Neutral Citation: [2022] UKFTT 355 (TC)

Case Number: TC08608

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2018/04887

PROCEDURE – application for reinstatement brought out of time – permission to admit the reinstatement application sought and granted – reinstatement application granted – appeal reinstated

Heard on: 25 and 26 August 2022
Judgment date: 23 September 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MRS NORAH CLARKE

Between

ALAN AND DIANE MCFARLAND

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Annett of ACG accountants

For the Respondents: Joseph Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision deals with two applications brought by the appellant following the automatic strikeout of its appeal at 5.01pm on 9 March 2020 for breaching an unless order. The first is an application that the appeal be reinstated (the "**reinstatement application**"). The reinstatement application should have been brought within 28 days from the date on which the tribunal sent notification of the striking out to the appellant. Such notification was contained in a letter dated 19 September 2020. The reinstatement application should, therefore, have been brought by 17 October 2020 but was not in fact made until 18 November 2021. The second application, therefore, is an application for permission to bring the reinstatement application out of time (the "**out of time application**").

2. For the reasons given later in this decision, we have decided to grant both of the appellant's applications.

THE LAW

RELEVANT LEGISLATION

3. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**", each a "**Rule**") provides:

> "2. Overriding objective and parties' obligation to co-operate with the Tribunal
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

4. Rule 8 provides:

"8. Striking out a party's case

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

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or Tribunal) in relation to the proceedings or that part of them.

(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;

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

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

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) 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.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

5. Rule 5 provides (as far as is relevant):

"5. Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction -

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit……..

(9) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(10) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

RELEVANT CASE LAW

Out of time application

6. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

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

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can

be granted for very short delays without even moving on to a consideration of those stages.

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

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

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

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal……"

Reinstatement application

7. The application of *Martland* to an application to reinstate an appeal was considered by the Upper Tribunal (Judge Herrington) in the case of *Dominic Chappell v The Pensions Regulator* [UKUT] 0209 ("***Chappell***"). In that case Mr Chappell had sought reinstatement of his appeal which had been automatically struck out for failure to comply with an unless order. Judge Herrington considered that the relevant principles, when considering a reinstatement application, were much the same as those set out in *Martland*, which, although it dealt with an application for bringing a late appeal, apply generally when considering any relief from sanctions. However, Judge Herrington considered that there was a difference between the application of the pure *Martland* principles which should be applied when considering a late appeal, and those which should be applied in relation to other case management decisions. In *Martland* the Upper Tribunal had rejected a submission that the merits of the underlying appeal will ordinarily be irrelevant when considering an application to admit a late appeal. And so, as can be seen from paragraph [100] of its decision, indicated that the tribunal may consider the merits of an applicant's case when considering an application to admit a late appeal.

8. But in *Chappell*, based on a detailed review of the relevant case law, Judge Herrington distinguished an application to admit a late appeal from other case management decisions. The distinction is that for case management decisions generally, the tribunal already has jurisdiction. This is to be contrasted with an application to admit a late appeal where the tribunal is considering whether it should assume a jurisdiction it would not otherwise have. The general rule for case management decisions is that the merits of the appellant's case cannot be taken into account. But there is an exception from this general rule, and a tribunal can take into account the merits of an appellant's case if it has an unanswerable case that its appeal will succeed. The question is whether the appellant's case is strong enough to obtain summary judgment. If so, then the tribunal can take the merits of his underlying appeal into account when

considering a case management decision and, in particular, a reinstatement application. If not, it cannot.

9. Following this analysis, Judge Herrington set out how he would apply the *Martland* principles to when considering an application for reinstatement. Even though *Chappell* was a case involving an application for reinstatement against The Pensions Regulator, it is an Upper Tribunal decision on the same point that I am considering in this decision and I consider that I am bound by the principles set out by Judge Herrington which are set out below:

> "99. In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order.
>
> 100. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.
>
> 101. I shall only consider the merits of Mr Chappell's reference to the extent that it appears that TPR's case has any feature such as those that I have described at [93] above."

THE FACTS

10. We were provided with a comprehensive bundle of documents. Mr Alan McFarland gave oral evidence as, too, did Miss Gemma McMahon, the accountant who initially acted for the appellants in relation to this appeal. Oral evidence was given on behalf of HMRC by Senior Officer George Maciver. From this evidence we find the following facts;

> (1) The appellant is a partnership which runs a cattle farm at two sites in County Tyrone Northern Ireland. The partners are also directors of a company. The appellant makes supplies to that company. In December 2017, HMRC issued a decision to the appellant determining that those supplies were standard rated. They subsequently issued assessments against which the appellant appealed. In October 2018 the tribunal issued directions requiring the appellant to nominate a representative and to submit a hardship application. These directions included an unless order. The appellant failed to comply with that unless order and consequently the appeal was struck out by order dated 21 December 2018.
>
> (2) In January 2019 the appellant applied to reinstate its appeal which was opposed by the respondents. The decision on that application was made by Judge Amanda Brown QC and was released on 24 February 2020. That decision included the following:
>
> > (a) An observation, when considering the conduct of the appellant, that they have "at every turn been dilatory" and that "a reflection of the facts indicates that the appellants are systematically non-compliant":
> >
> > (b) An observation that the appellant needed to provide evidence of hardship which must first be considered by HMRC:

(c) A direction reinstating the appeal for a period of 14 days, subject to a direction that "UNLESS the appellants shall substantiate their hardship application by production of such evidence as they consider relevant to support the claim within 14 days the appeal SHALL be STRUCK OUT without further reference to the parties." (The "**Unless Order**").

(3) The parties agree that by dint of the Rules the time and date for compliance with the Unless Order was 5 pm on 9 March 2020.

(4) Miss McMahon had represented the appellant in relation to this first application for reinstatement and it was she, along with Mr Annett (who represented the appellant before us) and Mr McFarland who took responsibility for the provision of the hardship evidence to the tribunal and to HMRC in accordance with the Unless Order.

(5) Those individuals sought to obtain that information from third parties, and that information was sent to Miss McMahon who works in an office on the farm at which her parents live and for whom she cares.

(6) Mr McFarland and Mr Annett had sent much information to Miss McMahon on and before 9 March 2020. She had collated this. A telephone conversation between these parties was then held by way of a conference call at around 4.46 pm on 9 March 2020. It was Miss McMahon's evidence that on the call she explained to Mr McFarland that all the information was ready to go, and that Mr McFarland told her to "push the button". What he meant by this was that the email should be sent. Miss McMahon then sent the email at 4.47 (the "**first email**") for which she received an automated response from the tribunal timed at 4.48. Whilst the first email was sent to the tribunal, it was not sent to HMRC. They are not identified as recipients on it. We find as a fact that HMRC did not receive the first email until 18 June 2021. Miss McMahon told Mr McFarland, over the phone, that she had received the automated response. His response was that this was a good job.

(7) Later on that evening, and after the first email had been sent, a further piece of financial information was obtained which Mr McFarland and Mr Annett thought was relevant to the hardship application. Mr Annett sent Miss McMahon an email telling her that this document had been sent to her. On a further conference call, it was agreed that this additional document would be sent to HMRC and to the tribunal. In an email timed at 23.49 on 9 March 2020 (the "**second email**") which was this time addressed not just to the tribunal but also to HMRC, that additional document was sent to those recipients along with all of the other documents sent by the first email. The second email is in identical terms to the first email save as regards the additional document, and the recipients. It makes no mention of the first email. It was Mr McFarland's evidence that notwithstanding he thought this second email was not necessary to comply with the Unless Order, and could have been sent the following day, he wanted it to be on the desks of those considering the hardship information at the same time as the information sent by the first email. Miss McMahon received an automated response for the second email timed at 11.50 on 9 March 2020. We find as a fact that the second email was also received by HMRC on or around that time.

(8) HMRC treated the application for hardship as having been made; granted hardship on 16 March 2020; sent draft directions to the appellant on 9 April 2020 and filed a statement of case dated 11 June 2020.

(9) Notwithstanding the automated acknowledgement of receipt of the first email, the tribunal had no record of receiving it, and in a letter dated 19 September 2020, addressed to Miss McMahon (and which, on her evidence, she did not receive) notified Miss McMahon that the only evidence on the tribunal's file of information relating to hardship was that contained in the second email which was received after the 5 pm deadline. Accordingly, Judge Bailey confirmed that the appeal had been automatically struck out at 5.01 pm on 9 March 2020.

(10) In a letter dated 27 November 2020 to the appellant, Senior Officer Maciver mentioned that the appeal had been struck out by Judge Bailey on 19 September 2020 due to the partnership's failure to comply with earlier tribunal directions. The appellant's evidence is that it did not receive this letter.

(11) In a letter dated 18 March 2021 to the appellant, Senior Officer Maciver repeated that information. The appellant does not dispute that it received this letter.

(12) On 24 March 2021 Mr McFarland spoke to Senior Officer Maciver on the telephone indicating that whilst he had received the 18 March 2021 letter, he had not received the 27 November 2020 letter. He also stated that he was not aware that the appeal had been struck out by Judge Bailey on 19 September 2020 and had received no notification of that. Accordingly, on 25 March 2021, Senior Officer Maciver sent copies of both his letter of 27 November 2020, and Judge Bailey's strike out decision of 19 September 2020 to the appellant.

(13) The appellant appointed ACG to represent it in respect of these matters, in succession to Miss McMahon who, in early 2021, had been debilitatingly ill for a number of months and was simply unable to work, let alone take conduct of these issues.

(14) She was aware that the appellant had tried to contact her. However, it was not until her health improved in May and June 2021 that she managed to have a discussion with the appellant (Mr McFarland).

(15) It was her evidence, as well as the evidence of Mr McFarland, that on 18 June 2021 she sent a copy of the first email to Mr McFarland. It is Mr McFarland's evidence that that was the first time that he had received a copy of the first email. It was also Mr McFarland's evidence that (notwithstanding that he had been told by Senior Officer Maciver on 24 March 2021 that the appeal had been struck out and had also been sent a copy of the 19 September 2020 letter explaining the reasons why the appeal had been struck out (namely non-compliance with the Unless Order)) he was not aware that Miss McMahon had actually sent the first email to the tribunal until 18 June 2021.His evidence was that he did not have a physical copy of the receipt from the tribunal to that email in his possession. We make a finding of fact in this regard later in this decision.

(16) ACG wrote to the tribunal on 14 April 2021. This letter was not in the bundle but it was referred to in a letter dated 16 April 2021 from ACG in which they say "as we have advised the Tribunal in our letter dated 14.04.2021 (copy enclosed) we do not accept that the strike out was validly communicated to the partnership and as such the opportunity to make an application for reinstatement passed without their knowledge. It is their intention to make an application for reinstatement based on those special circumstances……"

(17) HMRC responded to that letter on 28 April 2021.

(18) On 26 May 2021 the tribunal appears to have chased for progress on any application to reinstate (as evidenced in the tribunal's letter to the parties on 25 August 2021).

(19) On 20 June 2021, ACG sent an email to the tribunal recording that the appeal had been struck out at 5.01 pm on 9 March 2020 because of an alleged failure to provide the hardship documentation; they enclosed a copy of the first email which they alleged showed that the documentation was submitted in time and therefore the appeal should not have been struck out; and went on to say that in circumstances where the strike out was a result of an administrative error on the part of the tribunal, could the tribunal confirm that the appeal would be reinstated without the need for a formal application.

(20) On 26 June 2021, HMRC sent an email to ACG recording the history of the strike out and made observations regarding the first email which HMRC maintained, had not been received by them on or around the date on which the appellant professed to send it.

(21) On 25 August 2021 the tribunal wrote to the parties on the authority of Judge Kempster recording the history of the strike out and subsequent correspondence, and indicating that if the appellant wished to make an application for reinstatement then a formal application should be made supported with reasons and an indication of why it was being made out of time, and in particular accounting for the delay after the appellant's letter dated 14 April 2021.

(22) The appellant's evidence is that this letter was received neither by them nor by their agent which is consistent with the email sent by ACG to the tribunal on 13 September 2021 to which they attach their email of 20 June 2021 and state "we refer to the email below and await hearing from you urgently."

(23) The tribunal responded to this email on 5 November 2021 confirming that Judge Kempster's directions of 25 August 2021 remained in place and that if the appellant wished for its appeal to be reinstated it should make a formal application to do so, explaining when so doing the reasons for the delay in applying and in particular the delay since 14 April 2021 when "you stated that an application would be made."

(24) The appellant made a formal application for reinstatement on 18 November 2021.

DISCUSSION

11. The appellant submits as follows:

(1) There was no breach of the Unless Order. The first email was sent before the 5pm deadline. It did not need to be sent to HMRC to comply with the Unless Order.

(2) The automatic strikeout reflects an administrative error by the tribunal. If the hardship information had to be sent to HMRC, then the tribunal was wrong to strike out the appeal since it did not check with HMRC whether it had received that information and thus could not know that the Unless Order had been breached.

(3) The first email was clearly sent and received by the tribunal as evidenced by the automated receipt. HMRC's suspicions that it was never sent are misconceived.

(4) In any case HMRC have not been prejudiced by the breach. They received all the information they required by the Unless Order in the second email which they went on to process as if the appellant had been compliant. The second email was received only a few hours after the deadline.

(5) There have been a number of delays which are entirely reasonable and can be explained. A number of crucial documents (for example HMRC's letter of 27 November 2020 and the tribunal's letter of 25 August 2021) were never received by the appellant or its agent; once the appellant heard, on 24/25 March 2021 that the first email had not been received by HMRC, it immediately appointed a new agent; that agent could not progress an application for reinstatement until he had spoken to Miss McMahon who was at that stage extremely ill and unable to communicate until May/June 2021; there was then correspondence with the tribunal concerning the status of the first email and whether there had, in fact, been a technical breach; once that had been resolved, the appellant and its agent move with alacrity and submitted an application for reinstatement. At all times during this process the appellant and its agent have cooperated with the tribunal.

12. HMRC submit as follows:

(1) The appellant was in breach of the Unless Order. The obligation is to send hardship information to HMRC. The first email did not do this. The fact that HMRC then processed the second email is no answer to the technical breach and the automatic strikeout which inevitably followed.

(2) This is not the first time that the appellant has failed to comply with tribunal directions. The tribunal in this case can take into account previous breaches of directions and unless orders. The appellant was described as "systematically non-compliant" by Judge Brown.

(3) It is incumbent on the appellant to ensure that it can properly communicate with the tribunal. Given the IT difficulties which it and its agents faced, it should have submitted the hardship information well in advance of the 5pm deadline rather than attempting to do so some 13 minutes before it.

(4) HMRC are suspicious that the first email was not, in fact, sent and was a smokescreen which was only created once the appellant realised that the Rules required compliance with the Unless Order by 5pm rather than midnight on 9 March 2020.

(5) In any event, the appellant knew that the appeal had been struck out at the latest on 24/25 March 2021 yet no application for reinstatement was made until 18 November 2021 notwithstanding that in April 2021 the appellant expressed its intention to make an application for reinstatement something for which it was chased by the tribunal. This is a serious and significant delay. A protective application could have been made much earlier. The appellant did not need to speak to Miss McMahon about what had happened on 9 March 2020 since Mr McFarland and Mr Annett already knew. Her failure to communicate because of illness, therefore, is largely irrelevant.

(6) It was only on 20 June 2021 that the appellant sought to justify its failure to make an application for reinstatement on the basis that the first email had satisfied the requirements of the Unless Order and thus there was no breach. Yet on the appellant's evidence it knew on 9 March 2020 that the first email had been sent. So it is surprising

therefore that this was not raised as a defence to the strike out as soon as the appellant heard that the appeal had been struck out on 24/25 March 2021.

(7) The appellant has been constantly reminded of the importance of compliance with directions and in particular time limits. It has failed to comply once again, and no further indulgence should be extended to it.

The reinstatement application

13. We have decided to deal with the reinstatement application first. The reason for doing so is because the merits of that application can be considered at the final evaluation stage of the tripartite *Martland* test when considering the out of time application. It seems to us, therefore, sensible to establish whether the reinstatement application is meritorious so that we can take any such conclusion into our consideration when looking at the out of time application.

14. When considering the reinstatement application, we shall adopt the test set out in *Chappell*. We shall consider first the serious and significant nature of the breach of the Unless Order, and when doing so we shall look not just at that specific breach, but that breach in context of other failures by the appellant of directions and orders. We shall then consider the reasons for the breach. And finally we shall evaluate all the circumstances of the case taking into account the balance of prejudice, and bearing in mind that the need for litigation to be conducted efficiently, at proportionate cost, and the time limit should be respected, should have considerable importance. And in conducting this balancing exercise, which will take no account of any strengths or weaknesses of the appellants case in respect of the underlying VAT appeal.

15. The first issue, therefore, is the serious and significant nature of the breach. But this presupposes that was such a breach, something which the appellant denies. In its view the first email complied with the Unless Order as it was sent to the tribunal albeit not to HMRC. So, if there was no breach, that could be no serious or significant breach. HMRC say that there was a breach.

16. We agree with HMRC that there was a breach. The relevant legislation relating to hardship makes clear that the primary responsibility on the appellant would have been to deposit the tax at stake, but if HMRC give permission, no such deposit is needed provided the appellant can show hardship to HMRC. The tribunal has a residual role in that if HMRC do not give such permission, a taxpayer can appeal to the tribunal. But initially, the responsibility of a taxpayer is to justify hardship to HMRC not to the tribunal. It seems clear, too, to us from the wording of the judgment of Judge Brown that the direction to produce evidence of hardship was to produce it to HMRC (albeit that we accept that the direction might have been more precisely worded).

17. We have found as a fact that, notwithstanding HMRC's protestations to the contrary, the first email was sent at 4.47 on 9 March 2020. HMRC's suggestion that the electronic receipt from the tribunal produced in evidence did not correlate with that email is misconceived. The receipt clearly relates to that email. The issue for the appellant is that whilst it was sent to the tribunal, it was not sent to HMRC. It should have been. The appellant is therefore in breach of the Unless Order.

18. This is not the appellant's first breach of an unless order. The decision by Judge Brown of 24 February 2020 was a decision on an application by the appellant to reinstate its appeal which had been struck out for breach of an unless order. And as mentioned above, when

considering the serious and significant nature of the breach, we can take into account previous breaches. However, notwithstanding that Judge Brown records that the appellants are systematically non-compliant with tribunal directions, her decision was that on the facts the appellant was not in default of the unless order which led to that strike out.

19. The Unless Order obliged the appellant to provide the information to HMRC by 5pm on 9 March 2020. This was not so provided by the first email but it was provided by the second email which was timed at 23.49. This is about 7 hours late. Even judged in the context of previous failings by the appellant, we do not think this is either serious or significant. It is certainly not significant given that HMRC went on to process it and to proceed as if a timely submission of information had been made. We return to this when we consider the balance of prejudice at the final evaluation stage. And whilst such behaviour does not stop HMRC from maintaining that there was an automatic strikeout because of the technical breach of the Unless Order, it does have considerable importance when considering the significance of the breach and the balance of prejudice.

20. In our view, therefore, whilst there was a breach of the Unless Order that breach was not serious or significant as the appellant complied with the order only some 7 hours late.

21. We would also point out to the appellant that there was no administrative error by the tribunal in striking out the appeal. A strikeout occurs automatically if an appellant fails to comply with a mandatory unless order, irrespective of, frankly, what the tribunal administration believes. As a matter of fact, the appellant did not comply with the Unless Order as it had not sent the hardship information to HMRC before the deadline. The tribunal, therefore, was absolutely right to record the fact of the strike out as having taken place at 5.01 on 9 March 2020, in its letter of 19 September 2020. The fact that it did so on the basis that it had no record of the first email does not detract from the correctness of the strike out. There was no need for the tribunal to check with HMRC whether HMRC had received the information.

22. The reasons for that late compliance seemed to be twofold. Firstly, that it took a considerable length of time (most of the 14 days permitted by the Unless Order) for the appellant and its agents to obtain and collect in a form which could be sent to HMRC, the information required to justify hardship. And secondly that Miss McMahon sent the first email only to the tribunal when it should have been sent to HMRC (as was the case for the second email). To our mind these are decent reasons. The 14 day period is, in our view, quite tight to collect all the hardship information, but we can see why Judge Brown gave the appellant such a short timeframe, and indeed, we suspect, thought that the appellant should already have been collecting that information prior to the date of her decision. But it is our experience that when a deadline is imposed, it is often the case that things go right down to that deadline. HMRC have considerable experience of this regarding the plethora of electronic returns which are submitted shortly before midnight on 31 January in any year. We are not at all surprised that there was frantic activity by the appellant on 9 March in order to meet the deadline, and it was only shortly before 5pm that the first email was sent. HMRC suggest that given the IT issues faced by the appellant, it should have given itself more time. But as we say, we have found as a fact the first email was submitted before the deadline and was acknowledged as such by the tribunal. The fact that it took the appellant some time to collect the hardship information is, to our mind, an acceptable reason for the delay. But the truth of the matter is that the fundamental reason for the delay is that the first email was not sent to HMRC. And it was only the second email which complied with the Unless Order. The reason for this is that Miss McMahon failed to send the first email to HMRC. This was a slip of the keyboard. It was simply a mistake albeit one which had significant consequences. The mistake was remedied in the second email. To

our mind this mistake is again a justifiable reason why the deadline set out in the Unless Order was missed.

23. We now turn to the final evaluation stage. We have already found that the breach was neither serious nor significant, and that there were decent reasons for it. We cannot take into account any merit or otherwise in the underlying VAT appeal. We can however consider the prejudice which either party might suffer if we were to allow or deny this application. It seems to us that this balance of prejudice weighs very heavily in favour of the appellant and in allowing the application. This is notwithstanding that we accept that at this stage, compliance with rules and time limits and for litigation to be conducted efficiently have particular importance. However, as was said in the Upper Tribunal decision in *BMW Shipping Agents Ltd* [2021] UKUT 0091 ("***BMW***") "However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated."

24. In our view, as in *BMW*, the fundamental reason for the breach, namely the failure by Miss McMahon to send the first email to HMRC, was not particularly bad but it had a serious outcome. If we reinstate the appeal, HMRC will suffer no prejudice. As mentioned above, they processed the information provided in the second email and granted hardship. If we reject the application, then the appellant will suffer prejudice in that it will not be able to proceed with this appeal. Whilst this might be an inevitable consequence of its failure to comply with the Unless Order, it is something to which we can give weight when considering the balance of prejudice. Our view when evaluating all the circumstances is the same as the conclusion reached by the Upper Tribunal in *BMW*. Rejecting the appellant's strike out application and sanctioning the strike out would be disproportionate to the seriousness of the breach and the reasons for it. Subject to our decision on the out of time application, we allow the appellant's strike out application.

The out of time application

25. When considering this application we adopt the straightforward *Martland* approach as set out at [6] above.

26. We therefore consider the length of the delay and its seriousness and significance. The Rules provide that an application for reinstatement must be brought within 28 days "after the date that the tribunal sent notification of the striking out to the appellant." That notification was set out in the tribunal's letter of 19 September 2020 to Miss McMahon. The 28 days therefore expired around 17 October 2020. The reinstatement application was not made until 18 November 2021, over a year later. This is a serious and significant delay. However, we accept the evidence of the appellant that the notification of the striking out was not received by the appellant until Mr McFarlane's conversation with Senior Officer Maciver on 24 March 2021. We find as a fact that neither the tribunal's letter of 19 September 2020, nor HMRC's letter of 20 November 2021, were received either by the appellant's agent nor by the appellant itself. So even though the Rules provide for the 28-day period to start on the date that the tribunal "sent" notification to the appellant, it would seem unconscionable to take this at face value and to consider delay for a period in which the appellant was unaware that its appeal had been struck out. This is something which if not at this stage, we can consider at the final evaluation stage.

27. So, the delay between 24 March 2021 and 18 November 2021 is serious. Notwithstanding the fact that HMRC treated the second email as a timely application for hardship and processed the information contained within it, we also think that the delay is significant.

28. We now consider the reasons for that delay. The appellant contends that it arises for two main reasons. The first is that it needed to speak to Miss McMahon who was so ill that she was unable to provide the information sought by the appellants to enable it to make an application for reinstatement until 18 June 2021 when she sent a copy of the first email to the appellant. The second is that there was some considerable confusion about the status of the striking out in the context of the first email, and the allegations by the appellant that the strike out was misconceived. It was only once that position had been clarified that the appellant realised that it needed to make a formal application for reinstatement, which it then did in a timely fashion. The appellant also contended that it should be cut some slack given that it did not fully understand the procedural niceties given that it was a litigant in person and was not legally represented.

29. Dealing with this last point first, we reject it. The appellant was professionally represented throughout. Indeed, the reason that it appointed ACG in succession to Miss McMahon was that the latter had caused delays, and it was thought that ACG was better placed, in any event, given Miss McMahon's medical situation, to deal with the issues from March 2021 onwards. So, we can see no justification for a submission that the appellant was acting in person and without legal representation, and that, therefore, any procedural non-compliance should be indulged.

30. We now turn to the first point at [28] above, namely the need to speak to Miss McMahon before responding to the information that the appeal had been struck out. It was Mr McFarland's evidence that because he did not have the receipt to the first email in his possession, he was not, in March 2021, able to say that the first email satisfied the Unless Order as it had been sent before the deadline. We reject this evidence. We have found as a fact that Miss McMahon had told Mr McFarland that she had received a receipt from the tribunal. Mr McFarland had responded "good job." We think it is inconceivable that Mr McFarland did not understand that to be a receipt in response to the sending of the first email; and thus we find as a fact that Mr McFarland knew, on 9 March 2020 that the first email had been sent to HMRC. And so in March 2021, he would have been able to say that he had complied with the Unless Order. What this means is that there was no need for him to wait until Miss McMahon sent him a copy of the first email on 18 June 2021 to enable him to claim that there had been no breach of the Unless Order. And so this is not a justifiable reason to delay making an application for reinstatement until Miss McMahon had sent him that email. The same is true of ACG. Mr Annett was party to the conference call on 9 March 2021 and so would have been aware, too, that Miss McMahon was in receipt of the tribunal's automated response. He, too, therefore, would have been aware that the first email had been sent to the tribunal at 4.47.

31. The point of this is that the appellant and ACG could both have raised this point in correspondence with HMRC and with the tribunal in March 2021 (ACG having been appointed on 27 March 2021) rather than wait and raise it for the first time in ACG's email to the tribunal on 20 June 2021, some 3 months later. This, therefore, does not comprise a good reason for that delay.

32. Furthermore, on 14 and 16 April 2021, ACG had written to the tribunal making clear that it was the appellant's intention to make an application for reinstatement on the basis that they did not accept that the strike out was validly communicated to the partnership and as such the

opportunity to make an application for reinstatement passed without their knowledge. But it was only in response to the tribunal's chaser on 26 May 2021 that, almost a month later, ACG sent an email to the tribunal on 20 June 2021 raising the "no breach" point. Again, the justification for that delay was the necessity to speak to Miss McMahon, but as mentioned above, we cannot see what information relevant to an application for reinstatement, Miss McMahon would have been able to provide the appellant which it, or ACG, did not already hold. The reason, therefore, that the delay was caused by a delay in being able to have a coherent and constructive conversation with Mrs McMahon, whose information was of such fundamental importance that an application for reinstatement could not have been made without it, is a bad reason. It does not justify the delay.

33. However, the second reason, namely the confusion about the status of the striking out given the sending of the first email, the automated receipt from the tribunal timed at 4.48, and yet the fact that the tribunal file had no record of the first email, does seem to us to be a good reason. This is a complicated technical point. It has been argued before us that there was no technical breach of the Unless Order in that the first email complied with it. It is our view that it did not so comply given that the information was required to be sent to HMRC rather than the tribunal. But this is not straightforward, and we can see why the appellant and ACG wanted to clarify the situation with the tribunal before making a formal application for reinstatement which, to their minds, might be unnecessary given that there was no breach of the original order. Having raised this in their email on 20 June 2021 ACG then chased for a response on 13 September 2021. Although the tribunal had written to the appellant on 25 August 2021 telling the appellant that it needed to make a formal application for reinstatement, ACG's email of 13 September 2021 is consistent with the appellant's contention that neither it nor ACG received the tribunal's email of 25 August 2021. And so it was not until the tribunal's email on 5 November 2021 that they realised that a formal application for reinstatement was required. The application was then made about a fortnight later on 18 November 2021. So, the delay between clarification of the need to make a formal application and the making of that application itself, was short. And reflects the appellant's contention that it was conscious of and intended to comply with its obligations to the tribunal. The same can be said of the appellant's decision to appoint ACG very shortly after it learned, in March 2021, of the strike out. This reflects a desire to engage with the tribunal process.

34. So as far as reasons for the delay are concerned, we have one "bad" and one "good".

35. We now undertake a final evaluation, looking at the balance of prejudice, and recognising the importance of litigation being conducted efficiently, at proportionate cost, and that time limits should be respected. In the context of this evaluation, it is our view that the length of the delay should be considered from the date on which the appellant first became aware that its appeal had been struck out, namely 24 March 2021. So, the delay is approximately 8 months rather than over a year. But it is still serious and significant. As regards the reasons for the delay, we have mentioned above that we can see little justification for any delay caused by the need to discuss the case with Miss McMahon. But we do recognise that there is justification for the delay caused by a confusion regarding the status of the first email in the context of satisfaction with the Unless Order.

36. When considering the balance of prejudice, we can have regard to any obvious strength or weakness of the appellant's case. As case law shows, there is obviously much greater prejudice for an appellant to lose the opportunity of putting forward a really strong case than a very weak one. We have decided that the appellant, in the absence of the out of time application, should succeed with the reinstatement application. If, therefore, we do not give it permission

to bring that application out of time, we will have deprived it of the opportunity of bringing a cast-iron application. On the other side of the coin, we do not see how HMRC will be prejudiced by granting permission for the appellant to bring the reinstatement application out of time. As mentioned earlier in this decision, they have proceeded on the basis that the hardship information had been provided on a timely basis and have gone on to comply with their obligations under the Rules. By granting the out of time application, HMRC will simply be obliged to continue with the appeal. By not granting it, the appellant will be deprived of the right to bring a successful reinstatement application. Notwithstanding, therefore, the serious and significant length of the delay, and the fact that the reasons for that delay are not all good ones, it is our view that the final evaluation justifies a decision that the out of time application should succeed. We are comfortable that this is consistent with our responsibility to deal with cases fairly and justly.

DECISION

37. It is our decision that the out of time application is granted, as is the reinstatement application with the effect that the appeal is reinstated with immediate effect.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 23rd SEPTEMBER 2022