TC03890

Appeal numbers: TC/2009/14551, TC/2010/09137, TC/2012/00711

PROCEDURE — extension of time for service of costs schedule — principles to be followed after* Mitchell, McCarthy & Stone *and* Denton *— whether new rule 3.9 of CPR to be followed — no — Leeds CC v HMRC *and* Denton *followed — extension of time allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KUMON EDUCATIONAL UK CO LTD
KUMON BOOK SERVICES (UK) LTD **Appellants**

- and –

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

TRIBUNAL: JUDGE COLIN BISHOPP

Sitting in public in London on 24 April 2014

Sadiya Choudhury, counsel, instructed by Greenback Alan LLP, for the appellants

Alan Bates, counsel, for the respondents

DECISION

1. This decision relates to an application for an extension of time for the service of a costs schedule. The appellants were successful in their appeals to this tribunal. The appeals had been allocated to the Complex category in accordance with r 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and the consequence was that, as r 10 provides, the appellants could reasonably expect that a direction that HMRC pay their costs would be made. An application for such a direction was made (as r 10 requires) and it was served well within the time limit of 28 days for which r 10(4) provides, but it was not accompanied by the schedule of the costs claimed which r 10(3) demands. The reason for this omission given to me was that the person with conduct of the matter had not realised that this requirement had been introduced when this tribunal replaced the VAT and Duties Tribunal in 2009; there had formerly been no corresponding requirement.

2. The error was identified to the appellants' representatives by the tribunal only a day or two before the time limit expired. The person concerned was ill at the time, but returned to the office a few days later and, as I accept, made an application for an extension of time immediately. That application arrived four days after the time limit for making a costs application had expired.

3. The respondents, HMRC, opposed the application for an extension of time when it came before me. In doing so they relied on the judgment of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537, [2104] 1 WLR 795 ("*Mitchell*"), and on the application of that judgment to proceedings in the Upper Tribunal by Judge Sinfield in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), [2014] STC 973 ("*McCarthy & Stone*"). Those decisions heralded a much stricter attitude to compliance with time limits, and a greater reluctance to grant relief from sanctions, following upon amendments to r 3.9 of the Civil Procedure Rules ("CPR"). It was said to be common ground that the principles expressed in those decisions were correct, and inferentially that what was said by Judge Sinfield in relation to the Upper Tribunal was of equal application to the First-tier Tribunal. I would not disagree with that inference, in the sense that it seems to me that, unless there is a reason for differentiation, the practice in both tiers should be the same.

4. Matters have, however, moved on since *Mitchell* and *McCarthy & Stone*. In *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906 ("*Denton*") a differently constituted Court of Appeal made various observations about *Mitchell*, in particular to the effect that an insistence on stricter compliance with time limits did not carry with it the implication that minor inadvertent and inconsequential errors should result in windfall benefits to the opposing party. The change to r 3.9, as Jackson LJ put it at [96], was "not intended to introduce a harsh regime of almost zero tolerance, as some commentators have suggested."

5. Second, there is my own decision, while sitting as an Upper Tribunal judge, in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), in which I took into account what was said in *Denton* and, for that and other reasons, declined to follow what was said by Judge Sinfield in *McCarthy & Stone*. I did not accept that

a change in the CPR could be applied to the Upper Tribunal as if its rules had been changed in the same way but concluded, instead, that the former practice, as it was explained by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) ("*Data Select*"), should be followed until a rule change was made—as it might never be. I shall not repeat here what I said in *Leeds City Council*, but instead invite those interested to read it.

6. When the application in these appeals came before me, sitting as a First-tier Tribunal judge, I was, of course, bound by what Judge Sinfield said in *McCarthy & Stone*, assuming what he said was intended to apply to both the Upper Tribunal and the First-tier Tribunal, albeit there might have been an argument that I should nevertheless prefer what Morgan J said in *Data Select*. Leaving that possible argument to one side, I now have the luxury of being able to choose between two decisions of equal standing, and it will come as no surprise that I prefer my own reasoning in *Leeds City Council* to that of Judge Sinfield in *McCarthy & Stone*.

7. Had the application been made before *Mitchell* and *McCarthy & Stone* I strongly suspect that it would have been unopposed and that, even if it was opposed, it would have succeeded. Although the person concerned should plainly have checked what the requirements were, and should not have assumed that the earlier practice was unchanged, the omission was inadvertent and it was remedied, albeit by an application for an extension of time rather than by provision of a schedule, as soon as it reasonably could be. Mr Alan Bates, counsel for HMRC, pointed out that the requirement of a schedule is there for the purpose of ensuring that applications for costs can be dealt with expeditiously, and I agree with him; but it is not there in order to operate, as the Court of Appeal put it in *Denton*, as a tripwire leading to a windfall gain for the opposing party.

8. Moreover, it is clear from what was said in *Denton* that the perception, following *Mitchell* and *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624, that the courts would take an unforgiving approach to even minor failings, overstates the position. Time limits certainly should be complied with, in that a claimant ought to pursue his claim with diligence, and his opponent should be able to assume with confidence that, once the time limit has expired, there will be no claim. But mistakes happen; and it is not the function of a court or tribunal to penalise such mistakes without regard to the reasons for them and the consequences to which they lead.

9. In this case, as it seems to me, and whether one assumes that *Mitchell* does not apply in the tribunals or instead follows the guidance in *Denton*, the proper outcome is clear. The failing was trivial and inconsequential, and no prejudice to HMRC (other than the loss of a windfall gain) was identified. The oversight was remedied, even if by an application for an extension of time rather than by provision of the missing schedule. In my judgment it is plain that relief from the consequences which would otherwise flow from the failing should be given. I extend the appellant's time and direct that the schedule which was served shall form the basis of the appellants' claim for costs. The amount claimed is large, and in my view the costs payable should be the subject of detailed assessment on the standard basis by a costs judge of the Senior Courts. If the parties agree I shall so direct.

10. I do not criticise HMRC for opposing the application; in the light of *Mitchell* and *McCarthy & Stone*, as they were perceived before *Denton*, it was the right thing to do. But in my judgment, and for the reasons I gave in *Leeds City Council*, the *Mitchell* approach to time limits does not apply to this tribunal.

11. 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.

COLIN BISHOPP
CHAMBER PRESIDENT

RELEASE DATE: 1 August 2014