



**TC06745**

**Appeal number: TC/2016/01910**

*PROCEDURE – appeal struck out for failure to comply with an Unless Order – application to reinstate appeal out of time – whether extension of time – Rule 5(3) of the Tribunal Rules 2009 – use of judicial discretion – Martland followed – Pierhead considered – principle of legal certainty – application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BILKUS & BOYLE SOLICITORS**

**Applicant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON**

**Sitting in public at Eagle Building, Glasgow, on 8 August 2018**

**Mrs Margaret Boyle, former partner of Bilkus & Boyle, for the Applicant**

**Mr Mark Boyle, officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an application to reinstate an appeal that had been struck out on 27 October 2016 due to a failure to comply with an unless order.

5 2. The appeal that was struck out was in relation to default surcharges imposed by the respondents, which totalled £17,422.11 for the VAT periods from 12/14 to 12/15.

### **Preliminary hearing**

3. Following the strike-out of the appeal, the respondents (“HMRC”) were pursuing the current partnership of Bilkus and Boyle for settlement of the surcharges.  
10 The current partnership asserted that it is not liable for the historical surcharges, while also made an application to reinstate the appeal. The application was scheduled to be heard on 31 January 2018.

4. The reinstatement application that was supposed to be heard by the Tribunal on 15 31 January 2018 was made by the new partnership, which has no *locus standi* to make such an application, since the new partnership is not liable for the surcharges at issue.

5. The hearing resulted in a set of case management Directions being issued on 8 February 2018. The Directions were for the purposes of establishing: (a) the person(s) responsible for making the application of reinstatement; (b) the person(s) now held liable for the surcharges in issue; (c) the grounds for the *late* application to reinstate  
20 the appeal, and (d) the production of supporting evidence for the late application.

6. An application to reinstate the appeal is now brought by the former firm of Bilkus and Boyle, of which Mrs Margaret Boyle and Mr Campbell Porter were partners. It is now common ground that Mrs Boyle and Mr Porter are jointly liable for the historical surcharges.

### **Issue for determination**

7. The principal issue for the Tribunal’s determination is whether an extension of time should be granted for the late application to reinstate the appeal to be considered.

### **Applicable law**

#### *Procedural rules*

8. The procedural provisions for considering this application therefore come under  
30 the Tribunal Procedural (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the Tribunal Rules). The appeal was struck out under Rule 8(3)(a), which provides:

“(3) The Tribunal may strike out the whole or a part of the proceedings if –

35 (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of the them; ...”

9. The case management powers of the Tribunal are provided under Rule 5, which include the discretion to extend time under Rule 5(3)(a): –

**“Case management powers**

5 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

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

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

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

15 10. As with any other tribunal rules, Rule 5 is to be considered in conjunction with the overriding objective under Rule 2, which is “to deal with cases fairly and justly”, which includes –

20 “(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;

25 (d) using any special expertise of the Tribunal effectively; and

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

*Case law principles in granting an extension of time*

30 11. In the recent Upper Tribunal decision of *Martland v HMRC* [2018] UKUT 0178 (TCC), it was observed at [24] that:

“The statutory discretion conferred on the FTT in such cases is ‘at large’, in that there is no indication in the statute as to how the FTT should go about exercising it or what factors it should or should not take into account.”

35 12. *Martland* concerned an application to extend time to make an appeal, while the present case concerns an extension of time to apply to reinstate an appeal. In both instances, the fundamental consideration is whether an extension of time is to be granted, and involves applying the same principles as developed in “the well-known and wider stream of authority on relief from sanctions and extensions of time in  
40 connection with the procedural rules of the courts and tribunals” ([39] of *Martland*).

13. The principles from the stream of authority are summarised at [43] of *Martland*:

5 “The clear message emerging from the cases – particularised in *Denton*  
and similar cases and implicitly endorsed in *BPP* – is that in exercising  
judicial discretions generally, particular importance is to be given to  
the need for ‘litigation to be conducted efficiently and at proportionate  
cost’, and ‘to enforce compliance with rules, practice directions and  
orders’. We see no reason why the principles embodied in this message  
should not apply to applications to admit late appeals just as much as  
to applications for relief from sanctions, though of course this does not  
detract from the general injunction which continues to appear in CPR  
10 rule 3.9 to ‘consider all the circumstances of the case’.”

14. The three-stage approach in *Denton v TH White Ltd* [2014] EWCA Civ 906 is  
endorsed at [44] of *Martland* as a guidance for FTT to follow:

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

20 (1) Establish the length of the delay. If it was very short (which  
would, in the absence of unusual circumstances, equate to the  
breach being ‘neither serious nor significant’), then the FTT ‘is  
unlikely to need to spend much time on the second and third stages’  
– though this should not be taken to mean that applications can be  
granted for very short delays without even moving on to a  
consideration of those stages.

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

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

*Criteria for considering a reinstatement application*

35 15. There is convergence in the principles enunciated in *Martland* with the relevant  
criteria set out in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 (TCC),  
which concerned an application to reinstate the appeal following withdrawal under  
Rule 17 of the Tribunal Rules.

40 16. Whilst the appeal in the present case was struck out instead of being withdrawn  
as in *Pierhead*, the procedural hurdle for Bilkus and Boyle is the same as that faced  
by the appellant in *Pierhead*, since the application to reinstate in both instances was  
out of time.

17. The Judge at the First-tier Tribunal (“FTT”) in *Pierhead* took the approach as  
stated his decision at [41] of *Pierhead Purchasing Ltd* [2013] UKFTT 172 (TC):

5 “... Logically, I should therefore proceed by treating the Appellant’s application as an application for the Tribunal to extend the time allowed under Rule 17(4) and, assuming that I grant such extension, as an application to reinstate the appeal. I find it more productive, however, certainly in this case, to consider the two issues together if only because here are *prima facie* grounds for agreeing to extend the time allowed for the application.”

10 18. The FTT held that there was “a strong relationship between the grounds that are advanced to justify the application and the time that elapsed since the appeal was withdrawn” (at [42]). Due to the fact that the FTT in *Pierhead* had considered “the two issues together”, on appeal to the Upper Tribunal, one of the issues addressed by Mrs Justice Proudman in *Pierhead* was whether permission for an extension of time had been granted by the FTT.

15 19. In the present case, it is equally observed that there would seem to be a strong relationship between the grounds that are advanced to justify the application and the reasons for the delay in bringing the reinstatement application. It is, however, clear to me that the issue for determination, first and foremost, is one of extension of time.

20 20. The principles for considering a reinstatement application that is out of time are set out by Mrs Justice Proudman in the Upper Tribunal decision of *Pierhead* at [23]:

20 “Although as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56] - [57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,

- 30
- The reasons for the delay, that is to say, whether there is a good reason for it.
  - Whether HMRC would be prejudiced by reinstatement.
  - Loss to the appellant if reinstatement were refused.
  - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
  - Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.”
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21. Mrs Justice Proudman continued at [24] by qualifying the approach in the following terms:

40 “I was asked ... to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance in *Mitchell v News Group*

5                                *Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to the Tribunals in any event) does not exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective.”

22.    The principles set out in *Pierhead*, while specific to a reinstatement application made out of time, can be regarded as part of that “wider stream of authority” that is now consolidated into the principles enunciated in *Martland*. For present purposes, it is apt to follow the three-stage process set out in *Denton* as endorsed in *Martland*.  
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### **Factual background**

#### *The appeal in March 2016*

23.    The application for reinstatement is brought by Mrs Boyle and Mr Porter, both solicitors of the previous firm of Bilkus and Boyle Solicitors in Glasgow (henceforth jointly as “the applicant”), which was the same legal entity as the one which lodged the appeal in March 2016.  
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24.    The appealable decision from HMRC was dated 5 December 2015, and the time limit for notifying an appeal to the Tribunal was 4 January 2016.

25.    The covering letter accompanying the Notice of Appeal was dated 29 March 2016 and received by the Tribunal on 1 April 2016. As such, the original appeal was made out of time by nearly 3 months.  
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26.    The appellant had been in the default surcharge regime from period 09/11 onwards. The defaults appealed were in relation to the VAT periods from 12/14 to 12/15. The surcharge for each period was at 15%, and ranged from £3,169.96 (period 12/14) to £3,828.50 (period 09/15), with the total for the 5 periods being £17,412.11.  
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27.    During the rolling surcharge period that commenced with period 09/11, there had been time-to-pay agreements which avoided certain late payments from incurring a surcharge, and some defaults were cancelled by HMRC, such as those for periods 09/12 and 12/12 on grounds of reasonable excuse.

30    28.    The grounds of appeal (hand-written) as stated in the Notice of Appeal were:

(1) We are a small firm of Solicitors Legal Aid work is approximately [blank] % of our business. We have been severely affected by the erratic payments made to us by Legal Aid Board.

(2) This has affected our cash flow position. Our difficulties were caused by late payment from Legal Aid Board (a government department) which resulted in late payments to HMRC (another government department).  
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(3) We have maintained employing approximately 9 people throughout this period.

(4) Our non Legal Aid income has been used to pay the ongoing expenses.

(5) The surcharges imposed on us are punitive.

### *History of the firm*

29. Bilkus and Boyle is a firm of solicitors, and was established in 1980. Mrs Boyle  
5 was one of its founding members, and had been a partner of the appellant for some 38  
years until her recent retirement. Mrs Boyle's area of legal practice was in land  
transactions and conveyancing.

30. Mr Porter joined the firm in 1985 with expertise in dealing with criminal injury  
10 cases, which involves representing clients at court and at trials by jury. Mr Porter is a  
continuing partner in the new firm of Bilkus & Boyle.

31. The client base of the firm meant that legal aid funding represented an important  
part of the (old) firm's turnover, representing around 40% of the fees income, said  
Mrs Boyle at the hearing. The legal aid funding covered not only criminal cases, but  
also civil legal aid in relation to divorce and custodian matters.

15 32. The Minute of Agreement between the old and new partnerships of Bilkus and  
Boyle contained only five clauses (though peculiarly, the designation was from First  
to Sixth, with the Fifth clause being absent altogether). The Agreement established the  
date of changeover as 13 February 2017. Clause Fourth provides that the old  
20 partnership (as the First Party in the Agreement) "will be liable for all outstanding  
liabilities and debts including sums owed to HM Revenue and Customs".

33. The partnership was de-registered by HMRC for VAT purposes as at 1 July  
2017. By letter dated 27 September 2017, the new partnership advised HMRC that  
"there was no break in the partnership only a change in named partners". A form  
VAT2 was submitted by the named partners of the new partnership, being Mr Stuart  
25 Porter, Mr Campbell Porter, and Ms Katherine Wilson. On 10 October 2017, the VAT  
registration was reinstated retrospectively as from 1 July 2017.

### **The applicant's case**

34. As provided by the applicant in writing on 12 March 2018 in compliance with  
Tribunal Directions, the reasons for the late application for reinstatement are  
30 summarised as follows:

(1) Our failure to make the application within the 28 days of the strike-out  
direction of 27 October 2016 was caused by Mrs Boyle being unwell and  
suffering stress due to the fluctuation at that time in relation to the old  
partnership.

35 (2) Mrs Boyle was coming to the end of a partnership of over 30 years and  
found the ending of her involvement in the partnership distressing.

(3) At the same time the premises at 2175 Paisley Road West were being  
totally refurbished to accommodate the new partnership.

(4) The old partnership was in a state of flux with partnership changeover and premises refurbishment.

(5) The strike-out direction was received at this time of major upheaval within the old firm and accordingly the appropriate response was missed at that time due to the circumstances.

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35. The medical certificate provided by Mrs Boyle's doctor stated that she suffers from a chronic condition that can cause crippling abdominal pain, and is known to be aggravated by stress despite regular medication. The diagnosis was in 2014, and regular medication is prescribed as treatment, which at best helps to modify symptoms; that there are not alternative remedies but is a condition to be managed.

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36. At the hearing, Mrs Boyle elaborated on the stated grounds. She described the whole of 2016 as "extremely stressful"; that it was in the spring of 2016 that she discussed with Mr Porter about the worrying situation of the firm's finances; that the decision was reached whereby a substantial sum of money would be required to put an end to the firm's cash flow difficulties; that she was 73 of age in 2016 and started thinking of retirement; that the decision was reached to sell the firm's office premises at 2236 of Paisley Road West, and accommodated all staff at No. 2175, which is directly opposite to No. 2236.

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37. Mrs Boyle related the upheaval faced by the firm when the offer to purchase the office premises at No. 2236 came in October, and that it was for entry by the end of 2016. The sale offer meant that the firm had only a narrow window of opportunity (in November and December 2017) to carry out all the necessary refurbishment to the premises at 2175. In terms of logistics, all staff members moved into 2236 premises while 2175 was being renovated. The schedule was tight, but it had to be done during the narrow window before the entry date when the office premises of 2236 were still owned by the firm.

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38. The refurbishment involved structural changes: new floors were laid to remove rot, a new roof, and creating 3 rooms out of the attic floor; that it was not anything needing planning consent; that the major thing was the roof.

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39. When asked where Mr Porter was at this time when Mrs Boyle was preoccupied with the sale of premises and refurbishment, Mrs Boyle said he was "all over the place", "in and out of court", that he "assumed that I was dealing with it".

40. When asked who in the office would have oversight of the matter in relation to the appeal, Mrs Boyle admitted that: "The matter was in no one's mind".

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41. In terms of managing the firm's finances, Mrs Boyle emphasised that the firm employed 10 staff members and no redundancies were made; that she had to take out personal loans at various junctures to fund working capital, and she provided documents of these loans. She explained that the big decision to trim down the office operation to only one premises meant that a "very run down" third office in Paisley was sold in the summer of 2017. The sale proceeds from the two offices funded the refurbishment of 2175 and cleared the debts of the old firm; all outstanding VAT had

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been settled; only the surcharges remain outstanding. Mrs Boyle is personally (though jointly with Mr Porter) liable for the surcharges, and if the surcharges were enforced for payment, it would mean surrendering her pensions.

### **HMRC's objection**

5 42. The respondents object to the application made on 6 October 2017 for reinstatement; that no reasonable excuse has been provided for the late application.

43. The purpose of time limits is to provide clarity for all parties; and the appellant has not complied with the time limits; taxpayers are expected to act with reasonable prudence and diligence in dealing their affairs.

10 44. HMRC further submit that the appellant had continued to incur default surcharges for periods 03/16, 06/16 and 09/16, which were appealed to HMRC on 1 March 2017. There followed ten pieces of correspondence between the appellant and HMRC, with an exchange for each of the months in April, June, July, August and September of 2017. The historical surcharges under the appeal which had been struck  
15 out were not mentioned in any of the correspondence. There should be finality in litigation and the appeal should not be reinstated.

### **Discussion**

45. As matters stand, no appeal exists following the strike-out. The application for reinstatement is out of time, and unless the Tribunal gives permission, the late  
20 application cannot be considered. The critical issue is whether an extension of time should be allowed for the late application for reinstatement. To that end, as I indicate above, the three-stage approach in *Denton*, as endorsed in *Martland*, is followed.

#### *The length of delay*

25 46. The Upper Tribunal decision in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) gives guidance at [96] in considering the length of delay:

30 “The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

47. Whilst the present application does not concern the making of an appeal as in *Romasave*, the seriousness of any length of delay is to be assessed in like manner  
35 when it concerns the exercise of the right to reinstate an appeal.

48. In the present case, an “Unless Order” was issued on 15 September 2016 by Judge Richards, and stated as follows:

5 “The Appellant having failed to comply with the Directions issued on 05 July 2016 and having failed to reply to the letter from the Tribunal dated 22 August 2016 within the times stipulated therein or at all the Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 29 September 2016 confirms in writing to the Tribunal that he intends to proceed with the appeal then the proceedings MAY be STRUCK OUT without further reference to the parties.” (emphasis original)

49. On 27 October 2016, the appeal was struck out by Tribunal direction as follows:

10 “The Appellant having failed to comply with the Directions issued on 15 September 2016 which stated that such failure could result in the proceedings being struck out without further reference to the parties, the Tribunal DIRECTS that these proceedings are NOW STRUCK OUT.

15 The Appellant has the right to apply to the Tribunal within 28 days after the date of issue of this Direction for the proceedings to be reinstated.” (emphasis original)

50. The time limit to apply to reinstate the appeal expired on 24 November 2016. If the appellant had applied to reinstate the appeal before the expiry of the time limit, the application would have been considered as by right.

20 51. The supposed reinstatement application lodged by the new partnership was by letter dated 6 October 2017 to the Tribunals Service. Even if the application were to be reckoned as made on 6 October 2017, (and not from the date when the old partnership with the legal standing re-made the application on 12 March 2018), the application was still over 10 months out of time, or as HMRC stated, 317 days late.

25 52. The length of delay therefore “cannot be described as anything but serious and significant”. It is necessary then to consider the reasons for the delay.

*Reasons for the delay*

53. From Mrs Boyle’s representations made in writing and at the hearing, the reasons for the delay would seem to be two-fold.

30 54. Firstly, Mrs Boyle suffers from a chronic condition that requires regular mediation and careful management, and that it is a condition that can be aggravated by stress. Secondly, it was the upheaval within the practice in relation to the sale of office premises, and the renovation project in the months from October 2016 through to 13 February 2017 when the old partnership ceased.

35 55. I accept Mrs Boyle’s evidence totally, and have admiration for the tenacity and resilience she showed in continuing to manage the legal practice in her seventies, not only with her own health issues, but also through the many financial difficulties of the practice. It was her crucial decision in the spring of 2016 to retire from practice which set in motion the chain of events that caused considerable upheaval and stress  
40 throughout 2016.

56. As I understand it, to bring the finances of the practice into better order before her retirement, the decision was taken to operate only from one premises instead of three. The sale of two offices allowed the release of capital and reduced outgoings for the practice; these were strategic decisions which would seem necessary to attract new partners to take over the practice, and for Mrs Boyle to retire.

57. It would seem that the stress in the autumn of 2016 was to a large part due to the “rush” to refurbish the premises at 2175. The logistics of the refurbishment required the premises at 2175 to be vacated and the practice continued its business from the premises at 2236, which were sold in October 2016 for entry in December. The rush was caused by the necessity to complete the refurbishment of 2175 when the partnership would still have the use of the “second” office at 2236.

58. The offer to buy the office premises at 2236 Paisley Road West in October 2016 would seem to coincide with the timing of the strike-out direction on 27 October 2016. Referring to the strike-out direction, Mrs Boyle admitted that “the matter was in no one’s mind”, and I do not doubt that was the case.

59. However, for reasons set out as follows, I do not consider these circumstances give rise to a good explanation for the undue delay of over 10 months in making the reinstatement application:

(1) There was a pattern of dilatoriness in the way the partnership had dealt with the appeal. The appeal lodged on 29 March 2016 was itself late by nearly 3 months. The appellant did not comply with directions in relation to the appeal proceedings, and that was the reason for the unless order. In face of the unless order issued on 15 September 2016, there was still no response, and that resulted in the strike out.

(2) When considered against the subjective circumstances of Mrs Boyle and Mr Porter, the objective pattern of dilatoriness is far from excusable. This is a legal practice whose partners should be well aware of the consequences of breaches with time limits. The professional standards applicable in dealing with clients’ matters, which include compliance with time limits, are not being observed when dealing with its own appeal.

(3) While Mr Porter was jointly responsible for the appeal, he had simply assumed that Mrs Boyle would deal with it. He did not seem to have engaged with the appeal process at any stage. Even accepting that Mrs Boyle was the principal person responsible for pursuing the appeal, the whole point of being in partnership is to share responsibility, to stand in when circumstances require, and to provide back up when another partner is under strain.

(4) The practice had some 10 employees, and some would be legally qualified. Even if the partners were themselves pre-occupied, the exercise of foresight would have delegated the responsibility to a staff member or two who could maintain oversight of the progress of the appeal. In view of the chronic condition that Mrs Boyle suffers, which can be aggravated by stress, some form of delegation in relation to the appeal process would

seem to be both necessary and practical to ensure that a professional response to the process could be maintained.

5 (5) When the decision to sell the premises was taken, the upheaval that ensued was not unforeseeable. An exercise of foresight at an early stage would mean that an extension of time should have been requested for complying with the directions in the first place.

10 (6) The appellant had the right to apply for variation of the directions at the time, instead of allowing time limits to drift to such an extent that an unless order was issued as an ultimatum. It would seem that no application to extend time to comply with directions was ever made.

15 (7) Even if I were to consider that the appellant had a reasonable excuse for the delay in making a reinstatement application, that excuse would have ceased by December 2016 when the refurbishment was completed. But there was no action, no enquiry about the progress of the appeal by the appellant after December 2016. It took the enforcement actions of HMRC's Debt Management unit to jolt the firm into making the reinstatement application in October 2017.

20 60. The appellant simply had not acted with due diligence in pursuing the appeal. The threshold test for there to be a good explanation to merit an extension of time is arguably higher for a firm of solicitors, who should know better the utmost significance of time limits in any legal proceedings. Even if the situation the appellant found itself in the autumn of 2016 gave rise to attenuating circumstances for failure to comply with the time limit of 28 days after the strike-out decision, the continual delay was not excusable. The continual delay until 6 October 2017 in making the reinstatement application was symptomatic of the appellant's overall attitude in  
25 dealing with the appeal, which could be aptly described as passive disengagement.

*All the circumstances of the case*

30 61. I am conscious of the financial consequences for Mrs Boyle and Mr Porter if the application to reinstate the appeal is refused. I have considered the prejudice to the appellant in terms of the prospect of the appeal succeeding.

35 62. In my judgment, there is no reasonable prospect of the appellant's appeal succeeding. The main ground of appeal was to plead cash flow difficulty due to the payment terms set by the Legal Aid Board. Section 71(1)(a) of VATA specifically precludes "an insufficiency of funds" from being a reasonable excuse. This statutory exclusion is qualified, but only to a very limited extent by the authority of *C&E Comrs v Steptoe* [1992] STC 757, wherein the Court of Appeal distinguished between the direct or proximate cause from the underlying cause of the shortage of funds, and allowed the taxpayer's appeal by a majority (Lord Donaldson with Nolan LJ, Scott LJ dissenting).

40 63. However, it is clear from the authority of *Steptoe* that "there must be limits to what *could* be regarded as a reasonable excuse". Lord Donaldson agreed with Nolan LJ's reasoning as to what those limits could be and stated the following:

5 “Nolan LJ, as I read his judgment in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

10 64. The appellant had been in default from period 9/11. By the time the surcharges in question were imposed, the appellant had been in a rolling surcharge period for over three years. The payment terms by the Legal Aid Board, even if they were “erratic” as described by Mrs Boyle, had become a pattern of the trading conditions.

15 65. Furthermore, the payment terms would have been the same for Bilkus and Boyle as for all other legal firms taking on work funded by legal aid. The so-called difficulty for getting timely payments from the Legal Aid was not peculiar to Bilkus and Boyle, and was a condition that all legal firms have to work to.

66. For there to be a reasonable excuse, the test of reasonableness as articulated by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234 has to be applied to the subjective circumstances of the taxpayer:

20 “The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found  
25 himself at the relevant time, a reasonable thing to do?”

30 67. It is not clear if the firm had ever considered applying for “cash accounting” in returning its VAT. If the firm is eligible for cash accounting, then output VAT is accounted for only when a payment from the Legal Aid Board is received. The cash accounting scheme would have minimised the difficulty posed by a VAT liability crystallising according to the date of the invoice. A prudent taxpayer with the attributes of the applicant would have addressed this pertinent question as to whether the firm could have benefitted from the cash accounting scheme in early course.

35 68. The rationalisation of office accommodation in 2016 and 2017 was in part to reduce outgoings and to release working capital. It seems to me that working capital issues were a contributing factor to the insufficiency of funds in general, and the payment terms of the Legal Aid Board were a facet of the overall cash flow difficulty.

40 69. As noted earlier, HMRC had used their discretion in allowing time-to-pay agreements on more than one occasion, and had also cancelled some of the defaults. The surcharges in question had gone through review by HMRC, and relevant factors for reasonable excuse that had allowed some surcharges to be cancelled would have been similarly considered.

70. For these reasons, I do not consider that the appeal would have a reasonable prospect of success even if it were to be reinstated. A reasonable excuse due to “an insufficiency of funds” can only be tightly construed in accordance with the authority of *Steptoe*. The fact pattern in the present case does not suggest a *Steptoe* construction can be applied. It follows that the applicant’s pleading on ground of cash flow difficulty due to the legal aid payment terms has no reasonable prospect.

*Legal certainty and prejudice to good administration of justice*

71. For procedural reasons, and as explained to Mrs Boyle, the principle of legal certainty demands that parties to a potential litigation know their position at any one point in time. It is paramount for the court system, for justice, and for proper closure to a disputed matter, that time limits for bringing an appeal are strictly adhered to by a party wishing to seek justice at the court.

72. Procedurally, there can be no justification to consider an application for reinstatement of an appeal that is so significantly out of time.

73. The Tribunal’s overriding objective is to deal with cases fairly and justly, not only the appellants’, but also the respondents’. I have regard to the severe prejudice to HMRC if the appeals were reinstated. One aspect of fairness concerns the proportionate use of resources of the respondents as a party to litigation. The prejudice to HMRC would be to deploy resources to deal with cases that are quite properly considered as final and conclusive in law.

74. For similar reasons, the Tribunal’s consideration of justice should also encompass a public interest dimension as respects the access to justice. Master McCloud’s dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) (*‘Mitchell’*), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

‘Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18<sup>th</sup> Lecture ...

*“The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgment that the achievement of justice means something different now.”*

75. On the principle of legal certainty alone, I refuse the application to reinstate the appeals. The party seeking to reinstate an appeal after the expiry of the time limit has a heavy onus, and the applicant has not met this onus. There are no compelling reasons to displace the principle of legal certainty to reinstate this appeals that was struck out due to non-compliance with directions. This is irrespective of the fact that in my judgment, the appeal has no reasonable prospect of success.

**Decision**

76. For the reasons stated, the application to reinstate the appeals is refused.

77. 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.

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**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 3 OCTOBER 2018**