Neutral Citation: [2023] UKFTT 611 (TC)

Case Number: TC08853

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2013/03874

Procedure – application under Rule 8 of the FTT Procedure Rules for relief from sanctions by HMRC following non-compliance with an automatic Unless Order

Heard on: 11 and 12 January 2023 and
followed by written submissions on 23 January
8 February and 23 February 2023
Judgment date: 4 July 2023

Before

TRIBUNAL JUDGE BOWLER

Between

EBUYER (UK) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr John Wardell KC, Mr David Scorey KC and Akash Sonecha of counsel instructed by Keystone Law

For the Respondents: Mr Howard Watkinson and Mr James Puzey of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 10 December 2021 Judge Redston issued an Unless Order directing disclosure of specified documents by the Respondents ("HMRC") in the context of an ongoing appeal made by the Appellant ("Ebuyer"). On 5 April 2022 Ebuyer applied for a direction that HMRC are barred from continuing from further participation in the proceedings because they had failed to comply with the Unless Order. HMRC conceded that they had failed to comply and, recognising that under its terms they were automatically barred from continuing, applied for relief from sanctions. This decision explains the basis on which I have decided that HMRC should not be granted relief from sanctions.

2. In the course of the hearing and subsequently submissions were made regarding the admissibility of evidence from a representative acting for Ebuyer about discussions with an officer of HMRC. I have decided that it has not been necessary to consider the evidence of that representative. The conclusion that HMRC is not entitled to relief from sanctions is made without reference to the evidence of the representative and therefore it has not been necessary to rule upon its admissibility.

BACKGROUND

3. Ebuyer has appealed various HMRC's decisions (i) to deny Ebuyer the right to deduct input tax of approximately £6.7m in the periods 06/10-09/11 on the basis that the transactions were connected with the fraudulent evasion of VAT and that Ebuyer knew, or should have known, of the same and (ii) to assess Ebuyer to VAT of approximately £5.8m.

4. Ebuyer asserts that the assessment for VAT periods 06/10, 09/10 and 12/10 dated 31 January 2013 for approximately £3.7m and the assessment for VAT period 12/10 dated 25 April 2014 for approximately £183k were issued beyond the one-year time limit in s.73(6)(b) of the Value Added Tax Act 1994. This is referred to as the "time bar issue".

5. The appealed decisions were notified to Ebuyer in 2013-2014. HMRC's first round of evidence was served by early 2015. In the meantime, Ebuyer applied to strike out HMRC's Statement of Case, or in the alternative for various further and better particulars of HMRC's case, asserting that allegations of fraud were being made against it. Ebuyer also applied for a direction that CPR style standard disclosure was to apply to the proceedings. Judge Walters KC dismissed both applications on 24 September 2014. Ebuyer then appealed to the Upper Tribunal which allowed its appeal on 10 March 2016. The Court of Appeal then reversed that decision in a judgment handed down on 29 September 2017. By an application dated 27 October 2017 Ebuyer then sought permission to appeal to the Supreme Court from the Supreme Court. The Supreme Court refused permission to appeal on 15 February 2018.

6. It is relevant briefly to note that the Court of Appeal decision included consideration of what HMRC alleged in relation to knowledge of fraud and Ebuyer's claim that HJMRC's Statement of Case did not provide the necessary clarity to allow it to prepare its defence. The Court specifically endorsed Judge Walters KC's decision regarding the application for disclosure in which he refused Ebuyer's application for CPR style standard disclosure and said:

> "The references in the [Statement of Case] to an overall scheme to defraud the revenue involving an orchestrated and contrived series of transactions are, I accept, details as to relevant circumstances surrounding [E Buyer's] transactions, which HMRC may relevantly allege in order to establish, if they can, the context in which [E Buyer's] transactions took place. Establishing this context will be relevant as it will assist the tribunal in determining what [E Buyer] knew or ought to have known…"

7. Judge Walters KC concluded that that the proper course would be for Ebuyer to apply for a properly focussed direction requiring HMRC to provide documents. He would also direct, as HMRC requested, that the exhibits to the parties' witness statements should stand as the documents which they respectively intended to rely upon or produce in the proceedings, stating that that was in harmony with the view taken that Ebuyer must ascertain the full particulars of the case it had to meet from a close examination of HMRC's witness evidence.

8. Meanwhile on 16 June 2015 Ebuyer made a request for disclosure. That request was for:

(1) progress logs and policy responses, primarily said to be relevant to the time bar issue,

(2) policy documentation on double recovery and contra-trading, and

(3) notebooks of HMRC officers in relation to meetings with Ebuyer.

9. The request explained that the documents were sought for the following reasons:

(1) in relation to the time bar issue;

(2) in relation to HMRC's allegation that Ebuyer knew or should have known that its transactions were connected to fraudulent tax losses, not least because they may reveal evidence that underlines that contention;

(3) because the documents were an integral part of HMRC's process in reaching the decision to deny Ebuyer's input tax; and

(4) to the extent that HMRC had adduced witness statements which contain evidence regarding the views and opinions of officers, Ebuyer was entitled to test this by reference to the documents sought.

10. In relation to officers' notebooks the request explained that those were relevant in order to check the accuracy of the typed notes provided to Ebuyer and to ensure that any notebook entry which may assist Ebuyer in terms of the advice given by HMRC but not disclosed in HMRC's evidence was included in the appeal. Specifically, HMRC were asked to confirm at the very least that the original notebooks existed and had been preserved by HMRC.

11. On 24 July 2015 HMRC provided notes made by Officers Parbari and Ward for three visits, but declined to provide a copy of progress logs, saying that they did not consider they fell to be disclosed having regard to the disclosure obligations in the Tribunal..

12. On 21 September 2015 Ebuyer made an application to the Tribunal for disclosure. That application sought amongst other things all documentation relevant to and/or evidencing HMRC's extended verification of Ebuyer's transactions under appeal including, but not limited to, the progress logs. The reasons given stated that the documents sought were considered proportionate in light of the difficulties faced by Ebuyer in challenging HMRC's factual assertions as to the underlying fraud, the amounts involved and the time bar issue. Further explanations then focused, in particular, on the time bar issue. HMRC objected to the application, saying that it should be stayed pending the Upper Tribunal's decision; or, if not stayed, it should be dismissed as an abuse of the Tribunal's process given that Ebuyer had appealed to the Upper Tribunal in relation to the disclosure regime to apply to these proceedings. HMRC asserted that Ebuyer was effectively seeking to obtain what it had failed to obtain before Judge Walters KC. In addition, the application was disproportionate and unnecessarily broad. Ebuyer agreed to HMRC's proposal that the application be stayed pending a final ruling on the matters proceeding through the higher courts.

13. On 29 May 2018 Ebuyer's new representative offered to provide a first draft of directions for the future conduct of the appeal. However, no such draft was provided. Instead, HMRC provided draft directions to Ebuyer at the start of June 2019.

14. Ebuyer did not respond to the draft directions and on 10 July 2019 HMRC applied to the Tribunal for directions. On 2 August 2019 the Tribunal issued directions under which Ebuyer was to serve its witness evidence by not later than 30 September 2019. On 23 September 2019 Ebuyer requested a 14-day extension of time for service of its evidence, to which HMRC did not object. On 15 October 2019 Ebuyer requested a further extension of time, to 13 December 2019. HMRC did not object. On 12 December 2019 Ebuyer requested a further extension to 10 January 2020. HMRC did not object.

15. Ebuyer served its witness statements on 10 January 2020, but did not serve the exhibits. HMRC sought the exhibits from Ebuyer but by 18 February 2020 exhibits were still outstanding so that HMRC applied for an unless order. On 16 March 2020 Judge Redston issued an automatic unless order requiring service of the exhibits within 14 days (i.e., by 30 March 2020).

16. On 28 February 2020 the Tribunal wrote to the parties stating that unless Ebuyer could confirm that all the exhibits were served in compliance with the unless order, then the appeal had been struck out automatically.

17. On 21 September 2020 Ebuyer applied for reinstatement of its appeal. The primary reason for failure to comply with the unless order was said by Ebuyer to be because its representative could not travel, because he and his family were shielding during the pandemic due to a family member having severe health issues. HMRC say that being cognisant of their responsibilities to act as reasonable litigants; not seeking to take advantage of inadvertent mistakes by the other party; and not engaging in satellite litigation save where absolutely necessary, they confirmed on 9 December 2020 that they took a neutral stance on the application and did not object, it being a matter for the Tribunal whether the appeal should be reinstated. In its skeleton argument for reinstatement dated 20 November 2020 Ebuyer noted the prior co-operation by HMRC and reasonable approach of their then solicitor in progressing the appeal. On 6 June 2021 Judge Redston directed that Ebuyer's appeal should be reinstated.

18. On 8 March 2021 Ebuyer made a disclosure request ("the Disclosure Request") and an information request ("the Information Request"). The parties agreed directions ("the Agreed Directions") which included a direction giving effect to that Disclosure Request and Information Request. The Agreed Directions were endorsed by Judge Redston on 27 May 2021.

19. The Disclosure Request sought the following:

(1) HMRC's 'progress log' regarding the extended verification into Ebuyer which led to the assessments and/or decisions under appeal;

(2) relevant documents contained in Ebuyer's 'electronic folder' (i.e., the document recording any activity carried out by the Commissioners, together with any documents referred to therein) in relation to Ebuyer's transactions in dispute and/or HMRC's extended verification and/or the decisions and/or assessments under appeal;

(3) all officers' notebooks etc. in which any officer of HMRC made any record in relation to the facts and matters giving rise to the assessments and/or decisions under appeal (which includes, but is not limited to, the investigation and /or extended verification exercise);

(4) minutes of any relevant meetings in relation to the facts and matters giving rise to the said assessments and/or decisions under appeal; and

(5) copies of all relevant internal memos, emails, correspondence, and attendance notes of telephone conversations and/or meetings between officers of HMRC in respect of the extended verification of Ebuyer which gave rise to the assessments and/or decisions under appeal.

20. The Disclosure Request went on to explain "relevance" as follows:

> 4. The said documents are relevant to the issue when the facts and matters now relied upon by the Commissioners in support of its case against the Appellant were first known to the Commissioners. This is an issue central to the time bar defence: see, e.g., the Commissioners' Consolidated Statement of Case.
>
> 5. Further or alternatively, documents responsive to the requests above (including, in particular, the notebooks, internal memos, etc., to and/or from Officers Ward and/or Post) are also relevant to the issue of what facts and matters were known to and/or communicated by Officers Ward and/or Post which are in dispute between the parties: see, e.g., 3rd witness statement of Officer Parbari at §§28, 40 and 41.

21. In the paragraphs referred to of Officer Parbari's witness statement he responded to assertions made in one of Ebuyer's witnesses' witness statements about discussions with Ebuyer about: (i) the importance of being vigilant in multijurisdictional trading; (ii) advice from Mr Post that where possible serial numbers for larger items should be kept; and (iii) the extent of advice regarding due diligence checks provided by HMRC.

22. The Information Request also sought information about various matters including those relied upon by HMRC in relation to the due diligence carried out by Ebuyer in respect of its suppliers.

23. It was therefore clear that the information sought by Ebuyer, and which the Agreed Directions required, extended beyond that relating to the time bar issue.

24. While the use of "Further or alternatively" in the drafting of the explanation of "relevance" in the Disclosure Request raises a possible question of interpretation when read alone, I am satisfied that the drafting should be interpreted in the light of the history of the litigation. It would have made little sense for the taxpayer to be seeking information about the time bar issue or due diligence and knowledge in a disjunctive rather than conjunctive sense. It was clear from that history, including the litigation to the Court of Appeal and the witness statements, that the knowledge of the taxpayer and due diligence was very much in dispute. I am therefore satisfied that on the face of the Disclosure Request "relevance" as identified by Ebuyer was not limited just to issues concerning the application time limits to assessments, but extended to other matters of disputed fact and, in particular, the dispute as to the nature and extent of discussions with HMRC about due diligence.

25. Judge Redston provided that the first date for compliance with the Agreed Directions was 31 May 2021, but if the parties needed extra time the dates would be moved forward by 28 days. The parties were directed to inform the Tribunal no later than 3 June 2021 if the extra 28 days were needed.

26. Ebuyer's representatives wrote to the Tribunal on 28 May 2021 to ask for the 28 day extension.

27. As a result of the extension the Agreed Directions provided, in particular, that:

(1) by no later than 28 June 2021 Ebuyer would provide copies of the documents listed on HMRC's request for disclosure; or, to the extent that Ebuyer objected to providing them, a written statement explain the basis of their objections; and witness statements (and exhibits there to in response to the latest witness statements of Officer Parbari;

(2) by no later than 26 August 2021 HMRC would serve:

(a) Copies of each of the documents listed in Ebuyer's Disclosure Request which were in the possession, custody or control of HMRC, or if any of those documents were not in the possession, custody or control of HMRC or otherwise available to be produced by HMRC, a witness statement confirming the same; alternatively

(b) To the extent that HMRC objected to providing any documents and/or category of documents sought in the Appellant's Disclosure Request, a written statement explaining the basis of HMRC's objections; and

(c) If so advised, signed statements of witnesses of fact on whose evidence they intended to rely at the hearing in response to the witness evidence provided by Ebuyer, together with copies of any documents referred to in the statements/

(I refer to this direction as "Direction 2".)

(3) by no later than 26 August 2021 HMRC would serve the information requested in the Information Request or provide a written statement explaining the basis on which HMRC objected to so providing. (I refer to this direction as "Direction 5".)

28. On 7 September 2021 HMRC applied for an extension of the time to comply with Direction 2 until 26 October 2021. This was agreed with Ebuyer. The application was made on the basis of seeking time to allow HMRC's new solicitor to finish reading into the case and obtain further instructions from the clients and advice from counsel who had been unavailable due to summer leave. However, the evidence shows that the lawyer who had been handling the case informed Ebuyer in April 2021 that she was leaving and handing it over to a colleague: Mr Hathaway.

29. There was delay in placing the application before Judge Redston. Judge Redston allowed HMRC's application for extension of time, observing that:

(1) HMRC were in breach of Direction 2 by some 10 days by the date they made the application;

(2) neither holidays nor a change of personnel was likely to constitute a good reason;

(3) the directions were previously agreed by the parties;

(4) the appeal was already very old and the interests of justice were not served by further delays;

(5) had HMRC's application been put before her on a timely basis she would not have granted such a long extension, but given the lapse of time and the fact that Ebuyer had been working on the assumption that the new dates would apply, she had decided to allow it.

30. On 26 October 2021 HMRC made another application for a further 3 months to 28 January 2022 for compliance with Direction 2 and Direction 5 on the basis that the HMRC Officer with conduct of the case was off sick and awaiting surgery. While it was recognised

that work on the disclosure exercise could continue in his absence, it was said that as the key officer in the appeal his input was necessary in regards to the disclosures sought by Ebuyer.

31. On 28 October 2021 Ebuyer consented on the basis that this would be a finite and limited extension and that no further extensions of time would be required by HMRC. Ebuyer commented that HMRC should put in place measures to ensure compliance with the directions even if the officer in question was not able to return to work as quickly as expected.

32. On 10 December 2021 Judge Redston issued the Unless Order which stated as follows:

(1) the time to comply with Direction 2 was extended to 31 January 2022;

(2) if HMRC failed to comply with Direction 2, that was to be replaced by a new direction ("the New Direction") requiring provision of all documents on Ebuyer's list of documents by 28 February 2022 (save for any protected by legal professional privilege or which were not in HMRC's possession or power in which case a witness statement identifying the same was required); and barring HMRC from relying on further responsive witness evidence.

(3) if HMRC failed to comply with either Direction 2, or the New Direction by 28 February 2022, then they would be barred from further participation in the proceedings;

(4) all other time limits within the Agreed Directions (including that applying to Direction 5) were also extended.

33. Judge Redston set out her reasons for the Unless Order, stating that it was a very old case concerning transactions undertaken more than a decade previously. She noted that the repeated applications for extensions of time were prejudicial both to Ebuyer and other tribunal users. Further delay was not in the interests of justice. Judge Redston commented that the case had previously proceeded to the Court of Appeal with a key issue previously being the extent of disclosure to be given by HMRC. This was therefore not a new point. Furthermore, the HMRC officer who was off sick was not HMRC which was a government body required to comply with the Tribunal's directions.

34. HMRC were therefore very clearly put on notice as to what was expected and that the Tribunal was concerned about the repeated delays.

35. On 31 January 2022 HMRC wrote to Ebuyer saying that:

(1) they had made disclosure to Ebuyer as required by the Unless Order and the letter sent out provided HMRC's written statement required by the Unless Order to explain omitted documents;

(2) a disclosure request had been made to officers which was enclosed and which showed the basis on which officers of HMRC were requested to search for and identify potentially disclosable material;

(3) HMRC did not accept that complying with Ebuyer's request for disclosure required disclosure of every "document recording any activity carried out by the Commissioners, together with any documents referred to therein) in relation to Ebuyer's transactions in dispute and/or HMRC's extended verification and/or the decisions and/or assess hundred appeal as stated in Ebuyer's request. That was because such a request would be disproportionately wide and unjustified. The request was qualified by the word "relevant" which HMRC understood was accepted by Ebuyer to relate to whether the assessments were subject to a time limits challenge.

36. The disclosure request provided by HMRC with the letter of 31 January 2022 specifically limited documents sought by HMRC to those which were relevant to the time limits issue for Ebuyer. The request required a response by no later than 10 January 2022.

37. On 5 April 2022 Ebuyer applied for a direction that HMRC be barred from further participation in the proceedings for breach of the Unless Order.

38. In response, HMRC submitted a notice of objection and application for relief from sanctions on 24 May 2022 in which they:

(1) said that Ebuyer had made no comment at all on compliance with the disclosure direction following receipt of HMRC's letter of 31 January 2022 until the barring application made on 5 April 2022. This had had the effect of depriving HMRC of the opportunity for compliance with the New Direction;

(2) said that it was accepted that HMRC had inadvertently failed to disclose seven documents that were marked for disclosure and were therefore in breach of Direction 2 and the Unless Order to that extent. HMRC apologised for the omission and explained that the documents had inadvertently not been copied into the final version the folder that was provided to Ebuyer. This appeared to have occurred because the paralegal who was collating the material tested positive for Covid on 26 January 2022 and was therefore suffering symptoms in the days when the collation process was finalised. It was not a task that could be delegated to any other person at that stage given the significant amount of material to collate and manage from numerous files and that person's in-depth knowledge of the case;

(3) explained the basis on which HMRC considered that Direction 2 should be interpreted by reference to relevance which in turn was determined with regard to the time limits defence to certain of the assessments. Insofar as the disclosure had not produced documents which Ebuyer had hoped to see that was a consequence of the drafting of the Disclosure Request, not the fault of HMRC.

THE ISSUES

39. HMRC has applied for relief from sanctions in relation to the conceded breach of the Unless Order. However, Ebuyer asserts that in addition there has been a further and ongoing breach of the Unless Order in relation to a wider range of documents; in particular in relation to those concerning the due diligence and knowledge issue.

40. The parties dispute what is required of HMRC under the Unless Order insofar as it refers to the Disclosure Request. In essence, HMRC say that the Disclosure Request can be interpreted reasonably by them to be limited to matters relating to the time limits issue. Ebuyer submits that the Disclosure Request extended to documents beyond those relating to the time limits issue.

HMRC'S CASE

41. HMRC accept that they inadvertently failed to disclose seven documents that were marked for disclosure as part of the Disclosure Request: five progress logs and two memoranda to Officer Parbari from the VAT fraud policy team. Copies of those documents were provided with HMRC's response to Ebuyer's application on 24 May 2022. HMRC apply for relief from sanctions/the lifting of any bar on their further participation in relation to those seven documents.

42. HMRC apologise again to both Ebuyer and the Tribunal unreservedly for their inadvertent failure, which occurred for the reasons set out in a witness statement from Mr

Collins. Mr. Collins is not required for cross-examination by Ebuyer and it therefore follows that his evidence is accepted.

43. The disclosure process was being managed using electronic folders on a Sharepoint site. Whilst the seven documents had been marked for disclosure during HMRC's review, they were, inadvertently, not copied into the final version of the folder that was provided to Ebuyer. HMRC had therefore believed that all the documents identified for disclosure had been disclosed, but they had not. This inadvertent error occurred because Mr. Collins, as the paralegal who was responsible for collating the material marked for disclosure, tested positive for COVID on 26 January 2022 and was suffering symptoms in the ensuing days when the collation process was finalised. This was not a task that could be totally delegated to any other person at that stage given the significant amount of material to collate and manage from numerous files and that his in-depth knowledge of the case.

44. Despite what Ebuyer asserts are obvious prima facie defects in HMRC's approach, it made no comment at all on compliance with the disclosure direction, and therefore compliance with the Unless Order, until its unheralded application made more than two months later on 5 April 2022. That had the effect of depriving HMRC, seemingly quite deliberately, of the opportunity for compliance with the backstop provision in the New Direction.

45. In the context of the volume of documentation disclosed by HMRC as part of the disclosure exercise the breach in relation to the seven identified documents can properly be characterised as neither serious nor significant. Furthermore, the absence of the documents was apparently obvious to Ebuyer who could simply have asked for them. The illness of the paralegal who was completing the task can properly be characterised as a good reason. This is not a case where there has been contumacious, contumelious or deliberate breach of the Tribunal's directions. The consequences to HMRC of the sanction would be wholly disproportionate to the seriousness of the conduct. The consequences for Ebuyer if relief is granted are that it will have to continue to prosecute the appeal as it always has done. The seven documents were disclosed on 24 May 2022 and therefore granting relief would not result in further delay. The appeal has not yet been listed and therefore limited, if any, inconvenience has been caused to the Tribunal and other users of the Tribunal. Therefore the balance of prejudice falls in favour of granting relief.

46. Furthermore, considering the history of the litigation, Ebuyer has been the author of significant delay. Given the absence of a previous history of default by HMRC and the steps taken by both parties to progress this appeal, which is now at an advanced stage, granting relief would not undermine the requirement to give weight to the particular requirements in CPR 3.9(1).

47. In relation to the assertion by Ebuyer that there is a wider range of documents which HMRC have failed to produce, it is for Ebuyer to show sufficient precision of language in the underlying Disclosure Request; lack of good faith in compliance; and that the disclosure provided is "illusory" such that there has in fact been a breach. HMRC's approach to compliance with original Direction 2 was to assess what material was relevant by reference to Ebuyer's disclosure request and disclose that material. The primary relevance of the documents sought by the Disclosure Request was in relation to the time limits defence to certain of the assessments, as set out at [4] of the Disclosure Request. If the result of the Disclosure Request does not produce the documents that Ebuyer hoped for, that is a consequence of the drafting of the request, not the fault of HMRC. The relevance of documents is analysed by reference to the pleadings and the factual issues in dispute on the pleadings. Furthermore, where documents are sought by reference to criteria of relevance,

the party disclosing can self-certify relevance, with any dispute arising from the process being dealt with in a later application (*Tower Bridge GP Ltd v Revenue and Customs* [2016] UKFTT 54 (TC) at 23). Ebuyer did not seek an order for disclosure of documents referred to specifically in witness statements.

48. However, if the Tribunal concludes that HMRC are in breach of the Unless Order in relation to the additional documents, account should be taken of the fact that the error was made in good faith and with no intention to withhold documents.

EBUYER'S CASE

49. The documents requested in the Disclosure Request had been initially sought as long ago as 2015. Consequently, HMRC can have been under no misapprehension as to the need to preserve them. No fair assessment can be made of Ebuyer's conduct and in particular the steps it took to ensure that it was not exposed to the risk of being involved in MTIC fraud without addressing the advice it actually received from the relevant HMRC officers. HMRC have adopted an impermissibly narrow construction of the Disclosure Request and failed to undertake the exercise of collating documents in relation to item 5 of that request. That failure was serious and ongoing.

50. However, even if HMRC's own narrow interpretation was adopted they have conceded that they failed to disclose seven documents, including progress logs, in breach of the Unless Order. The explanation offered for that omission (the ill health of the paralegal) is not a valid excuse given the repeated extensions and clear language of the Unless Order. Given the existence of that Unless Order, the work undertaken by HMRC's paralegals should have been subject to extra scrutiny and checks. It is a distraction to merely focus on the actions of one person immediately prior to the deadline.

51. Furthermore, HMRC have unacceptably sought to narrow the confines of the enquiry to the time bar issue. Instead of considering from what time HMRC had sufficient knowledge to assess Ebuyer they have focused on the company's knowledge of five particular suppliers.

52. *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153 is authority to conclude that failure to comply with an unless order, as opposed to an ordinary order, in itself points towards the omission being serious and significant. In addition, the missing progress logs were of central importance to the issues in the case. It is not permissible to blame Ebuyer for failing to rectify HMRC's error. HMRC's reliance upon *Depp v News Group Newspapers* [202] EWHC 1734 is inappropriate. HMRC did not fail to disclose the missing documents on account of an erroneous view of the nature of their obligations.

53. A consequence of HMRC's failings is that it is unlikely that the appeal can be heard before 2024. That is unacceptable and highly prejudicial to Ebuyer, particularly as its appeal is dealing with events and transactions that occurred more than a decade ago.

54. In addition to the breaches of the Unless Order which HMRC admit, it is clear from the parties' witness evidence and the limited disclosure provided by HMRC on 31 January 2022 that further documents exist in their control which should have been disclosed:

(1) notes regarding meetings identified by the witnesses;

(2) evidence regarding advice about serial numbers; and

(3) evidence regarding other advice given to Ebuyer, including, in particular, emails identified in progress logs.

55. Deciding whether HMRC have failed to comply with the directions of the Unless Order does not require a substantive determination of Ebuyer's underlying case or the making of findings which the Tribunal cannot grapple with at this stage.

56. The Unless Order envisages HMRC's compliance being the end of the matter so far as production of the relevant documents is concerned. It is not an order for standard disclosure which would, in effect, envisage that Ebuyer would make further applications for specific disclosure or further information to the extent that the disclosure provided is deficient.

57. In relation to self-certification as addressed in the case of *Tower Bridge GP Ltd v Revenue and Customs* [2016] UKFTT 54 (TC) and relied upon by HMRC, that decision concerns the Tribunal's power to order specific disclosure. However, in any event, HMRC's reliance upon the decision is incorrect as the self-certification referred to therein is in the context of documents which are not explicitly referred to in witness statements. In this case certain of the relevant documents are referred to specifically in Mr Pullan's and Officer Parbari's statements to which reference is specifically made at item 5 of the Disclosure Request.

DISCUSSION

58. The parties agree that the correct approach is that set out by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 which sets out three stages for such a decision as this:

> (1) identify and assess the seriousness and significance of the failure to comply with the Unless Order;
>
> (2) consider why the default occurred;
>
> (3) evaluate all the circumstances of the case so as to enable the court to deal justly with the application, with particular weight being given to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

59. The court made clear that the assessment of the seriousness or significance of the breach should not, at least initially, involve a consideration of other unrelated failures that may have occurred in the past. It is only if the court decides that the breach is serious or significant, that the second and third stages of the assessment are engaged. A non-trivial breach for which no good reason is provided does not, without more, result in denial of relief from sanctions. All the circumstances must be considered and in so doing past or current breaches of the rules, practice directions and court orders by the parties may be taken into account. In that exercise regard should be given to two factors, amongst any other circumstances, which are: (a) the effect of the breach on the litigation; and (b) the importance of compliance with rules, practice directions and orders. However, litigants or their lawyers should not seek to take advantages of mistakes made by opposing parties in the hope that relief from sanctions will be denied so that they will obtain a windfall strike out or other litigation advantage. In particular, allowance should be made for human error.

60. In the case of *BPP Holdings Ltd v Revenue and Customs Commissioners [*2015] UKSC Lord Neuberger (at 24-27) confirmed that this approach should be applied in tax appeals.

61. Furthermore, I am satisfied that, as submitted by Mr Wardell, the issue before me is (as in *Depp*) whether the documents identified in the Agreed Directions have been provided. If that is the case the *Denton* process is then applied to that failure. This is not a case where there has been a list of documents identified as in an order for specific disclosure. It is a case where the issue is whether there should be relief from the sanctions resulting from breach of the Unless Order in the context of an agreed set of directions for disclosure.

Stage 1: Seriousness and significance of the breach

62. HMRC admit that they were in breach of the Unless Order in relation to seven progress logs but do not otherwise accept breach; and maintain that the omission of the seven documents was not serious and significant. Mr Wardell submitted that the fact that the breach was of an unless order in itself indicated that the breach was serious and significant.

63. I take into account the fact that in *Denton* one of the cases being considered involved the failure to comply with an unless order. The Court of Appeal did not suggest in the context of that failure that the nature of an unless order converted the breach into one which was serious and significant or was an even a factor in itself to lead to that conclusion. Instead, the Court of Appeal in *Denton* focussed on how quickly the breach was remedied and the effect of the breach on the conduct of the litigation.

64. However, Mr Wardell referred me to the case of *British Gas* which specifically considered the application of the *Denton* principles in the context of a breach of an automatic unless order where the defendant had been ordered to file a pre-trial checklist. Having addressed the statement made in *Denton* that in carrying out the first stage assessment of the seriousness and significance of the breach, the court must ignore historic breaches, Lord Justice Jackson went on to say (at para 38):

> " 38 An "unless order, however, does not stand on its own. The court usually only makes an "unless" order against a party which is already in breach. The "unless" order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation…
>
> 39 In order to assess the seriousness and significance of a breach of an "unless" order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.
>
> 40 In my view the phrase "the very breach" in para 27 of the *Denton* case, when applied to an "unless" order, means this: the failure to carry out the obligation which was (a) imposed by the original order or rule and (b) extended by the "unless" order.
>
> 41 The very fact that X has failed to comply with an "unless" order (as opposed to an "ordinary" order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the draconian sanction of strike out).

65. Lord Justice Jackson made clear that not all breaches of unless orders would automatically be serious and significant. He gave the example of a case where the breach was remedied within 45 minutes. However, in the *British Gas* itself Lord Jackson took into account that when the defendant finally complied it was 18 days late with reference to the original order and two days late with reference to the unless order.

66. In this case the Unless Order was made in the context of HMRC being in repeated breach of the Agreed Directions.

67. So far as the conceded breach regarding seven documents, HMRC provided those on 24 May 2022 which was:

(1) Very nearly 9 months late under the terms of the original Directions requiring provision by 26 August 2021;

(2) Very nearly 7 months late under the extension of time granted to 26 October 2021; and

(3) Very nearly 3 months late under the terms of the Unless Order (under which the New Direction applied such that the date for compliance was 28 February 2022).

68. HMRC seek to maintain that the breach was only in relation to seven out of 161 documents. However, the number of the documents is not the determining factor. The nature and relevance of the missing documents must be the relevant feature and not the number of documents. The seven documents were progress logs. Ebuyer had asked for them since 2015. They are potentially at the heart of Ebuyer's case about due diligence and knowledge as well as the time bar issue.

69. HMRC have submitted that Ebuyer should have identified that the seven documents were missing and brought this to HMRC's attention so that the omission could have been rectified quicker. I see no basis to conclude that there was any such obligation on Ebuyer; but more importantly, the fact that Ebuyer did not do so does not detract from the significance and seriousness of HMRC's breach of the Unless Order.

70. Given my conclusions so far, I have no hesitation in concluding that the breach in relation to the seven documents was serious and significant.

71. In relation to additional documents, HMRC have sought to maintain that the reference to "relevant" documents in the Disclosure Request should be interpreted by reference to the time bar issue alone, such that only the seven identified documents are in issue. However, I see little basis to narrow the term "relevant" in that way for the following reasons:

(1) it has been clear for much of the time of this appeal that Ebuyer has been seeking documentation relating not only to the time bar issue but also to the dispute about what it knew, or more particularly what it should have known, when entering into transactions. The parties have even litigated the knowledge issue and disclosure in relation thereto to the Court of Appeal;

(2) Ebuyer's witness has relied upon claimed conversations and meetings with HMRC officers saying that reassurances were provided about the extent of due diligence which the company was required to carry out. HMRC's officers have denied the version of events described by Ebuyer;

(3) As Mr Wardell showed at the hearing there was a clear dispute between the parties about the due diligence issues which was underlying comments made by Mr Parbari in the paragraphs of his Witness Statement referred to in the Disclosure Request.

72. Furthermore, under the terms of the Unless Order, the New Direction came into operation once HMRC had failed to comply with Direction 2 by 31 January 2022. Under the terms of the New Direction HMRC were required to provide all documents on Ebuyer's list save for those protected by privilege or which were not in their possession or power. That New Direction was not limited to documents relating to the time bar issue.

73. HMRC's limited approach to what was relevant means that they have not:

(1) searched for documents relating to the wider knowledge and due diligence issues;

(2) produced the notebooks, internal memos etc.to and from Officers Ward and Post referred to in the Disclosure Request and encapsulated in the Agreed Directions;

(3) produced documents which are referred to in their witness statements;

(4) produced documents which related to statements made by HMRC's witness Mr Parbari regarding the dispute concerning due diligence and knowledge. This has meant that, for example, emails referred to in disclosed progress logs which appear to have related to that issue have not been disclosed;

(5) produced documents responding to evidence from Ebuyer's witness about assurances given at meetings between Ebuyer and HMRC. For example, HMRC and Ebuyer dispute what was said at one meeting and Ebuyer says the typed note is inaccurate, but the officer's manuscript notes of the meeting have not been produced.

74. In relation to the scope of the Unless Order and whether or not there is scope for self-certification, I do not regard the principles stated by Judge Richards (as he then was) in *Tower Bridge* to mean that HMRC can rely on self-certification of relevance to decide that documents clearly identified in the Agreed Directions as relating to issues other than the time bar issue can be ignored. It would be one thing for HMRC to have considered documents and assessed their relevance to the disputed matters including both the time bar issue and knowledge/due diligence. For example, not every internal memo or email involving Officers Ward and Post in relation to Ebuyer will necessarily be relevant. HMRC could self-certify that they have produced all such documents which are "relevant" as judged by reference to the time bar issue and the due diligence/knowledge issue. However, it is not for HMRC to decide that all documents relating to anything other than the time bar are "irrelevant". This is directly contrary to the terms of the Agreed Directions and Unless Order.

75. The failure to produce any of the categories of documents identified above as relating to the due/diligence/knowledge issue is on its face serious and significant as the potential evidence shown by them goes to the heart of the dispute and the ability of Ebuyer properly to prepare its case. As with the conceded missing seven documents these additional documents were due to be produced by HMRC by 26 August 2021, and then finally under the Unless Order, on 28 February 2022. That ongoing failure to comply with the terms of the Unless Order must be found by me to be both serious and significant. The result has been further delay in already lengthy litigation. The potential to have the case listed this year has passed as a result of the delay caused by HMRC failing to comply with the Unless Order.

76. Consequently, the failure to produce any of the documents relating to the due diligence and knowledge issue makes an already serious and significant breach of the Unless Order more so.

Stage 2: Reasons for the defaults

77. HMRC say that in relation to the seven conceded documents the reason for their omission was Mr Collins testing positive for Covid and an oversight resulting from him being unwell. However, this ignores the fact that Mr Collins tested positive for covid on 26 January 2022, just a few days before the first deadline under the Unless Order. By that time HMRC had had ten months to carry out the disclosure exercise as a result of various extensions. Despite the clear warning from Judge Redston in the Unless Order when she commented on the inadequacy of reason for delay provided by HMRC relying on the illness of one person, HMRC had left the exercise to the last moment. Furthermore, as Judge Redston previously commented, HMRC is a large government organisation and one person's illness should not equate to HMRC being unable to comply with Tribunal directions.

78. In *British Gas* it was commented that an automatic unless order such as the Unless Order in this case should "galvanise" the ordered party into action. There is little evidence of HMRC being "galvanised". Despite the fact that the Agreed Directions were issued in May 2021 and had initially required disclosure by 26 August 2021, HMRC's compliance was turning upon the health of one individual just days before the deadline of the Unless Order.

79. While clearly sympathetic to the position of Mr Collins struggling to work with covid symptoms before testing positive and needing to isolate at home, I conclude that HMRC has not shown good reason for the omission of the seven documents.

80. In relation to the default regarding the additional documents, HMRC's reason is no more than that they disagree with the conclusion I have reached that disclosure was required by the Unless Order. Given my conclusions about those documents made so far there is clearly no good reason therefore for the failure to comply with the Unless Order in this respect.

Stage 3: All of the circumstances

81. I take into account that this has been a particularly vexatious and protracted appeal. Ebuyer has itself been the subject of an unless order resulting in its case previously being struck out. In that instance HMRC did not oppose the reinstatement application when Ebuyer explained the failure to serve exhibits was as a result of a representative and family shielding during the peak stages of the covid crisis. On the face of it there is some force in the argument that HMRC should be accorded similar leeway when the seven documents were omitted as a result of Mr Collins being ill with covid. However, that does not deal with the ongoing breach found in relation to the other documents.

82. When I move on from considering the fact that Ebuyer itself has previously failed to comply with Tribunal directions, I do not agree with HMRC's submission that the omission of the seven documents is equivalent to the clerical error given relief in the case of *BMW Shipping Agents*. HMRC's error was a repeated error to give the Tribunal's directions due time and attention. As Mr Wardell submitted, the evidence in emails shows that the claimed basis of the sought extension from August 2021 to October 2021 is hard to understand. The lawyer involved with the litigation had left some months earlier. As Judge Redston commented in granting that extension:

> (1) HMRC were in breach the Agreed Directions by some 10 days by the date they made the application;
>
> (2) neither holidays nor a change of personnel was likely to constitute a good reason;
>
> (3) the directions were previously agreed by the parties;
>
> (4) the appeal was already very old and the interests of justice were not served by further delays.

83. HMRC were therefore very clearly put on notice that the delays were of real concern to the Tribunal.

84. That concern was reinforced when Judge Redston issued the Unless Order. Yet still HMRC appear to have taken little action to carry out their obligations. Aside from the problems arising from leaving matters to the last moment which I have already addressed in the context of their reliance on Mr Collins' ill health as a reason for the failure to comply, HMRC only sent out the letter to officers seeking documents after HMRC had repeatedly failed to comply with the Agreed Directions. HMRC asked for the items to be disclosed to be provided by 10 January 2022.

85. Therefore in relation to the importance of compliance with orders of the Tribunal I conclude that the behaviour of HMRC in relation to the seven documents alone weighs heavily against them being granted relief from sanctions.

86. Weighed against that however is the fact that in providing the seven documents in May the practical effect on the litigation as a result of that breach of the Unless Order alone was relatively little. No date had been set for the hearing by May 2022.

87. That conclusion about the effect on the litigation cannot be reached in relation to the other documents which have still not been provided. The failure to provide the documents has required this two day case management hearing to be arranged. I have little doubt that even if Ebuyer had opposed HMRC's application for relief in relation to the seven documents alone, such an application could have been appropriately dealt with quickly on the papers. That is not so in relation to the additional documents. There is little doubt that this process has significantly delayed the progress of an already very old appeal. Realistically the case would not be listed now until well into 2024 at the earliest. Without this delay the case could have been listed in 2023.

88. However, I also take into account the significant public interest in HMRC being able to pursue an appeal in which some £7m of VAT is at stake. At the same time, I must also recognise that there is a public interest in court time being used efficiently and effectively; and court orders being respected and applied with care and timeously. This is a case where disclosure issues have already been litigated to the Court of Appeal in the context of the parties disputing Ebuyer's knowledge and due diligence and yet HMRC have adopted an approach to disclosure which appears to have excluded consideration of that element of the dispute with very little reason for doing so. It is not an answer to the repeated failures to comply with the Tribunal's directions to say that there was no intention to withhold documents.

89. Therefore, considering all of the circumstances in this case, HMRC's application for relief from sanctions is denied. The terms of the Unless Order should apply such that HMRC is barred from further participation in these proceedings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

TRIBUNAL JUDGE BOWLER

Release date: 04th JULY 2023