[2021] UKUT 91 (TCC)

Appeal number: UT/2018/0017(V)

PROCEDURE – application for reinstatement after appeal struck out – whether FTT followed correct approach

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
BMW SHIPPING AGENTS LIMITED	**Respondent**

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE JONATHAN CANNAN

Sitting in public by way of video hearing treated as taking place at the Royal Courts of Justice, Strand, London on 30 March 2021

Howard Watkinson instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Nigel Gibbon of Nigel Gibbon & Co for the Respondent

DECISION

1. With the permission of the Upper Tribunal (Judge Thomas Scott), the Appellants ("HMRC") appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 21 April 2020. In the Decision, the FTT gave the Respondent (the "Company") permission to apply out of time to reinstate an appeal that had previously been struck out for failure to comply with an "unless" direction. Having granted the extension of time, the FTT then allowed the application for reinstatement.

2. In this decision, references to numbers in square brackets are to paragraphs of the Decision unless the context requires otherwise.

The Decision and the grounds of appeal against it

Background facts

3. By a letter dated 18 April 2016, HMRC sent the Company a C18 post-clearance demand note for unpaid import VAT in the sum of £3,029,526.15, on the basis that its claims to onward supply relief ("OSR") in respect of various goods were invalid. The Company instructed Mr Nigel Gibbon as its tax agent, and on 24 August 2016 Mr Gibbon wrote to HMRC on its behalf. That letter accepted the Company was not entitled to OSR and that import VAT was due on the goods. However, it was argued that because the Company was merely a shipping agent or freight forwarder it was not liable to pay that import VAT.

4. On 17 November 2016 HMRC issued a review letter upholding the decision to issue the C18 post-clearance demand note. On 7 December 2016 Mr Gibbon filed a notice of appeal with the FTT, thus beginning the present proceedings. Correspondence from Mr Gibbon accompanying the notice of appeal gave three different email addresses, introducing confusion about his email address that was to have unfortunate consequences.

> (1) The notice of appeal itself gave an email address to which we will refer as the "NG address" (because it referred to Mr Gibbon by his initials NG). Mr Gibbon acknowledges this was an error on his part. Mr Gibbon did not have access to the NG address when filing the notice of appeal or at any subsequent time: the email address had been set up for him by an IT agent who had "gone missing" and Mr Gibbon did not know the password to access the account. The email address had been entered into a blank notice of appeal that Mr Gibbon used as a template and was not updated when the email address was no longer accessible ([20]).
>
> (2) Together with the notice of appeal, Mr Gibbon sent a letter dated 2 June 2016 from the Company authorising him both to act as its tax agent with HMRC and to conduct any proceedings before the FTT as its representative. That letter of authorisation gave an email address for Mr Gibbon that we will refer to as the "Gibbonco" address. Mr Gibbon said in a witness

statement that was before the FTT, that was not challenged in cross-examination, that he had access to the Gibbonco address throughout.

(3) Mr Gibbon sent the notice of appeal and the letter of authorisation from a third email address (to which we will refer as the ".com address"). Mr Gibbon regularly monitored the .com address and regarded it as the principal email account for his professional practice.

5. The FTT did not initially treat Mr Gibbon as duly authorised to conduct the litigation on the Company's behalf. Therefore, the FTT sent a letter dated 31 March 2017 which, among other matters, assigned the appeal to the "complex" category and required HMRC to serve a Statement of Case within 60 days. The letter was sent to HMRC and directly to the Company without any copy to Mr Gibbon. As the FTT subsequently acknowledged, this was a mistake on the part of the FTT's administration as Mr Gibbon was, at all material times, authorised to act as the Company's representative because of the letter of authorisation referred to at paragraph 4(2) above ([6]).

6. On 10 May 2017, Mr Gibbon sent the FTT an email from the .com address chasing up registration of the appeal. That letter prompted the FTT to realise the mistake we have just referred to and on 31 May 2017 the Tribunal wrote to Mr Gibbon at the .com address enclosing a copy of its letter of 31 March 2017 and saying:

> We apologise to you for not sending you the correspondence at the time as our records did not show Nigel Gibbon & Co as authorised. We have now updated our records and will correspond with you directly in relation to the above appeal.

7. The FTT's letter of 31 May 2017 advised Mr Gibbon that HMRC's Statement of Case was due that day, on 31 May 2017. Gibbon made no diary entry to check that the Statement of Case was received ([26]) and, as will be seen, that failure also had unfortunate repercussions.

8. Both the FTT and HMRC sent documents and directions relating to the appeal to the NG address, that being the address given on the Company's notice of appeal. Because that email address was operative (although Mr Gibbon could not access it), no "bounce-back" or error message was received when emails were sent to it. In particular, HMRC's Statement of Case was sent to that email address. On 24 July 2017 the Tribunal issued case-management directions which included a requirement for the Company to serve a list of documents by 1 September 2017. Those directions were sent by email with a covering letter to Mr Gibbon at the NG address.

9. Mr Gibbon did not receive that email, because he had no access to the NG address. Nor did he receive HMRC's Statement of Case that had been sent to NG address. The Company failed to file a list of documents by the 1 September 2017 deadline.

10. Since the FTT had not received a list of documents, in breach of the requirements of case-management directions, the following correspondence ensued:

(1) On 13 September 2017 HMRC requested an unless order to the effect that the appeal would be struck out unless a list of documents was filed within 14 days;

(2) On 22 September 2017 the FTT wrote to Mr Gibbon asking to be advised within 7 days as to the Company's compliance with the 24 July 2017 directions;

(3) On 16 October 2017 HMRC repeated their request for an unless order;

(4) On 27 October 2017 the Tribunal directed that it *would* strike the appeal out unless the Company confirmed in writing that it intended to proceed with the appeal by 5pm on 9 November 2017. Otherwise, the appeal *might* be struck out without further reference to the parties if by the same date the Company had not complied with the 24 July 2017 directions.

(5) There was no response from Mr Gibbon or the Company to the FTT's unless order of 27 October 2017. On 13 November 2017 HMRC requested confirmation that the appeal had been struck out.

(6) On 22 November 2017 the Tribunal sent the parties a letter confirming that the appeal was struck out.

11. All of the correspondence and directions set out above were either sent to, or copied to, Mr Gibbon at the NG address. He received none of them ([40]). During the hearing, the FTT noted that copies of letters on the FTT's administrative file were marked in manuscript as having been sent "by post & email" (see, for example, [7]). However, the FTT's findings in this regard were equivocal: it said only, at [42], that it was "at least possible that [Mr Gibbon] may have received some of this correspondence by [hard copy] mail but not realised it". Both parties were agreed at the hearing before us that there was no factual finding to the effect that the FTT sent any hard copy correspondence to Mr Gibbon, or that, if it did, Mr Gibbon received that correspondence.

12. On 14 September 2018 Mr Gibbon sent an email to the Tribunal (from the .com address) saying that he had been conducting a review of cases and noted no Statement of Case had been received for the appeal. On 12 October 2018 the Tribunal sent a letter to Mr Gibbon, dated 9 October 2019 confirming that the appeal had been struck out and enclosing hard copies of the correspondence sent to the NG address.

13. On 12 October 2018 Mr Gibbon applied on behalf of the Company for permission to make a late application for reinstatement, and to have the C18 appeal reinstated. The FTT found ([45]) that these applications were made immediately on Mr Gibbon becoming aware that the appeal had been struck out. HMRC objected to the application on 23 October 2018.

The FTT's conclusion and reasoning

14. The FTT started by setting out the relevant background, relevant aspects of the FTT's rules of procedure (the "FTT Rules") and the competing submissions of the parties. It is sufficient to note that, by Rule 8(6) of the FTT Rules, an application for

reinstatement must be made in writing and received by the FTT "within 28 days after the date on which the Tribunal sent notification of the striking out to the appellant". Accordingly, it was common ground before us, as before the FTT, that the deadline for the Company to apply for reinstatement expired 28 days after 22 November 2017 (i.e. on 20 December 2017), even though Mr Gibbon did not realise that the appeal had been struck out until much later.

15. The FTT did not approach the Company's application for an extension of time separately from its application for reinstatement and instead considered both applications together. The core of its FTT's reasoning is set out in the section headed "The Tribunal's Findings" at [40] to [70].

16. Before the FTT, Mr Gibbon acknowledged that he had made two errors: recording the NG address in the notice of appeal, and not bringing the appeal forward for review soon enough despite being aware, on 31 May 2017, that HMRC's Statement of Case was due that day ([41]). He said, however, that the Tribunal was communicating with him using the .com address in relation to many other appeals and he had no reason to suspect that there was an issue in relation to his e-mail address in this appeal.

17. At [40] to [43] the FTT accepted Mr Gibbon's evidence that he had not received crucial documents and correspondence that were sent to the NG address. At [44] and [45], the FTT expressed the following conclusions about Mr Gibbon's conduct:

> On its consideration of the material as a whole, the Tribunal finds that there were no failings on Mr Gibbon's part that were deliberate, or that were so careless as to indicate a cavalier attitude to the Rules. There has for instance been no suggestion that either Mr Gibbon, or the Appellant company, have acted in bad faith, or have been deliberately dilatory, or have sought to gain some tactical advantage by failing to comply with directions and then making a late application for reinstatement. Whether or not Mr Gibbon should have known of the Tribunal's directions and the strike out well before 12 October 2018, the Tribunal is satisfied that, justifiably or unjustifiably, neither Mr Gibbon nor the Appellant were in fact consciously aware of the directions or the strike out before that date…the Tribunal accepts that Mr Gibbon made the application for reinstatement immediately upon becoming aware that the appeal had been struck out.

18. The Tribunal noted it was bound by a number of decisions, including *BPP Holdings Ltd & Ors v Revenue and Customs* [2017] UKSC 55; *Martland v The Commissioners for HM Revenue and Customs (Tax)* [2018] UKUT 178 (TCC) and *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537. Its discussion of these authorities is at [47]:

> The starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be. The Tribunal is required to conduct a balancing exercise, having regard to all factors that are relevant in the circumstances of the particular case. It is not necessary for the Tribunal to structure its deliberations artificially by reference to factors set out in previous cases. Relevant factors normally

> include the purpose of the time limit, the length of the delay, whether there is there a good explanation for the delay, and the consequences for the parties of an extension of time or a refusal to extend time. Relevant factors also include the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, but these do not have special weight or importance and the obligation of the Tribunal remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant.

19. The Tribunal began with an assessment of the seriousness and significance of both the failures to comply with directions and the lateness in applying for reinstatement. It found that both failures were serious and significant (at [48]-[49]).

20. At [50] to [55], the FTT considered the reasons for both failures. It referred back to its findings as to why the failures took place, but did not in this section of the Decision, express any overall evaluative conclusion on the quality or nature of those reasons. It did, however, note at [51] that both parties were agreed that the failings of Mr Gibbon should be treated as failings of the Company, since he was the Company's authorised representative, but that no special considerations arose because mistakes were made by a professional adviser as distinct from the Company itself ([53]). It noted that there was no evidence that the Company itself had sought to make enquiries of Mr Gibbon as to the status of the appeal and concluded that this was a matter it would take into account weighing the circumstances as a whole.

21. The FTT then moved to an evaluation of "all the circumstances of the case … balancing the merits of the reasons for the delay and the prejudice that would be caused to the parties" (at [56]). The Tribunal observed at [57]:

> 57. This evaluation proceeds from the starting point that that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected.

22. In this section of the Decision, the FTT did express some conclusions on the quality of the reasons given for "the delay" (without always distinguishing between the separate defaults consisting of the failure to comply with case management directions, and the failure to apply for reinstatement in time). It concluded as follows:

> (1) Mr Gibbon was a VAT professional who owed duties to his clients. Inadequate office systems or mere overlooking of a deadline were unlikely to be good reasons "for delay", although it would always be necessary to consider the circumstances of "the default as a whole".
>
> (2) It characterised Mr Gibbon's mistake in including the NG address on the Notice of Appeal as a "clerical error of the kind that should not occur, but which inevitably does occur from time to time".
>
> (3) It decided that it was "not unreasonable" for Mr Gibbon to conclude, when the FTT wrote to him on 31 May 2017 to say that it had updated its records (to recognise him as a duly appointed representative), that it would

correspond with him using the .com email address rather than going back to the notice of appeal and taking the NG address from there. Mr Gibbon was not entirely to blame for the confusion over the email addresses after 31 May 2017.

(4) Moreover, while Mr Gibbon should have followed up much sooner, having been notified on 31 May 2017, that HMRC's Statement of Case was due that day, it was appropriate to take into account the fact that, during this period it was "not unreasonable" for him to believe that the FTT would address email correspondence to him at the .com address.

(5) In relation to the period from December 2017 to September 2018, the FTT accepted Mr Gibbon's unchallenged evidence that, in this period his professional practice had suffered and he had been "firefighting" because of his responsibilities in caring for his wife who had suffered a serious injury in December 2017. The FTT concluded that was not a "complete excuse" but it was a relevant factor to be taken into account.

23. Having concluded at [65] that the merits of the appeal were not so obviously weak as to count against the Company in the balancing exercise, the FTT moved, at [66] to [70], to considering the prejudice that would arise to the parties if the application was, or was not, granted (not making any distinction between the application to extend time, or the application for reinstatement). It concluded that the prejudice to the Appellant was significant, because it would lose the chance to pursue a significant appeal in which some £3 million was at stake, a "hugely significant" sum for the Company. The FTT considered that prejudice to be all the greater because of the Company's argument that, since it was a freight forwarder, rather than a principal involved in the import, it had retained none of the gross consideration by reference to which the £3 million import VAT arose. It considered that no prejudice to HMRC had been identified beyond the fact that, if the application was allowed, HMRC would have to respond to an appeal which they thought was "dead and buried long ago".

24. The FTT concluded at [71], that, having balanced all the considerations, it would extend time to permit the Company to make a late application for reinstatement and, having done so, reinstated the appeal.

HMRC's grounds of appeal

25. HMRC appeal against the Decision on four grounds:

(1) Ground 1 – The FTT erred in law by failing to follow binding guidance in relation to the "stricter" approach to compliance with time limits.

(2) Ground 2 – The FTT erred in law by failing to follow the general principle that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial.

(3) Ground 3 – The FTT erred in law by giving too much weight to the prejudice to the Appellant of refusing reinstatement.

(4) Ground 4 – the FTT's conclusion was perverse.

The grounds of appeal considered

26. In *Martland*, to which the FTT referred in the Decision, the Upper Tribunal gave guidance to First-tier Tribunals on how to approach applications for permission to make late appeals. That guidance was given in circumstances where a taxpayer had missed a statutory deadline for making an appeal. However, the Upper Tribunal in *Martland* performed a detailed analysis of case law on the exercise of judicial discretions, both in the courts and the Tribunals, to grant relief from sanctions that had been imposed for failure to comply with case management directions. In *Chappell v Pensions Regulator* [2019] UKUT 209 (TCC), the Upper Tribunal confirmed that the guidance in *Martland* applied in cases such as this, where the FTT was being asked to give the Company relief from sanctions. At paragraphs 44 and 45 of *Martland* the Upper Tribunal said:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected….

27. It will be seen that this guidance draws heavily on the similar "three-stage approach", explained at paragraph 24 of the judgment of the Court of Appeal in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 that is applied in the courts when exercising the discretion under CPR 3.9. CPR 3.9 specifically singles out (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, practice directions and orders as factors to be considered when exercising discretion to grant relief from sanctions. In *Denton*, the Court of Appeal stated that these factors should be given "particular weight" in the third stage. There is no express requirement in the FTT Rules to consider these matters when considering either an application for reinstatement or an application for an extension of time. However, in giving its binding guidance in *Martland*, the Upper Tribunal was

itself drawing on the decision of the Supreme Court in *BPP Holdings Ltd* which endorsed guidance given by the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) to the effect that tribunals should not apply a more relaxed approach to compliance with rules, directions and orders than the courts that are subject to CPR.

28. Therefore, the FTT had to take into account the "particular importance" of litigation being conducted efficiently and at proportionate cost and of rules and time limits being respected and give particular weight to those factors. However, in its self-direction at [47], the FTT said:

> These [factors] do not have special weight or importance and the obligation of the Tribunal remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant.

29. That, on its face, suggests that the FTT was misdirecting itself as to the parameters applicable to its exercise of discretion. Mr Gibbon argued that, even if the self-direction at [47] was not expressed perfectly, the FTT applied the correct approach when it said, at [57], that its evaluation has to proceed from the "starting point" that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected. We do not accept that submission. The wording in paragraph [57] might have been regarded as unexceptionable if the FTT had not included its mistaken self-direction at [47]. However, when paragraph [57] and [47] are read together, we have reached the clear conclusion that describing the two factors merely as "starting points" did not give them the particular weight that *Martland* required.

30. We are only reinforced in that conclusion by the fact that an identically constituted FTT made an identical error of law in *HMRC v Websons (8) Limited* [2020] UKUT 0154 (TCC). The decision of the Upper Tribunal in *Websons (8)* was released on 12 May 2020 so the FTT would not have been able to reflect on it before releasing the Decision. At paragraph 22 of the decision in *Websons (8)* the Upper Tribunal noted that the FTT had made a very similar self-direction in that case to that set out in [47] of the Decision. At paragraphs 2 and 3 of Websons (8) the Upper Tribunal recorded, without criticism, the parties' agreement that this self-direction involved an error of law in failing to "take into account the particular importance of the need to conduct litigation efficiently and proportionately".

31. Moreover, in its decision refusing permission to appeal against the Decision, the FTT justified its conclusion that "no special weight or importance" needed to be given to the efficient conduct of litigation, or compliance with rules by referring to the decision in *Romasave (Property Services) Ltd v Revenue and Customs* [2015] UKUT 254 (TCC). We agree with HMRC that any conclusion to that effect in *Romasave* has now been overtaken by the judgment of the Supreme Court in *BPP* as reflected in the Upper Tribunal's guidance in *Martland*. While decisions on applications for permission to appeal should not generally be taken as expanding the reasoning set out in the underlying decision, in this case, it serves to confirm that the FTT was taking an incorrect approach.

32. We consider, therefore, that Ground 1 is made out. Since that Ground demonstrates that the FTT applied the wrong principle in deciding how to exercise its discretion, it follows that we will exercise our power to set the Decision aside. Both parties asked that, if we set the Decision aside, we should remake it based on the FTT's findings of fact and the unchallenged evidence of Mr Gibbon which was before the FTT, rather than remitting it to the FTT for reconsideration. We agree that we have the necessary facts before us in order to do so and we will, therefore, in the section that follows, consider how the Decision should be remade. In remaking the Decision, we will consider arguments that were advanced in relation to the other grounds of appeal, but we will not formally decide whether those other grounds of appeal are established since we do not need to do so given that HMRC's success on Ground 1 alone means that the Decision is to be set aside and remade.

Remaking the Decision

33. In remaking the Decision, we will note as a starting point that the Company is seeking two separate, though obviously related, reliefs from sanctions. First it seeks relief from the sanction imposed by Rule 8(6) of the FTT Rules to the effect that no application for reinstatement can be made later than 28 days after the date the FTT sent notice that the appeal was struck out. That aspect of the request for relief from sanctions involved a request for an extension of the relevant time limit pursuant to Rule 5(3)(a) of the FTT Rules. The second relief from sanctions, which arises only if the extension of time is granted, is a request that the Company's appeal, which was struck out for failure to comply with the "unless" direction of 27 October 2017 should be reinstated.

34. We will deal with the two applications for relief separately.

The application for an extension of time

35. We will apply the three-stage approach set out in *Martland* and, since we are remaking a decision of the FTT, will also have regard to the overriding objective, set out in Rule 2 of the FTT Rules, of dealing with cases fairly and justly.

36. As regards the first stage, the application for reinstatement was made on 12 October 2018. It should have been made by 20 December 2017. The delay involved is just short of 10 months which is clearly "serious and significant".

37. The parties advanced different articulations of the reasons for the Company's delay in applying for reinstatement. Mr Gibbon argued that the reasons were simple: the Company did not apply for reinstatement earlier than it did because it did not know the appeal had been struck out as all relevant correspondence and directions had been sent to the NG address to which Mr Gibbon had no access. HMRC argue that this formulation of the reasons for the delay overlooks Mr Gibbon's culpability in the matter. If he had exercised more care in completing the notice of appeal, he would not have supplied the NG address. If he had followed matters up with the FTT, or with HMRC, on any single occasion after 31 May 2017, the problem with the email address would have come to light and the Company could either have complied with the FTT's directions or, at the very least, have applied for reinstatement much earlier.

38. We favour the explanation of the reasons that Mr Gibbon put forward. That is not because we consider that his actions, or failure to take action, prior to 20 December 2017 is irrelevant. They are clearly relevant but, in our judgment, they are primarily relevant in relation to the application for reinstatement itself, which we consider in the next section, as distinct from the application to extend time. Any litigant whose appeal has been struck out will, almost inevitably, have committed some serious breaches of the FTT Rules or applicable case management directions. If the situation were otherwise, the appeal would not have been struck out. Yet the FTT Rules afford any person whose appeal is struck out a right to apply for reinstatement, within the 28-day time limit. Accordingly, historic failures, no matter how serious, are not a bar to an application for reinstatement if made in time. It follows, in our judgment, that where an application for reinstatement is made out of time, the focus should be on the proximate cause of why the 28-day time limit was missed, and not a wider examination of the litigant's conduct leading up to the strike out which will be relevant in considering the underlying application for reinstatement.

39. Having identified the nature of the reasons for the delay, we move to the third *Martland* stage which itself includes an evaluation of the quality of those reasons. In this case, the FTT found as a fact that Mr Gibbon was not aware until 12 October 2018 that the appeal had been struck out. As soon as he became aware, he applied for reinstatement. We consider that Mr Gibbon had an understandable reason for missing the deadline specified in Rule 8(6): it was simply not possible for him to apply for reinstatement before the point at which he knew the appeal was struck out. In saying this, we are not losing sight of the deficiencies in the conduct of the litigation, summarised at paragraph 37 to which HMRC referred and which Mr Gibbon largely accepted. However, we consider those deficiencies are more appropriately addressed in the section that follows, in which we consider the application for reinstatement itself.

40. HMRC counter that Mr Gibbon's delay, after 20 December 2017 in applying for reinstatement involved a continuing failure to follow up with the FTT on the progress of the Company's appeal. They submit that, if Mr Gibbon had followed up, the problem with the email addresses would have been unearthed and he would have been able to apply for reinstatement much earlier. There is some force in that submission. However, as we will explain in more detail in the next section, while a litigant's failure to comply with directions of which it is aware can fairly be characterised as a continuing failure, we think that this is less true of Mr Gibbon's failure to follow up. By 20 December 2017, it seems clear that Mr Gibbon, having initially failed to diarise a follow-up following the FTT's email of 31 May 2017, forgot to consider how the appeal was progressing. It would take some external stimulus for him to remember it again. The most obvious such external stimulus would have been correspondence from either HMRC or the FTT, but that correspondence was being sent to the NG address. We also note that from December 2017, Mr Gibbon had significant caring responsibilities for his wife and was "fire-fighting" in relation to his professional practice. Like the FTT, we would not say that these responsibilities provide a complete or good excuse but they do provide relevant context.

41. Other factors are also relevant in the evaluation of the quality of the reasons. The FTT found that it was reasonable for Mr Gibbon to believe, following the email of 31

May 2017, that correspondence would be sent to him at the .com address. In so far as necessary we draw the same inference from the primary facts. Ultimately, if belatedly, following the period of "fire-fighting", Mr Gibbon did perform a review of his files and did get back in touch with the FTT on 14 September 2018. This was not a case where a belated application for reinstatement was made in response to HMRC's attempts to collect the debt. There had been no enforcement action by HMRC. Against that, the Company should have done more to follow up with Mr Gibbon as to the progress of its appeal that involved a large sum of money.

42. Overall, we would characterise the Company's reasons for not applying reinstatement in time as "understandable". We stop short of describing them as "good" since there was undoubtedly an element of fault on the part of both the Company and Mr Gibbon. But equally, describing the reasons as "poor" would be wrong since ultimately no application for reinstatement could be made until Mr Gibbon knew that the appeal had been struck out. When balancing the quality of the reasons against other considerations at the third *Martland* stage, we will give particular weight to the importance of litigation being conducted efficiently and at proportionate cost and to time limits imposed by the FTT Rules being met. But, even giving that consideration particular weight, the Company could not comply with the deadline in Rule 8(6) because it did not know that its appeal had been struck out. If we decline to extend time for the reinstatement application, then the Company loses all prospect of defending the C-18 demand that HMRC has imposed. But if we grant the extension of time, then it remains possible that the conduct of the litigation that caused the Company to miss the time limit for serving a list of documents, including its protracted failure to follow up on the progress of its appeal, could count against it when the reinstatement application is considered. In short, granting the extension of time would not deprive HMRC of the ability to argue that, because of deficiencies in the conduct of the litigation, the appeal should not be reinstated.

43. Accordingly, in the circumstances of this case we consider the fair and just course is to allow the application for an extension of time.

The application for reinstatement itself

44. We will apply the same approach as we applied when considering whether to extend time. We will consider the matter in the light of the overriding objective set out in Rule 2 of the FTT Rules and apply the three-stage approach set out in *Martland*.

45. We start with an assessment of the seriousness and significance of the Company's breach of the FTT's case management directions. That breach consisted of failing to serve a list of documents by the required deadline and then failing to comply with the terms of the "unless" order giving a final chance for compliance. The breach of case management directions continued from 1 September 2017, when the list of documents was due, to 22 November 2017, when the appeal was struck out, a period of more than three months. We consider the breach to be serious and significant.

46. Next we consider the reasons why the breach of directions took place. It would be too simplistic, in the context of the application for reinstatement, to conclude that the

breach occurred because the Company was not aware that case management directions had been made. Mr Gibbon contributed to that state of affairs by (i) including the NG address on the notice of appeal and (ii) failing to follow up on the progress of the appeal despite having been told on 31 May 2017 that HMRC's Statement of Case was due that day.

47. We consider, however, that it is possible to exaggerate the seriousness of those failings. We agree with the FTT that the mistake with the NG address was a minor clerical error, even though serious consequences flowed from it. Certainly, Mr Gibbon should have done more to follow up on the progress of the appeal. However, for most representatives who put correct contact details on a notice of appeal, the question of "following up" with the FTT will not typically arise: the appeal will be registered, an HMRC Statement of Case will be produced and the appeal will automatically be set on a path where the representative is notified of a case management timetable. It was because these steps did not follow that Mr Gibbon contacted the Tribunal in May 2017. His failure was not to diarise the appeal for follow up if he did not receive the Statement of Case. That was a matter of oversight on his part which on its own would not have led to significant difficulties. It is the combination of a single clerical error and a single oversight which has led to serious consequences.

48. HMRC counter that Mr Gibbon's failure to diarise a follow-up if HMRC's Statement of Case was not received was the very reason why the long period of delay until September 2018 took place and was all the more serious since that delay was so protracted. Of course we see the logic of that submission, but we consider that in this case it can be taken too far. It is undoubtedly the case that where a litigant receives case management directions, but fails to comply with them, the failure becomes more serious as more time elapses. On each day that goes past, the litigant is in effect deciding to prioritise something else over compliance with case-management directions. Moreover, as time goes by, it might be expected that both the court or tribunal involved, and the litigant's opponent, will be chasing up on compliance with the directions so a continued failure to comply will typically involve ignoring reminders or warnings. But, because of Mr Gibbon's clerical slip, he was receiving no reminders or warnings. Moreover, once he had neglected to mark the file for follow-up, it became less likely that he would remember to follow up unless some external stimulus was applied to jog his memory. In saying this, we are not condoning forgetfulness, simply noting that forgetfulness, as distinct from conscious non-compliance, does not necessarily become more serious over time in circumstances where normal reminders that might be expected are not received.

49. Putting all that together, we would evaluate the reasons for the breach of directions as consisting of an unfortunate combination of two events. The first was the clerical slip with the email address which meant that Mr Gibbon was not aware that a list of documents needed to be filed. Having contacted the FTT in May 2017 he could reasonably expect to receive correspondence from the FTT at his .com address. However, he did not receive the usual reminders that follow from non-compliance (some of which are summarised at paragraph 10 above). The second was Mr Gibbon's failure to diarise the appeal for follow-up. On its own that was an oversight which might normally have no consequence because a Statement of Case would have followed in

the ordinary run of things. Here it did not follow because both HMRC and the FTT were, as a result of the clerical slip, sending documents to the NG address. Certainly Mr Gibbon could, and should, have done more to follow up. However, since he was not receiving any correspondence from the FTT or from HMRC, the failure to follow up became more protracted and in the end, partly because of his wife's accident, there was no follow-up until September 2018. The combination of these various factors served to make the consequences of Mr Gibbon's mistakes much more serious than they would otherwise have been.

50. That leads us to the balancing exercise at the third *Martland* stage and the requirement that we give particular weight to the importance of litigation being conducted efficiently and at proportionate cost and of directions and time limits being respected. HMRC invite us to approach the balancing exercise from a standpoint that, as a matter of principle "well-intentioned incompetence" (to use the phrase of the Court of Appeal at paragraph 48 of *Mitchell*) should not usually benefit from relief from sanctions. However, we do not consider that the Court of Appeal in *Mitchell* was laying down any general principle in this regard. Rather, read in context, paragraph 48 of *Mitchell* was dealing with a situation (considered in *Ian Wyche v Careforce Group plc* [2013] EWHC 3282) in which a litigant was granted relief from the sanction imposed by an "unless" order on the grounds that, although the order had not been complied with, the default was "unintentional". In casting doubt on that aspect of the decision, the Court of Appeal commented:

> We are not sure in what sense the judge was using the word 'unintentional'. In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. We share the judge's desire to discourage satellite litigation but that is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders.

51. Thus, the point being made by the Court of Appeal was that since particular weight has to be given to compliance with rules, practice directions and orders, it will not usually be good enough for a litigant to say, on an application for relief from sanctions, that a genuine attempt was made to comply, or that the litigant honestly thought the rules were complied with. Moreover, at paragraph 31 of *Denton*, the Court of Appeal confirmed that there are situations in which "serious and significant" breaches of direction for which there is no good reason can still in appropriate cases benefit from relief from sanctions at the third stage of examination. Therefore, we do not consider that any principle emerging from *Mitchell* precludes the Company from obtaining relief from sanctions simply because a serious and significant breach of directions arose because of failures on Mr Gibbon's part.

52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated.

53. In this context, the reasons are not particularly "good" because of the failings, both of Mr Gibbon and of the Company, that led to the breach. However, they are not particularly "bad" because the failings on their own were relatively modest, even though the combination of them led to a serious outcome.

54. If the appeal is not reinstated, then the Company loses the right to contest an appeal involving a large sum of money. HMRC argue, by reference to the decision of the Upper Tribunal in *HMRC v Katib* [2019] UKUT 189 (TCC), that this should not weigh greatly in the balance since, by definition, any taxpayer whose appeal is struck out loses the chance to contest that appeal, whether it involves a large, or a small sum. However, we do not consider that *Katib* lays down any principle to the effect that this factor is irrelevant. We will come to questions of weight later, but on any view, a consequence of the appeal not being reinstated is that the Company will indisputably owe HMRC £3m. That consequence should form part of the balancing exercise. The weight to be attached to it is a separate matter.

55. If the appeal is not reinstated, then HMRC will, as the FTT put it, have to defend an appeal that they thought was "dead and buried long ago". Neither party asks us to take the merits of the appeal into account.

56. The final task, therefore, is to weigh all factors in the balance. In our judgment, the balance comes down, albeit by a slender margin, in favour of reinstating the appeal. Strike out of an appeal is a draconian sanction and for that reason it is not exercised without warning. Yet here, the Company received no warning before the appeal was struck out. Certainly neither the Company nor Mr Gibbon was blameless in this regard, but we have already explained our view as to the reasons for the default. In our judgment, not reinstating this appeal would involve imposing a sanction on the Company which is disproportionate to the seriousness of the conduct that led to breach of the FTT's directions.

57. HMRC argue that this analysis gives too much weight to the fact that the Company will, if the appeal is not reinstated, lose the right to contest the appeal which should not be regarded as "prejudice", but rather as an ordinary incident of strike out. They also argue that it gives insufficient weight to the particular importance of litigation being conducted efficiently and directions being complied with. We do not agree. Certainly, if the facts were different, and the reasons for the breach of directions were weaker, it is unlikely that we would have reinstated the appeal. To do otherwise would not be giving the particular weight required to the efficient conduct of litigation, and compliance with directions. But here, while the Company's reasons could certainly be stronger, they are not particularly bad. Having performed the overall balancing exercise, we consider that those reasons are adequate to support reinstatement. Moreover, although it is particularly important that litigation is conducted efficiently, and case management directions are complied with, that does not in our judgment mean that, in the circumstances of this case, we should not give some weight to the fact that strike-out would impose a sanction that is disproportionate to the seriousness of the breach. Considerations of proportionality remain at the heart of the overriding objective set out in Rule 2 of FTT Rules.

Disposition

The Decision is vitiated by the error of principle we have identified in our analysis of Ground 1. We set aside the Decision and remake it, applying the correct principle. The result of remaking the Decision is that the appeal is reinstated, the same conclusion as that reached by the FTT.

Signed on original

JUDGE JONATHAN RICHARDS
JUDGE JONATHAN CANNAN

RELEASE DATE: 22 April 2021