[2018] UKFTT 123 (TC)

TC06379

Appeal number: TC/2014/03349 & TC/2014/04185

PROCEDURE – relief from sanctions –* BPP *applied – applications dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY ORLANDO CLARKE **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 22 February 2018

Ms L Frawley, Counsel, for the Appellant

Mr Vallis, HMRC officer, for the Respondents

DECISION

Background

1. On 10 June 2014 a Mr Horler, acting on behalf Mr Anthony Clarke, lodged an appeal against 4 assessments to (allegedly) underpaid income tax for years 2000/01-20003/04 amounting to approximately £80,000. It was allocated reference TC/14/3349. The ground of appeal stated was that the assessments were out of time because Mr Clarke did not deliberately (said the notice of appeal) omit to pay the tax so HMRC could not apply the extended time limit necessary to make the assessments. The notice of appeal stated that the quantum of the assessments was agreed. Indeed, the quantum of the assessments was based on a disclosure report prepared by an adviser acting on behalf of the appellant.

2. On the same day, Mr Horler lodged an appeal against penalties imposed on Mr Clarke in respect of other years amounting to just over £2000. The grounds of appeal were, as above, that Mr Clarke's behaviour was not 'deliberate' but also that it was wrong for HMRC to withdraw and then re-issue penalty assessments. That appeal was allocated ref TC/14/3351. It was later consolidated with the 3349 appeal and therefore both appeals are now under reference TC/14/3349.

3. On 2 August 2014, Mr Horler lodged an appeal against a VAT assessment for approximately £859,000 on Mr Clarke. The grounds of appeal were that it was out of time because (said the notice of appeal) HMRC knew enough to assess more than 12 months earlier. While it did not state the quantum of assessment had been agreed, it did not suggest that it considered it wrong. The appeal was allocated reference TC/2014/4187.

4. On the same day, Mr Horler lodged an appeal against a VAT civil evasion penalty on Mr Clarke of approximately £171,000. The grounds of appeal appeared to merely be that the VAT assessment was wrong. It was allocated reference TC/14/4185 and later consolidated with the above appeal under reference TC/14/4185.

5. For reasons which do not matter now, these appeals were stayed for some time. HMRC delivered their statement of case on TC/14/4185 (the VAT appeal) in March 2015 and on TC/14/3349 (the income tax appeal) on 24 August 2015. Case management directions to prepare the cases for hearing were issued respectively on 11 and 25 September 2015.

6. The directions in the VAT appeals, and in particular the directions to deliver a list of documents by 25 September 2015 and witness statements by 23 October 2015, were not complied with by the appellant. An 'unless' order was issued on 12 November 2015. It required the appellant to notify by 19 November 2015 an intent to pursue the appeal and stated that if he failed to do so the appeal 'may' be struck out. The 'unless' order was not complied with and the VAT appeal was struck out on 8 December 2015.

7. The direction in the income tax appeal to deliver a list of documents by 6 November 2015 was not complied with (there was no direction for witness statements in this appeal: that was probably an error by the Tribunal but is not relevant). On 30 November 2015, the Tribunal wrote a letter reminding the appellant of the need to comply with the income tax directions. In the absence of any reply or compliance, an 'unless' order was issued on 18 December 2015 requiring the appellant to notify an intent to pursue the income tax appeal and to comply with the direction for a list of documents no later than 4 January 2016. It stated that if he failed to do so the appeal 'may' be struck out. The unless order was not complied with and the appeal was struck out on 19 January 2016.

8. All correspondence on the appeals was sent to Mr Horler. None of it was sent direct to the appellant (apart from the notice of hearing of the reinstatement application). As Mr Horler had been appointed by Mr Clarke as his representative in these appeals, that was in accordance with the Tribunal's rules, in particular Rule (4)(a) which provides that the Tribunal must provide the appellant's representative with anything required to be given to the appellant, and need not provide it to the appellant.

9. On 25 January 2016, Mr Horler applied for reinstatement of the income tax appeals. His letter made no mention of the VAT appeals. HMRC objected to the reinstatement. In that letter they suggested the Tribunal consider the VAT appeals at the same time but it appears this suggestion was not acted on or ever referred to.

10. The reinstatement application was heard on 12 April 2016 and dismissed by written decision of Judge Clark on 16 June 2016. While it only ruled on the income tax appeals, it did mention the VAT appeals in a number of paragraphs.

11. On 9 June 2017, the appellant by his new adviser, Ms Frawley, applied out of time for permission to appeal Judge Clark's decision refusing to reinstate the income tax appeal; on the same date he applied out of time for reinstatement of the VAT appeal.

Mr Clarke's witness statement

12. The day before the hearing before me Mr Clarke submitted a witness statement. It ran to 8 pages and had three exhibits.

13. HMRC objected to it being allowed in evidence as it was given on short notice, and thus would (in Mr Vallis' opinion) necessitate an adjournment to allow HMRC to consider its contents, and was (Mr Vallis said) in any event irrelevant to the matters which had to be decided in this hearing.

14. Dealing with its relevance first, the witness statement covered Mr Clarke's business activities in respect of which the disputed assessments were made, it summarised HMRC's investigation and went into some detail about Mr Clarke's concerns with the disclosure report prepared on his behalf in 2012 by his then advisers and used by HMRC in preparing the assessments. It did not really contain any

evidence about what Mr Clarke was doing about these appeals just before they were struck out, and in between their striking out and the lodging of the applications the subject of this hearing.

15. For that reason, it appeared to me to be very largely irrelevant to what I would have to decide: in so far as Mr Clarke gave evidence in his witness statement that he believed the disclosure report was wrong, it was strictly irrelevant as I needed evidence of fact and not opinion. Ms Frawley would be able to make submissions as to the prospects of the appeals: I would not have regard to non-expert opinion evidence on this.

16. Moreover, with regards to its lateness, it seemed to me that the witness statement and particularly the third exhibit contained statements that the disclosure report was wrong and/or based on a fundamental misunderstanding of what Mr Clarke's VAT supplies were. These were statements that HMRC would be bound to challenge as inconsistent with their assessments: if the witness statement was allowed in, the hearing would very likely be derailed as the entire half day allocated to the hearing would be swallowed up in HMRC challenging in cross examination statements that were not actually relevant to this hearing, however relevant to the substantive hearing if it were ever to take place.

17. Had the appellant sought its admission earlier, it was possible the matter could have been agreed: HMRC would have had time to explain their objections and possibly a much shorter and relevant witness statement could have been prepared and admitted. But there was no time to do so when a witness statement was produced the day before a hearing.

18. I refused to admit the witness statement.

19. In the event, I do not see that it affected the case put forward by the appellant. While Mr Clarke was not called to give evidence, HMRC accepted (at least for the purpose of this hearing) that I should proceed on the basis that the reasons given by Mr Clarke's now representative for his failure to pursue the appeals in 2015-2017 should be assumed to be accurate. In any event, the witness statement did not contain them.

The hearing today

20. As discussed at the outset of the hearing, I had up to four applications to determine, albeit one of them would be determined (if at all) ex parte (in other words, without representations from HMRC):

(1) Whether to extend time for Mr Clarke to lodge his application for permission to appeal Judge Clark's decision; if granted, I would then determine the application for permission to appeal (the ex parte matter).

(2) Whether to extend time for Mr Clarke to lodge his application for reinstatement of the VAT appeal; and if I did so, to determine the reinstatement application.

As I heard representations on all of them, I determined all of them, although strictly it was unnecessary to consider the permission to appeal application and the reinstatement application as I decided not to extent time to make either of these applications.

The legal test for relief from sanctions

21. The three applications which were not ex parte were all applications for relief from sanctions. Both applications for extension of time were applications for relief from the sanction of being unable to make the underlying application because it was out of time. The application for reinstatement was an application for relief from the sanction of the appeal being struck out.

22. The same legal test applies to all three applications for relief from sanction, although of course the outcome of each application would not necessarily be the same, as each would depend on its own individual circumstances. But I will deal only once with the legal test.

23. The parties did not agree on the exact test for relief from sanctions, although they did appear to agree that the differences between them were more apparent then real. Ms Frawley relied on *Denton* [2014] EWCA Civ 906, which, as she pointed out, was approved by the Supreme Court in *BPP* [2017] UKSC 55 where it said the Tribunals should follow a 'similar' approach to compliance to that in the courts. In *Denton* the Court of Appeal had set out a three stage approach when considering relief from sanctions:

(1) The first stage is to identify and assess the seriousness and significance of the failure to comply;

(2) The second stage is to consider why the failure occurred;

(3) The third is to consider all the circumstances of the case.

24. Mr Vallis relied on *Data Select* [2012] UKUT 187 (TCC) which provided that the Tribunal should, when considering whether to disapply a time-limit, consider all the circumstances of the case and that would mean considering:

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there a good explanation for the delay?

(4) What will be the consequences for the parties of the extension of time?

(5) What will be the consequences for the parties of a refusal to extent time?

25. As was commented by the Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 254 at [89] there is no real difference between these two tests. This must be so because in *Denton*, the Judge accepted that the court would move on from the first stage test to the second stage test in all cases other than where breach was not serious or significant [28], and that having done so the seriousness and significance of the breach would be factors considered in the balancing exercise.

26. There was discussion in *Denton* at [26] about what serious and significant meant in this context. It is clear from what the judges there said that a breach is serious and/or significant if it puts a hearing date in danger or otherwise impacts on the conduct of the litigation. Certain other breaches might be serious and significant.

27. Of course, I recognise that the *Data Select* criteria were specific to an application for relief from the sanction of being out of time to make an application; one of the applications here, however, is for reinstatement. Reinstatement was considered in *Pierhead Purchasing* [2014] UKUT 321 (TCC) where the Judge said it was relevant, when considering the over-riding objective and all circumstances of the case, to focus on:

> [23] .....
>
> The reasons for the delay, that is to say, whether there is a good reason for it.
>
> Whether HMRC would be prejudiced by reinstatement
>
> Loss to the appellant if reinstatement were refused
>
> The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration
>
> Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained

28. It seems to me that the Judge was here saying much the same as in *Denton* and *Data Select:* the Tribunal must consider all circumstances relevant to the particular application it was hearing and perform a balancing exercise.

The importance of compliance

29. Both parties accepted that in that balancing exercise, the weight given to compliance has increased in comparison to the position before the reform of the CPR. That this stricter approach to compliance applies in the Tribunals as well in the courts was made clear in *BPP,* where the Supreme Court approved at [25] the statements in *McCarthy and Stone* [2014] UKUT 196 (TCC) and *BPP* [2016] EWCA Civ 121 that the Tribunal should give a similar importance to the need for compliance with rules and directions as exists in the courts. The parties entirely differed, however, on what should be the appropriate outcome of this application after the Tribunal applied the principles as explained in *BPP*.

30. The new approach requires the Tribunal to give significant (but not paramount) weight to the need for litigants to respect the Tribunal's rules and directions. If the litigants do not respect the need for compliance, the Tribunal will be unable to meet is overriding objective of dealing cases fairly and justly, as it would be building into the litigation process procrastination and delay. Where a Tribunal excuses a delay which has occurred for no good reason, the result is not only that the litigants concerned are encouraged to think non-compliance will not receive a sanction but that litigants in other cases also get the message that procrastination is permitted.

The relevance of the merits of the appeal

31. Another matter on which the parties did not necessarily agree was the question of the merits of the proposed appeal: Mr Vallis agreed with me that the merits would normally only influence the balancing exercise if the appeal was either a very strong or a very weak one. This was because the Tribunal hearing the application for relief from sanctions should not conduct a mini-trial and reach its own view on whether an appeal would succeed or fail: so in a situation where the underlying appeal simply had a reasonable prospect of success, being neither very strong nor very weak, its merits, as such, would not normally tilt the balance of the application one way or the other. On the other hand, there was strong prejudice to an appellant if an appeal which was clearly very likely to succeed was struck out, and a clear lack of prejudice to an appellant if an appeal which was clearly very likely to fail was struck out.

32. Ms Frawley said she did not accept this was right, although it seemed more a case that she considered that her client did have a very strong appeal and that therefore the merits of the appeal should count in favour of permission to appeal being given and the VAT appeals being reinstated, and I will consider this submission in relation to the three applications for relief from sanctions. But as a matter of principles, I agree with the summary in §31.

The relevance of reliance on an advisor

33. Ms Frawley's case was that Mr Clarke should not be held accountable for the failings of his representative. Her case was that Mr Clarke was not aware of the deadlines and should not be punished because they were missed.

34. I do not agree. While an appellant does nothing wrong in seeking to appoint a representative, the appellant has chosen to bring legal proceedings, and must accept the responsibility to pursue them as directed by the Tribunal. The appointment of a representative does not absolve the appellant from such a duty: that would be unfair on the other litigant, who has no choice over whether the appellant appoints a representative or as to who that representative is. It is the litigant who appoints a representative who must (in general at least) take the burden as well as the benefit of what his representative does (or fails to do) in his appeal. The risk of a poorly performing representative must (in general) fall on the litigant appointing that representative and not on the other party to the appeal. To rule otherwise is manifestly unfair to HMRC, who had no choice or control of Mr Clarke's decision to appoint a representative, and to whom the appellant's representative owes no duty of care.

35. Ms Frawley suggested the position is different where the appointed representative was not legally qualified and not insured. She pointed out that the CPR would not allow someone who was not a legal representative and professionally qualified (or equivalent) to represent a person in court: she suggested the Tribunal or HMRC should bear responsibility for Mr Clarke's choice of Mr Horler because the Tribunal rules permit anyone (whether legally qualified or subject to a professional body and whether or not insured) to represent a taxpayer in the Tribunal.

36. I do not agree that that is a reason for shifting liability for the appellant's representative's defaults to the respondents. It is the appellant's choice who to appoint as representative. He must take responsibility for his choice. It is not for the respondent to underwrite the appellant's choice of an unqualified and uninsured representative. And while the Tribunal's rules, no doubt intended to improve access to justice, permit the appointment of an unqualified and uninsured representative, it is not responsible where the appellant chooses such a representative.

37. While I accept that Mr Clarke chose someone recommended to him, and that for the first 12 months or so after the appointment he had no cause to complain about his representative, nevertheless he knew or ought to have known that Mr Horler held no professional qualification, was not professionally supervised, and was not insured. It was his choice to appoint him.

Should litigants in person be treated more leniently?

38. Ms Frawley also suggested that Mr Clarke should be treated as a litigant in person (as he was not *legally* represented) and that the courts were and should be more lenient to a litigant in person. In reality, this amounted to much the same as the previous proposition that Mr Clarke should not be held accountable for the failures of his unqualified and uninsured representative.

39. The day before the hearing, although none of us were aware of it at the time, the Supreme Court issued its decision in *Barton v Wright Hassall LLP* [2018] UKSC 12 where the court said:

> [18]...[Litigants in person's] lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3, [2014] EWCA Civ 1652. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, ... The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation

> Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.

40. The gist of this is that, while the Tribunal will do what it can to assist litigants in person, by and large litigants in person have no extra leniency in respect of compliance with the rules and directions of the Tribunal, although their status as litigants in person might have relevance in marginal cases where it is an explanation for the default.

41. But I do not see that as being of assistance to Mr Clarke. He was not a litigant in person: his defaults were not because he was inexperienced in litigation but because his representative let him down. And while I will take that factor into account, for the reasons given at §§33-37 above, it is not normally a factor for leniency.

42. Having considered the principles to apply, I now consider the three applications for relief from sanctions and the permission to appeal application.

Application for permission to appeal out of time

The seriousness and significance of the failure to comply with the time limit

43. Judge Clark's decision was released on 16 June 2016. The time limit for appeal expired on 11 August 2016. The application for permission to appeal was lodged on 9 June 2017. The delay was therefore of 9 months and 29 days.

44. Mr Vallis pointed out that in *Romasave* the Tribunal said a delay of 3 months 'cannot be described as anything but serious and significant' in the context of a timelimit of 30 days. Ms Frawley, on the other hand, did not consider that the delay of nearly 10 months was serious and significant at least not in the context of (a) other delays in the progress of the appeal (b) the reasons for the delay and (c) the lack of (as she saw it) prejudice to HMRC occasioned by the delay.

45. I don't accept Ms Frawley's position on this. On (a) while there had been earlier stays in the appeal, it was not demonstrated to me that they had been occasioned by defaults by either party. Moreover, the fact that the subject matter of the appeals dated back to 2000, so far from excusing a further delay of 10 months as she suggested, meant that unjustified further delays should be avoided. And so far as (b) was concerned, the balancing exercise should be performed after consideration of all relevant factors. And so far as (c) was concerned, HMRC were clearly prejudiced by the near 10 month delay: if the application was allowed, the appeal would take 10 months longer to resolve than if the application had been made promptly not to mention that for those 10 months HMRC had justifiably proceeded on the basis that the assessments were enforceable.

46. At one point, Ms Frawley suggested that the default was not so serious because Mr Clarke did not know of the appeal time limit. I had no evidence on this. In any event, it is the appellant's position that he was advised not to appeal: he ought to have

appreciated there would be a time-limit but in any event, having taken the decision not to appeal, any lack of knowledge of what the exact time limit was would not have mattered. It did not *cause* the failure to appeal in time.

47. Ms Frawley suggested that the default was at the 'bottom of the range of seriousness' (citing *Denton* at [62]) and that HMRC were being opportunistic in seeking to rely on the default as a reason to prevent permission to appeal being given (*Denton* at [43]): I do not agree.

48. My view is that a delay of nearly 10 months was serious and significant, in the context of a 56 day time limit in which to lodge an appeal. It was certainly not trivial, minor nor insignificant ([26] of *Denton*) such that the application for an extension of time should be allowed without carrying out the weighting exercise. Such a delay undoubtedly would add nearly a year to the length of time it would take to resolve an appeal if permission were given. If a delay of 10 months was not to be regarded as serious and significant, the Tribunal would have reverted to the pre- reform of the CPR position where the importance of deciding an appeal on its merits was given such significance that defaults were frequently forgiven, resulting in an expectation that they would be forgiven and thus leading to general procrastination in the conduct of litigation that by itself was a denial of justice and which the reform was meant to correct. So I move on to the second stage.

The reason for the failure

49. While I had no evidence on this, HMRC accepted the reasons put forward by Ms Frawley in her application. Those reasons were that Mr Horler had advised Mr Clarke that there was 'no point' in appealing Judge Clark's decision. Mr Clarke had accepted that advice, at least for a period. Instead, he had pursued the possibility of suing Mr Horler (presumably for the defaults which led to the striking out of the income tax appeal). He first received advice on this in February 2017; on 27 April 2017 he was advised to contact the Tribunal to find out the position on the VAT appeals. On 23 May 2017, the Tribunal confirmed the status of the VAT appeals, and on 6 June 2017 provided the appellant with some documents relating to the appeals. The applications for permission to appeal and reinstatement were made shortly afterwards (9 June 2017).

50. HMRC does not accept that the above explanation amounts to a good reason for the default. Mr Vallis points out:

(1) Mr Clarke had taken a positive decision not to appeal the decision. He was aware of his right to do so, but had decided not to pursue it.

(2) That decision was based on advice from Mr Horler, given at a time when Mr Clarke had good reason to be dissatisfied with Mr Horler's ability to give him proper and professional representation in these appeals. He should not, says HMRC, have relied on Mr Horler's advice on this (save that, of course, HMRC consider that Mr Horler's advice not to appeal was correct).

(3) There is no explanation of why it took Mr Clarke so long to change his mind. While it might well have been sensible to take advice from a different professional on his legal position with respect to his appeals, he took far too long over doing so which led to the 10 months' delay in lodging the appeal.

51. Ms Frawley's position was that Mr Clarke should not be criticised for relying on Mr Horler's (in her view, wrong) advice: while Mr Clarke knew that Mr Horler had failed to reply to correspondence and comply with directions from the Tribunal on his appeals, which had resulted in the failure of the reinstatement application, at the time he decided not to appeal he had no reason to suppose that Mr Horler's technical advice was not sound.

52. Whilst I accept this last point made by Ms Frawley, I do not think it helps Mr Clarke's case. He had 56 days to appeal; he had the choice of whether to accept Mr Horler's advice not to appeal; he had the right to seek advice from a new adviser. Ultimately, he chose to seek new advice, but long after the time limit had expired. I have been given no good reason why he took so long to seek alternative advice.

53. Moreover, I do not accept for the reasons given at §§33-37 above that reliance on what the appellant now considers to have been bad advice is by itself a good reasons to give relief from the sanction of being out of time to appeal. The appellant chose his representative and chose to rely on his representative's advice. Ordinarily speaking, he should abide by his choice.

54. So I now move on to consider all the circumstances of the case.

The merits of the putative appeal to the Upper Tribunal

55. It makes sense to consider the merits of the underlying applications and appeal as that may affect, as I have said at §§31-32, the question of prejudice to the parties. Ultimately, the issue is Mr Clarke's prospect of success in challenging the income tax assessments: that requires him not only to receive permission to appeal, it requires him to succeed in any appeal to the Upper Tribunal; and as the Upper Tribunal (if they allow the appeal) are most likely simply to remit the proceedings to another FTT Tribunal to carry out the balancing exercise again, it also requires him to win his reinstatement application before a new FTT panel and then if he succeeds in reinstatement, it requires him then to succeed in the underlying appeal. He has to succeed in all these four stages in order to ultimately succeed in challenging the assessments.

56. So far as the permission to appeal application is concerned, my conclusion below at §76 is that I would grant it on some of the grounds on which it is applied for on the basis it is arguable that Judge Clarke applied the wrong test or put the wrong weight on the matter of the potential application to amend the grounds of appeal. But I do not consider that Judge Clark's decision was obviously wrong in law such that it should be reviewed (§75). I also do not consider that the application for reinstatement was one which so obviously should have been allowed that the Upper Tribunal would decide the application in favour of the appellant (§74). Therefore, the putative appeal

before the Upper Tribunal would have no more than a reasonable prospect of success of having the application for reinstatement remitted back to the FTT to re-decide.

57. And if that was the outcome, the next question would be whether the FTT would allow the application for reinstatement. And my conclusion below at §74-75 is that that application had no more than a reasonable prospect of success: it was not obviously one which should succeed.

58. And if it did succeed, the next question would be the prospects of success of the underlying appeal. As I have said, the original grounds of appeal were that it was out of time (see §1). Ms Frawley did not really mention this ground so I certainly cannot conclude that it is bound to succeed; as HMRC conceded the appeal had a reasonable prospect of success, I will assume that this ground of appeal has a reasonable prospect of success. Ms Frawley now wants to challenge quantum, something not previously in issue. But I was given no reason and certainly no evidence from which I could conclude that such a ground of appeal was very likely to succeed. I can therefore only proceed on the basis of HMRC's concession that the appeal had a reasonable prospect of success.

59. In conclusion, while I would give permission to appeal, each of the last three stages of litigation which Mr Clarke would have to win in order to successfully challenge the income tax assessments each have a reasonable prospect of success, but no more. His ultimate success is therefore rather less certain than if he only needed to win one further stage.

The consequences to the parties of refusing or allowing an extension

60. If the extension is refused HMRC have legal certainty that the income tax appeal has finally come to an end and they can pursue enforcement of the assessments.

61. If the extension is refused, Mr Clarke will have lost his right to contest his liability to some £80K of tax and penalties. At one point, Ms Frawley suggested the liability in dispute in the income tax appeals was closer to £180K: while this does not appear to be right, it would make no difference to the outcome of this application if it was right. Whichever figure is right, the sum at stake is a very significant sum, although Mr Clarke's counsel did not suggest that by itself it would render Mr Clarke bankrupt or homeless. The loss of the right to pursue his appeal is a serious disadvantage to Mr Clarke.

62. There was some mention in the hearing of whether Mr Clarke was entitled to compensation for that. Mr Clarke's position is that he has been the victim of a succession of poor advisers: he says his original advisers over-estimated his tax liability and (as Judge Clark found) his next adviser then acted in such a manner that Mr Clarke lost his right to contest the assessments in this Tribunal. If Mr Clarke is correct, he appears (subject to time limits) to have the right to sue both advisers for the losses occasioned by their negligence. He would have to prove his losses and

prove their negligence, of course, and his right of action against his ex-advisers would only be worthwhile in so far as either they have assets or insurance cover.

63. However, in my view, Mr Clark's potential right of action against his advisers is not a reason to refuse relief from sanctions. Having the right to sue other persons should not be a reason to refuse relief from sanctions which would otherwise be justified. But, by the same token, the respondents should not be seen as providing an appellant with a kind of free back-up insurance when it turns out the appellant's advisers were uninsured. Therefore, here where the right to sue for poor advice may be nugatory (perhaps because, as Mr Clarke claims, Mr Horler was uninsured) that is not a reason to grant relief. The position is simply that the loss of the right to challenge the assessments is a very serious disadvantage to Mr Clarke as it carries very serious financial implications, whether or not he has an effective right to challenge his erstwhile advisers.

64. The consequences of allowing the requested extension of time is really the mirror image of what I have just said: HMRC will have to continue to spend time and resources in defending this appeal. From Mr Clarke's point of view allowing this application will either be pointless (if he loses before the Upper Tribunal) or will put in train a very long process (involving at least 2 and probably 3 hearings) in which he is not certain at the end of the day to succeed, although I accept he would have a reasonable prospect of success at each stage. If ultimately he succeeded, of course, he will have successfully challenged assessments for very significant sums of money.

Conclusion

65. Time limits should be obeyed for the reasons I have already stated at §§29-30: there was very significant delay in seeking permission to appeal in this case. It was serious because not only would it add significantly to the time required to resolve the any appeal in the Upper Tribunal but also because it reverses HMRC's legitimate expectations which must have arisen from the appellant's failure to appeal in time. HMRC have the right to finality in litigation and the general public have an interest in justice being administered efficiently. Excusing the delay in this case would make it more difficult not to sanction future delays in the conduct of this appeal and similar delays in other cases

66. I have some sympathy with Mr Clarke who relied on advice given to him, and now considers that he was let down. But Mr Clarke clearly knew of his right of appeal and chose to accept Mr Horler's advice not to exercise it. He knew, or certainly should have known, that the right to appeal was time limited. Moreover, he had cause to be not entirely satisfied with Mr Horler's performance, yet he chose to continue to rely on his advice at that time, and delay, it seems for months, before he approached different tax advisers for advice.

67. I take into account the very serious consequences for Mr Clarke in not being given permission to appeal, as my refusal means that he immediately becomes liable for the £80K odd at stake in the income tax appeal, although this is tempered by the fact that even if the sought-for appeal to the Upper Tribunal against Judge Clark's

decision succeeded, it would put in train a long process of litigation in which Mr Clarke has a number of obstacles to overcome before he could avoid that liability and at best at each stage he would only have a reasonable prospect of success.

68. On balance, while I recognise the seriousness of the matter to Mr Clarke, I do not think he had a good reason for appealing late, and taking into account the length of the delay (also not satisfactorily explained) with the need for litigants to respect time limits, I do not think it right to extend the time to appeal. Ultimately it was Mr Clarke's decision not to appeal and justice requires, in my view, that he must abide by his decision.

Permission to appeal application

69. For that reason, I do not have to consider the permission to appeal application. However, I have already indicated that I would have granted permission to appeal on some of the grounds for which it was applied.

70. Ms Frawley criticised Judge Clark's decision on eight grounds, although it seemed to me that they might fairly be summarised as follows:

(a) She considered the exercise of discretion came to the wrong answer because he did not properly apply the test in *Denton;*

(b) She considered the exercise of discretion came to the wrong answer and therefore must have involved the judge giving improper weight to the various circumstances: this seemed to be an allegation he exercised his discretion unreasonably;

(c) The judge was wrong in law to attribute Mr Horler's failings to Mr Clarke;

(d) The Judge was wrong in law to be influenced by the possibility that Mr Clarke intended to apply to amend his grounds of appeal to bring in a challenge on quantum if the appeal was not struck out.

71. I would refuse permission on the ground that the Judge applied the wrong test by referring to *Data Select* (and *Vaultdown* and *Bazaar*) rather than *Denton.* I have already explained there is no real difference. As I have said, while *Denton* says that if the failure is not serious and significant, there is usually no need to move on to the later stages of the test, but *Data Select* does not express the test in the form of 'stages', where a failure is serious or significant both tests require all circumstances of the case to be considered. The failure was found by Judge Clark to be serious and significant and so either way the result under both tests would be that the Tribunal had to consider all the circumstances of the case. And Judge Clark did so.

72. I would refuse permission to appeal applied for on the general ground that the Judge incorrectly exercised his discretion. It is by itself too vague. Some specifics to this allegation were given. It was said that the Judge confused the direction to provide a list of documents with the direction to state an intent to pursue the appeal. But I find this ground is not made out as on the contrary the Judge was well aware of the

distinction (see [90]). I would also refuse permission in so far as Ms Frawley suggests that Judge Clark was wrong to take into account, when considering the application to reinstate once struck out for failing to state an intent to pursue, the appellant's failure to comply with the direction to provide his list of documents. On the contrary, all the circumstances of the case should be considered: not just the failure to comply which led to the strike out but other failures as well. I would also refuse permission on the grounds that the judge took into account that the appellant's failure to comply with directions had given HMRC an 'impression' that the appellant was no longer interested in the appeal. So far from being wrong in law, it is difficult to see what other conclusion could reasonably be drawn.

73. The last two grounds, however, were specific and arguable. While I recognise that the question of whether an agent's failings should be attributed to the appellant is arguable, Judge Clark's conclusions are similar to mine in this case (see §§33-37 above), and while I also recognise that Judge Clark may have put too much weight on the fact that the appellant intended to amend his grounds of appeal to bring in quantum, and I myself put no weight on it in the decisions I make here, I do not consider it a clear error of law to do so.

74. Nevertheless, I considered it possible that the appeal might succeed on either of these grounds, although even if it did, the best outcome for Mr Clarke would be the case being remitted to the FTT for the exercise of discretion to be carried out a second time by a different Judge. It could not be said that it was clear that Judge Clarke should have allowed the reinstatement application. Nor can it be said that Judge Clark made any clear errors of law such that I should (had I extended time to appeal) review the decision under Rule 41 and remit it for re-decision in the FTT thus bypassing the Upper Tribunal.

75. In conclusion, had I extended time, I would have granted permission to appeal on these two grounds only.

The application to apply for reinstatement out of time

The seriousness and significance of the failure to comply with the time limit

76. The VAT appeal was struck out on 8 December 2015; the appellant (or more accurately Mr Horler) was notified by letter of the same date of the right to apply for reinstatement within 28 days. That right expired on 5 January 2016. The appellant applied for reinstatement on 9 June 2017. The delay was therefore of one year, five months and 4 days.

77. As before, Ms Frawley did not consider that the delay of nearly 18 months was serious and significant at least not in the context of (a) other delays in the progress of the appeal (b) the reasons for the delay and (c) the lack of (as she saw it) prejudice to HMRC occasioned by the delay.

78. My conclusion is very similar to that in respect of the other application for an extension of time: on (a) it was not proved to me that there had been any earlier

delays occasioned by defaults on either side. Moreover, the fact that the subject matter of the appeals dated back to 2000, so far from excusing a further delay of well over a year, meant that unnecessary further delays should be avoided and the appeal determined as fast as consistent with justice. And so far as (b) was concerned, the balancing exercise should be performed after consideration of all relevant factors. And so far as (c) was concerned, HMRC were clearly prejudiced by the near one and half year's delay: if the application was allowed, the appeal would take nearly 18 months longer to resolve than if the application had been made promptly not to mention that for the last nearly 18 months HMRC had proceeded on the basis that the assessments were enforceable.

79. Ms Frawley suggested that the default was at the 'bottom of the range of seriousness' (citing *Denton* at [62]) and that HMRC were being opportunistic in seeking to rely on the default as a reason to prevent permission to appeal being given (*Denton* at [43]): I do not agree.

80. My view is that a delay of nearly 18 months was serious and significant, in the context of a 28 day time limit in which to lodge an application for reinstatement. It was certainly not trivial, minor nor insignificant ([26] of *Denton*) such that the application for an extension of time should be allowed without carrying out the weighing exercise. Such a delay undoubtedly would add nearly 18 months to the length of time it would take to resolve the appeal. If a delay of 18 months was not to be regarded as serious and significant, the Tribunal would have reverted to the pre-reform of the CPR position where the importance of deciding an appeal on its merits was given such significance that defaults were frequently forgiven, resulting in an expectation that they would be forgiven and thus leading to general procrastination in the conduct of litigation that by itself was a denial of justice and which the reform was meant to correct. So I move on to the second stage.

The reason for the failure

81. The question is the delay from the expiry of the right to apply for reinstatement: not the delays which led to the strike out in the first place.

82. The appellant's position as reported by me at §49 above, although without evidence, was that he did not know the VAT appeals had been struck out until the Tribunal confirmed this on 23 May 2017. His position is that he can't reasonably have been expected to apply for reinstatement until he knew that the appeals had been struck out. And he applied for reinstatement well within 28 days of 23 May 2017.

83. HMRC do not accept that. They consider he should be treated as having known of the time-limit on reinstatement from when it was notified to Mr Horler, because Mr Horler was his representative. Even if that is wrong, they consider he ought to have made it his business to find out what was going on in the appeal long before he did, particularly in view of the issues he knew in early 2016 existed with the income tax appeals.

84. In fact, it was HMRC's case that Mr Clarke had heard HMRC's presenting officer and Mr Horler discuss the VAT appeals at the hearing in front of Judge Clark: but I had no evidence to that effect, and Ms Frawley (on instructions) did not accept that that was true. So I do not accept HMRC's case on this.

85. But I do find that Mr Clarke knew or ought to have known there was an issue with the VAT appeals long before 2017: he clearly was clearly aware of the problems with the *income* tax appeals from January 2016 and ought to have questioned the position with the VAT appeals; indeed it was clear he was concerned about the appeals from November 2015 and the status of the VAT appeals was referred to Judge Clark's decision which he could have read. He should have questioned the position long before 2017.

86. Either Mr Clarke thought the reinstatement application in front of Judge Clark applied to all his appeals, in which case he chose to accept Mr Horler's advice not to appeal them. Alternatively, he appreciated (correctly) that the VAT appeals were not dealt with by Judge Clark. If so, it is a mystery to me as to why he did nothing for over a year. He clearly knew Mr Horler had failed to deal with the income tax appeal and was on notice the same might well be true of the VAT appeal. Yet he did nothing for a very long period.

87. So even if I accepted that Mr Clark's reliance on Mr Horler was a good reason for him doing nothing on the VAT appeals until April or June 2016, he does not have a good reason for failing to progress them until mid-2017. In any event, for the reasons given above at §§33-37, I don't accept his reliance on Mr Horler was a good reason for the failure to apply for reinstatement within the time limit.

The prospects of success

88. If this application is granted, Mr Clarke faces two legal decisions he must win in order to succeed in upsetting the VAT assessments. Firstly, he must succeed in his reinstatement application, and then he must succeed in his appeal. Succeeding in the first but not the second would be a pointless waste of costs, so I consider the merits of both.

89. So far as the reinstatement application was concerned, had it been made in time, I would have considered that it was neither hopeless nor bound to succeed. I give it full consideration below. It had a reasonable prospect of success, although ultimately my decision was that it did not succeed.

90. So far as the underlying VAT appeal was concerned, Mr Vallis' view was this was an appeal with reasonable prospects of success. He did not regard it as a very strong case nor as a very weak case.

91. Ms Frawley clearly passionately believed that her client had been badly advised from the outset and the disclosure report already referred to over-stated his liability. It had been prepared by accountants and her opinion was that they had not understood the legal position and in particular her view was that her client should only have been

liable for VAT on the commission he received (which would give a liability to VAT of about £200K, and not on the gross amount received (the basis of the disclosure report and subsequent assessment to VAT of nearly £900K).

92. This was not, of course, currently a ground of appeal and Ms Frawley accepted that to become a ground of appeal Mr Clarke would need to amend his notice of appeal. However, even preceding on the assumption that if reinstated he would be given permission to do so, I was not satisfied that this ground of appeal was virtually bound to succeed. I could not be so satisfied in the absence of any evidence at all about how Mr Clarke operated his business.

93. It seemed to me that Mr Vallis' view was right: the VAT appeal, even if the grounds of appeal were amended as Ms Frawley desired, had a reasonable prospect of success; it was neither bound to fail nor bound to succeed.

The consequences to the parties of refusing or allowing an extension

94. This is much the same as I considered with respect to the application for permission to appeal out of time, and set out at §§60-64 above. I will not repeat it all.

95. I note, however, that the sums involved with the VAT appeal are very much larger than with the income tax appeal. Nearly £900K is at stake and Ms Frawley's position, which Mr Vallis did not challenge, is that Mr Clarke was at risk of bankruptcy and losing his home if he lost the VAT appeal. Therefore, as I have concluded his appeal would have a reasonable prospect of success if allowed to proceed, the loss of the right to make that appeal is a very serious disadvantage to Mr Clarke.

96. The consequences of allowing the requested extension of time is really the mirror image of what I have just said: HMRC will have to continue to spend time and resources in defending this appeal. Mr Clarke will obtain the right to apply for reinstatement, which if he does so successfully, will give him the right to pursue his appeal. At both stages, he has a reasonable prospect of success, but nevertheless must succeed in both for the extension of time to be of value. And if he does succeed, he will avoid bankruptcy and loss of his home on the basis of the VAT assessment.

Conclusion

97. Time limits should be obeyed for the reasons I have already stated at §§29-30: there was very significant delay of nearly 18 months in seeking reinstatement in this case. It was serious because not only would it add significantly to the time required to resolve the appeal but also because it reverses HMRC's legitimate expectations which must have arisen from the appellant's failure to apply for reinstatement in time. HMRC have the right to finality in litigation and the general public have an interest in justice being administered efficiently. Excusing the delay in this case would make it more difficult not to sanction future delays in the conduct of this appeal and similar delays in other cases.

98. I do not consider that a good reason for the near 18 month delay has been given as I explain above. I am mystified as to why Mr Clarke, who was on notice that his adviser might not be adequate in November 2015, and who by the end of January 2016 clearly knew the income tax appeals (at the least) were struck out, did not effectively investigate the position on the VAT appeals long before he actually did. This is particularly inexplicable in view of the very large sum at stake and its significance to him personally.

99. I do take into account that an adverse decision on this application from me may well render Mr Clarke bankrupt and homeless (although that is tempered by the knowledge that even if I gave the extension, it would put in train a long process of litigation in which Mr Clarke has a number of obstacles to overcome before he could avoid that liability and at best at each stage he would only have a reasonable prospect of success and thus of avoiding bankruptcy and homelessness.)

100. Nevertheless, on balance and taking all factors into account, while I recognise the extreme seriousness of the matter to Mr Clarke, I have been given no acceptable explanation for a very significant delay of over 18 months in applying for reinstatement. Mr Clarke had to satisfy me that the extension of time was justified and he has not done so. I will not grant the extension of time.

The reinstatement application

101. My above refusal to extend time means there is no need to consider the reinstatement application but I do so in case this matter goes further.

102. As explained above, the VAT appeal was struck out on 8 December 2015 after a failure to comply with the unless order of 12 November 2015. The reinstatement application is an application for relief from the sanction of being struck out, and therefore, as I have said, the same legal test applies as for the other applications for relief from sanction.

The seriousness and significance of the failure to comply with the unless order

103. The appellant's case was that its failure to comply with the unless order was not a serious matter. All it did, says the appellant, was fail to tell HMRC and the Tribunal that he intended to pursue the appeal. HMRC now know that he does.

104. The appellant also says his default was not significant: nothing has happened bar delay. HMRC has not (says the appellant) incurred wasted costs. And the appellant's underlying failures to provide his list of documents and witness statements, which led to the unless order, albeit were not a subject of the unless order, prejudiced no one but himself.

105. I do not agree with the appellant's analysis of the significance of his failures. And I explain why.

106. So far as the list of documents is concerned, it is very important that parties exchange well in advance of the hearing the documentary evidence on which they rely in the appeal. To properly prepare for the case, each side needs to know what evidence the other party relies upon. When the appellant failed to provide its list of documents, HMRC was deprived of knowing the appellant's evidential case.

107. Ms Frawley points out that the Tribunal's first 'chasing' letter sent to the appellant when he failed to provide his list of documents on the due date merely warned that he might not be able to rely on his documentary evidence in the hearing. This was the basis of Ms Frawley's statement that the only prejudice in his failure to comply was to himself as he might not be allowed to rely on his own documentary evidence.

108. However, while it is true that a judge would be unlikely to permit an appellant to rely on evidence not disclosed in advance, it is not right to say that the only prejudice in failing to provide his list of documents is to the appellant. That is because it may be unfair to HMRC to permit the appeal to proceed even without the appellant's undisclosed documentary evidence, because an appellant is very unlikely to succeed without evidence (as the appellant normally has the burden of proving its case) and holding a hearing in such an eventuality is likely to be a waste of everyone's time and money. The failure to provide his list of documents, being the documentary evidence upon which he relied, was therefore a very serious matter and did prejudice HMRC, at least if the appeal was to continue.

109. I recognise that the requirement to provide his list of documents was not subject to the unless order. Nevertheless, other defaults, apart from the failure to comply with the unless order, are relevant when considering whether to reinstate an appeal. It is also relevant that the default is still outstanding today, more than two years after the compliance date.

110. The same is true of the witness statements. The failure to provide them meant that either HMRC would be ambushed by Mr Clarke's evidence at the hearing, or the hearing judge would refuse to permit any person (including Mr Clarke himself) to give evidence in support of Mr Clarke's appeal, in which case the appeal was very unlikely to succeed and would be a waste of everyone's time and money. Although not a failing for which the unless order was issued, it is a relevant default. It is also default still outstanding today. The failure to provide witness statements is therefore a very serious matter and did prejudice HMRC.

111. Lastly, the unless order, while it was issued because of Mr Clarke's failure to provide witness statements and a list of documents, nevertheless only required Mr Clarke to notify an intention to pursue the appeal. While it would have been very easy to comply with this order - a one-line email would be sufficient – that does not mean that the failure to comply was not serious. On the contrary, knowing whether the appellant is pursuing the appeal is also obviously of critical importance to the respondents: if an appeal is not being pursued, no further time or money needs to be spent on it, and HMRC would be entitled to enforce the assessments the subject of the appeal. While some appellants who lose interest in pursuing their appeal take the

trouble to notify the Tribunal of this and withdraw their appeal, others simply do nothing. An unless order requiring notification of intent to pursue is intended to distinguish between appellants who have lost interest in the appeal but have not notified anyone of this, and those who actually do want to pursue their appeal. The failure to respond to it meant that HMRC and the Tribunal did draw the conclusion that the appellant did not intend to pursue the appeal. It gave rise to the legitimate expectation that the appeal proceedings were at an end. So Mr Clarke's failure to tell the Tribunal and HMRC that he actually did want to pursue the appeal was serious and significant, and did prejudice HMRC. And the failure lasted a considerable period from the compliance date of 19 November 2015 until the application for reinstatement in June 2017.

112. Ms Frawley says that allowing the appeal to proceed does not mean the litigation is conducted inefficiently or at disproportionate cost. But litigation is conducted inefficiently where parties do not comply with directions and have to be sent chasing letters and unless orders to seek to obtain compliance; litigation is conducted at disproportionate cost when it becomes protracted because no effective sanction is imposed for a party's failure to respect the timetable laid down. The failure to comply with the unless order by itself was serious and significant; the failure to comply for such a long period even more serious.

The reason for the failure

113. I was not given any evidence, but Ms Frawley said the appellant accepted Judge Clark's findings of fact in the income tax reinstatement decision. I understood that therefore the same reason for the failure to pursue the income tax appeal was the reason put forward for the failure to pursue the VAT appeal. HMRC did not suggest that they challenged Judge Clark's findings of fact either. On that basis, I proceeded on the basis that I should apply Judge Clark's findings of fact to the VAT appeal reinstatement application.

Judge Clark's findings of fact

114. Judge Clark's findings in respect of Mr Horler's activities were as follows. Mr Horler's explanation for the defaults was given in a letter of 25 January 2016 which was set out at [24] and were in summary that:

> (a) Mr Horler was suffering from long term depression and unable to deal with complex matters;
>
> (b) He did not receive any of the paperwork from the Tribunal until 19 January 2016 because it had been sent to his previous address.

115. The Tribunal's findings of fact do not come until late in the decision. At [102] the Tribunal rejects excuse (b) finding that Mr Horler had received all the relevant correspondence from both HMRC and HMCTS (the Tribunal) by email.

116. The Tribunal made no findings about the depression (see [104]) but proceeded on the assumption that Mr Horler had been depressed and this had affected his capacity to work to some extent. The Tribunal did rule at [105] that it was not

satisfied that Mr Horler's condition made it impossible to notify the Tribunal that he was in difficulties. The Tribunal's conclusion was that they did not consider Mr Horler's explanation for the defaults satisfactory [§107].

117. Judge Clark's findings in respect of Mr Clarke's activities were as follows. Mr Clarke has left the conduct of the tax litigation in Mr Horler's hands but [§29] had become concerned in late 2015 over what was happening. He tried to contact Mr Horler by email on 2 November 2015 [§68] and involved the accountant who had introduced him to Mr Horler. On 20 November 2015, he was told by his accountant that Mr Horler would be in contact with him the following week.

118. He made other attempts to chase Mr Horler (he even visited his home although discovered he no longer lived there [§31]) but Judge Clark found that this all happened after 22 January 2016, which was after the income tax appeal was struck out, and long after the VAT appeal was struck out.

119. Mr Clarke had received no correspondence from the Tribunal (apart from the notice of hearing letter). He was not aware of the unless order nor the strike out order ([33-34] and [72]). Mr Clarke did not attempt to contact HMRC or the Tribunal at any point ([73]).

Did this amount to a good reason for the failure to comply with the unless order?

120. Mr Clarke's position here, and in front of Judge Clark, was that he had quite properly entrusted his VAT appeal to someone recommended to him as capable of dealing with such appeals, and had been badly let down by that person.

121. I agree that Mr Horler did let Mr Clarke down badly. He neither pursued the appeals in accordance with the Tribunal's directions (he did not even bother to send a one-line email stating an intention to pursue the appeal) and nor did he tell Mr Clarke that he was unable to properly represent him, thus he failed to prompt Mr Clarke into instructing someone who would not let him down.

122. Judge Clark did not consider that as a matter of law that was a good reason for the failure. As he explained at [62-63], in his view, the choice to appoint a representative was the appellant's, but doing so did not absolve the appellant from his duty as a litigant. I came to the same conclusion at §§33-37 of this decision.

Was there a good reason for Mr Horler's failings?

123. However, treating Mr Horler's failings as Mr Clarke's failings means I must consider whether Mr Horler failed in his duty to Mr Clarke for good reasons. As I have said at §114, Judge Clark did not think so. And on the basis of the findings of fact made by Judge Clark, I agree: there was no good explanation for why Mr Horler did absolutely nothing on Mr Clarke's case in circumstances where the Tribunal did not find that Mr Horler's depression had entirely incapacitated him but on the contrary found that he would have been able to at least notify Mr Clarke of his difficulties.

124. I also accept that Mr Clarke did make some attempts to remedy the situation. However, Judge Clark's findings were that, despite being concerned, and despite

being promised an email the next week, Mr Clarke did nothing from 20 November 2015 to 22 January 2016, and I find it clear, that even when Mr Clarke did re-establish contact with Mr Horler, nothing was done on the VAT appeals until 2017. I consider that Mr Clarke was on notice from late November 2015 that there was a problem with his representative, but he chose to do nothing about the VAT appeal until 2017. While the compliance date was 17 November 2017, early on in the period when Mr Clarke knew he had problems with Mr Horler's capacity to represent him, the failure to comply persisted until mid 2017, during virtually all of which period Mr Horler knew he could not rely on Mr Horler to deal promptly with his appeal. I have not been given an acceptable explanation for this long delay.

125. Indeed, Ms Frawley adds further facts in her application, in particular that Mr Clarke sent another chasing email to Mr Horler on 21 December 2015 because he had received correspondence from HMRC earlier in December seeking to enforce the VAT debt. But still he did nothing further to progress the VAT appeals until 2017. While again I had no evidence on whether these facts were true, HMRC did not challenge them. Proceeding on the assumption they were not in dispute, it is of no help to Mr Clarke, but rather the reverse. It reinforces my view that Mr Clarke did nothing effective to address what should have been very real concerns to him about what was going on with his VAT appeal.

The merits of the VAT appeal

126. I have already dealt with this at §93 above. On the information I have, I can only conclude that the appeal has a reasonable prospect of success, as conceded by HMRC. Ms Frawley would like me to draw the conclusion that the appeal is virtually bound to lead to a significant reduction in the assessment, but I have no grounds on which to reach such a conclusion. If the evidence in the witness statement was intended to provide such grounds, it was excluded (and rightly excluded) because HMRC had no real opportunity to respond to it and provide their own view on the merits of the appellant's new case on quantum.

The consequences to the parties of refusing or allowing reinstatement

127. I have already said that the consequences of refusing reinstatement would be very serious indeed to Mr Clarke: he would lose the right to pursue an appeal which has a reasonable prospect of reducing assessments of over £1 million to nil or a much smaller amount, thus avoiding bankruptcy and the loss of his home. This is a very strong factor in favour of reinstatement as it would give him the chance to contest the appeal which has for him a reasonable prospect of success.

128. The appellant points out that he has a right to access to justice, and considers that denying him reinstatement denies him that right. I do not accept that: he was given his right of access to justice when he was given the right to appeal the assessments. He exercised that right but then his appeal was struck out for non-compliance. The question is whether he should be given access to justice a second time on the same dispute.

129. So far as HMRC is concerned, while it is right that in general HMRC should only be interested in enforcing payment of the true tax liability, nevertheless, it would be wrong if taxpayers could dispute their tax liability whenever they chose, rather than in accordance with the time-limits laid down by Parliament to give finality to tax disputes. So HMRC are prejudiced by reinstatement.

Conclusion

130. I have refused to extend time to apply for reinstatement. My decision on the reinstatement application is therefore of no effect, and I only record my decision in case this matter goes further.

131. Ms Frawley's case is that if there ought to be a sanction on Mr Clarke, it should be less severe than striking out. She suggested that preventing him relying on his own evidence might be a suitable sanction for failing to provide a list of documents and witness statements. I have already dealt with why this is not a suitable sanction. In summary, it would in many cases be wrong to allow a hearing to proceed where the appellant did not produce any evidence as the appeal would not have a reasonable prospect of success: so barring an appellant who did not produce his evidence in advance from using his evidence in a hearing is often not a suitable sanction. Striking out (after suitable warnings) is more likely to be appropriate as the case would not have a reasonable prospect of success without evidence.

132. In any event in this case, the strike out of the VAT appeal was for failure to notify an intent to pursue the appeal, the appellant having already failed to produce his evidence. In my view, striking out is the obvious and only really suitable sanction for an appellant who fails to reply to correspondence and directions from the Tribunal as it appears they are not pursuing the appeal but have not had the courtesy to actually withdraw it. While HMRC and the Tribunal now know that Mr Clarke did wish to pursue the appeal, neither the Tribunal nor HMRC knew this when the appeal was struck out, nor for well over a year after it was struck out.

133. So I do not accept that the original sanction was too severe. The comments of the Supreme Court in *BPP* that in that appeal the barring was close to the border of when debarring would be too severe a sanction ([34]) were made in the context of an unless order to compel delivery of a proper statement of case: unlike here, there was no overt concern in the unless order in *BPP* with whether HMRC intended to pursue the appeal.

134. So, taking account of the fact that the decision to strike out was entirely justified on what was known to the judge making the order at that time, the question is whether the appellant has satisfied me that his appeal should be reinstated. The failure to comply was serious, was preceded by other serious breaches of direction, and has lasted for slightly over 18 months; yet the strike out will have severe consequences for the appellant. At the same time, I have found that there is no good reason explaining the default: the appellant chose his representative and must take responsibility for the representative's compliance failures. Indeed, by the end of November 2015, when Mr Horler had not contacted him as promised, Mr Clarke should have been concerned

and taken steps. Had he acted fast enough, he might have prevented the strike out on 8 December 2015 but was instead content to let the matter drift, despite its importance to him, for well over a year. There was clear prejudice to HMRC in the appellant's failures to comply over such a period. While the balance is somewhat finer in this case than in the applications to extend time, I am not satisfied, taking all matters into account including the need for weight to be given to the importance of compliance, that the appeal should be reinstated. I would refuse the application for reinstatement.

135. That concludes the applications made by Mr Clarke but I must consider one further matter and that is the question of anonymization.

Anonymisation?

136. While I do not believe that the hearing in front of Judge Clark was conducted in private, he did order that his decision would be anonymised. It was published under the name *Andrew Green* and referred to Mr Horler as Mr Blue.

137. The hearing in front of me was not conducted in private although in reality (as is true in virtually all hearings in front of this Tribunal) no members of the public were present. Neither party applied for anonymization of this decision although both indicated that they had no objections to it being anonymised. They understood that the earlier anonymization had been granted to protect Mr Horler's professional reputation: Ms Frawley said Mr Clarke did not suggest that there was any need to anonymise it for himself. It was agreed that I would decide at the time of writing up whether or not the decision should be anonymised.

138. I have decided it should not be anonymised.

139. As a matter of law, the principle of open and public justice would require all cases to be published without protecting anyone's identity, but it is recognised that in some exceptional circumstances justice would not be served if identities were made public. In *Banerjee* [2009] EWHC 1229 (Ch) the High Court said that when determining whether anonymity should be ordered, the court must have regard to the need to protect confidential material and a person's right to private life (§26). The Tribunal should also should have regard to the fact that a person's tax affairs are particularly sensitive, while at the same time that tax matters are of general public interest (§35).

140. That is not relevant here where Mr Clarke does not seen anonymization for himself. In this case, it is the potential damage to Mr Horler's reputation that is the only ground on which anonymization might be justified.

141. In *Banerjee,* the court found no exceptional circumstances to justify a doctor's desire for anonymity because of the risk her patients might find out about her dispute with HMRC over professional expenses. In *Mr A* [2012] UKFTT 541 (TC) a well-known media presenter allegedly involved in a tax avoidance scheme was at risk from adverse publicity if the proceedings were not in private: that was found not to amount to exceptional circumstances. In *Chan & Chan* [2014] UKFTT 256 (TC) I said at

[93] that while professional reputation is important, it is at least as important to the general public that it is deserved. Damage to reputation would therefore not ordinarily be an exceptional circumstance.

142. Nevertheless, I recognise that there is a real distinction between cases where the person accused of misconduct is a party or a witness and has the power to defend their reputation and those who have no connection to the proceedings. In this hearing, Mr Horler was not present and could not offer any defence. Nevertheless, that is far from an unusual circumstance: it is quite common for allegations and findings to be made against third parties who are not present in the hearing and do not have the chance to defend themselves. That does not prevent the findings being made nor necessarily justify anonymity.

143. I also said at [94] of *Chan* that it might be appropriate to protect a reputation at interim hearings where allegations would be made and recorded, but no findings made either of guilt or in exoneration although I note that the correctness of this point was doubted in *Gold Nuts Ltd and others* [2015] UKFTT 432 (TC) at 70-74. It doesn't arise here as this is more akin to a final hearing.

144. The last point, but certainly not least, to consider is that if I do not anonymise this decision I will be undermining Judge Clark's earlier decision to anonymise his determination, in circumstances where Judge Clark's decision on anonymization is not challenged. However, the reality is that neither party has any real interest in the question of anonymization. At the hearing before Judge Clark, Mr Horler (the representative) desired anonymity and neither party objected to this. This is because the question of anonymization is not (normally) one in dispute between the parties: the dispute is between one person's desire for anonymity versus the interests of the general public in the administration of justice being conducted in the public domain.

145. My conclusion is, balancing the need not to undermine earlier Tribunal decisions against the need for justice to be seen to be done, I consider I should follow Judge Clark's decision on anonymisation unless I consider it was obviously wrong in law: I will follow it if I consider it was right or merely arguably wrong. So I move on to consider the rightness or otherwise of Judge Clark's decision on anonymization.

146. Judge Clark says little about the anonymisation: what he says is at §1. It appears it was granted to protect Mr Horler's personal and private position. What that was must be determined from the text of the decision as anonymisation is not referred to again.

147. Judge Clark does not record his weighing exercise such as that described in other cases on anonymisation. I have to presume his decision was that the public interest in open justice was outweighed by the need to respect Mr Horler's private and professional life, although no reasons are given why this was so.

148. And I do not accept Judge Clark was right to order anonymisation to protect Mr Horler's professional reputation or private life. Mr Horler was present in the court room and able to defend his professional reputation: in practice he admitted the

defaults which were recorded in the decision. It would not be right to order anonymization to protect a reputation that was not deserved. And so far as his private life was concerned, he claimed to be suffering from depression. While mental illness can justify anonymity, an undiagnosed depression that was not considered by the Tribunal to be particularly severe, nor to excuse professional failings, clearly does not.

149. So my conclusion is that I think Judge Clark's decision on anonymisation was obviously wrong in law and that I should not follow it. That means I have to make up my own mind so far as the hearing before me was concerned. In the hearing before me, I recognise that Mr Horler was not present to defend himself, which seems to me is a greater argument in favour of anonymisation than before Judge Clark, but nevertheless taking into account his admitted negligence in that earlier hearing, I do not think the further allegations made in the hearing before me were significantly different to justify anonymity when weighed against the public interest in open hearings and determinations.

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

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 09 MARCH 2018