



**TC07732**

**Appeal number: TC/2016/04421**

*PROCEDURE – application for reinstatement – late application – permission to admit the late application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ANDREW DUNCOMBE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**Sitting in chambers in Taylor House, London on 13 January 2020 with submissions from the parties received in January and February 2020**

**Having considered the written submissions of CM Accountants for the Appellant that the Appellant's appeal be reinstated and the written objections thereto submitted by the Respondents.**

## DECISION

### INTRODUCTION

1. This decision has its roots in an appeal by the appellant which was made on 17 August 2016. The appellant has been assessed tax of £140,293.61 which arises, in HMRC's view, as a result of an unauthorised taxable payment which the appellant received in the tax years 2011/12 and 2012/13 from the Salmon Enterprises (UK) Pension Scheme (the "**Scheme**") in which the appellant had invested

2. However the decision itself concerns the application of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**", each a "**Rule**"). Broadly speaking, what has happened in this appeal is that the appeal was struck out by the Tribunal on 6 December 2018 for failure to comply with an unless order. The appellant made a late application for reinstatement of this appeal on 17 September 2019. What I have to decide is whether I should give permission for the appellant's reinstatement application to be made out of time, and if so, whether the appeal should be reinstated.

3. The appellant's main ground for both reinstatement and his late application for reinstatement is that he had relied on a professional adviser who seriously let him down before disappearing. This is similar to the position of the appellant in the case of *HMRC v Mohammed Hafeez Katib* [2019] UKUT 0189, ("*Katib*") an Upper Tribunal decision which is binding on me. Neither party had cited *Katib* in their original representations to the Tribunal, and so I directed that the appellant should provide the Tribunal with additional information about his communication with that agent both parties should provide submissions relating to the relevance of *Katib* and its application to the facts. I have taken into account that information and those submissions when reaching my decision.

4. For the reasons given later in this decision I have decided in favour of HMRC. I reject the appellant's application that he should be permitted to make a late application to reinstate his appeal.

### RELEVANT LEGISLATION

5. Rule 2 provides:

"2.— Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the

proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

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

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

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

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

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

6. Rule 8 provides:

“8. Striking out a party's case

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

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

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

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

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

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

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

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

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

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

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

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

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

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

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

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

“5.— Case management powers

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

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

## **BACKGROUND FACTS**

8. From the court file and written representations of the parties I find the following facts:

(1) On 23 March 2016 Angela Brooks sent a letter to the pension scheme is services for the attention of Lynn Faulkner and Mike Bridges. The heading of that letter states, in bold, “Ark Class Action” and the address from which it was sent is given as 24 Calle Cuatro Esquinas, Lanjaron 18420, Granada Spain (the “**Spanish Address**”). The email address was given as angiebrooks@gmail.com (the “**gmail address**”). Angela Brooks’ mobile and landline telephone numbers were also provided. In that letter, written on behalf of the appellant, Angela Brooks asks that the letter is treated as an appeal and a request for postponement of the tax in respect of the protected assessment issue. She then proceeds to give grounds of appeal and for the request for postponement.

(2) In a letter dated 20 July 2016 which was sent to the Spanish address, Mrs Newham of HMRC wrote to follow-up a letter that she had written to Angela Brooks on 7 June 2016 and two enclosed a copy of the review conclusion letter. That review conclusion letter dated 20 July 2016 was addressed to the appellant at the Coach House, Queen’s Drive, Rowington, Warwickshire. It told the appellant that a copy of the letter had been sent to Angela Brooks and also referred to his agent “Cobham Murphy Ltd”.

(3) The outcome of the statutory review was that HMRC’s decision to impose a tax charge on an unauthorised taxable payment which HMRC alleged the appellant had received from the scheme, was upheld in an amount (for both tax years) of £140,293.61.

(4) The appellant sent an email to Angela Brooks on 15 August 2016 saying that he had until the end of that week to apply to the Tribunal and asked whether this was in hand.

(5) By email dated 17 August 2016 the appellant told the Tribunal that he had appointed Angela Brooks as his agent and that the Tribunal should liaise with her on all matters relating to his case.

(6) On 17 August 2016 the appellant notified his appeal to the Tribunal. This was submitted by Angela Brooks who gave her Spanish address and Gmail address as the contact details, and identified herself as the appellant’s representative. She identified at section 11 of the notice that she was the appellant’s legal representative.

(7) On 24 August 2016 Angela Brooks told the Tribunal that she was acting for eight clients in relation to unauthorised payment assessments and provided details of their names.

(8) By email dated 10 October 2016, Angela Brooks submitted, to the Tribunal, a notice of appeal for the appellant together with authority enabling her to act on his behalf dated 3 October 2016. As an aside, I am not at all clear why

this second notice of appeal and second notice of authority was submitted to the Tribunal, but nothing turns on this point.

(9) In February 2017, the appellant received an email from Angela Brooks dated 13 February 2017 which was a response to the government consultation on pension scams and cold calling compiled by Angela Brooks. It runs to some 27 pages.

(10) On 31 March 2017, HMRC sent a copy of the respondents statement of case to Angela Brooks at her gmail address.

(11) In early May 2017 the appellant received an email from Angela Brooks dated 2 May 2017. This was addressed to Sue Halfyard and Nicky Mitchell, and explained that the Tribunal has agreed with her and with HMRC that there would be two lead cases and all other cases will be stayed behind those until the appeals in the lead cases had been heard.

(12) Following correspondence between the parties and the Tribunal, it was decided that two of the eight clients for whom Angela Brooks acted should be nominated as lead cases. It subsequently transpired that one of those identified in the case had health issues and so was replaced by another client. This was in May 2017. Copies of the relevant letters were sent by the Tribunal to the gmail address. The Tribunal followed up, having sent received no response, by email to a second email address ([angiebrooks@pensionlife.com](mailto:angiebrooks@pensionlife.com)).

(13) In a letter dated 16 June 2017, Angela Brooks wrote to the Tribunal in response to letters sent to her by it, seeking reasons why 11 other client of hers were not included in the list of those who would be part of the lead case arrangements.

(14) This appears to be the last communication that either the Tribunal or HMRC received from Angela Brooks.

(15) On 22 June 2017 the Tribunal sent an email to Angela Brooks at her Gmail and pensionlife email addresses. A delivery failure message was received in respect of the email sent to her pensionlife email address.

(16) On 1 August 2017, Judge Brooks made a direction that the appellant's appeal be stayed until 60 days after the appeals in the lead cases were finally resolved by the courts or settled by the parties. A copy of that direction was sent to Angela Brooks at her gmail address.

(17) On 12 April 2018, the First-tier Tribunal released its decision in the lead cases and dismissed the appeals. The appellants in those lead cases then applied for permission to appeal against this decision, both to the FTT (which refused to admit their application) and then to the Upper Tribunal. In a decision notice dated 28 August 2018, the Upper Tribunal refused those appellants leave to appeal.

(18) On 10 October 2018, HMRC wrote to the Tribunal observing that mission to appeal to the Upper Tribunal had been refused and requesting that the Tribunal lifts the stay on all the cases affected by the lead cases. The letter to the Tribunal confirms that it had been copied to Angela Brooks, and indeed it was sent to her, at her gmail address, on that date.

(19) On 30 October 2018 the Tribunal sent an email to Angela Brooks at her gmail address attaching a letter explaining that the stay in the appellant's proceedings had now expired and asking her how she wanted to proceed with the appeal or whether she wished to withdraw from proceedings. She was asked to notify the Tribunal with this information, within 14 days from the date of that letter.

(20) On 20 November 2018 Judge Brooks issued a direction in the following terms

“The Appellant having failed to reply to the letter from the Tribunal dated 30 October 2018 within the time stipulated therein or at all the Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 5 December 2018 confirms in writing to the Tribunal an intention to proceed with the appeal then these proceedings WILL be STRUCK OUT without further reference to the parties”

(21) A copy of these directions was sent by email dated 20 November 2018 to Angela Brooks at her gmail address.

(22) In a letter dated 11 January 2019 to Angela Brooks addressed to her Spanish address but sent to her gmail address on that date, the Tribunal told Angela Brooks that the appellant's appeal had been automatically struck out on the day after the date specified in the aforesaid directions (i.e. on 6 December 2018) because she had not complied with those directions. A copy of those directions were enclosed with that letter.

(23) In a letter dated 30 April 2019 CM chartered accountants (“**CM**”) wrote to the Tribunal on behalf of the appellant explaining that it had become apparent from information provided (presumably to the appellant) by Mr Bridges of HMRC's pension services that the appellant's appeal had been determined but that the appellant had received no notification from the Tribunal in relation to that decision. CM went on to say that it may well be that correspondence had been issued to Angela Brooks but that she was uncontactable and had provided nothing to the appellant. CM went on to request that anything that had been issued in relation to the appellant's appeal to the appellant should be sent on to them as the appellant's newly appointed agent.

(24) In a letter dated 10 May 2019 addressed to the appellant at his address in Warwickshire, the Tribunal indicated that it had received correspondence from CM and sent, to him, copies of the direction of Judge Brooks dated 20 November 2018 and the letter sent to Angela Brooks on 11 January 2019 confirming that

the appellant's appeal had been struck out on 6 December 2018. It also informed him that if he wished the Tribunal to communicate with an agent, he should provide the Tribunal with written notice of the representative.

(25) On 25 June 2019 the Tribunal sent an email to HMRC explaining that the letter sent to the appellant on 10 May 2019 had been returned and asking HMRC whether it had a different address for the appellant.

(26) On 15 April 2019 the appellant signed a form of authority on form 64-8 authorising Cobham Murphy Ltd as his nominated agent for dealing with matters with HMRC. CM is the trading name of Cobham Murphy Ltd. A copy of that form of authority was sent by email by CM to the Tribunal on 24 June 2019. In that email CM followed up the request made in their letter of 30 April 2019 for copies of correspondence relating to the appellant's appeal and asking for such correspondence to be sent to them as soon as possible.

(27) On 18 July 2019 the Tribunal, having been unable to contact the appellant direct, sent an authorisation form (T239), to CM to which CM replied by email of 22 July 2019 telling the Tribunal that they would obtain the appellant's signature. The appellant signed the authorisation on 22 July 2019 and a copy of such authorisation was sent by CM to the Tribunal on 23 July 2019. In the covering email, CM told the Tribunal that the appellant had not received any correspondence relating to his appeal from the Tribunal, his agent had become uncontactable, and requested the relevant information should be sent by the Tribunal to CM since "it would appear that the reference number quoted to him relates to a Mr McCormack and not to Mr Duncombe".

(28) On 20 August 2019 CM sent an email to the Tribunal attached to an email chain which included their email of 23 July 2019 in which they said:

"I have not received a response to the request made almost a month ago – copy under.

Could you please give this matter your urgent attention?"

(29) On 10 September 2019 CM sent an email to the Tribunal attached the email trail which included their email of 20 August 2019, in which they said:

"Good Afternoon Anyone in the Tax Appeals Office

Can someone please answer these emails re-sent under?"

(30) On 16 September 2019 the Tribunal wrote to CM acknowledging receipt of their email of 20 August 2019 and apologising for the delay. In that letter they told CM that if their client wish to make an application for his appeal to be reinstated out of time he should do so as soon as possible with an explanation of why the application was not made within 28 days of being struck out and also an explanation of why his appeal differs from that determined in the lead cases. Any



such application, CM were told, must be made within 14 days of the date of that letter and copied to HMRC.

(31) On the following day, 17 September 2019, CM wrote to the Tribunal attaching an application that the appellant's appeal be reinstated out of time. The reasons given for the fact that the application was struck out for non-compliance with the directions were that the application was not made within the prescribed time due to the fact that he had received no notification of the striking out and that his agent at the time disappeared and became uncontactable.

(32) In that application, CM indicated that the appellant's grounds of appeal were different from the lead cases which consider the issues relating firstly whether the unauthorised payments from the schema taxable secondly the application of the surcharge the liabilities. However the Tribunal did not consider the quantum of the assessment made on the appellant. CM indicated that they were not challenging the findings of the Tribunal on the two aforesaid issues but requested that the appeal is reinstated so that the quantum of tax assessed on the appellant can be considered. They believe that the figure assessed by HMRC is the total amount transferred into the pension scheme and not the amount of payments out of the pension scheme.

(33) A copy of that application was sent to HMRC by the Tribunal on 25 October 2019. By letter dated 4 November 2019 HMRC formally objected to the appellant's application to reinstate his appeal and gave reasons for that objection.

(34) In a letter dated 15 November 2019 CM responded to HMRC's objections.

## **RELEVANT CASE LAW**

### *Late application*

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

“40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to “restate” the principles applicable to such applications as follows (at [24]):

“A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to

consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including

[factors (a) and (b)]”.

41. In respect of the “third stage” identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) “are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.”

10. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC’s further involvement in the proceedings for failure to comply with an “unless” order of the FTT.

11. In its previous form, the “checklist” of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider “all relevant factors” (and indeed, the list was preceded by the general injunction to “consider all the circumstances”). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge’s decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). 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 rule 3.9 to “consider all the circumstances of the case”.

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

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

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

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

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

14. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties’ incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.”

15. *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant’s appeal is hopeless in any event, then it would not be in

the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

16. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

### *Katib*

17. In *Katib* the Upper Tribunal had to consider the extent to which reliance on agent was a justifiable reason for failing to make a timely appeal. On the facts of that case, the Upper Tribunal concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis. The Upper Tribunal said this:

“53 The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was “serious and significant”. The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.

54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an “unless” order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:

Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the

client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

55. We do not accept Mr Magee’s general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client’s default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib’s behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.

56. Nor do we accept Mr Magee’s submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an “exception” to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib’s behalf, is unlikely to amount to a “good reason” for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.

57. The FTT concluded at [27(3)] of the Decision that the general rule set out in *Coventry City Council* should not apply because Mr Bridger was “on a frolic of his own acting outside the scope of any possible brief that [Mr Katib] could have given”. That conclusion, however, was reached without having regard to the particular importance of statutory time limits being respected and is thus vitiated by the error of law that has led to us setting aside the Decision. More significantly, we do not consider that the FTT’s departure from the general principle is justified by that fact in this case (which we think is probably an additional error of law, though not one relied on in the grounds of appeal).

58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr

Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.

59. Mr Magee urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task. Despite Mr Bridger assuring Mr Katib that his appeals were in hand, he was still receiving threats of enforcement action ([9]). Mr Bridger's advice to "cease to be a man by making a declaration to this effect" should have alerted Mr Katib to the warning signs. Mr Katib is not without responsibility in this story.

60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*. Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

61. Therefore, we have concluded that, in all the circumstances of the case, Mr Katib has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs. HMRC's appeal is allowed and we remake the Decision so as to refuse Mr Katib permission to make late appeals

### *Reinstatement*

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

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

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

“99. In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order.

100. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

101. I shall only consider the merits of Mr Chappell's reference to the extent that it appears that TPR's case has any feature such as those that I have described at [93] above."

## **THE PARTIES SUBMISSIONS**

21. The appellant's original submissions are straightforward. He left matters in the hands of Angela Brooks who seriously let him down before she disappeared. He had heard nothing from her or the Tribunal about the striking out. Angela Brooks had disappeared and become uncontactable. How, CM ask, could the appellant have responded to the directions of the Tribunal if he was unaware of them? The appellant has caused no delay to the appeal since he was unaware of his obligations to the Tribunal and relied upon Angela Brooks. HMRC themselves have not acted in a timely manner. The Tribunal was told that they could reveal information to Angela Brooks but this did not exonerate the Tribunal from serving copies of relevant documents on the appellant personally. HMRC, too, should have served documents on him personally. He has been dealt with unfairly as regards the quantum of the assessment. He made his application for reinstatement as soon as he was aware of the need to do so. If his application is not granted he will be prejudiced since he will be assessed to an excessive amount.

22. His further submissions in response to my directions did not take matters much further. The additional information that he provided comprised two "round robin" documents provided by Angela Brooks and only a single example of a direct approach from the appellant to her comprising the email dated 15 August 2016. However CM indicated that they represent another appellant in the same situation as this appellant who used Angela Brooks and in that case the judge reinstated the appeal in December 2019 and HMRC's solicitors office agreed to a basis on which the appeal could be settled.

23. The respondents object to the application on the basis that the appellant has failed to comply with the Rules and in particular has caused extensive delays as a result of repeatedly failing to comply with directions issued by the Tribunal. This includes the letter of 30 October 2018 and the unless order issued on 20 November 2018. Despite the Tribunal providing further time for him to apply for the reinstatement of his appeal on 11 January 2019 he still filed his application for reinstatement over seven months after this third deadline. His pattern of behaviour evidences a clear disregard for the processes of the Tribunal. This is evidenced by the fact that he failed to comply with the Tribunal's directions for a period of almost 11 months and this is wholly unreasonable. His reasons for this do not provide adequate justification for making his application for reinstatement so far out of time. The appellant has failed to help the Tribunal deal with the case fairly and justly and his past behaviour suggests that if his



appeal is reinstated, there is little likelihood that he will comply with further directions and instructions issued by the Tribunal.

24. The respondents further submissions in response to my directions were as follows: The appellant had not provided, as requested by those directions, copies of the correspondence which passed between the appellant and Angela Brooks; he had only provided two round-robin letters and one short email; the appellant should have endeavoured to find out more about the conduct and progress of the case: although Angela Brooks behaviour fell below an acceptable standard, the significant delays outweighed the prejudice caused by this behaviour and the appellant contributed to those delays by failing to take appropriate action in contacting Angela Brooks; Angela Brooks has not disappeared as she is actively litigating pension liberation cases against HMRC; CM's representation that they had recently acted for another client whose application for reinstatement had been admitted is irrelevant as it may not have considered *Katib*.

## **DISCUSSION**

25. I must first consider whether I should give the appellant permission to make his application for reinstatement out of time. The time limit to make such an application is set out in Rule 8(6). It must be made within 28 days of the date on which the Tribunal notifies the appellant that his appeal was struck out. The appellant's application was made on 17 September 2019. The letter from the Tribunal telling Angela Brooks that the appellant's appeal had been automatically struck out on 6 December 2018 was dated 11 January 2019. There was a delay of around nine months between notification by the Tribunal and the appellant's application. So the application is clearly late.

26. In considering whether I should give permission I adopt the 3 step approach set out in *Martland*, being particularly conscious, when carrying out the balancing exercise at step 3, that I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and that statutory time limits should be respected.

### **Length of delay**

27. As I have set out above, the delay in making the application for reinstatement is some nine months. This is clearly serious and significant. As in *Katib* the real question is how the second and third stages of the evaluation should be performed having regard to the particular importance of statutory time limits being respected.

28. I am acutely conscious of the principles set out in *Katib*, And in particular:

(1) In most cases when the Tribunal is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant.

(2) In most cases a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should

expect to provide a full account of exchanges and communications with those advisers.

(3) The Tribunal's error of law at first instance was to ignore the importance of respecting statutory time limits even though this was of particular importance to the exercise of that Tribunal's discretion.

(4) It is precisely because of the importance of complying with statutory time limits that when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant.

(5) The correct approach is to start with the general rule that failure by an adviser is unlikely to amount to a good reason for missing a deadline when considering the second stage of the evaluation required by *Martland*, but the Tribunal should recognise that there are exceptions to this general rule when considering the third stage, and failures by an adviser is a relevant consideration.

(6) Mr Katib's complaint was that his adviser was incompetent and failed to give proper advice or make an appeal on time yet told him that matters were in hand when they were not. "In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be..... .... It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal either by enabling the client to distance himself from the activity or otherwise".

(7) The fact that an appellant does not have expertise to deal with a dispute with HMRC and so instructs a representative does not weigh heavily in the balance. Failings by that representative are insufficient to displace the general rule that the appellant should bear the consequences of his agent's failings. His remedy is to pursue a claim in damages against that agent for any loss he suffers as a result of failings by that agent.

(8) Hardship caused by the loss of the opportunity to bring an appeal is a common feature in most applications for permission to bring a late appeal.

### **Reasons for the delay**

29. The reasons for the delay given by the appellant as arising from his instructing an ostensibly competent agent (Angela Brooks) who turned out to be unable to cope with the task that she had been instructed to undertake. She failed to keep the appellant informed of the state of his appeal; failed to tell him of the outcome of the lead cases; failed to tell him of the Unless Order of November 2018 and that his appeal had been struck out. In the appellant's words, she seriously let him down before she disappeared. He therefore knew nothing about the status of his appeal or the Unless Order or that his appeal had been struck out until CM were told that his appeal been struck out in a conversation with Mr Bridges on 17 April 2019. How could he, therefore, CM ask, have made his application before he had received all the information about the striking out and ignorance of it?

30. HMRC say that even if the appellant did not know of the striking out in January 2019, the fact that Mr Bridges told CM in a telephone call on 17 April 2019 that the appeal had been struck out still means that there has been a considerable delay before the appellant made his application for reinstatement. Interestingly, there is nothing on the file suggesting that CM asked Mr Bridges for copies of the relevant documentation, or that HMRC offered to provide it. HMRC are critical, too, of the fact that following CM's letter to the Tribunal of 30 April 2019 seeking information and documentation, the appellant did not contact the Tribunal about the status of his appeal until August 2019.

31. But that criticism does not seem to be warranted in light of the facts which are set out at [7 (23)-(27)] above. Those facts tell me is that as soon as CM became aware of the outcome of the appeal and the Unless Order on 17 April 2019 they moved into effective action. They wrote to the Tribunal on 30 April 2019 asking for documents to be sent either to them or to the appellant. They did not know that the Tribunal had sent copies to the appellant's incorrect address. They sent an HMRC authorisation form 64-8 to the Tribunal in June 2019. The delay between their letter of 30 April 2019 and sending this form of authority to the Tribunal in June 2019 is properly caused by the fact that they had not been sent anything by the Tribunal, and that they were unaware that the Tribunal had sent the documents to the appellant's incorrect address, and were presumably waiting for the appellant (to whom they assumed the papers would be sent) to contact them with that paperwork. The Tribunal sent a Tribunal authorisation form to CM on 18 July 2019. The appellant signed this on 22 July 2019 and CM returned it to the Tribunal on 23 July 2019. They then heard nothing. On 20 August 2019 they emailed the Tribunal asking it to give this matter their urgent attention. They heard nothing. They tried again on 10 September 2019. They were told, on 16 September 2019, that if they wish to make an out of time application for reinstatement that they should do so within 14 days. They did so. On the following day.

32. It seems to me that CM moved with commendable alacrity once they were initially instructed and as soon as they received any meaningful information from the Tribunal. HMRC suggest that they should have made an application for reinstatement shortly after they were told of the striking out in mid April 2019. But at that stage they had no details. It was wholly proper, in my view, full CM to find out about the Unless Order and the striking out and to fully apprise themselves of all relevant documentation before launching into an application. They tried to obtain this information, and the delays in May June and July 2019 were not of their making, and were simply a result of the appellant having moved house. CM then tried between mid-July and mid-September to obtain the necessary paperwork. They received it on 16 September 2019 made the application for reinstatement on 17 September 2019. I cannot see any cause for HMRC to complain that CM not acted in a timely fashion.

33. The truth of the matter is that the delay has been caused by Angela Brooks failing to engage with the Tribunal, with HMRC and with the appellant. Whilst she engaged with HMRC and the Tribunal in the early stages of the appeal, no communications from her were received either by the Tribunal or HMRC following her letter of 16 June 2017. It is this which has caused all the problems in this appeal.

34. However, *Katib* tells me that failings by a litigant's advisers should be regarded as failings of the litigant, and that the correct approach is to start with the general rule that failure by an adviser is unlikely to amount to a good reason for missing the deadline when considering the second stage of the evaluation required by *Martland*.

35. So whilst the commendable behaviour of CM can be attributed to the appellant, so too must the failings of Angela Brooks. It is clear from the facts set out at [7(16)-(22)] above that the Tribunal had kept Angela Brooks fully informed of the progress of the appellant's appeal. And had sent her copies of the unless order on 20 November 2018. She was also notified, by letter dated 11 January 2019 that the appellant's appeal had been automatically struck out on 6 December 2018. So she was fully aware of the appellant's position. The appellant has not made any suggestion that Angela Brooks had not been told of the progress of the appeal by either HMRC or the Tribunal. His case is that she did not tell him what was going on. So although *Katib* recognises that failure by an adviser might amount to a good reason for missing a deadline, I cannot see any reason for departing from the general rule that it does not in the case of this appellant. It is always open to an appellant to produce evidence as to why an agent has failed to meet a time limit. And that evidence might show a good reason for that failure. But, of course, in this appeal, it is the appellant's position that he has no idea of why Angela Brooks failed to comply with the Unless Order. So it is unsurprising that he has not produced any evidence of the reasons for that failure.

36. The appellant did not have expertise to deal with this appeal himself and so instructed Angela Brooks. It is clear from *Katib*, however, that this is also insufficient to displace the general rule that the appellant should bear the consequences of his agents failings.

37. Finally under this section, the appellant criticises both HMRC and the Tribunal for failing to keep the appellant notified as well as his agent. This criticism is unwarranted. Angela Brooks had declared herself to be the appellant's representative on his notice of appeal, and in these circumstances notice given to that representative is all that is required by both HMRC and the Tribunal.

### **Evaluation of all the circumstances**

38. I now turn to the third stage of the *Martland* approach, and it is at this stage that the failings by Angela Brooks become a relevant consideration.

39. However, I am in some evidential difficulty in considering the extent of Angela Brooks' alleged failings. In order to come to a conclusion that the appellant has, as he alleges, been badly let down by Angela Brooks in whose hands he left the conduct of his appeal, I need to understand the basis of his relationship with Angela Brooks. It is not possible for me to come to a conclusion on that point unless I know what each party expected of the other.

40. But the appellant has not provided me with details of the terms on which he engaged Angela Brooks, notwithstanding that I had issued specific directions seeking copies of all correspondence passing between the appellant and Angela Brooks. Given

that the appellant faces an uphill task and should expect to provide a full account of his exchanges with his adviser, something that I specifically set out in the directions, that is disappointing. I have to make a decision on the evidence before me.

41. I have no idea of the terms on which this appellant instructed this agent. I do not know, for example, whether those terms included something from the agent saying, in stark terms, that there was no need for the appellant to contact the agent at any stage after entering into the retainer, and that the agent would faithfully contact the appellant and keep him continually updated and informed about the status of the appeal. Or, to the contrary, those terms included something which said that the appellant should contact the agent if the appellant had not heard from the agent about the status of his appeal for a period of, say, two months. Clearly in the former case, the appellant's failure to contact the agent to find out what was going on would be a more reasonable approach than if the terms of engagement suggested he should do so on a regular basis. But I have no information either way.

42. I have no evidence to suggest that the responsibility for constantly updating the appellant as to the situation of his appeal was assumed by Angela Brooks. Whilst such responsibility might be implied into a general retainer between a professional adviser and the client, in the context of an application for a late appeal where a reason for that late appeal is reliance on an adviser, an appellant will face an uphill task and in my view would be expected to provide evidence of the terms of engagement. No such terms have been supplied to me. I cannot, therefore, make any assumption that Angela Brooks assumed responsibility for updating this appellant.

43. So whilst it is clear that the delay has been caused by Angela Brooks, this delay must be attributed to the appellant. That is the ratio of *Katib*. An appellant cannot generally rely on the behaviour of his agent and that agent's competence, as a reason for missing a deadline at the second stage of the *Martland* evaluation. And at this third stage of the evaluation, I am unable to come to any conclusion as to whether this delay is justifiable given the terms of the appellant's relationship with Angela Brooks. I cannot come to a definite conclusion that she has, as alleged, badly let down the appellant.

44. The appellant makes the point that if he is denied permission to reinstate his appeal, he will have been dealt with unfairly in that the quantum of the assessment is excessive. This point too is dealt with in *Katib*. In most cases where permission is denied, there will be financial hardship to the appellant. Whilst it is something I can weigh in the balance, I cannot give it sufficient weight to, as was said in *Katib*, "overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

45. Finally the appellant makes the point (or rather CM do) that a Judge in another case which is being conducted by CM has given permission to reinstate an appeal in similar circumstances to this appeal. HMRC make the point that that is largely irrelevant, as, for example, that Judge might not have considered *Katib*. I agree with HMRC that a decision by a different Judge in a different case is not relevant to this stage of the evaluation. Unless of course the appellant produces the case as an authority

and explains why I should follow it, something which he has not done. It is not just that that Judge might not have considered Katib. That is certainly relevant, but we have no details of the facts of that other case, and the application of the relevant law to those facts is wholly unknown to this Tribunal. CM have not provided a copy of the case, and whilst I do not doubt their assertion, I cannot give any weight to it in the context of this case.

46. So when considering the third stage of the *Martland* analysis, evaluating all the circumstances, I am afraid for the appellant that I can find nothing (conscious as I am that I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and, most relevantly in this case, that statutory time limits should be respected) to displace the first two stages of that analysis; namely that the delays were very significant and there was no good reason for them. The latter arises because of the attribution of the failings of Angela Brooks to this appellant.

## **DECISION**

47. I conclude, therefore, that I should not give the appellant permission to bring his application for reinstatement out of time. And that is my decision.

## **REINSTATEMENT**

48. In light of the foregoing decision, there is no need for me to consider the merits of the appellant's application for reinstatement. I have denied him permission to make that application. But had I needed to do so, I would also have rejected his application for reinstatement. The principles which I should adopt when considering an application for reinstatement are set out at [20] above, and are very similar if not identical to (save at the final evaluation stage) the principles that should be considered on an application for a late appeal. I have dealt with these, extensively, above and come to the conclusion that, applying the *Martland* principles, the appellant should not be permitted to bring a late application for reinstatement. Applying the same principles to his application for reinstatement, I would come to the same conclusion. I would have exercised my discretion against the appellant, and rejected his application for reinstatement.

## **APPEAL RIGHTS**

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days

after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 05 JUNE 2020**