



Neutral Citation: [2024] UKFTT 00066 (TC)

Case Number: TC09038

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

On the papers

Appeal reference: TC/2020/03127

COSTS – complex case – HMRC withdrew ground of challenge – Appellant’s costs application made over a month late – no good reason for delay – application extremely weak on the merits - insufficient detail – sums claimed in excess of standard costs without explanation or justification – no consideration as to whether costs were “of and incidental to the proceedings” – no consideration of the “indemnity principle” – permission to make costs application late refused

**Decided on 20 December 2023
Judgment date: 3 January 2024**

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

VIKRANT BHARGAVA

Appellant

and

**THE COMMISSIONERS FOR
HIS MAJESTY’S REVENUE AND CUSTOMS**

Respondents

Representation:

For the Appellant: Mr Brian White of Brian White Limited

For the Respondents: Alex Hodge and Emily Bridges, of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. On 20 August 2020, HMRC closed its enquiry into Mr Bhargava's 2013-14 self-assessment ("SA") tax return, and amended that return to include a further liability of £3,217,219. The decision was upheld on statutory review.
2. On 28 August 2020, Mr White notified the appeal to the Tribunal on behalf of Mr Bhargava. It was categorised as "complex" under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), and Mr Bhargava did not opt out of costs.
3. On 28 September 2022, HMRC provided the Tribunal with written notice that they were withdrawing their opposition to Mr Bhargava's appeal, and on 18 October 2022, the Tribunal informed the parties the appeal had been allowed.
4. Rule 10 requires that any cost application be made within the following 28 days; the deadline in Mr Bhargava's case was therefore 16 November 2022. The Rule also requires that the application includes "a schedule of the costs...claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs". Mr White sent a short email to the Tribunal on 6 December 2022 headed "application for costs" and only filed a costs schedule on 22 December 2022. The total claimed was £52,220, including VAT of £8,420.
5. In deciding whether to give Mr Bhargava permission to make his costs application ("the Application") late, I applied the three-stage test set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*"), which is as follows:
 - (1) establish the length of the delay and whether it is serious and/or significant;
 - (2) establish the reason(s) why the delay occurred; and
 - (3) evaluate all the circumstances of the case, using a balancing exercise to 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.
6. Applying that approach, I found as follows:
 - (1) the delay was over a month, and was serious and significant;
 - (2) there was no good reason for the delay; and
 - (3) the circumstances were overwhelmingly in favour of refusing to give permission, taking into account the particular need for time limits to be respected, and the fact that the merits were exceedingly weak. In other words, even if permission were to be given, the multiple shortcomings in the Application would have prevented the Tribunal from making a summary assessment of the costs. These included:
 - (a) a lack of the necessary detail about the costs claimed;
 - (b) the failure to explain why the rates for work done were higher than those normally awarded as "standard" costs;
 - (c) in relation to the majority of the costs, it was impossible to know whether they met the requirement of being "of and incidental to" the proceedings, because they predated the filing of the Notice of Appeal and no further information was provided; and

(d) there was no confirmation that Mr Bhargava was liable to pay the claimed costs as required under the “indemnity principle”; in particular, one of the invoices had been issued to a third party.

7. I therefore refuse Mr Bhargava permission to make the Application after the relevant time limit. It follows that he is not able to recover the costs claimed on his behalf by Mr White in the Application.

THE TCEA AND THE RULES

8. The Tribunal’s jurisdiction to award costs is governed by the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) and by the Tribunal Rules.

The TCEA

9. Section 29 of the TCEA reads:

“(1) The costs of and incidental to—

- (a) all proceedings in the First-tier Tribunal, and
- (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—

- (a) disallow, or
- (b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) “wasted costs” means any costs incurred by a party—

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
- (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.”

The Tribunal Rules

10. Rule 10 of the Tribunal Rules is headed “Orders for costs” and so far as relevant reads:

“(1) The Tribunal may only make an order in respect of costs...—

- (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
- (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; [or]

- (c) if—
 - (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
 - (ii) the taxpayer...has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs...under this sub-paragraph;...
- (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
- (3) A person making an application for an order under paragraph (1) must—
 - (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
 - (b) send or deliver with the application a schedule of the costs...claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs...if it decides to do so.
- (4) An application for an order under paragraph (1) may be made at any time during the proceedings, but may not be made later than 28 days after the date on which the Tribunal sends—
 - (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
 - (b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.
- (6) The amount of costs...to be paid under an order under paragraph (1) may be ascertained by—
 - (a) summary assessment by the Tribunal;
 - (b) agreement of a specified sum by the paying person and the person entitled to receive the costs...(the “receiving person”); or
 - (c) assessment of the whole or a specified part of the costs..., including the costs...of the assessment, incurred by the receiving person, if not agreed.
- (7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—
 - (a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;...”

THE DECISION AND THE APPEAL

11. On 30 January 2020, HMRC closed its enquiry into Mr Bhargava’s SA tax return for 2013-14, and amended that return to include a further liability of £3,217,219 relating to interest which was said to have arisen between 2008 and 2010, and to have been subsequently remitted to the UK.

12. On 20 August 2020, HMRC upheld that decision on statutory review. On 28 August 2020, on behalf of Mr Bhargava, Mr White notified an appeal against that decision by filing a Notice of Appeal. Attached to the Notice as constituting Mr Bhargava's grounds of appeal, was an Opinion from Mr Michael Firth of Counsel.

13. The Tribunal categorised the appeal as complex under Rule 23, and Mr Bhargava did not opt out of costs under Rule 10(1)(c)(ii). The parties engaged in ADR and a meeting took place in December 2020, but the case was not resolved by that process.

THE APPLICATION

14. At some point before 18 August 2022, the HMRC Officer responsible for Mr Bhargava's case changed. On 28 September 2022, HMRC provided the Tribunal with written notice that they were withdrawing their opposition to Mr Bhargava's appeal; Mr White was copied on that email.

15. He responded the same day, copying the Tribunal, saying "Costs incurred since the ADR were 70k. Costs incurred before were over £130k". He then said (text as in original):

"So hmrc should pay costs here and we will apply to the FTT for costs as hmrc has known for sometime this was wrong to go after!! Copied to the FTT as the appeal on costs remains open."

16. On 18 October 2022, the Tribunal informed the parties that the Tribunal was allowing Mr Bhargava's appeal, as HMRC had withdrawn their challenge. The Tribunal's letter also said "if you have any further application with regards to this appeal, it should be made within 28 days from the date of this letter, in the absence of which the file will be closed".

17. On 23 November 2022, Mr White emailed HMRC saying "you totally ignored this email re costs". HMRC did not respond.

18. On 6 December 2022, Mr White sent an email to the Tribunal headed "Application for costs". He began by saying "this is an application for costs which exceeded £100,000 for this case which was withdrawn by HMRC at the last possible moment". Various details about the appeal and HMRC's change of position then followed, and the email ended by saying:

"copied to the Respondent, who prior to this Application, has refused to engage in any discussion re reimbursing wasted costs [sic]."

19. On 13 December 2022, the Tribunal replied, saying:

"Your application must be accompanied by a schedule of the costs you are claiming. Please either:

- resubmit your application together with a schedule (and...an explanation of why the schedule was provided late); or
- submit a reasoned application for the Tribunal to dispense with the requirement to provide a schedule pending the determination of the application.

Bear in mind when deciding which course of action to pursue, that, even if the application for costs is successful, the Tribunal will only decide the amount of the costs award if a schedule of costs claimed is provided...

If the Tribunal does not hear from you within 14 days from the date of this letter, it will presume that you are not pursuing the application for costs."

20. On 19 December 2022, HMRC wrote to the Tribunal saying:

- (1) no application had been made for the Application to be accepted after the relevant time limit;

- (2) the letter of 6 December 2022 was not a valid costs application as it did not contain a costs schedule; and
 - (3) in the absence of a costs schedule “HMRC are unable to comment on matters of quantum and the Tribunal is unable to carry out any potential assessment under Rule 10(6)”.
21. Mr White responded a few minutes later, saying that “a full detailed cost schedule will be with the Tribunal within the 14 days set put [sic] by the Tribunal”.
22. On 22 December 2022, he provided the Tribunal with an N260 Form and copies of documents from Deloitte LLP (“Deloitte”), Hawksford Trust Co Jersey (“Hawksford”) and Rawlinson Hunter LLP (“Rawlinson Hunter”). Mr White’s covering email said that only “costs which were 100% solely related to the tribunal” had been included, and “any invoices which part related have been excluded in full”.
23. The N260 began by saying that the hourly rates for four grades of staff whose costs were being claimed were as follows:
- (1) partner £595;
 - (2) director £535;
 - (3) senior manager £450; and
 - (4) assistant manager £265.
24. The next part of N260 does not provide any further analysis, other than that the “work done on documents as set out in schedule [sic]” was £37,800. That schedule (“the Schedule”) lists the following:
- (1) Three amounts payable to Rawlinson Hunter, each supported by an invoice. None of the invoices give the grade of staff who carried out the work, or the time spent. They are as follows:
 - (a) an invoice for £1,950 dated 8 July 2019 relating to preparation for a meeting on 15 May 2019 “to discuss various HMRC enquiries into your UK personal tax affairs and matters arising therefrom”, together with follow up research and correspondence including a claim under Taxation of Chargeable Gains Act 1992 (“TCGA”), s 135;
 - (b) an invoice for £6,100 dated 14 December 2020 for the period to 30 November 2020, of which £4,600 related to the HMRC enquiries into Mr Bhargava’s affairs and £1,500 related to the ADR process; and
 - (c) an invoice dated 7 March 2022, for various matters of which the only one relevant to the Application was the £300 incurred in August 2021 for “commenting on draft witness statement”.
 - (2) Three amounts payable to Deloitte:
 - (a) an amount of £5,750 analysed in an undated Deloitte document headed “Mr Bhargava and Mrs Virmani Private Client Tax Fees period ended 31 January 2015”. The particulars include £5,750 for a response to HMRC’s letter of 15 October 2014, plus other unrelated matters which total £6,250. The hourly charge out rates for the partner, senior manager and assistant manager are the same as those set out at the beginning of the N260 (see §23 above), and the time stated is that spent by each grade on all the matters taken together, so it is not possible to know who worked on the enquiry-related issues and who worked on the other issues, or for how long;

(b) an amount of £12,000 supported by a similar document for the period ended 31 August 2015 in relation to HMRC's enquiry letter of 27 May 2015; the document includes hourly charge out rates and the total time spent by each grade. The rates are those set out at the beginning of the N260, but in addition includes 11 hours of "manager" time at £345 an hour and 6.5 hours of "analyst" time at £160 an hour; and

(c) an amount of £10,000 supported by an invoice dated 12 May 2017; the analysis shows that this was for responding on 23 March 2017 to HMRC's enquiry correspondence dated 21 December 2016. The rates are the same as those on the invoices from two years earlier and the time spent by each grade is included.

(3) An amount of £1,700 payable to Hawksford, supported by an invoice dated 11 April 2016 for "works undertaken liaising with Deloitte in relation to HMRC enquiries for the transfer of Heath House". The invoice is addressed to "the Heath House Property Partnership" rather than to Mr Bhargava.

(4) A fee of £6,000 for Mr Firth's Opinion which was issued on 30 March 2020, although the supporting invoice is dated 1 March 2022. There is no information as to the hours spent by Mr Firth or his hourly rate.

(5) VAT of £8,420 on the all the above sums other than the Hawksford invoice, to which VAT was not added.

25. The N260 requires the person signing it to certify that the costs claimed do not exceed those which the party is liable to pay in respect of that work. In Mr Bhargava's case, this part of the N260 has not been signed.

26. Taking into account each of the above amounts together with the VAT, the overall quantum of the claim was £52,220, rather than the £200,000 referred to in Mr White's email of 28 September 2022 or the £100,000 in his email of 6 December 2022.

27. On 11 January 2023, the Tribunal told Mr White that the Application had been filed late, and asked him to give reasons for the delay. Mr White replied the same day, attaching his email of 28 September 2022 and saying "the notification re costs was made to the Tribunal on 28 September 2022...so the claim was not late".

28. On 23 January 2023, the Tribunal wrote to Mr White reiterating that the Application had been made late and asking him again to provide reasons for the delay. Mr White responded on the same day, saying:

"We believed the reference to the claim for costs notified to the Tribunal on 28 September 2022 was sufficient to notify the Tribunal of the claim. We then asked HMRC that day to engage with us that day to resolve [sic] and HMRC ignored us for two months and replied that they did not think they were required to reply!!. It was therefore solely HMRC's fault that the detailed claim was not submitted as we were waiting on HMRC as to whether they would pay the costs without the Tribunal's involvement We now know that this was HMRC misleading us by not replying for two months."

29. That email was not copied to HMRC, and was only forwarded to them by the Tribunal on 3 August 2023. On the same date, the Tribunal directed the parties to provide submissions within 14 days as to the lateness of the Application and its substance.

30. On 11 August 2023, HMRC objected to the Application on the basis that (a) it was late and (b) did not include a valid or sufficient schedule of costs as required by the Tribunal Rules. Mr White responded the same day, saying that HMRC's substantive decision had been

“flawed”, and that HMRC had been on notice since the ADR in December 2020 that their case would not succeed.

31. On 25 September 2023, the Tribunal wrote to both parties, noting that neither had objected to the Application being decided on the papers, and directing that they file and serve any further submissions or evidence within 14 days.

32. On 7 September 2023, Mr White provided the Tribunal with a copy of an earlier exchange of emails relating to the merits of Mr Bhargava’s substantive appeal. On 9 October 2023, HMRC provided further written submissions relating to the Application.

COMPLEX CASE AND WASTED COSTS

33. It was common ground that the Application was for costs in an appeal categorised as “complex” under Rule 23, and that Mr Bhargava had not opted out of costs. There was thus no requirement for Mr Bhargava to show that HMRC had behaved “unreasonably” within the meaning of Rule 10(1)(b).

34. Although Mr White’s email of 6 December 2022 referred to the Application as being for “wasted costs”, he provided no related detail such as would be necessary to support such an application, see TCEA s 29(5) and (6). I have therefore proceeded on the basis that the Application is for costs against HMRC as a body under Rule 10(1)(c).

THE *MARTLAND* JUDGMENT

35. The case of *Martland* concerned an application to make a late appeal against excise duty and a related penalty, but the principles there set out have been applied and followed when deciding case management matters such as costs applications.

36. In *Martland* at [37] the UT set out Rule 3.9 of the Civil Procedure Rules (“CPR”), which reads:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.”

37. The UT then considered the authorities, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 (“*Denton*”) and *BPP v HMRC* [2017] UKSC 55 (“*BPP*”). The UT said:

“[40] In *Denton*, 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.’”

38. The UT noted at [42] that the Supreme Court in *BPP* had implicitly endorsed the approach set out in *Denton*. That Court also confirmed at [26] that “the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach”. At [43] the UT said:

“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’.”

39. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

- (1) establish the length of the delay and whether it is serious and/or significant;
- (2) establish the reason(s) why the delay occurred; and
- (3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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”.

40. The UT also said at [46]:

“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...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...”

41. As the issue I had to decide was whether to allow Mr Bhargava to make the Application late, the references in the above passage to the merits of the “appeal” are to be read as applying in the same way to the merits of the Application.

APPLICATION OF THOSE PRINCIPLES TO THE APPLICATION

42. I now apply the three stage approach in *Martland*, taking into account the parties’ submissions.

The length of the delay

43. Rule 10(4) of the Tribunal Rules states that a costs application “may not be made later than 28 days after the date on which the Tribunal sends a decision notice recording the decision which finally disposes of all issues in the proceedings”. On 18 October 2022 the Tribunal issued the notice ending the proceedings in Mr Bhargava’s appeal.

44. Rule 10(3) required Mr Bhargava to provide, no later than 28 days after the 18 October 2022, both “a written application” for costs and “a schedule of the costs claimed in sufficient detail to allow the Tribunal to undertake a summary assessment”. The 28 days expired on 16 November 2022. The parties disagreed as to whether the Application was late.

Email of 28 September 2022

45. Mr White submitted that his email to HMRC on 28 September 2023 was “sufficient to notify the Tribunal of the claim”, so the Application was not late.

46. This is plainly wrong. That email said (my emphasis) “we will apply to the FTT for costs”. Simply sending an email stating that there will be a future costs application is not itself such an application.

Email of 6 December 2022

47. Mr White headed this email “Application for costs”. However, I agree with HMRC that it was insufficient to meet the requirements of the Rule, because no schedule of costs was attached. Moreover, the email said that the claim was for costs “which exceeded £100,000” when the quantum of the actual claim was the much lower sum of £52,220.

Email of 22 December 2022

48. On 22 December 2022, Mr White provided the Schedule. He appears to consider that this was not provided late, because it was within the 14 days referred to in the Tribunal’s letter of 13 December 2022.

49. However, that letter stated only that “if the Tribunal does not hear from you within 14 days from the date of this letter, it will presume that you are not pursuing the application for costs”. It did not give Mr White permission to file the Schedule after the 28 days in Rule 10.

Not yet filed?

50. HMRC submitted that no valid costs application has ever been filed, and thus the delay is continuing. That submission is based on the numerous shortcomings in the Schedule and related information, which I consider later in this judgment.

The Tribunal’s view

51. I agree that HMRC’s position is arguable. Nevertheless, I decided to approach this case on the basis that the delay ran from 17 November 2022 to 22 December 2022. I have taken the shortcomings of the Application into account under the third stage of the *Martland* approach, see further below.

52. The next question was whether this delay was serious and/or significant. I considered the following:

(1) In *Denton* the Court of Appeal acknowledged that there are degrees of seriousness and significance, see [26] and [35].

(2) One end of that spectrum includes cases where “there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms”, see *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [40].

(3) In Mr Bhargava’s case, there was a delay of over five weeks, so more than doubling the 28 days allowed by the Rules.

(4) Until 22 December 2022, HMRC and the Tribunal had not been provided with the quantum of the claim, or with any related details, and so could not take any consequential steps.

(5) Both the Tribunal and HMRC spent time and incurred costs explaining to Mr White that there had been a failure to comply.

53. Taking into account all the above, I find that the delay was both serious (because of the length of time) and significant (because it prevented HMRC and the Tribunal dealing with the matter).

Reasons for the delay

54. I first discuss the reason for delay given by Mr White; I then consider whether Mr Bhargava has a good reason for the delay because he relied on Mr White.

Mr White’s reason

55. Mr White blamed HMRC for the delay, saying it was “solely HMRC’s fault that the detailed claim was not submitted as we were waiting on HMRC as to whether they would pay the costs without the Tribunal’s involvement”.

56. However, this falls well short of being a good reason for the delay, because:

(1) when Mr White emailed HMRC on 28 September 2022, he did not supply any details as to the costs claim;

(2) the figure he provided on that date was £200k (£70k plus £130k), around four times higher than the amount eventually claimed in the Schedule;

(3) he did not tell HMRC he wanted to negotiate to settle the costs, but on the contrary said he “will apply to the FTT for costs”;

(4) the reasonable person in Mr White’s position would have realised that his email was not an offer to settle the costs without the involvement of the Tribunal, and would also have realised HMRC would not read the email as such an offer; and

(5) even if the email *had* said that Mr Bhargava wanted to settle the costs, that would not have provided a good reason for ignoring the time limit in Rule 10.

(6) Instead, the reasonable person seeking to agree costs without the Tribunal’s involvement would, before the end of the 28 day time limit, have obtained HMRC’s agreement to opening negotiations, and applied to the Tribunal for an extension of time on that basis.

Reliance on Mr White?

57. The appellant in this case is not Mr White, but Mr Bhargava, and it is his costs which are at risk as the result of Mr White’s failure to comply with Rule 10. I decided it was in the interests of justice to consider whether Mr Bhargava’s reliance on Mr White provided him with a good reason for the failure.

58. It was common ground that Mr White was “an experienced tax practitioner” and Mr Bhargava could therefore reasonably have expected Mr White to be familiar with the Tribunal Rules and the consequences of non-compliance.

59. However, reliance on an experienced practitioner does not normally provide a litigant with a good reason for failing to follow procedural rules. In *Katib v HMRC* [2019] UKUT 189 (TCC) (“*Katib*”), the UT said at [49] (their emphasis):

“in most cases, when the FTT 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.”

60. The UT returned to this issue at [54], saying:

“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.”

61. The UT then cited the Court of Appeal’s judgment in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 (“*Hytec*”). Ward LJ, giving the leading judgment, said at p 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...”

62. In *Katib*, the UT continued at [56] by concluding that the correct approach was:

“...to start with the general rule that the failure of Mr Bridger [Mr Katib’s adviser] 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*.”

63. This was followed at [58] by the following passage:

“It is clear from the [FTT] 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 [personal liability notices] and failed to appeal against the PLNs on Mr Katib’s behalf. But...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.”

64. For the reasons explained in *Katib* and *Hytec*, this Tribunal should therefore not normally find that reliance on an adviser provides a good reason for delay. I could see no basis for departing from that normal position in Mr Bhargava’s case.

Conclusion on the second stage in Martland

65. For the reasons set out above, I find that there was no good reason for the failure to make the Application within the time limit set by the Rules.

All the circumstances

66. The third stage in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise.

The need for time limits to be respected

67. Significant weight must be placed as a matter of principle on the need for the time limits in the Tribunal Rules to be respected. This was described as “a matter of particular importance” in *Katib*; the same point is made in *Martland* at [46].

68. I have already found that there was no good reason for the delay. The failure to comply with the time limit for no good reason weighs heavily against allowing the Application to be made late.

Reliance on Mr White

69. As already noted, in *Katib* the UT found at [56] that reliance on advisers was unlikely to amount to a “good reason” for missing the statutory deadlines in the context of the second stage of the evaluation required by *Martland*. The UT continued in the same paragraph:

“...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.”

70. At [59] the UT considered the submission made on Mr Katib’s behalf that “Mr Katib did not have the expertise to deal with the dispute with HMRC himself”, but went on to say:

“...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.”

71. I similarly find that Mr Bhargava’s reliance on Mr White is a factor to be weighed in the balance in favour of allowing the Application to be made late, but that relatively little weight is to be given to that factor.

The merits generally

72. The UT said in *Martland* that there is “much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one”.

73. It is clear that the Application is very weak. Were Mr Bhargava to be given permission to make the Application late, there is no realistic possibility that the Tribunal would go on to allow it. This is because the information it contains does not “allow the Tribunal to undertake a summary assessment” of the costs.

74. There are five reasons why that is the position:

- (1) there is a serious lack of detail as to the time taken, the grade of the staff carrying out the work, and other related matters;
- (2) where detail is provided, the amounts claimed are significantly more than those normally allowed as “standard” costs, and no justification has been given for those higher rates;
- (3) almost all of the claimed sums arose before the appeal was notified to the Tribunal and Mr White has not shown that they are “of and incidental to” the proceedings;
- (4) it was also not possible to know whether some or all of, the costs of the ADR process were “of and relating to the proceedings”; and
- (5) the indemnity principle has not been addressed.

75. I explain each of those points further below.

Lack of detail

76. In *Distinctive Care v HMRC* [2018] UKUT 155 (TCC) at [69]–[70], the UT said that the related costs schedule should set out, for each fee earner, the following information

- (1) name;
- (2) hourly rate;
- (3) professional status/experience (eg paralegal, solicitor and experience in the role);
- (4) geographical location;
- (5) dates when the work in question was carried out; and
- (6) time spent on those dates.

77. The Application does not provide any of those details for any of the Rawlinson Hunter invoices or for the Hawksford invoice. Although the N260 begins by setting out the rates paid to four grades of employees, these have been taken from the Deloitte invoices and do not relate to the other professional fees. It is thus not possible to assess whether any of the Rawlinson Hunter or Hawksford invoice are reasonable or excessive.

78. Mr Firth’s invoice gives his name, status and location, and it is reasonable to assume that the work was carried out shortly before 30 March 2020, the date at the end of the Opinion. However, there is no information about his hourly rate or the time taken, so it is not possible to carry out a summary assessment.

79. The last two of the Deloitte invoices do give most of the necessary detail, but even then they do not say how long was spent on each piece of work, or by whom. The first of the Deloitte invoices is even more problematic, because it covers both enquiry-related work and other matters, and it is not possible to establish which grade of staff carried out the work which falls within the Application, or how the sum has been calculated.

Standard costs?

80. Costs are normally claimable on the “standard” basis. In assessing standard costs, the FTT usually follows the Guideline Hourly Rates (“GHRs”) for solicitors; accounting firms should apply the GHRs to their own partners and staff by analogy.

81. The GHRs are significantly lower than the figures claimed in the Schedule. Although it is possible to claim higher amounts, it is necessary to explain why those higher amounts are justified, and Mr White has not done that.

82. In relation to barristers, the Tribunal generally uses the rates paid by the Attorney General’s Panel, and these too are lower than the rates charged by most tax barristers. As Mr Firth’s invoice does not give his hourly rate or the time spent, it is not possible to know how his fees compare with those normally accepted as “standard” costs.

Of and incidental to the proceedings

83. TCEA, s 29 provides that the Tribunal only has the jurisdiction to award costs “of and incidental to” the “proceedings”. Until the Court of Appeal decision in *Distinctive Care v HMRC* [2019] EWCA Civ 1010, it was generally considered that only costs arising after the appeal was made to the Tribunal could be claimed. However, in that case the Court of Appeal said at [39] that:

“It is the nature of the work done and the scope of the ultimate appeal that determine whether those costs are incidental to the appeal, not the subjective intention of the party when incurring the costs. For example, materials

gathered or produced for the purpose of the internal review may then be recycled in the appeal before the FTT. Those costs are clearly of and incidental to the appeal even though they were largely incurred at the earlier stage.”

84. In order to show that earlier costs are “of and incidental to the proceedings”, an applicant must therefore explain why this is the case. Mr White has not done that. Instead, the position is as follows:

(1) The Notice of Appeal was dated 28 August 2020. Of the £43,500 of costs (excluding VAT) included on the Schedule, only £6,400 (around 15%) relate to work after the Notice of Appeal was filed. In addition, although Mr Firth’s Opinion was provided after that date, it is reasonable to infer that the related costs were “of and incidental to the proceedings” because that Opinion was attached as the grounds of appeal.

(2) Although many of the other costs relate to the HMRC enquiry, there is no way of knowing which points remained relevant to the proceedings, and which had changed. Some amounts appear to be entirely irrelevant: see for example the costs of making a TCGA s 135 claim.

The ADR process

85. The Tribunal has the jurisdiction to award costs relating to a failed ADR, see *Chantrey Vellacott v The Convergence Group Plc* [2007] EWHC 1774 at [227]. However, it is far from automatic that the party which is successful in subsequent litigation can obtain all the costs relating to that ADR, see [228] of the same judgement, and the discussion in *DBE Energy v Biogas Products* [2020] EWHC 1285 (TCC) at [35]-[36].

86. The Application included costs of £1,500 which explicitly related to the ADR, but it has simply been assumed that these were allowable; no explanation or justification has been provided.

The indemnity principle

87. As Warby LJ and McGowan J recently reaffirmed in *Commissioner of Police of the Metropolis v Malik* [2023] EWHC 3213 (Admin) it is:

“a basic principle that costs are awarded by the court ‘as an indemnity only’ and a party cannot recover from his opponent any more costs than he is liable to pay”.

88. It is for that reason that the N260 requires that the costs claimed be certified as being no greater than those the party is liable to pay. Mr White did not provide that certification. In addition, some of the amounts claimed are supported only by schedules without the related invoices, so it is not possible to see the recipient. Even more significantly, the Hawksford invoices was addressed to “the Heath House Property Partnership” rather than to Mr Bhargava.

Overall view on the merits

89. For the reasons explained above, the merits of the Application are extremely weak, because the figures included in the Schedule cannot be used to carry out a summary assessment.

90. Although Rule 10(6) and (7) allows the Tribunal to refer an application to the High Court for detailed assessment instead of making a summary assessment, such a reference would not have been in the interests of justice given the multiple deficiencies in the Application.

Other prejudice to Mr Bhargava

91. Refusing to give permission to bring the Application after the time limit will prejudice Mr Bhargava, because he will be unable to recover the costs relating to his appeal. However,

for the reasons set out above, had permission been given, there would be no reasonable prospect that the Application would have been allowed.

Balancing the factors

92. Once the circumstances have been identified, they must be balanced. The consistent message from *Denton*, *BPP*, *Martland* and *Katib* is that particular weight is to be given to the need to enforce compliance with the time limits set by the Tribunal Rules.

93. The delay in making the Application was serious and significant, and there was no good reason for that delay. Even if Mr Bhargava were to be given permission, the merits of the Application are extremely weak. Those factors weigh heavily against him.

94. On the other side of the scales is the prejudice to Mr Bhargava of losing the opportunity of recovering his costs, together with his reliance on Mr White, who failed to follow the relevant Rules. However, both those factors carry little weight for the reasons given above.

95. The result of the balancing exercise is therefore that permission to make the Application late is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release Date: 03rd JANUARY 2024