact that the relevant requirements were addressed only to professional representatives, that the document was published on the VTE's website and was widely disseminated, and that software was readily available to facilitate compliance, all provide good reasons not to send a copy of the Practice Statement to the parties in every appeal but nonetheless to require compliance.

173. We are therefore satisfied that it was open to the VTE, in regulating its own procedures, to make Practice Statements and to include within them directions applicable generally to all cases, non-compliance with which might attract the sanction of striking out under regulation 10(3)(a).

174. The second ground on which Mr Bacon argued that it was simply not open to the VTE to strike out the appeal relied on the VTE's stated practice that in the event of an unsuccessful application to adjourn an appeal the appeal would proceed. That practice was said to be apparent from PS/A2 itself, and in particular from paragraph 16(3), which states that if an application for adjournment is refused "the appeal will be heard." Similarly, paragraph 19 records that even the fact that the relevant case worker is not present will normally be insufficient to justify adjournment on the day "and the hearing of the appeal will proceed." Paragraph 11 of PS/A4 was to the same effect in dealing with postponement and adjournments generally, as it warned that "if an application for an adjournment is not granted the panel will continue the hearing and the parties must be prepared to present their cases".

175. These directions caused Mr Ellis to attend the hearing on 22 November ready to present the appeal if his application for an adjournment was rejected. The VO has not challenged the assertion made in the appellant's statement of case that Mr Ellis was in a position to proceed and we have no reason to doubt it.

176. We agree that any tribunal should proceed in accordance with its published practice, and before departing from it should consider carefully whether there is any risk of prejudice to parties who may be taken by surprise. We do not, however, accept

that the relevant paragraphs of PS/A2 indicated that a representative who failed to comply with paragraph 14 was not at risk of seeing their appeal struck out. Paragraph 16(1) makes it perfectly clear that where an appellant's representative fails to make contact in the required window it will be assumed by the VTE that the proceedings are no longer active and they may be struck out either before or at the hearing. The subsequent directions concerning postponement or adjournment must be read in the light of that unequivocal statement.

177. Paragraph 16(2) makes it clear that a late, pre-hearing request for postponement is likely to be refused, but paragraph 16(3) indicates that the application may be renewed at the hearing. If a postponement was granted either before or at the hearing the risk of striking out would obviously be lifted, but there is nothing to suggest that that risk will be lifted if postponement or adjournment is refused. In particular, the direction in paragraph 16(3) that, if an application to adjourn is refused "the appeal will be heard", does not indicate what form that hearing will take, or what will be considered. Where notice has been given of the VTE's intention to strike out the appeal for non-compliance, the first matter for consideration at the hearing will necessarily be whether that intention should be carried into effect, or whether the appellant can show cause why the appeal should not be struck out but should proceed.

178. We do not consider that paragraph 16 can reasonably be understood as signifying that an appellant who has not complied with paragraph 14 need only make an application for an adjournment in order to escape the threat of the appeal being struck out. That would render the threat of sanction toothless. It would also be source of uncertainty and potential unfairness to the VO who will have been entitled to assume that, contact not having been made as required by paragraph 14, the appeal is no longer active. The purpose of paragraph 14 is to enable the VTE to plan its own lists and to ensure that neither too much nor too little work is brought forward for hearing on each occasion. As we understand the VTE's listing practice, appeals where the appellant's representative does not make contact are not include in the provisional list of cases which may be effective, or the subsequent final hearing list. Naturally Valuation Officers also rely on those lists in planning which appeals they should prepare for and attend. If Mr Bacon's reading of paragraphs 16 and 19 was correct, the VTE would need to allow sufficient hearing time for all appeals which were under threat of being struck out (thereby preventing other appeals from being listed). The VO would also need to attend, ready to respond to every appeal, including those where notice of intention to strike out had been given, or would take the risk that an application for an adjournment would be refused and the appeal would proceed in his or her absence. That would not be a fair or coherent scheme. It would not be in anyone's interest, and we are satisfied it is not the effect of PS/A2.

179. We therefore consider that the threat of striking out identified in paragraph 16(1) hangs over an appeal until the threat is lifted or acted upon, at or before the hearing. For that reason we reject Mr Bacon's submission that, having dismissed the application made by Mr Ellis to adjourn the hearing, the VTE was bound to proceed to hear the substantive appeal and was not entitled to strike it out.

180. We nevertheless acknowledge that the drafting of PS/A2 could have been clearer. In particular paragraphs 16(1) and (2), which both deal with non-compliance with paragraph 14, ought to have been kept more clearly separate from paragraph 16(3), which is concerned with any application to adjourn, irrespective of compliance with paragraph 14.

181. The approach taken by Mr Bacon both in this appeal and in his original objections to the strike out decision, has been to challenge the existence of a power for the VTE to strike out for non-compliance with a Practice Statement. We are satisfied that that challenge fails for the reasons we have given, and that the President had jurisdiction to strike the appeal out.

182. Mr Bacon supplemented his main argument on the jurisdiction of the VTE, which we have just dealt with, with a series of additional points. It is necessary for us to refer only to one of these, namely the absence in this case of any statement of the VTE's reasons for striking out the appeal.

183. The VTE's decision was given orally at the hearing on 22 November. It was not followed either by a decision notice recording the decision itself and providing information concerning rights of appeal (as provided for by regulation 36) or by a written statement of the panel's reasons (in accordance with regulation 37 in any case where the panel's decision finally disposes of all issues in an appeal).

184. Immediately after the President's decision of 8 March Mr Bacon requested a statement of reasons for the strike out decision, with a view to pursuing an appeal against it. He was informed by the VTE's staff that as there had been no hearing of "any substantive matter" on 22 November, and as no evidence had been heard, no "full decision" had been issued. When Mr Bacon challenged this interpretation he was informed simply that there was nothing to add to this explanation.

185. We are satisfied that the VTE is obliged by its rules to issue both a decision notice and a statement of reasons as soon as reasonably practicable after making a decision to strike out an appeal under regulation 10(3). Regulations 36(2) and 37(1) impose those obligations in respect of any decision which finally disposes of all issues in the proceedings, and a decision to strike out the proceedings is clearly of that kind.

186. The refusal of the panel to supply written reasons for its decision was therefore not only contrary to the practice adopted in the other appeals before the Tribunal, it was a significant breach of the VTE's own rules.

187. Mr Bacon submitted that in view of this breach, the strike-out decision of 22 November, or the reinstatement refusal of 8 March should be overturned.

188. In considering this submission we would first state clearly that, while we agree with Mr Bacon that the failure of the VTE to supply a decision notice and reasons was a significant error, we reject his suggestion that the panel or its staff committed the offence under regulation 41(5) of intentionally obstructing access to the VTE's records of its decision. The ratepayer's legitimate ground of complaint is that the appropriate record was not made and distributed, not that access was denied to a record which existed. Nor do we think Mr Bacon is correct to suggest that the VTE sought to deny the ratepayer the right to seek reinstatement under regulation 10(5) or a review under regulation 40; on the contrary, the panel's clerk treated the objections as an application under regulation 10(5).

189. It is well-established that where a tribunal fails to comply with its obligation to give reasons for its decision there is no general or absolute principle that the party affected is entitled to have that decision set aside (see e.g. the discussion in *De Smith's Judicial Review* (7th ed.) at paragraphs 7-112 to 7-113). In any event, unless and until an order is sought and obtained for the setting aside of the decision, it continues to have effect. It is not a nullity.

190. The purpose of the decision notice required by regulation 36 is to inform the parties of the decision and of their rights of appeal (or the opportunity to seek a review). In this case part of that purpose may have been achieved when the decision was announced at the hearing in the presence of both parties' representatives and it is also true that the ratepayer has had the opportunity to challenge the striking out of the appeal by pursuing an application for reinstatement. But a decision notice stating the decision in writing, as required by regulation 36(2), and a written statement of the VTE panel's reasons in cases where the decision disposes of the proceedings, as required by regulation 37(1), are not optional. They are essential to the transparency of the VTE's procedures and to the effectiveness of the tribunal user's right to seek reinstatement or to appeal (see *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, 2417 at [15]). The obligation to provide them must in each case be complied with by the VTE "as soon as reasonably practicable".

191. It is also significant in this case that the choice to treat the two emails sent by Mr Bacon on the afternoon of 22 November 2016 as an application for reinstatement was made by the VTE, rather than by the ratepayer, and that that choice was made at a time when the reasons for the panel's decision to strike out the appeal were not known.

192. The purpose of the statement of reasons required by regulation 37 is to inform the parties of the reasons for the panel's decision, so that they may understand it and be in a position effectively to exercise the right to challenge it by an appeal. In this case it might be inferred that the panel decided to strike out the appeal because Mr Ellis had failed to make contact with the VTE between 14 and 7 days before the hearing date as required by PS/A2. But that is insufficient. In the absence of a statement of reasons there is real uncertainty about the basis on which the panel took its decision and hence its legality. There are at least three reasons for that uncertainty.

193. The first is the most obvious. Without a statement of the panel's reasons it is possible only to speculate about its thought processes. The ratepayer cannot know what approach the panel took in reaching a decision, whether that approach was legally incorrect, what matters were taken into account or were disregarded, or why the panel considered that the breach was sufficiently serious to justify striking out the appeal.

194. The second reason is that in this case it is not clear under what discretionary power the panel acted. The notice of intention to strike out warned the ratepayer that the panel intended to rely on regulation 10(3)(b), which is available only where there has been such a failure to cooperate as to prevent the VTE from dealing with the case fairly and justly. It is important to know whether, in making its decision, the panel purported to rely on that provision since the right to apply for reinstatement under regulation 10(5) is not available in such a case, but only where an appeal has been struck out under regulation 10(3)(a). If the decision was made on the basis indicated in the notice of intention to strike out, the only means of challenging it would be by an appeal to this Tribunal (unless, exceptionally, there were grounds for a review under regulation 40). In that event the President's decision of 8 March would have been *ultra vires*.

195. The final reason for uncertainty arises from the conversation between Mr Ellis and the panel's clerk, (see paragraph 155 above) in which the clerk is reported to have said, apparently in the presence of the panel, that instructions had been received from the President of the VTE that where a postponement was requested less than 7 clear days before a hearing, the case should be struck out unless there were "exceptional circumstances." The content of that conversation is corroborated to some extent by the email exchanges between Mr Bacon and the VTE on the afternoon of 22 November in which a member of the tribunal's staff said that, in the circumstances described, an adjournment of an appeal would only be granted "where a ratepayer's representative has an exceptional reason for failing to comply". That approach was also consistent with what had already been said in the VTE's email sent on 17 November giving notice that the tribunal was minded to strike out the appeal (paragraph 151 above). As we have previously stated (paragraphs 45 to 47 above), there is no legal basis for the VTE to adopt an "exceptional circumstances" test in order to decide whether an appeal should be struck out or reinstated, and for it to do so would also be contrary to its own relevant Practice statement, PS/C2. So if, for example, the panel had given reasons for its decision creating a "substantial doubt" as to whether they had made a legal error of this nature, those reasons would be treated as legally inadequate. Such a decision could be set aside (see *South Bucks DC v Porter (No. 2)* [2004] 1 WLR 1953 at paragraphs 31 and 36). That legal objection does not disappear if the VTE fails to give any reason at all.

196. These considerations lead us to conclude that the VTE may well have proceeded on a misunderstanding of its task on 22 November. That task was to consider all relevant factors and to decide whether the fair course was to strike out the appeal, to proceed to hear it, or to adjourn it to enable the parties to seek to reach agreement. If this had been an appeal against the strike out decision itself we could have set aside the decision for lack of reasons, or remitted it to the VTE with a direction that the

panel should issue a proper decision notice with a statement of reasons. Which of those two courses should be chosen is fact-sensitive. The latter course would enable the ratepayer to consider whether to challenge the reasons by bringing a further appeal, but it would be unattractive for its lack of finality in a modest case which the parties have been able to resolve by agreement (in the present case see paragraph 160 above). It may also be necessary for the Tribunal to be cautious about the risk of *ex post facto* reasoning (*R (Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538; *Caroopen v Secretary of State for the Home Department* [2017] 1 W.L.R. 2339 at paragraph 30).

197. But these proceedings are not an appeal against the strike out decision but against the refusal of reinstatement. We must therefore consider whether the failure to provide a statement of reasons for the strike out decision undermines the President's decision. We are satisfied that it does for two reasons.

198. The first is that without knowing the basis on which the panel reached its decision (and specifically whether it decided to strike out the appeal under sub-paragraph (a) or (b) of regulation 10(3)), it is impossible to know whether the President had jurisdiction to entertain an application for reinstatement under regulation 10(5). The fact that both a member of the VTE's staff and the President were prepared to treat Mr Bacon's complaints as if they were an application for reinstatement could not confer jurisdiction if the panel acted under regulation 10(3)(b), as it had indicated on 17 November that it intended to do. Nor did the President have jurisdiction to entertain an appeal against the panel's decision to strike out the appeal. It might have been open to the President to review the strike out decision under regulation 40 (this would have required him to waive the absence of a written application) and to treat the failure to provide a statement of reasons as a procedural irregularity within regulation 40(5)(d) which it was in the interests of justice to correct by setting the decision aside. But the President did not take that course.

199. Secondly, we remain concerned about the effect which both the absence of reasons and the VTE's election to treat Mr Bacon's protest as an application for reinstatement had on the scope of the matters considered by the President.

200. In his skeleton argument for this appeal Mr Bacon made a number of points which one might have expected to be relied on in a properly considered application for reinstatement. In particular he drew attention to the fact that the appellant had been ready to present its case at the hearing and that the VO had filed an uninformative statement of case, had failed to engage in discussions with a view to resolving the appeal, and had not responded to the additional information supplied by Mr Ellis. It might be said that the VO did not finally act on that additional information until he made the alteration in the list on 28 June 2017, reducing the rateable value of the appellant's premises by 20% as Mr Ellis had originally proposed. Mr Bacon suggested that in those circumstances, irrespective of the breach of paragraph 14 of PS/A2, the appeal was unlikely ever to have been effective on 22 November and a delay of 2 days in compliance with just that one requirement by an

appellant who was ready to proceed on the appointed day, was an insufficiently serious breach to justify striking it out.

201. There seems to us to be some substance in the suggestion that if Mr Ellis had informed the VTE that the appeal was still active on 15 November, as he ought to have done, instead of on 17 November, the hearing on 22 November would not have gone ahead because the VO was not ready.

202. In his decision of 8 March the President did not consider whether there were circumstances justifying reinstatement, and noted that no submission had been made "by way of mitigation". Although the President's decision is short it is clear enough that he had considered only Mr Bacon's challenge to the VTE's jurisdiction to strike out for non-compliance with a Practice Statement and had not considered whether the appeal ought nevertheless to be reinstated.

203. In dealing only with one potential limb of an application to reinstate the President apparently considered that he was responding to the form in which the application had been presented, but it appears to us that that form had effectively been dictated by the VTE, and not by Mr Bacon. It was not suggested to Mr Bacon by the VTE that he should make an application for reinstatement. He was told that his emails would be treated as such an application, and he was not asked if he wished to add anything to what he had already said. Mr Bacon's two emails of 22 and 23 November were written for a different purpose and at a time when he was entitled to assume that he had no right to apply for reinstatement as the notice of intention to strike out had indicated that the panel was minded to impose the sanction under regulation 10(3)(b).

204. For these reasons we are satisfied that there is a serious risk in this case that the fairness of the VTE's procedures have been compromised by the failure of the panel to provide a statement of reasons. That failure, and the VTE's decision to treat Mr Bacon's protest at the decision itself as if it were an application for reinstatement, have deprived the appellant of a proper opportunity to make a considered application for reinstatement, or to bring an appeal, whichever was the more appropriate procedural course. For that reason the appeal must be allowed and the President's decision to refuse reinstatement must be set aside.

Disposal

205. We have already indicated that, had we been considering an appeal against the panel's decision of 22 November, we would have been inclined to set the decision aside and remake it. Having concluded that the President's decision must also be set aside it remains to determine the fate of the proceedings before the VTE. In our judgment it would be disproportionate, in light of the agreement reached on an appropriate reduction in the rateable value of the premises with effect from 1 April 2015, for the VTE to be invited to revisit the appellant's failure to comply with PS/A2. Without going into the facts in detail the impression we have is that the

appellant's delay in compliance was very brief and occurred in circumstances in which Mr Ellis was ready to proceed and the VO was probably not. PS/A2 places the onus on the appellant to say whether the appeal is still live, but in this case the appellant's omission may have masked the fact that the greater default was on the part of the VO. For the appeal to be struck out in those circumstances would not be fair to the appellant and would represent an unmerited windfall for the VO. Rather than require the VTE to investigate the circumstances in sufficient detail to make a balanced *Denton* assessment of all relevant factors, the better course is for us simply to reinstate the appeal and to remit it to the VTE for determination.

206. The appellant must apply to the VTE for further directions in the appeal within one month of the date of this decision.

Portland Lighting Ltd

207. The appeal by Portland Lighting concerns three workshop/warehouse hereditaments at Walsall Enterprise Park, units A1, A2-A3, and A4-A5. The units were entered in the 2010 rating list with values of between £28,500 and £62,000 but these entries were altered by the VO on 19 February 2015. We assume the effect of the alteration was to increase the rateable values since on 11 March 2015 the appellant's agent, Colliers International, made proposals to reduce each of the list entries to £10. Those proposals were not accepted by the VO who referred them to the VTE as appeals against the alteration.

208. In due course the appeals were included in the list for hearing on 7 December 2016. We assume the VTE's standard directions were complied with by both parties and that statements of case were exchanged. The VTE's Practice Statement on the listing of appeals, PS/A2, also applied.

209. As the appellant was professionally represented, paragraph 14 of PS/A2 required its representative to make contact with the VTE between 24 and 30 November 2016 to indicate whether the proceedings were still active. That deadline was missed, and it was not until the afternoon of 1 December that contact was made and the VTE was informed that 12 Colliers' appeals, including the three with which we are concerned, were still live and would need to be heard.

210. As we have also seen in other cases the VTE responded to the late notice that the appeals were still active by immediately issuing notices of intention to strike them out. The notices were sent on 1 December, about two hours after Colliers had first made contact, and informed the appellant that its application to have the appeals heard at short notice was refused and that at the forthcoming hearing the panel might strike out the appeals under regulation 10(3)(b). Once again the notice of intention incorrectly stated that the appeal would be struck out unless the appellant was able to demonstrate that there had been an "exceptional reason" for not complying with the Practice Statement. The notice continued that if an "exceptional reason" could be demonstrated the hearing of the appeal would be relisted, but if it could not then the

appeal would be struck out. It is not clear from the material we have seen whether the substance of this email was also communicated to the VO (and if it was it is not clear whether the panel was told about that). If it was then the VO handling the appeal would have had good reason to think that he need not attend the hearing in order to deal with the substance of the appeal in any event.

211. No notice was given to either party that the appeal had been placed in the final hearing list for 7 December. Nevertheless the appellant attaches some significance to an email sent by the VTE's case officer to Mr Sadiq of Colliers on the afternoon of 6 December. This recorded that the case officer had been informed by the VO that Mr Sadiq proposed to attend the hearing the following day, and requested that he do so at 10.30. It is said by the appellant that this was, in effect, notice by the panel that the appeals would be heard. We think that that reads too much into the email, which is consistent with the VTE expecting Mr Sadiq to attend in order to deal with the strike out issue.

212. We are told that Mr Sadiq attended the hearing on 7 December, and was in a position to proceed with the appeals. The VO was not in attendance but had sent a representative with no detailed knowledge of the case. It appears that the panel initially indicated that it would be prepared to hear the appeals, but on being informed that the VO was not present it concluded that the hearing could not go ahead and that the appeals should be struck out.

213. Notice that the appeals had been struck out was provided to the appellant on 8 December. The basis of the decision was not stated, other than that it was made under regulation 10(3) owing to a failure to comply with a direction issued by the Tribunal. It is apparent from the decision notice, however, that the decision must have been taken under regulation 10(3)(a) (despite the notice of intention having referred only to regulation 10(3)(b)) because the appellant was informed specifically that regulation 10(5) allowed for the proceedings to be reinstated, which could not have been said if they had been struck out under regulation 10(3)(b).

214. No further statement of reasons was provided with the decision notice or subsequently. Once again this was a significant breach of the VTE's duty to provide reasons for any decision which finally disposes of proceedings (regulation 37(1)). It left the parties to infer which power the decision had been made under and to guess at the reasons. It is not known whether the panel considered the effect of the non-compliance with paragraph 14 (by this appellant and any other parties listed for the same date) upon the VTE's ability to run its list efficiently on that day in the interests of all parties and the tribunal's own resources.

The application for reinstatement and the VTE's decision

215. On 5 January 2017 the appellant applied for reinstatement of the appeals on a standard form provided by the VTE for that purpose. The form invited a full explanation of the circumstances which were said to justify reinstatement. In

completing the form Colliers explained that the VTE had been notified the appeals were still active 1 day later than required "because staff illness meant that the request could not go in sooner". Reliance was also placed on the fact that it was the failure of the VO to attend which had meant the hearing could not go ahead on the appointed day since both the appellant and the panel had been in a position to proceed.

216. On 16 February a senior member of the VTE refused the application for reinstatement. The decision stated that notices of intention to strike out had been issued because contact had not been made at the appropriate time, and that the appeals had been correctly struck out for non-compliance with a Practice Statement. The member took the view that there were no grounds for authorising reinstatement, and continued:

> "I do not accept the illness of one person in an organisation to be an acceptable reason for the cases not to be struck out.
>
> There is no presumption in favour of granting an application for reinstatement merely because the striking out will deprive an appellant of having the appeal determined on its merits (VTE/PS/C2)."

The appeal

217. The appeal was presented on behalf of the appellant by Mr Gould of Colliers international. In his statement of case he submitted that the decision to strike out the appeals had been unfair. At the hearing on 7 December the appellant was ready to proceed, but the VO was not. That was said to be because the VTE had failed to follow PS/A2 and had given notice that the appeal would be heard only on the day before the hearing. Reliance was also placed on paragraph 19 of PS/A2 which said that if an application to adjourn an appeal was refused the appeal would proceed. The VTE had therefore been wrong to strike out the appeals.

218. Mr Gould took two further points in his written and oral argument for the appeal.

219. The first was that, since the VTE had been notified only one day late that a hearing was required, and so was aware of that fact six days before the hearing, it should not have been difficult or impossible for the appeals to be included in the final list for hearing. There was therefore no reason for the VTE to assert in its notice of intention to strike out that Colliers' delay had meant the panel was unable to make the necessary arrangements for the appeals and was unable to progress them in a way that was fair and just to all parties, and no grounds for the panel to exercise its power under regulation 10(3)(b), as it had threatened to do.

220. Mr Gould's second point was that breach of a Practice Statement was not something which could be punished by striking out under regulation 10(3)(a), which was a sanction only available for non-compliance with a direction. This was the same point as had been taken by Mr Bacon in the First Colour appeal and we have already

given our reasons for rejecting it in paragraphs 166 to 172 above. We have also dealt with the argument, common to this appeal and that of First Colour, that the VTE was obliged by its own Practice Statements to hear any appeal in which an unsuccessful request for an adjournment was made on the day of the hearing. We have given our reasons for rejecting that submission in paragraphs 173 to 178 above.

221. We do not accept that the VTE was at fault in the manner in which it dealt with the listing of these appeals. On 1 December Colliers notified the VTE that 15 cases, including these three appeals, were still active and required a hearing slot on 7 December. A professional representative who has not complied with PS/A2, even if only by delaying for 24 hours in giving notice that an appeal is still live, cannot reasonably complain if the VTE does not include that appeal in its provisional hearing list. The volume of cases notified for hearing on the same day is necessarily large to enable the VTE to deal with the huge number of appeals which are commenced before it. There must necessarily be a closing date for the compilation of that list, and it is not unreasonable for the VTE to insist on compliance with the timetable it has published. As we have said the email from the VTE's case officer sent on 6 December 2016 did not imply that the hearing on the following day would consider the substantive appeals.

222. Nor do we accept that the VO was at fault in not being in attendance and prepared for these appeals to proceed on 7 December (this is not a case in which it is said the VO would not have been ready by the hearing date if proper notice had been given). Since the appeals were not in the provisional list the VO was entitled to assume that they would not be effective on 7 December and would either be struck out or adjourned.

223. However, we do consider that the VTE is open to criticism is in its failure to provide written reasons for the strike-out decision. Regulation 37(1) required them, and the provision of reasons is essential both to enable the parties to understand the decision and to make effective the right of appeal (see *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, 2417 at [15]). The fact that the decision concerned compliance with the VTE's procedural requirements did not exempt it from the duty to give reasons. The critical consideration for the purpose of regulation 37(1) was whether the decision finally disposed of the proceedings, which a decision to strike out an appeal clearly does.

224. Nor is the failure to give reasons cured, or capable of being overlooked, by reason of the appellant's unsuccessful application for reinstatement. The proper resolution of that application, applying *Denton* principles, required a consideration of all of the circumstances of the case, including the original panel's reasons for striking out the appeal. If, for example, the panel had had the capacity to hear the appeals on the appointed day, and would have done so but for the absence of the VO (as a result of the appellant's non-compliance with paragraph 14) the seriousness of the breach and the waste of judicial resources might have been given much greater weight by the VTE than if the adjournment of some cases was already inevitable because their list was over filled. The absence of reasons therefore had a damaging effect on the

ability of the VTE properly to consider the application for reinstatement, as well as on the ability of this Tribunal to consider the appeal against both decisions.

225. We do not suggest that the VTE might not be entitled to find that the illness of "one person in an organisation", and a large organisation at that, was not a "good reason" to explain Colliers' failure to comply with PS/A2. No information was provided on how long the relevant person had been unwell, or what steps, if any, had been taken to deal with their responsibilities in their absence. A specific warning of the need for a proper explanation had been provided in PS/C2, paragraph 6 of which stated that:

> "An application for reinstatement must give the reasons, together with any supporting documentation. It is for the appellant to provide adequate reasons and proof and it is not for the Tribunal to seek amplification or explanation."

But that aspect only went to one of the factors identified as being relevant in paragraph 3 of PS/C2. As we have explained it is not inevitable that an appeal should be struck out, or an application for reinstatement refused, simply because of the lack of a good reason for the default. Other relevant considerations expressly mentioned in PS/C2 included the interests of the administration of justice, whether the application had been made promptly, whether the failure to comply was intentional, accidental or negligent, and the effect on the parties of granting the application. The senior member failed to address any of these factors. Indeed, he expressly stated that the illness did not constitute "an acceptable reason for the cases not to be struck out." That approach did not accord with the VTE's own published policy at that time (nor would it now be permissible, applying the *BPP/Denton* principles required by CPS 2017). Indeed, it may suggest that the senior member was also influenced by the "exceptional circumstances" test which had been raised at the strike out stage.

226. For these reasons the VTE's decisions to strike out and to refuse to reinstate the appeals cannot stand.

Disposal

227. It follows that the appeal against the strike out decision must be allowed, and the refusal of reinstatement must also be set aside.

228. The Tribunal is now left with a choice either to remit the proceedings to the VTE for it to consider afresh whether the original appeal ought to be struck out for failure to comply with paragraph 14 of PS/A2, or to re-make the decision ourselves, considering what sanction, if any, is appropriate in view of the admitted breach.

229. To remit the proceedings to the VTE is not an attractive course. It would require an investigation of the circumstances attending the hearing on 7 December which, in the absence of a contemporaneous record, may be difficult. It would require both parties and the VTE itself to expend resources on an inquiry which is peripheral to the accuracy of the rating list. It would further prolong these proceedings.

230. On the other hand, for the Tribunal to remake the decision without knowledge, or the means of knowledge, of all the material circumstances would also be unsatisfactory. Nevertheless, we are satisfied that in this case the fair and proportionate course is for us to deal with the consequences of the breach on the basis of the incomplete information available to us. A decision to strike out an appeal is a draconian course which should only be taken if a tribunal is persuaded that it is clearly justified after exercising its discretion properly. Because of the insufficiency of information caused by the absence of a statement of reasons we cannot be so persuaded. The course we therefore choose to take is that permitted by regulation 9(2)(a), namely to waive the requirement of compliance and to impose no sanction.

231. We therefore remit the appeal to the VTE for determination of its substantive merits. The appellant is directed to apply to the VTE for further directions within one month of the date of this decision.

DP Realty Ltd

232. The final appeal concerns shop premises at 34-36 Timberley Lane, Birmingham, which were entered in the 2010 list with a value of £27,250. It is now common ground that that valuation was excessive, although by how much is not agreed.

233. On 23 March 2015 the ratepayers agent, Colliers International, submitted a proposal to reduce the unit's rateable value to £10. This was not accepted and the matter progressed as an appeal to the VTE, where it was given a hearing date of 16 September 2016.

234. The standard directions applied to the appeal, as did PS/A2. The parties exchanged statements of case and on 15 August Colliers informed the VTE that the appeal was still active. The subject line of Colliers' email of 15 August referred to the appeal reference number and the hearing date of 16 September. The VTE's case management officer informed Colliers on 9 September that the case had been added to the provisional hearing list, but on 14 September the VTE gave notice that due to a high demand for hearing time the appeal had been postponed. Notwithstanding the appeal having been postponed, the VO contacted Colliers on 19 September to propose a reduction in the assessment to £24,500, a proposal which was not accepted.

235. On 18 November the appeal was given a new hearing date of 25 January 2017. What happened next is not formally in evidence, but we were given the following explanation by Mr Gould, which we have no reason to doubt. It appears that the notice of the new hearing date was provided and entered automatically in Colliers computerised diary system before the formal notice of postponement of the appeal on 16 September was received. When the notice of postponement arrived, and was again recorded electronically, an error in the computer programme caused the entry to show the listing on 25 January as having been postponed.

236. In anticipation of the listing on 25 January, Colliers were required by paragraph 14 of PS/A2 to inform the VTE if the appeal was still active by not later than 18 January. At 9.56 am on 16 January notice was duly given that the appeal was indeed still active and that a hearing date would be required. Once again, the subject line of Colliers' email referred to the hearing date of the appeal as being 16 September, which may be an indication that all was not well with the diary system. It is not clear how Colliers were aware of the listing for 25 January which appears otherwise to have been deleted from their diary when notice of the postponement of the previous hearing was received, but they obviously were aware of it on 16 January when the necessary confirmation was sent.

237. 16 Minutes after confirming that the appeal was live, the same administrator at Colliers sent a second email to the VTE asking it to disregard the previous message. It is not known why that email was sent. One possibility is that the administrator may belatedly have noticed that the date of hearing given in the first email had already passed and, on looking for a new date in Colliers diary, found nothing (the date having been deleted automatically); assuming there had been some error, the administrator may then have retracted the request for a hearing slot.

238. Whatever the reason for the confusion at Colliers' end, the effect of the two emails was to indicate clearly enough that notice was not being given that the case was still live. Acting presumably on that understanding, the VTE case manager did not include the appeal in the provisional list or the final list for the hearing on 25 January. Nor, it appears, was any notice of intention to strike out the appeal given to Colliers. Such notices appear only to be given in response to a late application for a postponement or late compliance with the paragraph 14 direction.

239. Thus, having neither an entry in their electronic diary, nor notice that the appeal would be heard or struck out, Colliers did not attend the hearing on 25 January.

240. In these circumstances we would have expected the VTE to consider striking out the appeal in the exercise of its discretion, either for non-compliance with paragraph 14 of PS/A2, or under paragraph 20, which provides that in the event of non-attendance by an appellant's representative an appeal may be struck out. Neither course appears to have been taken by the VTE in this case. Instead, on 3 February 2017 notice was given that the appeal had been automatically struck out under regulation 10(1) "owing to a failure to comply with the requirements of the standard directions issued by the Tribunal".

The application for reinstatement and the VTE's decision

241. Colliers responded to the notice informing them that the appeal had been automatically struck out by applying on 14 February for reinstatement. The grounds of the application reflected Colliers belief at that time that they had received no notice of the hearing on 25 January, and that was the only reason given in support of the

application. At that stage Colliers appears to have been unaware that a problem had been created by their computer software.

242. The application was considered and refused by a senior VTE member on 8 March. The decision notice included the reasons for the decision which were in the following terms:

> "The application for reinstatement asserts the notice of hearing was not received and, consequently, the appellant's representative *did not know that a statement of case was due*. The notice was sent by email on the 18 November to [Colliers' address].
>
> The evidence available to me indicates that a notice of hearing was served by email to the representative's nominated email address and in accordance with the listing programme. No evidence of email failure or downtime or, undelivered email warnings have been presented to me.
>
> I can see no obvious reason for the notice going astray and, in the absence of persuasive argument, I reject the application to reinstate the appeal." (emphasis added)

The appeal

243. It is apparent from the reasons given in the refusal decision that the senior member was under the mistaken impression that the appellant had failed to provide a statement of case and that that was why the appeal had been struck out. Although the reasons begin by refuting the suggestion that notice of the hearing was not given, the first sentence suggests, erroneously, that the appellant relied on the supposed failure to notify as excusing their omission to serve a statement of case ("consequently, the appellant's representative did not know that a statement of case was due"). No such claim was made by Colliers in their application for reinstatement.

244. The senior member's reference to a failure to serve a statement of case is consistent with the VTE's notice of 3 February 2017 which stated that the appeal had been automatically struck out under regulation 10(1) because of a failure to comply with the requirements of the standard directions. The particular requirement of the standard directions which was thought not to have been complied with is not there stated, but the subsequent reference to a statement of case indicates that it must have been paragraph 2 which was in the mind of the decision maker (appellant to serve statement of case six weeks prior to the date of the hearing).

245. We see no reason to doubt that the decision to strike the appeal out was indeed made on the basis that no statement of case had been served, as the senior member understood. Yet, it was clearly unjustified for the appeal to be struck out for a supposed failure to serve a statement of case. The appellant statement of case had been served on 5 August 2016, in anticipation of the original hearing date. Paragraph 4(2) of PS/A7 provided specifically that where an appeal was postponed a statement of case already served would remain valid.

246. For that reason alone both the strike out decision and the decision of the senior member to refuse reinstatement must be set aside.

Disposal

247. For these reasons we allow the appeal and remit the matter to the VTE for the substantive appeal by the ratepayer to be considered on its merits.

248. The appellant must apply to the VTE for further directions in the appeal within one month of the date of this decision.

Concluding observations

249. In the event, we have allowed each of the appeals, but it should not be thought that the Tribunal is unsupportive of the VTE's continuing efforts to manage its own caseload effectively and to insist on compliance with its procedural code. The opposite is the case, and the guidance provided in this decision is intended to support those efforts, which are in the interests of all tribunal users and the public generally. Important lessons should be learned by all concerned from these decisions.

250. Parties in rating appeals and practitioners have had to change their approach to this type of litigation in order to comply with the VTE's new regime. No doubt many have succeeded in doing so. Those who have yet to ensure that their procedures comply with that regime have had more than adequate time within which to do so and cannot now delay any further in ensuring that compliance. Our decision should not be taken as condoning breaches of orders or Practice Statements made by the VTE or as signalling that the need for a robust case management regime is diminished. No party or practitioner should be conducting appeals on the basis that they do not need to comply. Quite the contrary. One of the core *Denton* principles is the particular importance to be given to the need for parties to comply with the relevant rules, practice statements and orders of the tribunal. As for the VTE we would anticipate that it will review its processes so as to overcome specific problems which the present appeals have revealed in the rolling-out of this challenging new regime.

251. All tribunal users, and especially those who are professionally represented, must now appreciate the importance of cooperating with the VTE so that it can sensibly plan its hearing lists and manage its finite resources. Ensuring that neither too much, nor too little work is included in those lists is for the benefit of all tribunal users.

252. No doubt the VTE itself appreciates the importance of applying its own Rules and procedures accurately, fairly and consistently. Having rightly and decisively moved away from the relaxed practices of the past it must avoid adopting an undiscriminating, zero-tolerance approach in their place. In *BPP* Lord Neuberger

PSC explained, at [34], that there must be a limit to the "permissible harshness" of a decision relating to the imposition or confirmation of a debarring order (or for that matter a striking out order) and in *Denton,* at [37], the Court of Appeal warned against an unduly draconian approach to relief. Compliance with rules is not to be regarded as an end in itself and should never be allowed to assume a greater importance than doing justice in each case. Conscientious adherence to the *BPP/Denton* principles which the VTE has expressly adopted in CPS 2017 will avoid that risk.

253. For the VTE's rules on striking out and reinstatement to be applied fairly and consistently it is essential that the basis on which any appeal has been struck out is clear; in particular it should be clear whether the sanction was imposed automatically under regulation 10(1), or was the result of a decision under regulation 10(2) or 10(3)(a), (b) or (c), since an application for reinstatement will only be possible under paragraphs (1) or (3)(a).

254. Where an appeal has been struck out automatically that fact should be recorded and the particular direction which has been breached should be identified.

255. Before the VTE makes a decision to strike out an appeal it should first consider whether some lesser sanction would be more appropriate. If it concludes that an order striking out an appeal is justified it must provide reasons for its decision as soon as reasonably practicable. Those reasons need not be lengthy or elaborate, but they must explain to the appellant (and to a decision maker considering an application for reinstatement) what failure of compliance or co-operation was committed and what factors have been taken into account by the panel in exercising their discretion.

256. Where an appeal has been struck out for non-compliance, an application for reinstatement must be supported by a proper explanation and an account of any facts which the applicant or its representative wishes the VTE to take into account (see paragraph 54 above). In a similar vein, the VTE had previously emphasised in paragraph 6 of PS/C2 the importance of an applicant providing a proper explanation for its delay or other default, together with any supporting documents to back up that explanation. It added a warning that it is for the applicant to provide "adequate reasons and proof and it is not for the Tribunal to seek amplification or explanation." It should also be assumed that the applicant has a single opportunity to present such evidence and is unlikely to be allowed to supplement the material it presents to the VTE in support of any subsequent appeal. On a procedural appeal this Tribunal will not readily admit evidence which was not made available to the VTE and will require a convincing explanation of why, with reasonable diligence, any additional material could not have been provided at the appropriate time before it will be prepared to consider it.

257. Having announced in their consolidated practice statement an intention to apply the approach to compliance exemplified by the *BPP* decision, the senior judges of the VTE should consider any application for reinstatement of an appeal in a systematic way, applying the three stage approach identified by the Court of Appeal in *Denton*

and endorsed by the Supreme Court in *BPP* (see paragraphs 52 to 62 above). It is convenient to identify those three stages here, so that they can be kept clearly in mind.

258. The three stage approach was described in paragraph [24] of *Denton*:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including" [(a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the importance of complying with rules, practice directions and orders].

259. The focus of the enquiry at the first stage should be on whether the breach was serious or significant. In these appeals there have been examples of cases where a representative was only one day late, but whether a breach or delay is serious or significant depends not only on the period of the delay, but on its consequences. If what would otherwise have been an effective hearing is lost by reason of a delay that will be an important factor in favour of finding that the breach was serious.

260. At the second stage the reasons for the default must be considered. The Court of Appeal in *Denton* (at [29]) referred specifically to cases where non-compliance was the result of solicitors being under pressure and having too much work. This will rarely be a good reason. Good reasons are likely to arise from circumstances outside the control of the party in default and should be taken into account at the second stage. This approach applies just as much to professional representatives in proceedings before the VTE, and in that context just as much to valuation officers and their representatives as to ratepayers.

261. When considering the second stage of the assessment the VTE should beware of attributing failures in compliance to the wrong party. In *Norton* Mr Marshall received no cooperation from the VO in his efforts to agree facts and issues, yet it was he who was said to have failed to comply with the Pilot direction requiring that consensus be achieved ten weeks before the hearing date.

262. At the third stage the VTE should evaluate all of the circumstances of the case. As there is no rule equivalent to CPR 3.9(1) it is for the VTE to determine what weight should be given to the importance of disputes being resolved efficiently and at proportionate cost, and the importance of complying with its rules, practice directions and orders. The Supreme Court has confirmed in *BPP* that a first instance tribunal may properly give particular weight to those matters, and by aligning its own practices with those of the courts in CPS 2017 the VTE has indicated its intention to

do so. In doing so the VTE must remember that its overriding objective is to deal with cases fairly and justly.

263. Finally, we draw attention to the following important passage in *Denton*, at paragraph [41], where the Court of Appeal warned against opportunism on the part of a respondent to an appeal:

> *"*We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation."

Valuation officers and their representatives should be frank with the VTE when it is considering whether to strike out an appeal for non-compliance. If the valuation officer was not ready, or shares responsibility for the default, the VTE should be made aware of that. In all but one of these appeals the valuation officer's statement of case sought to uphold the decision of the VTE which we have set aside. In future valuation officers will be expected to adopt a more principled approach from the outset.

264. In the same vein, the Tribunal expects that parties involved in any outstanding appeals from the VTE of a similar nature will endeavour to resolve those appeals wherever possible by consent, applying the principles set out in this decision and the case law to which we have referred. They should do so in order to comply with their obligation under Rule 2(4) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to help the Tribunal to further the overriding objective.

The Honourable Mr Justice Holgate,
Chamber President

Martin Rodger QC,
Deputy Chamber President

4 December 2017

UT Neutral citation number: [2017] UKUT 0460 (LC)
UTLC Case Nos: RA/7-10/2017, RA/15/2017, RA/21/2017, RA/22/2017, RA/28/2017

Costs

1. Following the Tribunal's substantive decision of 4 December 2017 applications for costs have been made on behalf of each of the appellants. Submissions in response on behalf of the Valuation Officers have also been received by the Tribunal. In each appeal the appellant has asked for an order that its costs be paid by the VO, and the VO has submitted that the correct order is that there should be no order for costs. We now make the following determinations.

RA/7-10/2017 - Simpsons Malt Ltd

2. At the request of the appellant the appeals by Simpsons Malt Ltd were determined under the Tribunal's written representations procedure. As Mr Turton acknowledged in his application for costs made on 18 December 2017, paragraph 5.1(3) of the Tribunal's Practice Directions provides that, in cases allocated to the written representations procedure, costs will only be awarded if there has been an unreasonable failure on the part of a claimant to accept an offer to settle, if either party has behaved unreasonably, or if the circumstances are in some other respect exceptional.

3. As recorded at paragraphs 87 to 90 of our substantive decision, the decision of the VTE to strike out the appeals was not made following an application by the VO; on the contrary, the VO supported Mr Turton's request for an adjournment of the hearing on 6 December 2016, which the VTE refused. The VO does not appear to have been involved in the unsuccessful application for reinstatement, and when the appeal was brought to this Tribunal the VO chose not to respond. It cannot therefore be said that, in this case, the VO has caused or contributed to the costs incurred by the appellant in securing the reinstatement of its appeals to the VTE. Mr Turton recognised this and made it clear that he levelled no criticism at the VO's conduct of the proceedings.

4. Mr Turton nevertheless submits that the circumstances of this appeal are exceptional, and that an exception ought therefore to be made to the Tribunal's usual practice under the written representations procedure. The exceptional features he relies on are: first, that the reasons for the VTE's decision to strike out the appeals were unclear and have ultimately been found by the Tribunal to have been wrong; secondly, that the VTE did not properly consider the application to reinstate the appeal before refusing it; and thirdly, that if the VTE had followed its own practice statements the appeal to this Tribunal would not have been necessary.

5. Mr Turton made his application for costs "with a little reluctance" and suggested that it would be "more appropriate to make an award against the VTE". Despite the reluctance with which it is made, we have nevertheless understood Mr Turton's application to be for an order that the appellant's costs of the appeal be paid by the VO. The VTE is not a party to this appeal and, in any event, no grounds have been advanced on which we could consider making an order against it. Mr Turton did not identify any specific statutory provision giving the Upper Tribunal power to make an order for the payment of costs by the VTE, or by any other inferior tribunal.

6. Power to award costs in "all proceedings in the Upper Tribunal" (which therefore includes proceedings on appeal from the VTE) is conferred on the Tribunal by section 27 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), which provides:

> "29. **Costs or expenses**
>
> (1) The costs of and incidental to –
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

… ".

7. Costs are therefore in the discretion of the Tribunal, which has "full power" to determine by whom and to what extent they are to be paid, subject to Tribunal Procedure Rules. Before turning to those Rules it is convenient to point out that the Tribunal's jurisdiction to make an order in respect of "wasted costs" could not be relied on to justify an award against an inferior tribunal. Only costs incurred as a result of an improper, unreasonable or negligent act or omission "on the part of any legal or other representative" may be the subject of a wasted costs order (section 27(5)). The VTE is not a "legal or other representative."

8. The relevant tribunal procedure rules are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended by the Tribunal Procedure (Amendment No. 3) Rules 2013 ("the 2013 Procedure Amendment Rules"), rule 10 of the 2010 Procedure Rules provides, so far as material:

"**Orders for costs**
10. – (1) The Tribunal may make an order for costs on an application or on its own initiative.

(2) Any order under paragraph (1) –

(a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);

(b) ...

(3) The Tribunal may in any proceedings make an order for costs –

(a) under section 29(4) of the 2007 Act (wasted costs) and for costs incurred in applying for an order for such costs;

(b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; or

(c) in the circumstances to which paragraph (14) refers.

(4) ….

(5) The Tribunal may make an order for costs in judicial review proceedings.

(6) The Tribunal may make an order for costs in proceedings –

(a) – (c) …;

(d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales. ….

(11) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations….

(14) The Tribunal may order a party to pay to another party costs of an amount equal to the whole or part of any fee paid (which has not been remitted by the Lord Chancellor under the Upper Tribunal (Lands Chamber) Fees Order 2009 in the proceedings by that other party that is not otherwise included in an award of costs.".

9. The Tribunal therefore has power under rule 10(6)(d) to make an order for costs on an appeal from the VTE. Unlike orders under rule 10(3) (wasted costs or costs for unreasonable behaviour) or rule 10(14) (reimbursement of fees) this power is not expressly limited to making orders against parties to the proceedings. Nevertheless, there is no suggestion in the Rules that the Tribunal has power to order anyone other than a party or its representative to pay costs; in particular there is no express power to order the VTE or any other inferior tribunal to pay the costs incurred by a party.

10. In relation to costs the Tribunal's Practice Direction confirms at paragraph 12.2 that the Tribunal's discretion in relation to costs will usually be exercised in accordance with the principles applied in the High Court and the County Court. Additionally, by section 25, of the 2007 Act, the Tribunal has the same wide ranging powers, rights, privileges and authority of the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents and all other matters incidental to its functions. It is therefore to be expected that the Tribunal's general approach to costs will be consistent with the approach of the High Court.

11. The practice of the High Court where the defendant in judicial review proceedings is a court or tribunal is generally that it will not impose costs orders unless the court or tribunal has acted obstructively or improperly, or has actively contested the claim (*R(Davies) v Birmingham Deputy Coroner* [2014] EWCA Civ 207). The same practice is likely to be applied in statutory appeals against tribunal decisions.

12. We have not heard full argument on the Tribunal's power to make orders for costs against the VTE. The brief review above does not suggest any obvious basis on which such an order could properly be made. If an application was to be made for such an order on grounds which the Tribunal considered at least arguable, it would be necessary for the Tribunal to give notice of the application to the VTE and allow it to

make representations. We have not thought it necessary to take that course in this appeal as we are satisfied that the VTE did not behave in a way which would justify such an order.

13. We therefore refuse Mr Turton's application. When the appellant asked for the proceedings to be determined by written representations, it intended to obtain for itself protection against an adverse award of costs in the event that its appeal was unsuccessful. In doing so it necessarily accepted that it would not be entitled to an order for the payment of its own costs unless there was some exceptional reason justifying such an order. As Mr Turton acknowledges, none of the features of the proceedings on which he relies were the result of conduct on the part of the VO or his representatives. There is no reason why, having acted entirely properly in the performance of his statutory duty, the VO should be responsible for the payment of the appellant's costs, and the matters relied on by Mr Turton are incapable of providing grounds for such an order. They amount to no more than that the appeal has been successful.

RA/15/2017 – Norton Motorcycles Ltd

14. In the notice of appeal lodged by Conneely Tribe on 2 March 2017 the appellant requested that the appeal be determined under the Tribunal's simplified procedure. At paragraph 3.3(4), the Tribunal's Practice Directions explain that no costs order will be made in a case assigned to the simplified procedure unless the Tribunal regards the circumstances as exceptional or considers that an order is appropriate to take into account any offer of settlement, or that a wasted costs order should be made.

15. In his respondent's notice the VO requested that the appeal be stayed to await the determination of another of these cases, or determined under the written representations procedure. For the reasons given in paragraph 6 above, both parties must therefore be taken to have sought for themselves the benefits of immunity from costs which their requested procedure entailed, and to have been willing to accept that they would not be able to recover their own costs.

16. In the event, the appeals were not formally allocated to any of the Tribunal's procedures but the parties were not required to provide disclosure or submit valuations or experts reports, and the appeals were conducted on a simplified basis. The scope of the issue in each appeal was narrow and procedural, and none of the appellants considered it necessary to obtain legal representation.

17. Mr Marshall made an application for costs on 20 December, to which the VO's solicitors replied on 22 December. The basis of the application was that the appeal

had succeeded, and no circumstances were identified which would justify the making of a costs order in a simplified procedure case.

18. The VO was not responsible for the decision of the VTE to strike out the appeal before it, and he supported the appellant's application for an adjournment of the hearing on 29 November 2016 when it was wrongly believed that the VTE's procedural directions had not been complied with. The VO does not appear to have made any submissions in response to the application for reinstatement.

19. When the appeal was lodged with this Tribunal, the VO initially sought an order that it be stayed but was directed by the Tribunal to file a statement of case. That document recited the procedural history of the matter and, having specifically noted that the appellant accepted that there had been a breach of the requirement to file a statement of case, submitted that the VTE had correctly followed its own procedures and that the appeal should be dismissed.

20. In Mr Singh's skeleton argument for the appeal the VO's position was modified and a neutral position was taken. The Tribunal was not asked by the VO to dismiss the appeal.

21. If the appeal is treated as having proceeded under the simplified procedure there has been nothing exceptional in its conduct which would justify a costs order against the VO. If the appeal is treated as falling outside paragraph 3.3(4) of the Practice Directions, because it was not formally allocated, there is still no justification for such an order. Costs were incurred by the appellant in correcting an error by the VTE. To an extent the appellant's representative may be said to have contributed to that error by accepting, mistakenly, that there had been a failure to comply with the VTE's procedural directions (an acknowledgement to which the President of the VTE referred when refusing to reinstate the proceedings). In any event, the errors which gave rise to the appeal in this tribunal were not caused or contributed to by the VO, nor were the appellant's costs increased by the manner in which the VO conducted the appeal. In those circumstances we do not consider that an order for costs in the appellant's favour is appropriate, and we refuse the application.

RA/21/2017 – First Colour Ltd

22. In the notice of appeal lodged by Colliers International on 23 March 2017 the appellant requested that the appeal be determined under the Tribunal's simplified procedure. In his respondent's notice of 12 May the VO agreed. By an order made on 3 June the Tribunal nevertheless allocated the appeal to the standard procedure. In that respect this appeal differs from the earlier appeals.

23. The appellant's statement of case was critical of the VO and suggested that the reason the appeal was struck out was that the VO's representative had not been sufficiently prepared to enable the hearing before the VTE to proceed on November 2016. The VO's statement of case accepted the facts asserted by the appellant but nevertheless submitted that the VTE had correctly followed its own procedures and that the appeal should be dismissed. Once again Mr Singh took a neutral position at the hearing before us.

24. As we explained in paragraph 155 of our substantive decision, the reason the VO was not represented at the hearing on 22 November was that the appellant's representative had failed to comply with PS/A2. It was for that reason that the VTE struck out the appeal, as it was entitled to do. The appeal has been reinstated by this Tribunal because the VTE's failure to give reasons for its strike-out decision compromised the appellant's ability to pursue an application for reinstatement to the VTE.

25. In his application for costs on behalf of the appellant Mr Bacon referred to the Tribunal's encouragement of Valuation Officers to take a more principled approach to cases of this nature in future. That is taken by Mr Bacon as a sufficient criticism of the VO's position in this appeal to justify an application for an award of costs on the indemnity basis.

26. As the VO's solicitor points out in his submissions in response to the application, it was the failure of the appellant's representative to comply with the VTE's directions which led to the appeal being struck out. The appeal having been struck out there was nothing the VO could do to secure its reinstatement, and he certainly did nothing to obstruct the unsuccessful application to the VTE for reinstatement. Nor has the VO's initial opposition to the appeal to this Tribunal added to the appellant's costs.

27. Although this appeal has proceeded under the standard procedure in which, ordinarily, the successful party is entitled to an order for the payment of its costs by the unsuccessful party, we do not consider that the VO should be ordered to pay the appellant's costs. Those costs are the price of extricating the appellant from the consequences of Colliers' failure to comply with the VTE's directions, and they should remain with the appellant.

RA/22/2017 – Portland Lighting Ltd

28. The facts of this appeal are not materially different from those of the First Colour appeal. The appeal to the VTE was struck out because of the failure of the appellant's representative to comply with PS/A2, which resulted in the non-attendance of the VO and meant that the appeal could not proceed. For the reasons given in paragraphs 221 and 222 of our substantive decision the VTE was entitled to treat the appellant as being in default, and no criticism can be levelled at the VO for his non-attendance. Our decision to allow the appeal and reinstate the proceedings is attributable to the VTE's failure to give reasons for the strike-out decision.

29. In this appeal both parties asked for the simplified procedure, but the Tribunal again allocated it to the standard procedure.

30. No criticism of the VO's conduct of the appeal was made by Mr Bacon in his application for an order that the VO pay the appellant's costs.

31. For the reasons given in paragraphs 19 and 20 concerning the First Colour appeal we refuse the application for costs in this case.

RA/28/2017 – D P Realty Ltd

32. There are only two differences between the circumstances of this appeal and of the previous two appeals. The first is that on 8 June 2017, at the request of both parties, the appeal was allocated by the Registrar to the simplified procedure. The second difference is that the manner in which the appellant's representative conducted the proceedings before the VTE is less directly connected to its flawed decision to strike out the appeal.

33. In making his application for costs Mr Gould, the appellant's representative, suggested that the appellant had not been in default, but a more accurate assessment might be that the appellant's failure to comply with PS/A2 (the same transgression as led to the striking out of the appeals by Portland and First Colour) was not relied on by the VTE as justifying the dismissal of DP Realty's appeal. Instead the VTE relied

on a separate and unjustified allegation that the appellant had failed to file a statement of case. For that reason we allowed the appeal.

34. Apart from those two differences the material facts of this appeal are indistinguishable from those of the previous two appeals, in which we have refused to make an order for the payment of the successful appellant's costs, despite the cases being conducted under the standard procedure.

35. Once again it is significant that the VO did not seek the original striking out order, or resist the application for reinstatement. Neither the appellant's initial failure to deal with the forthcoming hearing, nor the failure of the application for reinstatement, was the VO's responsibility.

36. Although the VTE did not rely on the appellant's breach of PS/A2 as a reason for striking out the appeal, it was that breach, and the non-attendance of the appellant's representative at the hearing, which caused it to consider using its strike-out powers. Had the appellant been represented on 25 January 2017, as it should have been, it seems unlikely that the VTE would have made the mistake it did. While the representative's non-attendance was due to technical software difficulties and the resulting administrative confusion, rather than the personal culpability of the representative, that does not seem to us to be a good reason to transfer responsibility for the appellant's costs to the VO.

37. For these reasons, and because no exceptional reason has been shown to justify departing from the Tribunal's usual practice in cases under the simplified procedure, we refuse the application for an order that the VO pay the appellant's costs.

The Honourable Mr Justice Holgate
Chamber President

Martin Rodger QC
Deputy Chamber President

6 March 2018