[2019] UKUT 0189 (TCC)

Appeal number: UT/2018/0017

PROCEDURE – Permission to make a late appeal

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
MUHAMMED HAFEEZ KATIB	**Respondent**

TRIBUNAL **MR JUSTICE MANN**
JUDGE JONATHAN RICHARDS

Sitting in public at The Rolls Building, Fetter Lane, London on 9 April 2019

Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Ronan Magee, instructed by Bond Adams LLP, for the Respondent

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DECISION

1. With the permission of the Upper Tribunal (Judge Herrington), the Appellants ("HMRC") appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 4 October 2017. In the Decision, the FTT allowed Mr Katib permission to make an appeal, out of time, against six personal liability notices that HMRC notified to him under paragraph 19(1) of Schedule 24 of the Finance Act 2007.

2. In this decision, references to numbers in square brackets are to paragraphs of the Decision unless the context requires otherwise.

The Decision and the grounds of appeal against it

The Decision and its reasoning

3. Mr Katib was the director of a company, MDM Global Limited ("MDM") which traded in metal. HMRC disallowed claims that MDM made for credit for input VAT and charged MDM penalties for inaccuracies in its VAT returns. MDM became insolvent and did not pay the penalties and HMRC issued personal liability notices ("PLNs") on Mr Katib on various dates from 5 December 2014 to 29 June 2015. ([4] and [5]). The amounts charged by the PLNs totalled in aggregate just over £490,000.

4. The deadline for making an appeal to the FTT against a PLN is 30 days from the date of the notice. Mr Katib did not appeal against any PLN within this period. On the facts of this case the delay in appealing was between 13.5 and 20 months (Mr Katib's case) and between 20 and 24 months (HMRC's case). The FTT did not think it necessary to resolve which of those versions was correct because on any footing they were very significant. On 15 September 2016, his advisers, Bond Adams LLP, filed notices of appeal against the PLNs, but these notices of appeal did not have attached to them the decisions against which Mr Katib was appealing. They therefore failed to meet the requirements of a notice of appeal set out in Rule 20(3) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "FTT Rules"). Bond Adams LLP refiled the notices of appeal, with the necessary copies of the HMRC decisions, on 10 March 2017. ([13])

5. The FTT had power under s83G(6) of the Value Added Tax Act 1994 ("VATA 1994") to give Mr Katib permission to make a late appeal. Having recited, at [22] to [26], the parties' submissions on the principles it should follow and the factors it should take into account the FTT directed itself that it would approach the exercise of its discretion by considering the five questions that Morgan J set out in *Data Select Ltd v HMRC* [2012] STC 2195:

(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?

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

6. In its analysis of Morgan J's first question, the FTT rejected a submission of HMRC that, in line with the decision of the Supreme Court in *BPP Holdings Limited v HMRC* [2017] UKSC 55, it should insist that time limits should be strictly adhered to saying, at [27(1)]:

> I do not consider BPP is helpful and certainly not decisive because in that case a direction had been made by the First-Tier tribunal (F-tT) and the F-tT had indicated that HMRC would be barred from participating in proceedings if the direction was not adhered to. The facts in this are very different: there had been no analogue of the F-tT's direction in *BPP* and no other "warning shot" over "the Respondent's bows". Nor was there in BPP an analogue of Mr Bridger's unusual behaviour in this case.

7. At [27(2)], the FTT concluded that Mr Katib's delay was "serious" whether or not the delay was between 13½ months and 20 months (as Mr Katib submitted) or 20 and 24 months (as HMRC submitted).

8. At [27(3)], the FTT considered whether Mr Katib had a good explanation for the delay. In doing so, it drew on findings that it had made earlier in the Decision on the conduct of Mr Katib's previous adviser, Mr Bridger of Sovereign Associates. Mr Bridger was not a witness in the proceedings but, in reliance on Mr Katib's evidence, the FTT concluded that Mr Bridger had given some "extraordinary" advice. For example, at [11], the FTT found:

> Mr Bridger's advice included that the Appellant should cease to be a man by making a declaration to that effect to enable Mr Bridger to communicate to the world that the Appellant was dead, that there was plenty of time to deal with an enforcement notice as the Bills of Exchange Act governed the counting of the time limit to do so.

At [16], the FTT found:

> I find that Mr Bridger misled the Appellant as to what steps were being taken and needed to be taken to challenge the personal penalty notices.

At [12], the FTT found that Mr Bridger's advice to Mr Katib demonstrated that Mr Bridger was a "fabulist".

9. Drawing on those findings, the FTT concluded that Mr Katib did have a good explanation for the delay. Since HMRC have made significant criticisms of this aspect of the FTT's reasoning, we set it out in full:

> *(3) Is there a good explanation for the delay?*
>
> The Appellant considered there was good reason for the delay which was due to Mr Bridger's failure to properly represent the Appellant. Mr Bridger failed to give the Appellant legal advice in relation to the personal penalty notices, failed to take steps to appeal the notices. On the contrary he habitually assured the appellant that matters were in hand, that there was no need for the appellant to be concerned, that he

> had the expertise to deal with the issue. Mr Bridger deliberately misled the Appellant and the appellant had relied upon Mr Bridger.
>
> The Respondents invited me to conclude that the principle in *Coventry City Council* should apply, that the conduct of a legal representative should be visited upon the head of the client. As there was no good reason for Mr Bridger's delay so there should be no good reason for the appellant's delay.
>
> I do not consider the *Coventry City Council* principle should apply in cases such as this where, to use an analogy from employment law, the so-called representative is on a frolic of his own acting outside the scope of any possible brief that the Appellant could have given. As mentioned above there was no analogue of the F-tT's direction in *BPP Holdings* and no other "warning shot" over "the Respondent's bows". Nor was there in *BPP Holdings* an analogue of Mr Bridger's unusual behaviour in this case.

10. At [27(4)], the FTT concluded that HMRC would suffer "no real prejudice" if Mr Katib was given permission to make a late appeal. At [27(5)], the FTT concluded that there would be "demonstrable injustice" if Mr Katib was not granted permission to make a late appeal. In doing so, the FTT once again considered the effect of the Supreme Court's decision in *BPP* but concluded:

> The facts of this case are very far away from those in BPP. They are extraordinary and in weighing all the circumstances in this case I am unable to accept the invitation to follow BPP for to do so in this case would be too extreme and fail to have regard to the overriding objective.

11. The FTT accordingly gave Mr Katib permission to make a late appeal.

HMRC's grounds of appeal

12. HMRC appeal against the Decision on three grounds:

> (1) Ground 1 – The FTT erred in law by failing to follow binding guidance from the Upper Tribunal, endorsed by the Supreme Court, in relation to the "stricter approach to compliance with time limits".
>
> (2) Ground 2 – The FTT erred in law by permitting Mr Katib to advance unpleaded allegations of dishonesty against Mr Bridger and then making findings in relation to the same instead of holding Mr Katib to his pleaded case.
>
> (3) Ground 3 – The FTT gave too much weight to Mr Katib's complaints about Mr Bridger in circumstances where he had not waived any privilege that existed between him and Mr Bridger.

Consideration of the grounds of appeal

13. In this section, we will consider whether any of HMRC's grounds of appeal disclose an error of law in the Decision. In the "Disposition" section that follows, we will consider how to deal with the Decision in the light of any errors of law that we identify.

Ground 1

14. In *BPP Holdings*, the Supreme Court endorsed guidance that the Upper Tribunal (Judge Sinfield) gave to the FTT in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Limited* [2014] STC 973 in the following terms:

> Such guidance to tribunals on tax cases was given by Judge Sinfield in the UT in McCarthy & Stone. In para 43, after referring to differences and similarities between the CPR and the tribunal rules, in that case the Tribunals Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), he accepted that "the CPR do not apply to tribunals" but added that he did not "accept 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 same view was expressed by Ryder LJ in paras 37 and 38 in the Court of Appeal in this case, including this: "I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals", and added that "[i]t should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's".
>
> 26. It is not for this Court to interfere with the guidance given by the UT and the Court of Appeal as to the proper approach to be adopted by the Ft-T in relation to the lifting or imposing of sanctions for failure to comply with time limits (save in the very unlikely event of such guidance being wrong in law). We have twice recently affirmed a similar proposition in relation to the Court of Appeal's role in relation to the proper approach to be taken in such cases by first instance judges - see *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 and *Thevarajah v Riordan* [2016] 1 WLR 76. The guidance given by Judge Sinfield in *McCarthy & Stone* was appropriate: as Mr Grodzinski QC, who appeared for BPP pointed out, it is "an important function" of the UT to develop guidance so as to achieve consistency in the Ft-T: see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48, para 41, per Lord Carnwath. And, by confirming that guidance in this case, the Senior President, with the support of Moore-Bick V-P and Richards LJ, has very substantially reinforced its authority. In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach.

15. The FTT did not have the benefit of the decision of the Upper Tribunal (Judge Berner and Judge Poole) in *William Martland v Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC) as it was released after the Decision. However, that decision also contains guidance to the FTT as to how it should approach the balancing exercise involved in considering applications by taxpayers for permission to make late appeals as follows:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected…The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

16. Mr Magee accepted, quite rightly, that the FTT should apply a "strict approach" to compliance with rules (including statutory time limits for bringing appeals) just as the courts do in analogous situations. However, he also rightly emphasised that, even applying a "strict approach", the exercise of judicial discretion must include the possibility of making allowances in exceptional circumstances. In Mr Magee's submission, the FTT had not failed to apply binding guidance on the "strict approach" or on the importance of statutory time limits (not least since it referred to the parties' submissions on *BPP Holdings* and *McCarthy & Stone* at [22] and [24(2)]). Rather, he argued that the FTT had applied that approach but had concluded that, given the extraordinary conduct of Mr Bridger, it would not be just to refuse Mr Katib permission to make a late appeal.

17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the *BPP Holdings* case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed.

18. We accept HMRC's submission that there is an error of law in the Decision of the kind alleged in Ground 1 and find Ground 1 to be established

Ground 2

19. Under Ground 2, HMRC make three separate, but related, points:

(1) First, they argue that the FTT was wrong to permit Mr Katib to alter his case fundamentally at the hearing without first making an application to amend his grounds of appeal to the FTT. That is effectively a complaint that the FTT wrongly permitted HMRC to be "ambushed" at the hearing.

(2) Second, they argue that the FTT was wrong to make findings of dishonesty against Mr Bridger and Sovereign Associates when Mr Katib had not pleaded dishonesty.

(3) Finally, they argue that the FTT was wrong to make findings of dishonesty against Mr Bridger and Sovereign Associates without first giving them the opportunity to answer those allegations.

20. In his oral submissions, Mr Watkinson took us through Mr Katib's pleadings and witness statements as part of his submissions that HMRC had been "ambushed". The essence of his submissions was as follows:

(1) Mr Katib's Grounds of Appeal submitted to the FTT on 14 September 2016 purported to deal both with penalty notices that HMRC had addressed to MDM and PLNs that HMRC had addressed to Mr Katib personally (even though Mr Katib had no standing, even as a director of MDM, to bring an appeal on MDM's behalf since MDM was in liquidation).

(2) Mr Katib's pleaded case in support of an application for MDM to appeal late against the penalty notices was that Sovereign Associates and Mr Bridger had failed to deal with those penalty notices competently or at all.

(3) By contrast, Mr Katib's pleaded case in relation to the PLNs was that, even though HMRC asserted that those PLNs had been sent to his home address between December 2014 and June 2015, Mr Katib only actually became aware of them on 22 June 2016. Mr Katib's witness statement made on 21 March 2017 followed the same approach.

(4) HMRC did not expect to have to deal with Mr Katib's purported appeal against penalty notices addressed to MDM (since Mr Katib had no standing to bring that appeal). In relation to Mr Katib's request for permission to appeal late against the PLNs, HMRC expected only to have to meet a case that Mr Katib did not receive those PLNs until 22 June 2016. They did not expect to have to deal with allegations against Sovereign Associates in the context of the appeal against the PLNs.

(5) They complained of the ambush at the FTT hearing. They did not request an adjournment of the hearing but rather asked the FTT to permit Mr Katib to run his "new" case only if he successfully applied to amend his grounds of appeal. The FTT was wrong to refuse HMRC's application.

21. For reasons that follow, we do not consider that HMRC were "ambushed" in any objectionable sense at the hearing before the FTT.

22. First, we do not consider that Mr Katib was seeking to appeal late against both the PLNs and the underlying penalties issued to MDM. The first paragraph of Mr Katib's grounds of appeal to the FTT make this clear:

> This is an application by Mr Muhammad Hafeez Katib (the "Appellant") to submit a late appeal against various assessments by the HMRC (the "Respondent") what is said to be indebtedness to Respondent in the sum of £490,501.33 in respect of unpaid penalties imposed on MDM Global Limited (the "Company")… It is said that the Appellant is personally liable as an officer of the Company by virtue of notices served dated [dates of penalty notices were provided]

23. That paragraph makes it clear that the appeal is by Mr Katib himself (not MDM) and that the appeal concerns the PLNs. Moreover, the dates provided match with the FTT's findings at [5] as to the dates of the PLNs. We do not, therefore, accept that there was a dichotomy between a case that Mr Katib was making in relation to the penalty notices served on MDM and the PLNs served on him.

24. Moreover, Mr Katib's witness statement made it clear that part of his case for seeking permission to make a late appeal against the PLNs involved allegations of dishonesty and incompetence Mr Bridger. There is little point in quoting extensively from that witness statement, but the following extract gives a flavour of these allegations.:

> As aforementioned, the personal liability notices were only served/received on 22 June 2016 upon the request of my instructed solicitors [i.e. the solicitors Mr Katib appointed after dispensing with the services of Sovereign Associates]. These matters were accordingly outside my control as I had only just discovered that Mr Bridger had been feeding lies to me all along to preserve his retainer for as long as possible. There is clear evidence of deception on Mr Bridger's part as he has dishonestly, whilst owing a duty of care, has appropriated my funds without providing the requisite due care and attention and service be that may [impliedly] and/or expressly under the terms of the agreement. The consequences of Mr Bridger's actions have placed me in this situation…

25. We consider that Mr Katib's witness statement set out sufficiently clearly the nature of the criticisms he was making against Mr Bridger and why they were relevant to his case. HMRC were not "ambushed". HMRC were entitled to be puzzled by aspects of Mr Katib's evidence. By 22 June 2016, the date on which he said he received the PLNs, Mr Katib had dispensed with the services of Sovereign Associates. If Mr Bridger was not acting on the date on which Mr Katib said he received the PLNs, it is not clear how Mr Bridger could, as Mr Katib claimed in his oral evidence, have failed either to advise properly on the process for appealing against those PLNs or to lodge appeals on Mr Katib's behalf. However, the fact that there might have been an inconsistency in Mr Katib's evidence does not mean that HMRC were "ambushed". Indeed, Mr Watkinson who appeared for HMRC before the FTT indicated to us that the apparent inconsistency was tested in cross-examination and led to Mr Katib accepting that he may well have received the PLNs prior to 22 June 2016 (at a time when Mr Bridger was acting for him).

26. Overall, HMRC's arguments based on "ambush" involve a criticism of the FTT's case management decision to permit Mr Katib to make a case relying on Mr Bridger's failings without applying to amend his grounds of appeal. A high threshold applies

before we should interfere with that case management decision. The position was summarised succinctly by Sales J, as he then was, in *HMRC v Ingenious Games LLP and others* [2014] UKUT 0062 (TCC), at [56]:

> The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT.

27. We do not consider that the FTT stepped outside the "generous ambit of discretion". No doubt it would have been preferable if the allegations against Mr Bridger, and their significance, formed part of Mr Katib's grounds of appeal and were not just made in witness statement. However, the overriding objective set out in Rule 2 of the FTT Rules enjoins the FTT to avoid unnecessary formality. Mr Katib's position was fairly set out in his witness statement and HMRC were not arguing that the hearing should be adjourned to enable them to obtain further evidence to meet the arguments he was making. All parties were, therefore, ready and able to proceed with the FTT hearing and the FTT was entirely justified in concluding that a formal application to amend grounds of appeal was unnecessary. We would have made the same decision ourselves.

28. We also reject HMRC's argument that it was, in any event, not open to the FTT to make findings of dishonesty against Mr Bridger given that those allegations had not been pleaded.

29. HMRC relied on statements by Lord Millett in *Three Rivers District Council and others v Governor and Company of the Bank of England* [2001] UKHL 16 at [184] to [186] as follows:

> 184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence… This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

30. We do not, however, consider that either of the principles that Lord Millett identified was infringed in the circumstances of this case.

31. First, Lord Millett was making his comments in relation to the situation where a claimant is making allegations of fraud against the defendant to the proceedings because it is clearly important for the defendant (who has to answer the claimant's case) to know the precise nature of an allegation that is made against him or her and the precise facts that are relied upon to substantiate an inference of fraud. Mr Katib was not making any allegations of fraud against HMRC; rather he was saying that the fact he had suffered fraud at the hands of Mr Bridger meant that the FTT should exercise discretion to permit him to make a late appeal.

32. Second, as we have noted, Mr Katib had made it plain in his witness statement that he considered Mr Bridger had acted fraudulently and the facts he relied upon to support that allegation. As noted at [27], we do not consider it matters greatly that the allegation was made, and particularised, in Mr Katib's witness statement, rather than in his grounds of appeal.

33. Perhaps most fundamentally, given that HMRC received adequate notice of Mr Katib's case, it did not matter greatly to them whether he was alleging fraud against Mr Bridger or simply incompetence. Whether fraud or incompetence was alleged, Mr Katib's point was the same: Mr Bridger's deficiencies meant that he should be given permission to make a late appeal. Therefore, on closer inspection, HMRC's complaint that fraud was not adequately pleaded is simply an aspect of their claims of "ambush" that we have already considered, and rejected.

34. At least in theory, Mr Bridger might have been concerned that Mr Katib was alleging fraud, and not just incompetence, against him (although there is no suggestion that he applied either to be joined into the FTT proceedings or has sought permission to appeal against the FTT's findings in this regard). This forms the basis of the third aspect of HMRC's arguments under Ground 2, namely that before making findings of fraud against Mr Bridger the FTT should have given him an opportunity to explain himself.

35. In support of that proposition, Mr Watkinson referred us to first to *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104. In that case the Court of Appeal held that a judge was not entitled to make findings of fraud against a witness appearing for the defendant in proceedings when fraud had neither been pleaded nor put to the witness in cross-examination. That is clearly some distance from the circumstances of this appeal (as Mr Bridger did not appear as a witness for either party and, as we have noted, an allegation of fraud against Mr Bridger had been clearly made). Mr Watkinson was correct to accept that, on its own, this decision does not stand as authority for the third aspect of HMRC's argument.

36. HMRC submit, however, that the case of *MRH Solicitors v Manchester County Court* [2015] EWHC 1795 extends the principle set out in *Vogon International*. That case related to county court proceedings involving motor accidents in which the defendant insurance companies denied liability for a claim on the basis that the accidents had been fraudulently staged by drivers of some of the vehicles involved in them. The defendants had not pleaded that the claimant's solicitors were involved in the fraud and indeed they expressly disavowed any such allegation. Moreover, the solicitors were not party to the litigation. Nevertheless, the county court found that the claimant's solicitors were involved in the fraud. The High Court (Burnett LJ and Nicol J) granted the solicitors' application for judicial review of the county court's decision.

37. HMRC argue that the decision of the High Court in *MRH Solicitors* demonstrates that the FTT was not entitled to make findings of fraud against Mr Bridger because he had not been given a chance to explain himself in the FTT proceedings. They rely, in particular, on paragraphs [34] to [37] of the judgment. We do not, however, consider that the decision is authority for such a broad proposition.

38. Nicol J gave a single judgment on behalf of both members of the panel. At [34] of that judgment he said that:

> … [I]n the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to rebut the allegations.

He went on to explain, at [34] and [35], that such a course was a matter of fairness and, moreover, could avoid the possibility of a court falling into error. At [36], he explained that considerations of common fairness were all the stronger given that fraud against the solicitors had not been pleaded.

39. In our view, however, the High Court in *MRH Solicitors* was not setting out a general rule that findings of fraud could never be made against non-parties to the litigation without a court first hearing from those parties. Rather, the High Court was simply emphasising the considerations that a court should have in mind before making findings against such persons and the importance of considerations of natural justice. Paragraph [24] of the judgment emphasises that the correct course of action where fraud is alleged against a non-party will depend on the facts of the individual case:

> 24.In the unlikely event that something similar to this should happen in the future, in our view the right course would be for the third party who

> believes they have been unfairly criticised in a judgment to apply to be joined as a party. We emphasise that we are not saying that a third party who is criticised will necessarily be entitled to be joined as a party. There are many cases heard in the civil courts (and also family and criminal courts) where the conduct of an absent person falls to be considered. For example, in a conspiracy case not all the alleged conspirators may be before the court as parties or witnesses. In complex commercial frauds it may well be part of the case that an absent person or institution was party to dishonest conduct somewhere in the chain. Everything will depend on the facts of the individual case.

40. In the circumstances of this case, we consider that the FTT was fully entitled to make findings of fraud against Mr Bridger. Mr Katib had put Mr Bridger's conduct squarely in issue in his witness statement and, as we have concluded above, HMRC had adequate notice of the allegations that were made against him and the relevance of those allegations to Mr Katib's appeal. The facts, therefore, are in marked contrast to those in *MRH Solicitors*, where no fraud against the solicitors had been pleaded. If Mr Bridger or Sovereign Associates were dissatisfied with the findings that the FTT made, in principle they had a remedy since the decision of the FTT would be susceptible to judicial review just as the decision of the county court was in *MRH Solicitors*. However, the mere fact that Mr Bridger or Sovereign Associates might feel aggrieved at findings that were made in their absence does not allow HMRC to escape the implications of those findings.

41. For all of those reasons, HMRC's appeal on Ground 2 is dismissed.

Ground 3

42. As Ground 3, HMRC argue that the FTT erred in law in giving too much weight to Mr Katib's complaints about Mr Bridger in circumstances where he had not waived any privilege that existed. There is no suggestion that Mr Bridger is a solicitor, barrister or other legal professional whose advice is subject to legal professional privilege. However, both parties proceeded on the basis that communications between Mr Katib and Mr Bridger might nevertheless be subject to litigation privilege on the basis that they took place in contemplation of litigation between Mr Katib and HMRC. Without deciding the point, we will similarly proceed on the basis that Mr Katib might have been entitled to assert litigation privilege.

43. HMRC's Ground 3 needs to be understood in the context of an application that they made to the FTT on 12 January 2017. In that application, HMRC asked the FTT, among other matters, to direct Mr Katib, no later than 8 weeks before the hearing date, to confirm (i) whether he waived privilege over communications with Sovereign Associates; (ii) whether he consented to HMRC contacting Sovereign Associates and (iii) to provide HMRC with contact details to enable them to do so.

44. HMRC, therefore, had shown an interest in contacting Mr Bridger and Sovereign Associates themselves and considered that they needed directions from the FTT to enable them to do so. On 17 February 2017 a Tribunal caseworker made case management directions which referred to HMRC's application of 12 January 2017, but

did not make the directions regarding Sovereign Associates that HMRC had sought and gave no reasons for declining to make them. HMRC did not persist with their application for directions from the FTT, but rather asked Mr Katib's representatives in *inter partes* correspondence if Mr Katib would waive privilege as regards communications with Sovereign Associates. Mr Katib did not provide a general waiver of privilege in the terms that HMRC requested.

45. HMRC submit that the FTT should have concluded that, in an absence of a general waiver of privilege, Mr Katib's complaints about Mr Bridger were "featherweight". They invite this Tribunal to issue general guidance to the FTT to the effect that a formal waiver of privilege should be required in similar cases where a taxpayer is relying on the averred failings of professional advisers in support of an application for permission to make a late appeal.

46. Mr Watkinson referred us to various authorities in which a court attached significance to the presence of a waiver of privilege where a litigant is relying on the shortcomings of an adviser in support of a claim for discretionary relief. For example, in *Devon & Cornwall Autistic Community Trust (a company limited by guarantee) v Cornwall Council* [2015] EWHC 129 (QB), a company applied for permission to serve witness statements late, and for a trial date to be vacated even though at that time it was in breach of directions. In connection with that application, they argued that their legal advisers had wrongly terminated their retainer leaving them unable to comply with directions.

47. The court concluded that the company's explanation of the circumstances in which their legal advisers ceased to act was inadequate saying, at [21]:

> In my judgment, the reasons which explain why matters have come to this pass cried out for proper and detailed explanation. In circumstances such as this, I would have expected a detailed witness statement from senior employees of the Claimant setting out, with full particulars, the precise events which have led to the present situation and, for reasons set out below, a waiver of privilege thereby permitting the legal advisers to explain themselves.

48. However, in *Devon & Cornwall Autistic Community Trust*, the court was not setting out a general rule that, in all cases, a formal waiver of privilege is a necessary precondition for a litigant seeking to blame previous advisers to obtain relief from sanctions. In a similar vein, we have derived relatively little assistance from the authorities in the criminal law arena on which HMRC relied, including *R v A (EO)* [2014] EWCA Crim 567. We accept that those authorities indicate that the Court of Appeal is unlikely to entertain appeals made on the basis of incompetent representation by previous advisers unless the convicted defendant waives privilege to allow the former advisers to answer the allegation. Absent such an approach, the Court of Appeal would be invited to take the word of a convicted criminal, with an obvious self-interest in making allegations against former advisers. However, Mr Katib was not a convicted criminal. The penalty assessments against which he was seeking to appeal had not been determined to be due beyond all reasonable doubt (and indeed had not been considered by an independent court or tribunal at all). In seeking permission to appeal late against

those assessments, Mr Katib was in a very different position from that considered in *R v A (EO)*.

49. We accept HMRC's general point that, 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 and we will return to this issue in the "Disposition" section that follows. Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers. It will often be impossible to give the requisite full account without waiving privilege. In this case Mr Katib did provide a reasonably full account of his dealings with Mr Bridger. He put correspondence with him into evidence and, in doing so, waived any privilege that he had in relation to that correspondence. We reject HMRC's submission that, in the absence of a signed, formal waiver of privilege, this was necessarily insufficient for his application to succeed. If HMRC felt that they needed full access to Sovereign Associates and Mr Bridger to meet the case that Mr Katib was making, they could have persisted with their application to the FTT referred to at [43]. Once they had not done so, it was a matter for the FTT to decide on the basis of the evidence it had whether Mr Katib's complaints about his former advisers were justified and, if they were, whether he should be granted permission to make a late appeal. At [7], the FTT considered, and rejected HMRC's submissions that the correspondence put in evidence had been "cherry-picked" and was insufficient and having done so, we consider that, even without a formal waiver of privilege, the FTT's findings as to the conduct of Mr Bridger were open to it. HMRC's appeal on Ground 3 is accordingly dismissed.

50. We see no need to issue general guidance to the FTT that a formal waiver of privilege is necessary in all cases. Provided that an FTT follows the guidance set out in *Martland* referred to above and acknowledges that, in most cases, failings by a litigant's adviser are, for the purposes of an application for permission to appeal late, to be regarded as failings of the litigant (as discussed in more detail in the next section), it will be able to determine future applications of this nature.

Disposition

51. We have decided that the Decision contains an error of law of the kind HMRC identified in their Ground 1 of appeal. It follows that, under s12 of the Tribunals, Courts and Enforcement Act 2007, we have the power (but not the obligation) to set aside the Decision. If we choose to set aside the Decision, we must either (i) remit the appeal back to the FTT with directions for reconsideration or (ii) re-make the Decision.

52. The FTT's error of law was to ignore the importance of respecting statutory time limits even though this was of particular importance to the exercise of the FTT's discretion. That error was clearly material to the Decision and we will set the Decision aside. We have also decided to remake the Decision as set out below by applying the three-stage approach set out in *Martland* (outlined at [15] above).

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

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

> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

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

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

Martland, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.

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

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

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

60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*. Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered

this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

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

MR JUSTICE MANN

JUDGE JONATHAN RICHARDS

RELEASE DATE: 19 June 2019