[2020] UKFTT 0036 (TC)

TC07542

Procedure – application for reinstatement of struck out appeal – Denton and BPP Holdings applied – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/05407 (1)
TC/2017/06867 (2)
TC/2017/06869 (3)

BETWEEN

MCMANUS BROTHERS (a firm comprising Seamus McManus and John McManus) (1)
SEAMUS McMANUS (2)
JOHN McMANUS (3) **Appellants**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at The Law Courts, Belfast on 13 January 2020

Nicholas Compton, counsel, instructed by Tiernans solicitors, for the Appellants

Dermot Ryder, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is a decision on the Appellants' application for re-instatement of their appeals after they had been struck out for failure to comply with the Tribunal's Directions.

THE FACTS

2. I had the Tribunal's own correspondence files and small bundles of documents provided by both parties. Included in the bundle delivered by the Appellants were two one-page witness statements made by Seamus and John McManus, each addressed to the assessments raised against them in respect of the period 2009-13; they did not address the reinstatement application before me (except to the extent that they went to the question of the prejudice that would be suffered by them if reinstatement were not ordered) nor did they address the assessments in respect of earlier years or the penalty assessments. Also included in the Appellants' bundle was a one-page letter from their accountants G.P. Boyle & Co. Limited enclosing (a) a table showing what was said to be the turnover and expenditure of the partnership from April 2008 to April 2013, showing "predominantly trade profits over the period" but also containing an unexplained "net capital expenditure adjustment item for each year which gives the adjusted profits declared on self-assessment tax returns to HMRC"; (b) copies of unaudited financial statements of the first Appellant firm for the years ended 30 April 2008 to 2013 inclusive (it was confirmed in the hearing by both parties that this was the first time these documents had been produced to HMRC); and (c) copies of the second and third Appellants' self-assessment tax returns for the years ended 5 April 2009 to 2013 inclusive.

3. I find the following facts.

4. These appeals (including other appeals of the second and third Appellant which have subsequently been consolidated with their above-referenced appeals) were notified to the Tribunal on 7 October 2016 (as to the first Appellant), 13 and 15 September 2017 (as to the second Appellant) and 13 and 15 September 2017 (as to the third Appellant).

5. Initially the appeal of the first Appellant (which was subject to a hardship requirement) proceeded independently, whilst the appeals of the second and third Appellants proceeded together. Ultimately, HMRC served separate statements of case on all five appeals on 8 January 2018. Case management directions were issued by the Tribunal on the first Appellant's appeal on 21 February 2018, requiring lists of documents, witness statements and listing information to be delivered by 6 April, 4 May and 18 May 2018 respectively.

6. Some confusion arose over authorisation of the second and third Appellants' representatives, as a result of which their four appeals were only joined by direction of the Tribunal issued on 13 March 2018 and on the same date combined case management directions were issued requiring lists of documents and listing information to be delivered by 27 April 2018. On 30 April 2018 the second and third Appellants' representative Tiernans applied for an extension of time to deliver their list of documents, and also enquired why the first Appellant's appeal was not consolidated with the appeals of the second and third Appellants. In that email it was stated that the Appellants had only "in recent days" provided to them "a very large volume of documentation of an accountancy nature which requires analysis by the appellants legal team but we have also sought the assistance of the appellants accountants. It will take at least 2 weeks to come to terms with this documentation." They therefore applied for "clarification and a new set of Directions which accurately set out the relevant appeals".

7. The confusion over authorisation continued but on 18 May 2018 the Tribunal wrote to Tiernans pointing out that the first Appellant had not complied with the case management directions issued on 21 February 2018. In response, Tiernans submitted by email on 23 May 2018 responses to the case management directions issued on the second and third Appellants' appeals, but not the first Appellant's appeal. They also re-sent the content of their previous email dated 30 April 2018, questioning why all the appeals had not been consolidated.

8. This prompted a referral of the files to Judge Mosedale, who instructed that a letter be sent in which she proposed (subject to any representations to the contrary from the parties) setting aside the existing case management directions and joining all the appeals for hearing. This was sent on 2 July 2018. HMRC agreed to the proposal, but no response was received from the Appellants' representative. On 27 September 2018, under instructions from Judge Mosedale the Tribunal therefore issued Directions which consolidated the two appeals of the second Appellant under one reference, did the same in relation to the two appeals of the third Appellant and then joined those appeals "for the purposes of case management and hearing" with the appeal of the first Appellant. Directions were issued for production of lists of documents (by 11 October 2018), witness statements (by 8 November 2018) and listing information (by 22 November 2018). The Appellants were also directed to provide the hearing bundles by 6 December 2018.

9. No response was received from the Appellants or their representative, and on 3 December 2018 the Tribunal wrote to Tiernans to chase compliance with the Directions.

10. On 3 December 2018, the brother of Michael McVerry of Tiernans (the solicitor with conduct of the matter) died suddenly and unexpectedly from a heart attack. Mr McVerry became heavily involved not only in the immediate shock and grief of his brother's death but also, for some time, in the winding down of his brother's business.

11. On 8 December 2018, HMRC confirmed to the Tribunal that they had not received the hearing bundles as required by the 27 September 2018 Directions.

12. On 16 January 2019, the Tribunal issued an "unless" order, requiring the Appellants to confirm their intention to continue with the appeals no later than 7 February 2019, in default of which the appeals would be automatically struck out.

13. On 6 February 2019, Tiernans (Mr McVerry) sent to the Tribunal a one line email as follows:

> We wish to confirm that these appeals are proceeding in accordance with the Direction of the 16th January 2019.

14. In response to this, the Tribunal issued a further unless order on 1 March 2019, stating that:

> UNLESS the appellants 15th March 2019 comply with the Directions issued on 27 September 2018 to provide their list of documents and their witness statements and, at the same time, makes an application for them to be permitted to comply out of time, then these proceedings MAY be STRUCK OUT without further reference to the parties.

15. Nothing was heard from the Appellants or Tiernans in response, so on 10 May 2019 the Tribunal sent a warning letter to the effect that the Judge was "minded to strike out the appeals on the basis that it is not fair to allow the appeals to proceed without disclosure of evidence which is to be relied on and if the appellants have no evidence their appeal is most unlikely to succeed." The letter went on to say "If you have anything to say in opposition to that course of action, please respond within 14 days of the release date of this letter."

16. Again no response was received, so on 24 June 2019 (in relation to the first and second Appellants) and on 25 June 2019 (in relation to the third Appellant) the Tribunal issued directions striking out the appeals for failure to comply with the Directions issued on 1 March 2019. The reasons given for striking the appeals out were as follows:

> (a) The appellants have failed to serve their evidence in support of their appeals. Either the appellants have evidence or they do not: if they do have

> evidence, their failure to serve it means that the proceedings (if allowed to continue) would be unfair to HMRC which would not be given the chance to consider the evidence before preparing for any hearing; if the appellants do not have evidence, then their appeals are most unlikely to succeed as they have the burden of proof and allowing the proceedings to continue wastes the time of the Tribunal and the time and costs of HMRC;
>
> (b) The appellants have been warned that they are at risk of striking out but have not made any representations to oppose it so it appears that the appellants do not wish to pursue the proceedings and it is not right to put the Tribunal and HMRC to any further time and costs in this matter

17. These strike out directions included the statement that "The appellant has the right to apply for the proceedings to be reinstated but such an application must be (a) in writing, (b) supported by reasons and include an explanation for the non-compliance and (c) be received by the Tribunal within 28 days from the date of this letter."

18. On 22 July 2019, Tiernans applied for reinstatement by email from Mr McVerry. The email contained the following text:

> I undertake to forward the List of Documents and witness Statements within 7 days if reinstatement is granted. I acknowledge some personal responsibility for the failure to engage actively with this case. I note that in the Direction of the 1st March 2019 reference is made to a letter of 3 December 2018. I have attached here with Death Certificate of my brother Declan McVerry who died suddenly on that very day 3 December 2018 aged 51 of a cardiac arrest. Since his death I have had to deal with the fallout for his family and business dealings which has involved winding down a significant Tyre Distribution company to say nothing of dealing with the personal shock and grief. Indeed this work is still ongoing. I cannot recall receiving the letter of the 3rd December 2018 but this is most likely due to the chaos of life in the weeks following 3rd December.
>
> Since my brother's death I have had also had to go through cardiac investigation which has resulted in two heart surgeries. I have returned to work today following some rest and recuperation.
>
> I apologise to the Tribunal and indeed the representatives of the Respondents. However I would ask that the reinstatement be granted to afford the appellants their opportunity to advance their appeals.

19. At the hearing, some further detail was provided orally of Mr McVerry's own health problems. He had, following the death of his brother, been subject to cardiac investigations himself in January 2019, which had identified some problems. He had suffered a heart attack (presumably a minor one) on 11 July and had an operation on 16 July, of which no details were provided.

20. The Tribunal sent a copy of the Tiernans email of 22 July 2019 to HMRC on 31 July 2019, seeking any representations on it within 14 days. On the same day, HMRC submitted their response to the original 22nd July application (which had presumably been copied to them by Tiernans, though they had not informed the Tribunal of that fact). Whilst acknowledging the personal difficulties encountered by Mr McVerry, and wishing him well in his recovery, HMRC noted there were apparently (according to the Tiernans website) four other solicitors within Tiernans and considered there ought to have been some response from the firm notwithstanding Mr McVerry's personal problems. They then rehearsed the history of the appeals, illustrating the delay throughout. They asserted this was a continuation of the behaviour of the Appellants throughout the prior compliance enquiries. Mr McVerry responded on the same day, explaining that one of the four had left the firm, one had only recently returned part-time on a phased basis from maternity leave, one had no experience in Tribunal work and the other was a conveyancing and family lawyer.

21. On the instructions of Judge Mosedale the Tribunal listed the reinstatement application for hearing and in the letters dated 16 and 20 August 2019 seeking the parties' "dates to avoid" for the hearing, the Tribunal said this:

> The appellants are on notice that if they fail to serve their witness evidence and list of documents before the application for reinstatement is heard, the application is less likely to succeed. This is because, firstly, the appeal was struck out for non-compliance and compliance is long overdue, so the appellants need to remedy this, and secondly, the hearing Judge may wish to consider the prospects of success if the appeal were reinstated (in that, if the appeal is without reasonable prospects of success, it may not be appropriate to reinstated; and if the appeal would be very likely to succeed, that supports the application).

22. The hearing was listed for Monday, 13 January 2020 in Belfast. At 16.28 on Friday 10 January, the Tribunal received an email from Tiernans which attached the Appellants' bundle referred to at [2] above. A hard copy was brought along to the hearing.

SUBMISSIONS

On behalf of the Appellants

23. Mr Compton rightly accepted that the delay throughout the proceedings on the part of the Appellants was serious and substantial. But in the circumstances he sought to argue that there was a good explanation for that delay (in the form of the death of Mr McVerry's brother and Mr McVerry's own health problems) and that in exercising my discretion to grant reinstatement, I should bear in mind that explanation, and also that (1) it was not easy in Northern Ireland to find anyone with expertise in the work of the Tax Tribunal who could have stood in for Mr McVerry during his health problems, (2) the extreme prejudice that would be suffered by the Appellants if they were not permitted to defend the appeals, (3) the lack of prejudice to HMRC if reinstatement were ordered, bearing in mind that the burden of proof lay on the Appellants, (4) the Tribunal's statutory duty to adjudicate on the correct amount of tax due, (5) the fact that the Appellants would lose their right to "participate fully in the proceedings" as contemplated in the Tribunal's procedure rules if the application were refused, and (6) the required documents and witness statements had now been provided and the Tribunal could manage the appeals robustly to a hearing. In his submission, in the light of all those factors, I ought to exercise my discretion to reinstate the appeals so they could be allowed to proceed to a full hearing.

On behalf of HMRC

24. Mr Ryder confirmed HMRC's sympathy for Mr McVerry's bereavement and his personal health problems, which they did not seek to dispute. However, the conduct of the appeal throughout (both before and after the period of difficulty for Mr McVerry had been a story of persistent default on the part of the Appellants, following on from a complete lack of engagement on their part in HMRC's earlier enquiries. Against the historical background, the undertakings of future compliance and engagement could not be trusted.

DISCUSSION

25. The appeals in this case were originally struck out pursuant to rule 8(3)(a) of the Tribunal's procedure rules, which provides as follows:

> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

26. The power to reinstate is contained in rule 8(5), which simply states that "If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated."

27. The test to be applied by the Tribunal in exercising its discretion is not laid down in the rules, but has been extensively considered in the authorities on this and related matters. It is of course also covered by the requirement in Rule 2 of the procedure rules to give effect to the overriding objective of dealing with cases "fairly and justly", specifically by reference to the particular matters referred to at Rule 2(2)(a) to (e).

28. I consider this application to be effectively an application for relief from the sanction of striking out for non-compliance with the Tribunal's directions. As such, the principles to be applied are to be derived from *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1WLR 3926 and *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945.

29. In *Denton,* the Court of Appeal was considering the application of the current version of CPR Rule 3.9 to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):

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

30. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered." These two factors are "the need… for litigation to be conducted efficiently and at proportionate cost; and … to enforce compliance with rules, practice directions and orders."

31. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT (a process analogous

to the striking out of the appeals in the present case, and governed by the same rule in the Tribunal's procedure rules).

32. In the present case, it is acknowledged that the delay was both serious and significant. I would have regarded it as such even if Mr Compton had not correctly acknowledged as much.

33. The explanation for the specific delay which caused the strike-out must clearly address the period of default. This was, in respect of the 27 September 2018 Directions, from 11 October 2018 to 10 January 2020 (in respect of the list of documents) and from 8 November 2018 to 10 January 2020 (in respect of the witness statements). Additionally, of course, the "unless" orders of 24/25 June 2019 intervened and reinforced the earlier requirements.

34. The explanation provided – relating to Mr McVerry's circumstances – does weigh in the balance in favour of granting reinstatement. However, the weight given to it is greatly affected by the fact that it can only provide some explanation for the period from 3 December 2018 to Mr McVerry's return to work on 22 July 2019, and the two requirements of the 27 September 2018 Directions which were subsequently made the subject of the "unless" orders of 24/25 June 2019 should have been complied with well before 3 December 2018. Even for the period 3 December 2018 to 22 July 2019, the explanation does not address the fact that it would have been very simple to have contacted HMRC and the Tribunal to explain the situation briefly and apply for an extension of time (it being noted that Mr McVerry did send a one line email in response to the "unless" order issued on 16 January 2019).

35. In carrying out the overall balancing exercise, my view on the submissions of Mr Compton summarised at [23] above is as follows (adopting the same numbering):

(1) It should not have been necessary to transfer the entire conduct of the appeals to another firm, only to have approached HMRC and the Tribunal with an application for an extension of time, outlining the particular circumstances in which Mr McVerry found himself. Whatever the difficulty of finding alternative competent representation (as to which there was no evidence before me), this simple step could have been taken and was not. I can therefore give this argument only limited weight.

(2) Obviously the loss of the opportunity to contest the disputed liabilities does cause the Appellants a great deal of prejudice. However if that were accepted as an adequate excuse for non-compliance, all appellants in appeals involving a significant amount of money would be permitted to disregard all time limits – hardly consistent with the particular importance of the need for litigation to be conducted efficiently and to enforce

compliance with orders of the Tribunal. I can therefore give this argument only limited weight. I did consider it appropriate to form an initial view of the strength of the Appellants' case, based on the evidence which had belatedly been submitted, as to which see [36] below.

(3) It is simply not correct to say that HMRC would not be prejudiced by the reinstatement of the appeal. Whilst the burden of proof may lie on the Appellants, HMRC would still be required to devote time, money and resources to the conduct of an appeal which they had quite properly regarded as concluded. I therefore give little weight to this submission.

(4) It is correct that the Tribunal is under an obligation to determine the correct liabilities under appeal, but that is not an absolute obligation. It is to be discharged by affording the parties the opportunity to engage the resources of the Tribunal in accordance with its rules of procedure. If they choose not to observe those rules, it cannot be right that the Tribunal nonetheless remains under an obligation to adjudicate on the appeal. I give no weight to this submission.

(5) Obviously as a result of the appeals being struck out, the Appellants forfeit the right to participate in the proceedings. That is a necessary consequence of being struck out. However, the rules specifically provide for such a strike out in appropriate circumstances, so it cannot be correct that the right to participate fully in the proceedings effectively negates the power to strike them out. The right to participate must be regarded as a right to do so on the basis of the rules themselves, so that the right is foregone in the circumstances prescribed by the rules.

(6) There was nothing in the materials put before the Tribunal which gave me any material assurance that the appeals, if reinstated, would be conducted robustly to a hearing. The witness statements provided were of the briefest and most formulaic type, and provided no evidence to rebut the presumptions upon which HMRC had based their assessments, nor did they address the pre-2009 assessments or the penalty elements of the appeals at all. They referred in general terms to the downturn in the Irish economy over the period 2009-13 and the significant impact that fact was said to have had on the business. Sean McManus also claimed to have left the business after a dispute with his brother in August 2012.

36. I felt it appropriate also to examine the available evidence briefly to establish whether the underlying appeals appeared to be obviously very weak or very strong (without seeking to embark on a "mini trial" of the appeals as a whole). Mr Compton submitted that the witness statements and other documents before me had been prepared and submitted for the purpose only of the reinstatement hearing, and that "far more" would be required for any final hearing. This submission in itself could be taken as implying that the Appellants had not in fact complied with the Tribunal's 1 March 2019 Direction at all – which would further weaken the argument for reinstatement. I therefore considered it appropriate to regard the documents as constituting the Appellants' attempt at compliance in full with the 1 March 2019 Direction.

37. The accounting material supplied on 10 January 2020 showed that the tax returns of the second and third Appellants bore no resemblance to the unaudited financial statements of the partnership business for any relevant year, the difference in each case being described in the accountants' letter as "net capital expenditure", giving rise to "adjusted profits". No explanation was given as to why some kind of capital adjustment to the trading profits shown in the accounts should be reflected in the income tax self-assessment returns of the second and third Appellants, or how the VAT position of the first Appellant was affected at all. Also, the reported turnover in the financial statements provided by the Appellants did not conform with the claim in the witness statements that the business had been seriously affected throughout the period 2009-13 by the problems of the Irish economy. The turnover in the year to 30 April 2009 was £501,280, rising to £737,298 the following year before falling sharply to £312,667 for the year ended 30 April 2011 but then bouncing back to £808,470 in the year ended 30 April 2012 then dropping again to £339,343 the following year.

38. It therefore appeared to me that the underlying case put forward by the Appellants in the evidence which had been belatedly served had obvious, serious and unexplained weaknesses (to the extent it addressed the specific liabilities which were the subject of the appeals at all), which I considered also weighed against reinstatement of the appeals.

DECISION

39. In the circumstances, after weighing up all the circumstances of the case which had been outlined to me at the hearing or emerged from my consideration of the evidence, and bearing in mind the particular importance of the need for litigation to be conducted efficiently and for time limits laid down by the Tribunal to be respected, I considered the overall balance weighed strongly against permitting reinstatement.

40. The reinstatement application made on 22 July 2019 is therefore REFUSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 21 JANUARY 2020