Appeal number: FTC/27/2012

[2014] UKUT 0350 (TCC)

COSTS — respondents successful in appeal — application for costs made four working days late — whether time limit should be extended — principles to be applied — UT Rules 2, 5, 10 —* Mitchell, McCarthy & Stone *and* Denton *considered — extension of time allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LEEDS CITY COUNCIL **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 27 March 2014

Jonathan Bremner, counsel, instructed by Shepherd & Wedderburn LLP, for the Appellant

Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants and Respondents

DECISION

1. On 3 December 2013 the decision of this tribunal (Judge Aleksander and myself) in an appeal by Leeds City Council ("Leeds") against HMRC's rejection of its claim for repayment of various amounts of VAT for which it had accounted incorrectly was released. HMRC were found to have been correct, and the appeal was dismissed. Rule 10(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal has the power to make a direction that the unsuccessful party to an appeal of that kind must pay the costs incurred by the successful party. It is not disputed that, but for the events which I describe below, it is probable that a direction in HMRC's favour would have been made in this case.

2. Rule 10(5) provides that an application for a costs direction must be made in writing, and be accompanied by a schedule of the costs claimed; and rule 10(6) that the application must be made within a month of the release of the decision. It follows from what I have said that HMRC's application should have been made by not later than 3 January 2014. It was in fact made on 9 January 2014, six calendar or four working days late; in addition it was not accompanied by a schedule of the costs claimed. A schedule produced some time later shows that HMRC are seeking slightly less than £18,000. I will come to the reasons for the delay later.

3. HMRC recognised that their application for a costs direction was late, and they added to it an application for an extension of time. They also sought a direction that the requirement for a schedule be dispensed with, on the ground that the amount sought was such that detailed assessment should be directed. Leeds served a notice of objection, on 23 January 2014; the notice focussed primarily on the lateness of HMRC's application, but also relied on the absence of a schedule.

4. The notice of objection made extensive reference to the judgment of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537, [2104] 1 WLR 795 ("*Mitchell*"), and to the decision of Judge Sinfield, sitting in this tribunal, in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), [2014] STC 973 ("*McCarthy & Stone*"), in which he considered the application of *Mitchell* to proceedings in this tribunal. Those cases were also central to the parties' arguments when HMRC's application came before me. HMRC were represented by Mr Andrew Macnab and Leeds by Mr Jonathan Bremner.

5. I mention, for completeness, that I was referred to and have considered *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) (Morgan J) ("*Data Select*"), *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 (Court of Appeal) ("*Durrant*"), *Associated Electrical Industries Ltd v Alstom Ltd* [2014] EWHC 430 (Comm) (Andrew Smith J) and *Chartwell Estate Agents Ltd v Fergies Properties SA and another* [2014] EWCA Civ 506 (Court of Appeal). More important than all of them, however, is the recent judgment of the Court of Appeal in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906 ("*Denton*").

6. *Mitchell* was concerned with the consequences of the then recent amendment of rule 3.9 of the Civil Procedure Rules ("the CPR"). The claimant in that case should have delivered a costs budget by 11 June 2013, seven days before a case management hearing at which it would be considered. It was in fact filed, and only after some prompting, on 17 June. The consequence of the failure of a party to file a costs budget in time was spelt out by CPR rule 3.14: that party's budget should be treated as comprising only the court fees, an amount considerably smaller than the total the budget showed when it was served (and much less than the defendant's budget too). At a later hearing the master refused to grant any relief from that sanction. That refusal was upheld by the Court of Appeal.

7. It was the first case in which the Court of Appeal had considered the relevant changes to the CPR. Until 1 April 2013 rule 3.9 read:

> "On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—(a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representatives; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party."

8. On 1 April 2013 the rule was changed so as to read:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—(a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

9. As the Court of Appeal explained, at [36] and following, the change reduced the number of considerations which the court was required to take into account, albeit the obligation to consider "all the circumstance of the case" remained. The purpose was to achieve the reforms recommended by Sir Rupert Jackson in his *Review of Civil Litigation Costs* report, reforms designed essentially to reduce the costs and delays of litigation by the adoption of a less indulgent approach to failures to comply with rules and directions. The master's decision to refuse relief, despite the relative brevity of the delay in *Mitchell* and the fact that it had been remedied, was found to be, as the court put it, "robust", but well within the bounds of a reasonable exercise of judicial discretion, and it was for that reason that it was upheld. The court went on to add, at [59] that "if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback".

10. In *McCarthy & Stone* Judge Sinfield was required to decide whether HMRC should be granted an extension of time for the filing with this tribunal of their notice of appeal in a case in which permission had been granted by the First-tier Tribunal. That permission was given by a decision notice released on 4 April 2013. It was sent to HMRC, in accordance with the normal procedure by which communications between the First-tier Tribunal and HMRC take place, by email to a "clearing house" from which it was forwarded to the two members of HMRC's solicitor's office who had conduct of the matter for HMRC. Unfortunately, one of the two left the solicitor's office and the other went on long-term sick leave a few days later, and apparently neither had taken any action with respect to the permission to appeal which had been granted. Although, shortly afterwards, other members of the solicitor's office were given access to their email accounts it was not until late June that anyone in that office realised that although permission had been given nothing had been done about serving notice of appeal at the Upper Tribunal office; that was done on 1 July. The time limit for serving the notice of appeal is one month from the grant of permission, and HMRC were accordingly almost two months late.

11. Judge Sinfield quoted, at [35], the observation of Richards LJ in *Durrant* that the discussion in *Mitchell* of the change to rule 3.9 of the CPR amounted to a "clear endorsement of a tougher, more robust approach towards enforcing compliance with rules, practice directions and orders and thus towards relief from sanction." The critical passage of his decision is as follows:

> "[42] In my view, the new CPR 3.9 and the comments by the Court of Appeal in *Mitchell* and *Durrant* clearly show that courts must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. Mr Macnab's answer to this point [Mr Macnab represented HMRC in that case too] was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR 1 is in different terms to the overriding objective in r 2(3) of the UT Rules. From 1 April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and at proportionate cost. CPR 1 also provides that dealing with a case justly includes ensuring that it is dealt with expeditiously. Mr Hitchmough [for McCarthy & Stone] submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.
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> [43] I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, *ie* more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. The overriding objective in the UT Rules requires the UT to avoid unnecessary formality and seek flexibility in proceedings.
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> [44] An informal and flexible approach may mean that a self-represented litigant is granted relief from a failure to comply with the rules, including time limits, in circumstances where a more experienced and better resourced party is not. That difference in treatment between different parties does not mean that the UT is applying dual standards but only that the level of experience and resources

of a party are factors which should be taken into account in considering all the circumstances of the case. Such factors will, however, carry less weight than the two principal matters which must be considered in the new CPR 3.9.

[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules."

12. Although a decision of another judge of this Chamber is not binding on me, the convention is that a judge should follow the decision of another judge at the same level unless he is satisfied that the decision, or the reasoning which led to it, is wrong. With great respect to him, I am satisfied, for the reasons which follow, that Judge Sinfield's reasoning in *McCarthy & Stone* is wrong, and I decline to follow it.

13. Judge Sinfield mentioned the fact that the overriding objective of the CPR and that which applies in this tribunal differ, and that the CPR version was also amended with effect from 1 April 2013. The full text of the CPR version, as so amended, is as follows:

"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

14. In the Upper Tribunal rules, the overriding objective appears at rule 2:

"(1) The overriding objective of these Rules is to enable the Upper 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 Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper 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 Upper Tribunal to further the overriding objective; and

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

15. A comparison of the two texts reveals some important differences. Although CPR rule 1(2)(d) and Upper Tribunal rule 2(2)(e) are differently worded, they mean, in my view, substantially the same thing. However, the CPR go on to refer at rule 1(2)(f) to the obligation to enforce compliance with rules, practice directions and orders. That obligation is absent from the Upper Tribunal rules which instead, by rule 2(2)(c), require the tribunal to avoid unnecessary formality and to seek flexibility. Thus although the different rules have (among others) the common objective of avoiding unnecessary delay, they do not approach the task in quite the same way.

16. For some years it has been the practice in this Chamber, and in the Tax Chamber of the First-tier Tribunal, to look to the CPR for assistance on matters about which the tribunal rules are silent. As Judge Sinfield said, the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances. The correct approach, at least until *Mitchell*, was described by Morgan J, sitting in this tribunal, in *Data Select*, where the question was whether a late appeal to the First-tier Tribunal should be admitted, in accordance with s 83G of the Value Added Tax Act 1994. The pertinent passage in his decision is as follows:

> "[34] … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time

limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

[35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.

[36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.

[37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

[38] As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach."

17. Those observations were made in 2012, and they refer to the versions of the overriding objective and of rule 3.9 as they were in force at the time.

18. It is plain that the changes to the overriding objective of the CPR and to rule 3.9 were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts: see *Mitchell* at [34] to [51], and *Durrant* at [3]. The Tribunals Procedure Committee, which is charged with the duty of drafting the rules of procedure used in the tribunals (see the Tribunals, Courts

and Enforcement Act 2007 s 22(2)) has not, so far, thought fit to introduce similar changes to the Upper Tribunal rules. It may do so at some time in the future, or it may not. It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their adoption in the Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce significant changes in practice without warning.

19. In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*.

20. In this case the explanation given for the delay was that it was due to a combination of lack of knowledge and oversight. The matter was being handled by a solicitor whose experience was in criminal cases but who had moved about 18 months before the relevant events into civil work. Her unchallenged statement explained that she was still in the process of gaining familiarity with civil procedure, and was in addition rather over-worked. She was not aware of the time limit for lodging an application for costs, but as soon as she realised that the time limit had expired she made an application, accompanied by a request for an extension of time. No schedule of costs was submitted until Leeds' notice of objection was received, for the reason I have given: it was assumed that detailed assessment would be required and that the preparation of a schedule represented unnecessary work.

21. Mr Bremner's argument before me focussed, as I have said, on *Mitchell* and on Judge Sinfield's application of it in *McCarthy & Stone* to proceedings in this tribunal. I hope I do no injustice to Mr Bremner in saying that, had he not had *Mitchell* and *McCarthy & Stone* at his disposal, his resistance to HMRC's application would have been rather less strenuous, although I think he was right to argue that the reason advanced for the delay was rather feeble. On the other hand, the period of delay was short and once the error was discovered prompt action was taken, albeit there was still only an incomplete application.

22. Before going further I think it appropriate to set out some of what the Court of Appeal said in *Denton*:

> "[37] We are concerned that some judges are adopting an unreasonable approach to rule 3.9(1). As we shall explain, the decisions reached by the courts below in each of the three cases under appeal to this court illustrate this well. Two of them evidence an unduly draconian approach and the third evidences an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage. As regards the former, we repeat the passage from the 18th Implementation Lecture on the Jackson reforms to which the court referred at para 38 of its judgment in Mitchell: '[i]t has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If

that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case' ….

[40] Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that 'the parties are required to help the court to further the overriding objective'. Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.

[41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).

[42] It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

[43] The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget."

23. Jackson LJ (who is of course Sir Rupert Jackson, the author of the report which led to the change to, among others, rule 3.9) disagreed in minor ways with his brethren but pertinently observed, at [96], that:

> "The rule becomes an aid to doing justice. The new rule 3.9 is intended to introduce a culture of compliance, because that is necessary to promote access to justice at proportionate cost. It is not intended to introduce a harsh regime of almost zero tolerance, as some commentators have suggested."

24. I come then to the circumstances of this case, and the criteria set out in *Data Select*. The aim of the rule, like any other imposing a time limit, is to require a party asserting a right to do so promptly, and to afford to his opponent the assurance that, after the limit has expired, no claim will be made. The delay in this case was short, and the period included the Christmas and New Year holiday. I have already said that the reason was weak, but one can nevertheless understand how the error was made. The consequence of my refusing an extension of time will be that HMRC will be deprived of the costs direction they would ordinarily have expected, while Leeds will gain what can only be described as a windfall.

25. In my judgment, this application would have succeeded, and quite possibly without opposition, before *Mitchell*. The appeal before the tribunal was equivalent to a commercial dispute, with significant sums at stake. Had Leeds won, it would have expected to recover its costs, and it knew (or should have known) that if it lost it was likely to be required to pay HMRC's costs. There will be no real injustice to Leeds if it is required to pay those costs, while there will be injustice to HMRC, representing the body of taxpayers, if it is deprived of a costs direction because of a minor error. I am satisfied that it is appropriate to extend HMRC's time and to admit the application, and I so direct. I should add that I regard the omission of a costs schedule as a negligible failing which does not affect that outcome. While it might have been prudent to include a schedule, given the climate following *Mitchell*, the omission has not in fact had any adverse consequences for Leeds.

26. As the focus of the hearing before me was whether an extension of time should be granted I did not hear argument about whether, should I so direct, I should make a direction for costs in HMRC's favour, and whether I should direct detailed or summary assessment. I leave the parties, if they can, to agree on those points; if they are unable to do so they may return for further argument. If on that occasion I should make a costs direction, I would also be willing (indeed, would prefer) to embark on summary assessment.

27. I should, finally, make it clear that I do not criticise Mr Bremner and those he represents for opposing HMRC's application, nor do I regard that opposition as opportunistic. The decisions in *Mitchell* and *McCarthy & Stone* suggest that it was the right thing to do. But I am satisfied, following *Denton*, that opposition to short extensions when a mistake has been made and there is no real prejudice beyond the loss of a windfall gain is not within the spirit of the overriding objective of r 2 of the Upper Tribunal rules, and should be the exception rather than the norm. Time limits are there to be complied with, and for the reason I have given; but mistakes do occur

and if they are not egregious—for example when there is a failure to comply without good reason with an "unless" direction—or are not remedied promptly when discovered, they should not, in my view, lead to satellite litigation which takes up the resources of the parties and the tribunal. What was said in *Denton* at [42] on that topic is of equal application to the tribunals.

Colin Bishopp
Upper Tribunal Judge
Release Date: 29 July 2014