Reference: PTA/345/2013

Procedure – Application under Rule 5(3)(a) Tribunal Procedure (Upper Tribunal) Rules 2008 for extension of time to provide notice of appeal to Upper Tribunal under Rule 23(2)(a) - effect of amendments to CPR 3.9 with effect from 1 April 2013 and Mitchell v News Group Newspapers Ltd – application refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

- and –

McCARTHY & STONE (DEVELOPMENTS) LIMITED
MONARCH REALISATIONS No 1 PLC (IN ADMINISTRATION)

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public in London on 17 December 2013

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

Andrew Hitchmough QC and Thomas Chacko, counsel, instructed by Wedlake Bell LLP for the Respondents

DECISION

Background

1. The Respondents (referred to in this decision simply as McCarthy & Stone) built and sold retirement accommodation consisting of separate apartments with communal areas, such as residents' lounges. They furnished the communal areas and claimed to deduct the input tax incurred on such furnishings. The Applicants ("HMRC") decided that the input tax was not deductible and McCarthy & Stone appealed to the First-tier Tribunal ("FTT"). The appeal turned on whether there was a single zero rated supply of residential accommodation or a single supply with a zero rated (accommodation) element and an exempt (use of communal area furniture) element. In a decision released on 6 December 2012, *McCarthy & Stone (Developments) Ltd & Another v HMRC* [2013] UKFTT 727 (TC), the FTT (Judge Charles Hellier and Tribunal Member Sheila Cheesman) allowed the appeal. The FTT concluded that there was a single zero rated supply and, accordingly, the input tax on the communal area furnishings was deductible.

2. On 8 February 2013, HMRC applied to the FTT for permission to appeal to the Upper Tribunal ("UT") against that part of the FTT's decision which related to accounting periods after 1 April 1989 when certain amendments made by the Finance Act 1989 came into force.

3. In a decision notice released on 4 April 2013, the FTT granted HMRC permission to appeal. The FTT administrative staff notified HMRC that permission had been granted by email on 4 April 2013. Notification was also sent to McCarthy & Stone's then representatives, Deloitte LLP ("Deloitte"), on the same day.

4. Rule 23(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") provides that an appellant must provide a notice of appeal to the Upper Tribunal so that it is received within one month after the date on which the FTT sent the decision notice granting permission to the appellant. In this case, the period of one month expired on 4 May 2013 but, as that day was a Saturday, the time limit was automatically extended, by Rule 12(2) of the UT Rules, to 5:00 pm on Monday 6 May 2013. HMRC provided their notice of appeal to the UT on 1 July 2013. That was 56 days late.

5. Rule 23(5) of the UT Rules provides:

> "If the appellant provides the notice of appeal to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)
>
> (a) the notice of appeal must include a request for an extension of time and the reason why the notice was not provided in time; and
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> (b) unless the Upper Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the notice of appeal."

Application for extension of time

6. At the same time, ie 1 July 2013, as providing the notice of appeal to the UT, HMRC also filed an application for an extension of time under rule 5(3)(a) of the UT Rules. Rule 5(3)(a) of the UT Rules provides that the UT may extend the time for complying with any rule. On 17 July 2013, McCarthy & Stone served a 'Notice of Opposition' to HMRC's application.

Evidence

7. Mr Geraint Williams, a solicitor in the office of the General Counsel and Solicitor to HMRC ("HMRC Solicitor's Office"), produced two witness statements on behalf of HMRC which stood as evidence in chief and no application was made by McCarthy & Stone to cross-examine him. Mrs Rowan Baker, Financial Controller (Accounting and Tax), of McCarthy & Stone, produced a witness statement and she also gave evidence in order to answer questions from me arising from her statement. She was not asked any questions by counsel for either party. On the basis of the witness statements and the documents in the bundles, which were not challenged, I find the material facts in relation to HMRC's failure to provide the notice of appeal to the UT within the time limit to be as set out below.

Facts

8. The FTT issued its decision allowing McCarthy & Stone's appeal on 6 December 2012. The time limit for applying to the FTT for permission to appeal under rule 39(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is 56 days from the date that the decision is sent by the FTT, ie 31 January 2013 in this case. HMRC foresaw that they would find it difficult to meet the time limit. On 23 January 2013, Mr Marek Stok, the solicitor in HMRC Solicitor's Office who had care of the case, applied to the FTT for the time limit to be extended to 8 February. The FTT granted the extension on 31 January.

9. On 8 February, Mr Stok, on behalf of HMRC, applied to the FTT for permission to appeal to the UT against that part of the FTT's decision released on 6 December 2012 that related to periods from 1989 to 2009.

10. On 26 February, Mr Paul Belbin, the HMRC Customer Relationship Manager for McCarthy & Stone, emailed Ms Rebecca Matthews at McCarthy & Stone. The email concerned the repayment of input tax and interest that had become due as a result of the FTT's decision allowing McCarthy & Stone's appeal. Mr Belbin said that the repayment of the post-1989 (he must have meant post-1 April 1989) element would be subject to an undertaking by McCarthy & Stone to repay HMRC in the event of a successful appeal by HMRC.

11. On Thursday 4 April, the FTT issued a decision giving HMRC permission to appeal to the UT. At 12:26 on 4 April, the FTT sent an email to the HMRC 'Tribunals Appeals, Clearing House' inbox headed "Decision TC/2010/00691 & 0686 McCarthy & Stone (Developments ltd" [sic] and marked with high importance. There was no narrative message. The FTT's decision granting permission to appeal was

attached to the email. On the same day, the FTT sent a copy of the decision granting HMRC permission to appeal to Deloitte.

12. Deloitte sent the decision of the FTT granting HMRC permission to appeal to Mrs Baker at McCarthy & Stone by email on or around 4 April 2013. Deloitte stated in the email that HMRC had 30 days to lodge a notice of appeal with the UT.

13. On Friday 5 April at 12:12, the HMRC Tribunals Appeals, Clearing House forwarded the email to the 'Appeals 26' inbox at HMRC Solicitor's Office. At 13:43, the email was forwarded to Mr Stok and a paralegal, Mr Paul Coleman, in HMRC's Solicitor's Office.

14. On Tuesday 9 April, Ms Matthews at McCarthy & Stone sent a copy of the decision granting permission to appeal to Mr Belbin of HMRC by email. Mr Belbin did not forward the email to the HMRC Solicitor's Office because he assumed that the Solicitor's Office had already received the permission decision from the FTT.

15. Mr Coleman's last day working in HMRC's Solicitor's Office was Thursday 11 April. From Friday 12 April, Mr Stok was absent from the HMRC Solicitor's Office on long-term sick leave. I was not given any details about Mr Stok's illness or whether it affected his ability to perform his duties before his absence. Mr Andrew Macnab, who appeared for HMRC, said that HMRC did not wish to rely on Mr Stok's illness as a reason for the failure to provide the notice of appeal within the time limit. Accordingly, I assume that Mr Stok's ability to carry out his duties was unimpaired up to and including 12 April.

16. On Tuesday 16 April, Mr Williams took over the line management of, ie responsibility for the case files of, the absent Mr Stok. I was not told who, if anyone, was responsible for the work previously undertaken by Mr Coleman.

17. On or about Saturday 20 April, Mr Williams and Mr Karl Beresford, a paralegal, were granted access to Mr Stok's email account to ensure that it was monitored during his absence. At that time, Mr Stok's inbox contained over 1,500 emails and was at full capacity. Mr Williams and Mr Beresford did not read the email with the decision granting permission to appeal attached at that time. Mr Beresford transferred the emails to other folders to ensure that Mr Stok's inbox could continue to receive emails. I was not given any information about what happened to Mr Coleman's email account after he left the HMRC's Solicitor's Office.

18. McCarthy & Stone and Deloitte expected HMRC to lodge the notice of appeal within the time limit. Mrs Baker was in regular contact with Deloitte to check whether HMRC had lodged a notice of appeal. She asked Deloitte to telephone the UT to check. Around mid-June, Mrs Baker received an email from Deloitte stating that the UT had confirmed on the telephone that no notice of appeal had been received. Mrs Baker said that she thought that was enough, without any further confirmation, for her to authorise an adjustment to the Group Management Accounts to show the full amount of the disputed VAT input tax as due to McCarthy & Stone.

19. McCarthy & Stone updated its financial forecast position to 31 August 2013 to reflect a recovery of the full amount, including interest, of £2.8 million due to McCarthy & Stone from HMRC as a result of the FTT's decision. This forecast formed the basis of a term sheet which McCarthy & Stone first issued to key lenders and shareholders on 19 June with a view to the negotiation of a fundamental restructuring and refinancing of the McCarthy & Stone Group's debt.

20. On 25 June, the Board of McCarthy & Stone approved the Group Management Accounts for May 2013. Those accounts showed the full amount claimed by McCarthy & Stone from HMRC, £2.2 million excluding interest, as due to the company. This represented a material asset in the books of the company.

21. At some time on Friday 28 June, McCarthy & Stone sent the Group Management Accounts for May 2013 to lenders and shareholders. On the same day, at 14:20, Mrs Baker received an email from Mr Belbin. The email referred to a part of McCarthy & Stone's claim being "subject to the appeal process". Mrs Baker telephoned Mr Belbin at 15:30 and said that she had understood that there was no appeal to the UT because HMRC had failed to lodge a notice of appeal with the UT. Mr Belbin expressed surprise. Mr Belbin immediately contacted HMRC's Solicitor's Office.

22. Mr Williams's first witness statement stated that, while reviewing Mr Stok's cases on 28 June, he noted that the application for permission to appeal to the UT had not been received from the FTT and asked Ms Sarah-Jane Lockhead, a paralegal, to contact the FTT. Mr Williams's evidence did not mention that Mr Belbin had contacted the HMRC Solicitor's Office and that this had caused Mr Williams to look at the case file for this appeal although this was accepted by Mr Macnab at the hearing before me. Mr Macnab said that Mr Williams was reviewing Mr Stok's case files as part of an ongoing process. Mr Williams was not aware of the email of 4 April from the FTT or that there was any requirement to provide a notice of appeal to the UT until Mr Belbin's telephone call on the afternoon of 28 June.

23. Ms Lockhead contacted the FTT by telephone on 28 June. Mr Vintura of the FTT sent Ms Lockhead a copy of the decision granting permission to appeal by email at 16:41 on that day.

24. On Monday 1 July 2013 at 12:13, Ms Matthews of McCarthy & Stone sent an email to Mr Belbin at HMRC agreeing his calculation of the amount to be repaid and asking him to "set the ball rolling on the undertaking and repayment as soon as possible". Also on 1 July, Ms Lockhead of HMRC Solicitor's Office sent an email to Mr Vintura at 16.16 which attached, among other things, the FTT's decision granting permission to appeal and the notice of appeal as well as the application for an extension of time which is the subject of this decision. It must be pointed out that Mr Vintura is a clerk in the FTT and not the UT. Ms Lockhead sent a further email at 16:45 which attached the grounds of appeal that had been omitted from her earlier email. Ms Lockhead did not copy the emails that she sent to the FTT to McCarthy & Stone or Deloitte.

25. On 2 July, Mr Belbin emailed Ms Matthews, copying in Mrs Baker, with a letter relating to the repayment and a draft undertaking.

26. On 3 July, McCarthy & Stone finalised the term sheet, referred to at [19] above for the restructuring and refinancing negotiations with key lenders and shareholders. On the same day, at 13:35, the UT sent an email to Giles Salmond at Deloitte stating that the UT had received an out of time notice of appeal from HMRC on 1 July and asking whether there would be any objection to the application. Mr Salmond replied by email within a few minutes, saying that he would take his client's instructions and revert.

Application for an extension of time

27. At the hearing, both parties referred to the version of rule 3.9 of the Civil Procedure Rules ("CPR") which, until 1 April 2013, provided:

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

I refer to this version as the old CPR 3.9.

28. Mr Andrew Hitchmough QC, who appeared with Mr Thomas Chacko for McCarthy & Stone, relied on the version of CPR 3.9 as amended to give effect to the recommendations of Sir Rupert Jackson in his *Review of Civil Litigation Costs*. With effect from 1 April 2013, CPR 3.9 provides as follows:

> "(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."

I refer to this version as the new CPR 3.9.

29. Mr Hitchmough submitted that the new CPR 3.9 is stricter than the old version. Mr Hitchmough relied on the recent decision of the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537. That was an appeal by Mr Mitchell against a ruling by a Master in the High Court that, because his solicitor had failed to file a costs budget on time (it was six days late), the budget was to be treated as comprising only the applicable court fees. Mr Mitchell also appealed against the Master's refusal to grant relief under CPR 3.9 from that decision. It was the first time that the Court of Appeal had been required to consider the new CPR 3.9.

30. Lord Dyson MR gave the judgment of the Court. At [1], the Court observed:

> "The question at the heart of the appeal is: how strictly should the courts now enforce compliance with rules, practice directions and court orders? The traditional approach of our civil courts on the whole was to excuse non-compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs). The Woolf reforms attempted to encourage the courts to adopt a less indulgent approach. In his Review of Civil Litigation Costs, Sir Rupert concluded that a still tougher and less forgiving approach was required. His recommendations were incorporated into the Civil Procedure Rules."

31. At [34] – [37], the Court made the following general comments on the new CPR 3.9:

> "34. Much has been said about the Jackson reforms and in particular on the question whether the court is now required to adopt a more "robust" approach to granting relief to defaulting parties from the consequences of their defaults. The amendment to CPR 3.9 followed the recommendations made in Sir Rupert Jackson's Final Report Ch 39. At para 6.5, he said:
>
> > 'First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed. However, I do not advocate the extreme course which was canvassed as one possibility in [the Preliminary Report] paragraph 43.4.21 or any approach of that nature.'
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> 35. The 'extreme course' to which he was referring was that non-compliance would no longer be tolerated, save in 'exceptional circumstances'. Instead, he recommended that sub-paragraphs (a) to (i) of CPR 3.9 be repealed and replaced by the wording that is to be found in the current version of the rule. He said that the new form of words

> ‘does not preclude the court taking into account all of the matters listed in the current paragraphs (a) to (i). However, it simplifies the rule and avoids the need for judges to embark upon a lengthy recitation of factors. It also signals the change of balance which I am advocating.’
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> 36. As Sir Rupert made clear, the explicit mention in his recommendation for the version of CPR 3.9 of the obligation to consider the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders reflected a deliberate shift of emphasis. These considerations should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule.
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> 37. We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned.”

32. At [40] – [41], the Court gave the following guidance as to how the new approach should be applied in practice:

> “40. … It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "de minimis non curat lex" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, 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. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.
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> 41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed

> with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

33. At [49], the Court referred to the checklist of factors in the old CPR 3.9 and observed:

> "We accept that, depending on the facts of the case, it will be appropriate to consider some or even all of these factors as part of "all the circumstances of the case". But, as we have already said, the most important factors are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders."

34. The Court of Appeal in *Mitchell* dismissed the appeal and gave the material reasons quite shortly at [59] which included the following:

> "The defaults by the claimant's solicitors were not minor or trivial and there was no good excuse for them. They resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants."

35. On the same day as the hearing of this application, the Court of Appeal issued its judgment in *Durrant v Avon & Somerset Constabulary* [2013] EWCA Civ 1624. The case was an appeal against a decision to grant relief from a sanction for non-compliance with an order requiring service of witness statements by a specified date. The sanction was that the defendant might not rely on any witness evidence other than that of witnesses whose statements had been served by the specified date. The decision does not modify the guidance given in *Mitchell* in any way but, as Richards LJ, who gave the judgment of the Court, observed, the case provided an early

opportunity to apply that guidance. The Court noted that the judgment in *Mitchell* was a

> "… clear endorsement of a tougher, more robust approach towards enforcing compliance with rules, practice directions and orders and thus towards relief from sanction."

36. The Court noted, at [41] of *Durrant*, that the first instance judge in that case

> "… went through the old checklist of factors in the superseded version of CPR 3.9 before coming to the two considerations specifically mentioned in the new CPR 3.9 (the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and court orders) and then returning to consider further 'all the circumstances of the case'. He did not appreciate that the two considerations specifically mentioned in the new rule are the most important considerations and should be given greater weight than other factors (see *Mitchell* paras 36-37 and 49). Nor did he appreciate how much less tolerant an approach towards non-compliance with rules, practice directions and orders is required by the new rule."

The Court of Appeal concluded that the judge below had erred and the applications for relief from sanction should have been refused.

Discussion

37. The FTT's email of 4 April 2013 was received by the HMRC solicitor responsible for the case and a paralegal who had been working on the appeal on 5 April. Between then and 28 June, the email was simply overlooked by HMRC Solicitor's Office. Mr Macnab did not put forward any explanation or reason why the email notifying the grant of permission was not acted upon. He said that the 4 April email had "slipped through the cracks" and frankly admitted that it was an administrative error (a more colourful term was also used in oral submissions).

38. Mr Macnab submitted that this was a straightforward application. The UT had a discretion to extend time under the UT Rules which it must exercise judicially having regard to the overriding objective as prescribed by those Rules. Rule 2(3) of the UT Rules provides that the UT must seek to give effect to the overriding objective when it exercises any power under the Rules. The overriding objective of the UT Rules is set out in Rule 2(1) and is to enable the UT to deal with cases fairly and justly. Rule 2(2) states that dealing with a case fairly and justly includes, among other things:

> "(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> … and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues."

39. Mr Macnab submitted that, applying the overriding objective, it would be unfair and unjust for HMRC to be prevented from pursuing this appeal because of a relatively short delay, of just under two months, resulting from an unintentional error of the kind that occurred. Mr Macnab said that courts have viewed applications for extensions of 2 months or less as fundamentally different, in terms of fairness, from applications for much longer extensions and referred me to the comments of Arden LJ at [36] and Brooke LJ at [55] in *Smith v Brough* [2005] EWCA Civ 261. I do not regard those comments as laying down any rule that a delay of two months should be regarded as fundamentally different from a longer delay. The length of the delay is a matter that must be taken into consideration along with the other circumstances of a case. In some circumstances, perhaps where potential prejudice to a party is both obvious and great, a much shorter delay than two months would be considered to be unfair. Further, the comments in *Smith v Brough* were made before the changes to CPR 3.9 and before the Court of Appeal's comments in *Mitchell* in which missing a time limit by 6 days was described as not minor or trivial.

40. Mr Macnab also contended that, applying the overriding objective of the UT Rules, it would be fair and just to grant HMRC's application. He submitted that this was particularly so in circumstances where HMRC had been granted permission to appeal by the FTT; McCarthy & Stone knew that HMRC had been granted permission to appeal; and HMRC had never given any indication to McCarthy & Stone that the appeal had been abandoned. I do not accept this submission. It is really saying that the sanction, which is that HMRC cannot pursue their appeal, is unfair. That sanction is specified in Rule 23(5)(b) of the UT Rules as the consequence of a failure to comply with Rule 23(2). As the Court of Appeal in *Mitchell* observed at [45]:

> "In the present case, the sanction is stated in CPR 3.14 itself: unless the court otherwise orders, the defaulting party will be treated as having filed a budget comprising only the applicable court fees. It is not open to that party to complain that the sanction does not comply with the overriding objective or is otherwise unfair."

41. HMRC cannot complain that the sanction provided by the UT Rules does not comply with the overriding objective or that the consequences of it are such that it must be fair and just to grant relief from it. HMRC must find reasons in the circumstances of the case, rather than in the nature or effect of the sanction, why it would be fair and just to grant the application. I do not consider that the fact that HMRC had been granted permission to appeal by the FTT is relevant to the question of whether it would be fair and just to grant HMRC's application. The grant of permission to appeal is what started time running and it has nothing to say about why the time limit was not met. The fact that McCarthy & Stone knew that HMRC had been granted permission to appeal is equally irrelevant to the issue for the same reason. Finally, the fact that HMRC gave no indication that they had abandoned the appeal is also not relevant to the issue of why the time limit was not met and whether fairness and justice require the default to be relieved from the sanction in the UT Rules.

42. In my view, the new CPR 3.9 and the comments by the Court of Appeal in *Mitchell* and *Durrant* clearly show that courts must be tougher and more robust than

they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. Mr Macnab's answer to this point was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR 1 is in different terms to the overriding objective in Rule 2(3) of the UT Rules. From 1 April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and at proportionate cost. CPR 1 also provides that dealing with a case justly includes ensuring that it is dealt with expeditiously. Mr Hitchmough submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.

43. I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. The overriding objective in the UT Rules requires the UT to avoid unnecessary formality and seek flexibility in proceedings.

44. An informal and flexible approach may mean that a self-represented litigant is granted relief from a failure to comply with the rules, including time limits, in circumstances where a more experienced and better resourced party is not. That difference in treatment between different parties does not mean that the UT is applying dual standards but only that the level of experience and resources of a party are factors which should be taken into account in considering all the circumstances of the case. Such factors will, however, carry less weight than the two principal matters which must be considered in the new CPR 3.9.

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

46. The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

47. As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take

account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders.

48. Accordingly, in considering HMRC's application to be allowed to serve a notice of appeal after the time limit for doing so has passed, I have treated the need for appeals to be conducted efficiently and the need to enforce compliance with the UT Rules as important issues which carry greater weight than the other issues in the case. I turn to consider those issues next. As discussed below, I have also had regard to the different matters listed in the old CPR 3.9 but I have given them less weight in making my decision. They are discussed in more detail below.

The need for appeals to be conducted efficiently

49. Unlike the example given by the Court in *Mitchell*, this was not a case where, because of overwork or other reason, a solicitor simply overlooked a deadline which the Court stated would be unlikely to be a good reason to grant an extension of time. In this case, Mr Stok and Mr Coleman received the notification of the grant of permission to appeal and, it appears, did not inform others of it when, for different reasons, they stopped working at the Solicitor's Office. Mr Williams and Mr Beresford missed the FTT's email with the decision granting permission to appeal when reviewing Mr Stok's files after he had gone on long term sick leave. Although I accept that it is easy to overlook one email among so many, I consider that the fact that this one was missed shows that this appeal was not being efficiently managed after Mr Stok's departure. There was no evidence that Mr Stok had not maintained the file relating to the appeal properly. It should have been clear from looking at the case file that an application to appeal had been made to the FTT on 8 February. A decision from the FTT should have been expected within a few weeks (certainly before the date of Mr Stok's departure) and a simple search of Mr Stok's inbox would have discovered the email which had the name and reference of the appeal in its subject line. The evidence shows that, despite it being an active matter, Mr Williams did not review the file for this appeal until prompted to do so by Mr Belbin's telephone call on 28 June. I conclude that, between 12 April and 28 June, this appeal was not being conducted efficiently.

50. The fact that the appeal was not being conducted efficiently does not inevitably lead to the conclusion that HMRC's application must be refused. In particular, if there is a good reason for the conduct then this factor would weigh less heavily against HMRC. The burden is on HMRC to satisfy me that there was a good reason for the time limit not being met. HMRC's frank admission that they made an administrative error is commendable but does not provide any explanation for the failure to comply with the time limit. Although Mr Stok went on long term sick leave from 12 April, HMRC expressly disclaimed any reliance on his illness either before or after his absence as a reason for the failure. I think that is right. HMRC Solicitor's Office has many lawyers and paralegals and should be able to handle cases in the event that a lawyer falls ill or leaves. No reason was given why Mr Williams' review of Mr Stok's active case files and email account did not reveal that the FTT's decision granting permission to appeal had been received. In short, HMRC are not only unable

to give a good reason for the failure to serve the notice of appeal on the UT within one month, they are unable to give any explanation at all. It seems to me that, in the circumstances of this appeal, it would not be consistent with the need to ensure that appeals in the UT are conducted efficiently to allow HMRC to serve a notice of appeal almost two months after the time limit has expired.

The need to enforce compliance with the UT Rules

51. In *Mitchell*, the Court of Appeal stated, at [48], that

> "… we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial."

52. The failure by HMRC Solicitor's Office to provide the notice of appeal for a period of 56 days after the time limit for doing so had expired was neither minor nor trivial. The service of the notice of appeal on the UT, which then sends it to the respondent, is an important part of the appeal process without which further progress is impossible. The fact that a failure to comply with a time limit is neither minor nor trivial does not preclude the UT from extending time in order to enable the party to comply if there was a good reason for the default and it is fair and just to do so in all the circumstances of the case. As discussed above, HMRC have not advanced any reason for the failure to comply with the UT Rules other than administrative error which I equate with the "well-intentioned incompetence" mentioned in *Mitchell*. As in that case, I find that the administrative error that led to a breach of the UT Rules was neither minor nor trivial. Refusing applications to extend time limits made after they have expired reinforces the need for parties to comply with the time limits in the UT Rules and directions made under them. In the absence of any good reason for failing to comply with the time limit, I can find no reason, in the circumstances of this case, not to apply the sanction provided by Rule 23(5)(b) of the UT Rules and refuse to admit HMRC's notice of appeal.

Other issues

53. As the Court of Appeal noted in *Mitchell* at [35] quoted above, Sir Rupert Jackson said in his report that the new CPR 3.9 does not preclude the court taking into account all of the matters listed in the old CPR 3.9 but it should avoid the need for judges to embark upon a lengthy recitation of factors. It seems to me, therefore, that it is no longer necessary to conduct the exercise undertaken by Morgan J in *Data Select v HMRC* [2012] UKUT 187 (TCC) in every case. *Data Select* concerned an application to the FTT for an extension of time for making an appeal. The FTT considered that, in the exercise of its discretion, it should have regard to the factors referred to in the old CPR 3.9 as well as the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which is identical to the overriding objective in the UT Rules. When the case came before the UT, Morgan J held, at [34], that, as a general rule, when a court or tribunal is asked to extend a relevant time limit, it asks itself the following questions:

(1) what is the purpose of the time limit?

(2) how long was the delay?

(3) is there a good explanation for the delay?

(4) what will be the consequences for the parties of an extension of time? and

(5) what will be the consequences for the parties of a refusal to extend time?

The court or tribunal then makes its decision in the light of the answers to those questions.

54. Morgan J, in [35] and [36], referred to *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261, [2006] CP Rep 17; *HMRC v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196; and *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135, [2006] STC 1218 as useful guides to the approach to be taken to applications. And, indeed, I was referred to all of those cases by one or other, sometimes both, of the parties.

55. Morgan J also held, at [37], that the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in the old CPR 3.9, is the correct approach for the FTT to adopt in relation to an application to extend time. In my view, that approach can no longer be regarded as correct in the light of the guidance given by the Court of Appeal in *Mitchell*. That is not to say that the factors in the old CPR 3.9 are irrelevant. Those factors may, depending on the case, be part of "all the circumstances of the case" which it is appropriate to consider. The matters listed in the old CPR 3.9 are a useful aid to ensure that all relevant other issues have been taken into account. In my view, it is no longer necessary, however, to treat the matters in the old CPR 3.9 as a checklist of issues which must be set out in full and considered in every decision.

56. In case I am wrong in my view and also because the parties made submissions on each of them, I now consider each of the factors listed in old CPR 3.9 in the context of HMRC's application.

The interests of the administration of justice

(1) As I stated in [31] of *Globalised Corporation Ltd v HMRC* [2012] UKFTT 556 (TC), the issue to be considered is not the interests of justice generally or even in relation to the parties but the interests of the administration of justice. It is clearly in the interests of the administration of justice that there should be time limits and that they should be observed as this contributes to the finality of litigation. I consider that the interests of justice also require consideration of two aspects of dealing fairly and justly, specified by rule 2(2)(c) and (e) of the UT Rules, namely enabling parties to participate fully in proceedings and avoiding delay. Mr Macnab submitted that refusing to grant an extension of time would mean that HMRC are unable to proceed with an appeal for which they have been given permission and that would have wider consequences because the issue in this appeal is one that may affect other taxpayers. Mr Hitchmough submitted that the FTT's decision is not binding and

HMRC can always re-litigate the issue. That does not seem to me to be an answer as further litigation of a point that has already been the subject of an appeal would not, in my view, be in the interests of the administration of justice. On the other hand, granting the extension entrenches a delay in this case and delay caused by failure to comply with a time limit can never be said to be in the interests of the administration of justice. I conclude that this factor does not assist me in deciding whether to grant HMRC's application.

Whether the application for relief has been made promptly

(2) The failure to file the notice of appeal was discovered on 28 June 2013 and HMRC applied to the UT for an extension of time on 1 July which was the next working day, 29 and 30 June being a Saturday and Sunday. I consider that the application was made promptly. Mr Hitchmough criticised the application for being materially incorrect. I do not accept that the fact that the application contained errors, which it did, means that it was not made promptly. It is clear that HMRC made the application in a hurry and I accept, as there was no evidence to the contrary, that they believed it to be correct at the time. The fact that the application was made promptly does not necessarily lead me to conclude that I should extend the time for providing the notice of appeal whereas evidence of tardiness would count against granting HMRC's application.

Whether the failure to comply was intentional

(3) I conclude from the evidence that I have seen, and in particular that of Mr Williams, that HMRC's failure to comply with the time limit for providing the notice of appeal within one month was not intentional. This weighs in favour of granting HMRC's application for an extension of time.

Whether there is a good explanation for the failure

(4) I have already discussed this at [49] and [50] above and concluded that there was no good explanation for the failure to provide the notice of appeal within the time limit. My conclusion in relation to this matter suggests that I should not grant HMRC's application to extend the time for providing the notice of appeal.

The extent to which HMRC has complied with other rules

(5) As the appeal had barely started, this factor is not relevant in relation to these particular proceedings. If a broader perspective is relevant, my own experience is that HMRC do not deliberately or persistently disregard time limits or other provisions of the UT rules. I would, of course, not expect HMRC to engage in such conduct and this factor does not carry much weight in favour of granting HMRC's application.

Whether the failure was caused by the party or his legal representatives

(6) Both parties agreed that this is not a relevant factor as HMRC are both client and legal representative.

Whether the trial date or the likely trial date can still be met if relief is granted;

(7) This factor is not relevant as no date for any hearing of the appeal has been set.

The effect which the failure to comply had on each party

(8) The issue to be considered under this heading is what effect did HMRC's failure to provide a notice of appeal to the UT have on McCarthy & Stone. As described above, McCarthy & Stone assumed that HMRC, despite having been granted permission, had decided not to appeal. That assumption was made on the basis of information from Deloitte that the UT had confirmed by telephone, on more than one occasion, that HMRC had not lodged a notice of appeal. Neither Deloitte nor McCarthy & Stone sought confirmation from HMRC that they had abandoned their appeal. I find it surprising that between 6 May and 28 June, neither Mrs Baker nor Ms Matthews thought to ask Mr Belbin, by telephone or in an email, why HMRC had not pursued the appeal, especially when such a course of action would affect the Group Management Accounts and negotiations about a fundamental restructuring and refinancing of the McCarthy & Stone Group's debt. I also find it surprising that Mrs Baker should authorise the adjustment to the accounts simply on the basis of a reported oral confirmation by the UT that HMRC had not filed a notice of appeal when there were other obvious reasons why the UT might not have received the application. Mrs Baker's evidence was not, however, challenged by HMRC and I accept it as far as it goes. Mr Hitchmough submitted that by adjusting the Management Accounts and sending them to lenders and shareholders, McCarthy & Stone had acted to its detriment. Mrs Baker's evidence did not establish actual detriment and no other evidence of actual detriment as a result of the adjustment to the accounts was produced. Further, it is clear that the term sheet used to negotiate the restructuring and refinancing of the Group's debt was not finalised until 3 July which was five days after Mrs Baker's telephone conversation with Mr Belbin and the same day as the UT sent HMRC's notice of appeal and application to Deloitte. Clearly, the management accounts would have had to be restated and the shareholders and lenders informed once the true position was known but I do not accept that McCarthy & Stone suffered any material detriment as a result of HMRC's failure to serve the notice of appeal on the UT until July. The fact that McCarthy & Stone suffered no material detriment does not mean that HMRC's application should be granted although evidence of actual detriment would have weighed heavily against extending time.

The effect which the granting of relief would have on each party

(9) It is clear that HMRC will only be able to pursue their appeal if the application for an extension of time is granted and they will be prejudiced if their application is refused. The effect on McCarthy & Stone if the application

is granted is that the company must face the prospect of an appeal before the UT with its attendant costs and the risk that part of the decision of the FTT in the company's favour might be overturned. Those consequences are, however, the result of the grant of permission to appeal by the FTT and do not flow from HMRC's failure to provide the notice of appeal within the time limit. I consider that the fact that HMRC would be precluded from pursuing its appeal if the application is refused lends strength to HMRC's submissions that the application should be granted but it does not carry much weight as it is the sanction provided by the UT Rules for such a failure.

Conclusion

57. Taking all the circumstances of the case into account and bearing in mind the overriding objective of the UT Rules, I consider that the two requirements specifically mentioned in the new CPR 3.9, namely the need for appeals to be conducted efficiently and the need to enforce compliance with the UT Rules, lead ineluctably to the conclusion that HMRC's application to submit a notice of appeal after the time limit has expired should be refused. I have also considered all the factors listed in the old CPR 3.9 although only some of them carry any weight in the circumstances of this case. I have found that they are fairly evenly balanced, tending slightly in favour of HMRC. If I was only considering the factors listed in the old CPR 3.9 then I would, on balance, have granted HMRC's application but the requirements in the new CPR 3.9 carry greater weight. Accordingly, I have concluded that HMRC's application must be refused.

Decision

58. For the reasons given above, HMRC's application for an extension of time to serve its notice of appeal is refused and the notice of appeal is not admitted.

Greg Sinfield

Upper Tribunal Judge

Released: 10 January 2014