[2019] UKUT 0209 (TCC)

Reference number: FS/2018/002

PENSIONS REGULATOR - reference of determination to issue contribution notice - reference struck out due to non-compliance with unless order - whether reference should be reinstated - Rules 2, 8 (1) (a), (5) & (6) and para 5 (2) Sch 3 Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DOMINIC CHAPPELL **Applicant**

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 11 June 2019

The Applicant in person

James Walmsley, Counsel, instructed by The Pensions Regulator, for the Respondent

DECISION

Introduction

1. This decision relates to an application made by the Applicant ("Mr Chappell") on 14 December 2018 to reinstate a reference made by Mr Chappell on 9 February 2018 and which had been struck out automatically on 30 November 2018 due to the failure on the part of Mr Chappell to comply with an "unless" order made on 5 November 2018. The reference relates to a Determination Notice issued by the Determinations Panel of The Pensions Regulator ("TPR") dated 15 January 2018 pursuant to which the Determinations Panel determined that Contribution Notices be issued to Mr Chappell pursuant to s 38 Pensions Act 2004 ("PA2004") in a total amount of £9,542,985 in respect of two pension schemes, the BHS Pension Scheme and the BHS Senior Management Scheme (together the "Schemes").

Background to the reference and the regulatory proceedings

2. The summary in [3] to [7] below is taken from TPR's Statement of Case in these proceedings. Although Mr Chappell disputes a number of the factual statements in the Statement of Case it does not appear that he disputes the matters that constitute the following summary, unless otherwise indicated.

3. BHS Limited ("BHS") was a well-known British department store chain that operated at many locations across the UK. In 2000, BHS was purchased by a company ultimately owned by the wife of Sir Philip Green and was within the control of Sir Philip Green's family.

4. In March 2015 Retail Acquisitions Limited ("RAL"), a company of which Mr Chappell was at the material times a director and 90% shareholder, purchased the BHS group from the Taveta Group, whose main operating business was the well-known retail owner of various retail outlets, Arcadia, and which was controlled by Sir Philip Green's family. The purchase price was £1. The vendor was to make a loan to BHS's parent company on completion, some intercompany debt was written off and the remaining intercompany debt was secured by fixed charge. At completion, RAL was to procure a £10 million capital injection.

5. At the time of this transaction ("the Sale"), it was known that the Schemes had substantial deficits and under the terms of the acquisition agreement RAL was to use its reasonable endeavours to reach agreement with the Trustees for the compromise of the liabilities of the Schemes and implement such a compromise as soon as reasonably practicable following completion. BHS was to continue to pay £5 million per annum contributions to the Schemes, which would be matched by the Taveta Group for a period of 3 years.

6. When RAL agreed to enter into the transaction, its board minutes recorded that implementing a prior proposal by BHS to address the deficits in the Schemes would be expensive and that post completion all of the implementation risk and cost of those

proposals would be RAL's. That prior proposal, named "Project Thor" had been put forward on behalf of BHS and Taveta to the Trustees of the Schemes for the restructuring of the Schemes by compromising their liabilities alongside a wider restructure of the BHS business, in particular its real estate portfolio. The proposal sought to deliver a better outcome for members of the Schemes than would have been achieved in the event of BHS's insolvency. Deloitte had been appointed to advise the Taveta Group in relation to Project Thor and carried out extensive work which recognised that BHS was a loss-making business which depended on wider support from its parent's group and that, without a solvent restructuring, BHS would enter administration and the Schemes would enter the Payment Protection Fund. No agreement to implement Project Thor was ever reached.

7. Significant sums were paid by BHS to Mr Chappell, his associates, and advisers following the completion of the Sale. Although the amount is in dispute, TPR contends that £9,542,985 was paid before BHS went into administration on 25 April 2016. Liquidators were appointed in December 2016.

8. In November 2016 TPR commenced regulatory proceedings by the issue of a Warning Notice against Mr Chappell seeking the issue of Contribution Notices against him pursuant to s 38 PA 2004. In broad terms, s 38 PA 2004 imposes a number of tests or conditions for the issue of a Contribution Notice against a target to pay amounts to an occupational pension scheme. The target must be a person connected with, or an associate of the employer in relation to the scheme. It is common ground that Mr Chappell is connected with the employer, BHS, by virtue of his directorship of BHS following the sale to RAL. In those circumstances, one of the further conditions for issuing a Contribution Notice is that TPR is of the opinion that the target was a party to an act or a deliberate failure to act which has caused material detriment to the scheme. If that is so, a Contribution Notice may be issued to the target if TPR is of the opinion that it is reasonable to impose liability on the target to pay the sum specified in the Contribution Notice.

9. In this case, both in the regulatory proceedings and in its Statement of Case filed in this reference, TPR contends that Mr Chappell is a party to a number of acts or failures which have caused a material detriment to the Schemes, and which I refer to again later, including

(1) The Sale itself.

(2) The continuation in business when BHS was loss-making and insolvent, thereby worsening the position of the Schemes.

(3) The appointment of inexperienced management to the BHS board.

(4) The failure to prepare a realistic "turnaround" business plan for BHS.

(5) Other failures in the way in which BHS was managed resulting in further deterioration and/or removal of value from the business.

(6) The late and minimal attempts to pursue a pension restructuring in the context of the required business "turnaround" and the inability to recognise the

need for, and secure (whether from the former owner or otherwise) of the necessary funding for a pensions restructuring solution.

(7) The failure meaningfully to engage with the Trustees on the issue of pensions.

(8) The failure to commence essential negotiations with landlords in a timely manner, culminating in the administration of BHS.

(9) Extraction of monies directly or indirectly from BHS to the benefit of Mr Chappell, his family, associates and advisers, through RAL, without reasonable basis.

10. TPR contends that those matters have caused material detriment to the likelihood of accrued benefits under the Schemes being received and that it is reasonable to issue Contribution Notice in an amount of £9,542,985, being the figure that TPR has identified as having been extracted or diverted from BHS for the benefit of Mr Chappell, his family, his associates and RAL's advisers.

11. Mr Chappell denies that he has been a party to acts which have caused material detriment to the Schemes, objects to the characterisation of the amounts paid to him or his family, associates and advisers as having been "extracted" as opposed to have been paid for legitimate commercial reasons and contends that it would not be reasonable to issue Contribution Notices to him.

12. With the Warning Notice, TPR disclosed to Mr Chappell some 14,000 documents which it had obtained during the course of its investigations as regards the Schemes and it appears that Mr Chappell carried out a review of those documents with his legal advisers, including counsel, following the issue of the Warning Notice. However, despite being given extensions of time to do so, Mr Chappell did not put in any written representations on the Warning Notice nor did he attend the oral representations meeting before the Determination Panel. Accordingly, the Determination Notice was issued without the benefit of any representations from Mr Chappell.

Procedural history of the Tribunal proceedings

13. As mentioned above, Mr Chappell filed his reference notice with the Tribunal within the statutory time limit on 9 February 2018.

14. Following the grant of an extension of time, TPR filed its Statement of Case and its list of documents, listing those documents on which it relied in support of the referred action and further material which in the opinion of TPR might undermine the decision to take action on 24 April 2018, as required by paragraph 4 of Schedule 3 to The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"). Prior to compiling its list of documents, in order to limit the material to those documents which are necessary in order to comply with the relevant provisions of the Rules as regards disclosure, TPR had carried out a filtering exercise from documents it disclosed to Mr Chappell in the regulatory proceedings so that the list comprised some 2,200 documents in total.

15. It is not disputed that TPR sent its Statement of Case and list of documents to Mr Chappell on the same date, as required by paragraph 4 (4) of the Rules. From that point, as provided in paragraph 5 of Schedule 3 to the Rules, time began for the filing by Mr Chappell of a reply to the Statement of Case; paragraph 5 (1) (a) provides that the Reply must be received by the Upper Tribunal no later than 28 days after the date on which the applicant received a copy of the Statement of Case.

16. It is the usual practice of the Tribunal on a receipt of a Statement of Case to write to the applicant to inform the applicant of its receipt and to notify him of his requirement to file a Reply and the time limit within which it is to be filed. However, there were two mistakes relating to the letter issued in this case. First, it was sent to an incorrect email address and secondly, it wrongly stated that time for the filing of the Reply started from the date of the Tribunal's letter, in this case 11 May 2018, rather than 24 April 2018, the date on which the Statement of Case was filed with the Tribunal and copied to Mr Chappell.

17. On 12 June 2018, which was after the time for the filing of the Reply had expired, the Tribunal realised its mistake as regards the email address, notifying Mr Chappell's representative of that mistake and stating "accordingly, you have 28 days from today (that is, until 10 July 2018) to provide a written reply and list of documents." As mentioned, the date of 10 July was given because of the Tribunal's misapprehension that time for the filing of the reply only began to run from the date on which the Tribunal notified Mr Chappell's representative that the Statement of Case had been received.

18. That email subsequently came to my attention, and in directions dated 17 August 2018 (which I refer to later) I directed that in the circumstances the Tribunal's notification that the initial period expired on 10 July must be regarded as the granting of an extension of time, although made under a misapprehension.

19. TPR had heard nothing from Mr Chappell following service of the Statement of Case on 24 April 2018, and so wrote to Mr Chappell on 18 June 2018 to ask for clarification of his intentions. It appears that, following the lapse of some 11 weeks since the filing of the Statement of Case TPR was concerned that Mr Chappell's intentions may simply be to delay the process for as long as possible.

20. TPR did not even receive an acknowledgement to that letter and therefore wrote to the Tribunal on 27 June 2018. TPR sought an unless order requiring compliance with the deadline of 10 July 2018, subject to any reasoned objection that may be raised by Mr Chappell within 7 days of the order being imposed.

21. On 10 July 2018 (the day of the deadline) the Tribunal directed that TPR's application was premature, and that the Tribunal would be working on the basis that the Reply would be filed on time.

22. After close of business on 10 July 2018 (and therefore after expiry of the deadline for the Reply) Mr Adrian Ring, solicitor, acting on behalf of Mr Chappell, sent an email containing an application for an extension of 3 months for the Reply.

23. In that email Mr Ring, in referring to the Tribunal's email of 12 June 2018, said that attachments to the email included the Statement of Case and the List of Documents. I accept, as submitted by Mr Walmsley, that the way that Mr Ring's response was phrased appeared to give the impression that it was only on 12 June 2018 that those documents had been received by Mr Chappell and Mr Ring's email did not indicate that the Statement of Case and List of Documents had in fact been sent on 24 April 2018.

24. In support of the application for an extension of time, Mr Ring stated that Mr Chappell's legal team consisted of two people, plus counsel and that those persons had "relevant and necessary knowledge and cannot be easily replaced". The email went on to say:

> "It has taken the time to date to review the Statement of Case and begin to review the List of Documents. TPR notes that [Mr Ring's firm] have not requested any documents, but fails to mention that this is unnecessary, as the memory stick which accompanied the Warning Notice contains everything we have so far searched for. For some perspective, Mr Chappell and his team have to date extracted and considered 12 lever arch files of material. Once all the material is considered, drafting a Reply can begin, but not before. The applicant's list of documents also need to be considered, although most if not all of the list will comprise material already known to and already obtained by TPR. It is likely to be mostly relevant documentation taken from the Warning Notice disclosure."

25. I accept Mr Walmsley's submission that what I have quoted above gives the impression that a document review process was in progress (involving counsel as well as two persons from Mr Ring's firm) as a necessary precursor to drafting of the Reply. I also accept his submission that the terms of the email specifically recognised that there would need to be a list of documents supplied by Mr Chappell, even if all the documents to be relied on were already known to and already obtained by TPR.

26. TPR responded to this application on 12 July 2018. It objected to the manner in which Mr Chappell had applied after the event for the extension without giving any real explanation for what efforts had been made to meet the previous deadline and why the application was only made when it was. TPR also criticised the lack of explanation as to how far the intended document review had progressed and the fact that the drafting of the Reply had not even started. TPR did, however, indicate that despite these points, it would not seek to object to the granting of the extension sought, should the Tribunal be minded to grant an extension.

27. TPR sought that any extension be imposed on an unless order basis, for a number of reasons, including the points described above and its observation that Mr Chappell must have been aware for a very substantial period of time that he would be requesting an extension of time, and indeed a very lengthy one, yet waited until after the expiry of the deadline for filing the Reply before communicating this fact to the Tribunal and TPR.

28. On 18 July 2018, the Tribunal gave Mr Chappell 14 days to respond to the Regulator's representations on the 3 month extension application.

29. On 17 August 2018 I granted the 3 month extension sought, to 9 October 2018. I declined to make an unless order, stating that the reason was that the failure to seek the extension before the expiry of the period running at that time was trivial, the application having been made an hour and a half after the expiry time. However, I also stated in my reasons for granting the extension that taking into account the previous extension which was treated as having been made as a result of the Tribunal's mistake, with the extra extension which had now been granted Mr Chappell would have had a very lengthy period to prepare his Reply and list of documents and in those circumstances, it would be very unlikely that I would be able to agree to a further extension, unless there were exceptional circumstances for which a full and verified explanation was given.

30. The revised deadline of 9 October 2018 passed without the Reply having been filed or served and without any application for a further extension of time having been made. Indeed, there was no communication from Mr Chappell or his solicitor of any kind relating to the matter to either TPR or the Tribunal. TPR wrote to Mr Ring about this on 12 October 2018. It asked Mr Ring whether Mr Chappell intended to pursue the reference or whether he had no objection to being struck out, asking for a response by 15 October 2018. No response to that letter having been received, TPR made an application to the Tribunal on 17 October 2018 for the Reference to be struck out.

31. On 18 October 2018 the Tribunal wrote to the parties as follows:

> "In the light of the Regulator's representations and the absence of any communication from the Applicant or his representatives, subject to any further representations from either party which are made within the next 7 days, the Tribunal proposes to issue a direction that the proceedings be struck out unless the Applicant's Reply is filed in compliance with the Tribunal Procedure Rules within 7 days of the Tribunal's direction."

32. On 24 October 2018 Mr Ring applied for a further extension to 30 November 2018. Mr Ring characterised the original extension requested as being a "first extension", discounting the extension granted as a result of the Tribunal's misapprehension as being one shared by all the parties and confirming that no work was undertaken on the matter until the Tribunal's letter of 12 June 2018. I regard that explanation as disingenuous; at no time was it disputed that Mr Chappell had received the Statement of Case and TPR's List of Documents on 24 April 2018 and if he had examined the Rules at that point he would have seen that time had started to run from that time. I think it is more likely, consistent with what happened on 9 October 2018, that Mr Chappell was aware of the deadline but simply allowed it to pass. Therefore, and as is apparent from the directions I made on 17 August 2018, the extension granted on 17 August 2018 cannot be regarded as a first extension.

33. As Mr Walmsley observed, in the letter seeking the extension Mr Ring emphasised that a substantial document review process was in progress, and (though it was left unclear whether Counsel had yet been instructed) confirmed that Counsel

would be involved in the drafting of the Reply: Mr Ring suggested in the letter that, if necessary, alternative counsel would be instructed in order to comply with the new deadline sought.

34. The main explanation given for the failure to meet the previous deadline was Mr Chappell's engagement in significant other litigation, namely his appeal against his conviction for failing to meet its obligations under s 72 PA 2004 to provide documents to TPR and the proceedings being brought against him to disqualify him from acting as a director under the Companies Directors Disqualification Act 1986. It was disclosed at that time that Mr Chappell was the subject of an unless order to file and serve evidence in those proceedings by 30 October 2018, in default of which he would be debarred from relying on evidence in those proceedings.

35. It was accepted in Mr Ring's letter that it was reasonable for the Tribunal to treat any extension granted as the final deadline for any Reply.

36. By letter of 1 November 2018 TPR sought directions that would effectively require (on unless order terms) Mr Chappell to put in evidence in support of the application for the further extension, compliant with the indication I gave in my reasons for the directions of 17 August 2018 that any further extension would require a "full and verified explanation" to be given.

37. On 5 November 2018 I made directions, granting Mr Chappell the extension sought, but on unless order terms (the "Unless Order"). I set out in full the reasons I gave for those directions as follows:

> "1. The Applicant was granted a lengthy extension of time to provide his Reply pursuant to my directions which were released on 17 August 2018. Those directions made it clear that following the extension of time that was granted, namely until 9 October 2018, the Applicant would have been given a very lengthy period to prepare his Reply and list of documents and that it would therefore be very unlikely that I would be able to agree to a further extension, unless there were exceptional circumstances for which a full and verified explanation had been given.
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> 2. 9 October 2018 came and passed without any communication from the Applicant, and in particular no application was made prior to the expiry of the time limit to extend time. The Respondent made a strike out application on 17 October 2018 and it was only on 25 October 2018 that the Applicant made an application for a further extension of time. That conduct is unacceptable. It is not only discourteous to the Tribunal but in my view it constitutes a failure to cooperate with the Tribunal to further the overriding objective of the Rules to avoid unnecessary delay in breach of Rule 2 (4) of the Rules.
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> 3. The Applicant's application gives no reason why an application for an extension of time could not have been made before the current period expired. In the absence of such an explanation, I can only assume that the approach of the Applicant when he realises that he will not be able to meet a deadline is simply to ignore it and then react when either the Respondent or the Tribunal take some action. Again, that behaviour is unacceptable.

4. It is quite clear that the Applicant must have known for some time that he was unlikely to meet the original deadline. That must have become apparent to the Applicant's representative following his unfortunate illness (and I am prepared to accept Mr Ring's word as a solicitor without further verification as to the nature of his illness and his inability to work). He should at that time have been open and cooperative with the Tribunal and alerted it to the difficulties that were being encountered and how it was going to affect the timetable. Likewise, he should have informed the Tribunal as to other unforeseen difficulties arising out of other litigation in which the Applicant is involved. I do not accept the intervention of the holiday season as an excuse; this was clearly factored into the timetable for the extension granted in August, as I made clear in my reasons for the directions.

5. In the circumstances, the case for a further extension is not strong. I agree with the Respondent that the application gives no indication as to how far the preparation of the Reply has been progressed.

6. The Respondent has asked that I should require a detailed explanation as to all of these matters, properly verified, before I grant an extension. However, the time between now and 30 November is relatively short. The Respondent's latest application presupposes that I will have sufficient time at my disposal to consider all the material that comes in and make an assessment as to whether in the light of that material I should grant a further extension, a process that is unlikely to be completed until shortly before the period requested for the extension expires. I do not believe that carrying out such a process would be a fruitful use of the Tribunal's time and it would divert the Applicant from the pressing need to complete his Reply.

7. Consequently, in my view the appropriate course of action to take is to grant an extension but to make it the subject of an unless order. In view of the conduct of the Applicant to date, and without a strong case for a further extension, bearing in mind the need for time limits to be respected and litigation to be progressed without unnecessary delay the granting of a further extension may be regarded as generous. In those circumstances, the making of an unless order which makes it clear that the Applicant now has one final chance to comply with the Rules is justified.

8. If the Applicant does not meet the extended deadline, then the proceedings will automatically be struck out without further reference to the parties. The direction makes it clear that the Reply must comply with all of the requirements of paragraph 5 to Schedule 3 to the Rules if the direction is to be regarded as having been complied with."

38. At 5.01.pm on 30 November 2018, one minute after the deadline, Mr Ring filed and served a document labelled as Mr Chappell's Reply. I return later to the substance of that document, but at this stage I observe, and this was not disputed by Mr Chappell in the hearing of his reinstatement application, that despite the indications to the contrary given in Mr Ring's letter of 24 October 2018 as referred to above, it is clear from the document itself that it was not prepared by Counsel nor was it the result of a substantial document review process. The document was not accompanied by a

list of all the documents on which Mr Chappell relied in support of his case, as required by paragraph 5 (3) of Schedule 3 to the Rules.

39. Mr Chappell admitted that he prepared the document himself and I accept Mr Walmsley's submission that it bears the hallmarks of a document produced without any attempt to cross check underlying contemporaneous documents in any detail and reads more like a commentary on TPR's Statement of Case. Mr Chappell confirmed at the hearing that no significant document review process had taken place since that conducted in relation to the Warning Notice and that he was in effect acting in person in relation to this reference. Mr Chappell said that neither Mr Ring and his firm nor Counsel were involved in the matter in any substantive way because of a lack of financial resources on his part.

40. The Tribunal wrote to TPR on 3 December 2018 saying that it had 14 days to submit any secondary disclosure. In the light of that letter, TPR wrote to Mr Ring on 4 December 2018 reserving all its rights in respect of what it contended were Mr Chappell's failures to comply with paragraph 5 of Schedule 3 to the Rules, but also in particular requesting that Mr Chappell provide his putative List of Documents as soon as possible and indicate if he would have any objection to a holding order confirming that time was not running for secondary disclosure pending receipt of that List of Documents. TPR confirmed that it did not seek to insist that Mr Chappell include documents on his list which already appeared on TPR's list of documents supplied with the Statement of Case. However, it said that if there were any further documents on which Mr Chappell wished to rely they should be included, whether they were documents TPR had not seen before or were documents supplied with the Warning Notice but not included on TPR's List of Documents in the Tribunal proceedings and which Mr Chappell had previously indicated were being reviewed for the purposes of production of the Reply.

41. No substantive reply having been received from Mr Ring, TPR wrote to the Tribunal on 7 December 2018 stating that all its rights were reserved in respect of non-compliance with the Unless Order, but in the meantime seeking a direction making clear that time was not running for secondary disclosure.

42. On 10 December 2018, the Tribunal wrote to the parties to inform them that the matter had been referred to myself and that I had observed that as a consequence of the failure to comply with paragraph 5 of Schedule 3 to the Rules by not providing a list of documents with the Reply, the reference must be regarded as having been struck out automatically pursuant to the terms of the Unless Order and the operation of Rule 8 (1) of the Rules. The parties were notified that the reference could therefore not proceed unless any further application was made to reinstate the reference pursuant to Rule 8 (5) of the Rules.

43. However, the email stated that I was prepared to reinstate the reference provided an application in that respect was received from Mr Chappell by 14 December 2018 and such application was accompanied by a full explanation of the reason for the failure to comply and the outstanding list of documents. The letter went on to say that if Mr Chappell did not file his list of documents by 17 December 2018 then the

reference would not be reinstated unless an application in that regard was made in compliance with Rule 8 (5) and in the meantime TPR would be under no obligation to provide any secondary disclosure as a result of the reference having been struck out automatically.

44. On 14 December 2018 Mr Ring made the reinstatement application. He said that Mr Chappell apologises that the Reply was "apparently" not in compliance with the Rules, stating that Mr Chappell meant no disrespect to the Tribunal and did not deliberately omit the list of documents upon which he relied in support of his case. Mr Ring explained that it had previously been indicated in the representations submitted on 10 July and the further representations submitted on 24 October that the documentation needed was likely to be within the material provided by TPR, including both the documents provided with the Statement of Case and those attached to the Warning Notice. Mr Ring stated that Mr Chappell did not appreciate the requirement to file a list of documents in circumstances where all the documentation was already in the possession of TPR and had already been listed. As Mr Walmsley observed, that explanation was in conflict with what was stated by Mr Ring on 10 July 2018 where it was accepted that there would need to be a list, even if the documents in question were already known to or had already been obtained by TPR.

45. Mr Ring also referred to Mr Chappell's lack of resources to enable him to review the documentation. He went on to say that Mr Chappell wished to rely on the documents provided by the Regulator with the Statement of Case and the core documents provided with the Warning Notice, attaching a list including hyperlink references from the original list provided by TPR at the time of the Warning Notice.

46. On 18 December 2018, the Tribunal gave TPR until 21 December 2018 to make representations in response to the reinstatement application. Those representations, opposing the application, were filed on 21 December 2018. In short, TPR opposed the application on the basis that serious breaches of the Rules and the Tribunal's directions had been committed because Mr Chappell had continued to show complete disregard and disrespect for the requirements of the rules and directions and the need to cooperate in the achievement of the overriding objective. Aside from the failure to provide a list of documents, TPR contended that the Reply did not comply with paragraph 5 (2) (c) of Schedule 3 to the Rules because it did not set out the reasons for disputing those matters in TPR's Statement of Case that he disputes.

47. On 4 January 2019 the Tribunal directed (among other things) that Mr Chappell state within 14 days whether he wished the application to be determined on the papers or following a hearing. On 18 January 2019, Mr Chappell stated that he wished the application to be determined following a hearing. In the course of the Tribunal arranging the dates for that hearing, Mr Ring gave every indication that he would be attending the hearing, stating that it would be unfair to expect to proceed with the hearing on a date that he (Mr Ring) was not available. On 20 February 2019, the reinstatement application was listed for 11 June 2019.

48. On 27 March 2019 TPR wrote to Mr Ring with some proposed directions for the case management of the reinstatement application (including provision for any

representations from Mr Chappell in response to TPR's representations objecting to the application) and the exchange of skeleton arguments a week before the hearing.

49. Having received no response to the letter of 27 March 2019, TPR wrote to Mr Ring again on 10 April 2019 requesting that Mr Chappell engage constructively, in particular in relation to the directions that were proposed for the management of the reinstatement application.

50. Having received no response to either the letter of 27 March 2019 or the letter of 10 April 2019, TPR wrote again on 26 April 2019, requesting (among other things) that Mr Ring at least confirm whether he agreed to the proposed skeleton deadline of 4 June 2019.

51. Having received no response to the letters of 27 March 2019, 10 April 2019 or 26 April 2019, TPR wrote again on 3 May 2019 stating (among other things) that in the absence of any response, TPR would proceed on the basis that Mr Ring had no comment on the proposal in relation to skeleton argument timing.

52. Having received no responses to the letters of 27 March 2019, 10 April 2019, 26 April 2019 or 3 May 2019, TPR wrote again on 8 May 2019 stating (among other things) that it would be applying that day for a direction from the Upper Tribunal in relation to skeleton argument timing. That application was made by email on 8 May 2019 and the Upper Tribunal made the direction sought on 13 May 2019.

53. In the correspondence from 27 March 2019 onwards TPR also sought to engage in relation to the hearing bundle, to which neither Mr Ring nor Mr Chappell provided a response.

54. TPR filed its skeleton argument in accordance with the Tribunal's direction on 4 June 2019. No skeleton argument was filed by on behalf of Mr Chappell. On 5 June 2019 Mr Ring wrote to TPR stating that Mr Chappell had no skeleton to exchange and that he would be relying on the material submitted by TPR with the Warning Notice as well as the Warning Notice itself in addition to the "detailed reply he has already filed and served in these proceedings." Mr Ring also stated that Mr Chappell would be representing himself at the hearing.

55. In his email of 5 June 2019 Mr Ring also referred to "two matters of note", one relating to a "qualifying floating charge" and whether it was genuine and the second was "the scandal surrounding the "bogus" PwC Audit of BHS that was finalised and put forward as genuine by BHS/Arcadia/Sir Philip Green prior to the purchase of BHS by RAL." Mr Ring stated that both events post-dated the proceedings begun by TPR, but both the qualifying floating charge and the Audit were referred to and relied upon by TPR.

56. In its email of 5 June 2019 TPR sought clarification of what exactly Mr Chappell wished to rely on and for what purpose. On 10 June 2019 Mr Ring responded, stating that Mr Chappell was not in a position to instruct him or counsel in relation to the hearing or a skeleton and "he is simply not equipped to provide a skeleton himself." He went on to say that Mr Chappell was content to rely on all of

the material produced by TPR, as sent to Mr Chappell under the cover of a Warning Notice and also accompanying the Statement of Case served in the Tribunal proceedings. He said that there was nothing in any of that documentation which had not been seen by, or analysed by, TPR. Mr Ring also observed that Mr Chappell had no documentation himself, not having had access to any BHS material since the commencement of the Administration. Mr Ring stated that this was "intended to be an answer to the possible criticism that Mr Chappell did not supply any documentation to accompany his Reply to the Statement of Case." As regards the "two matters of note" Mr Ring said that it was Mr Chappell's contention that they were relevant to the proper disposal of the reinstatement application as they were central to the case brought by TPR and Mr Chappell's ability to counter the accusations against him. At the end of his email, Mr Ring confirmed that his firm did continue to assist Mr Chappell in the matter, but nobody from his firm was intending to be in attendance at the hearing.

The pleadings

The Statement of Case

57. The principal matters on which TPR relies in the Statement of Case for the issue of Contribution Notices to Mr Chappell can be summarised as follows:

(1) Mr Chappell did little to investigate the matter of pensions or retain an understanding of the pension situation before the Sale and agreed to limited disclosure being given in relation to the Schemes (paragraph 49).

(2) It must have been apparent to Mr Chappell and the RAL Board of the seriousness of the pension issues facing BHS shortly after the Sale had been completed (paragraph 65).

(3) The precarious position of BHS immediately after the Sale was also known to the RAL team (paragraph 66).

(4) The fortunes of BHS (and the position of the Schemes) were damaged by the Sale and the way in which the business was conducted after the Sale (paragraphs 67 to 76). In particular:

(i) By overseeing the business that continued to be loss-making, the RAL team inevitably worsened the position of BHS to the detriment of its unsecured creditors, including the Schemes.

(ii) Inexperienced personnel were appointed to the board of BHS. Mr Chappell and the newly appointed directors had no or little retail or relevant management experience.

(iii) No realistic business turn-around plan was ever developed prior to the Sale or then put into action. Prior to the Sale, an Arcadia developed "turnaround plan" was presented which Grant Thornton, advisers to RAL, treated with some scepticism in their due diligence report prepared for the purposes of the Sale.

(iv) Measures to achieve cost savings on BHS's rent liabilities were not implemented, a creditors voluntary arrangement with landlords being entered into far too late.

(v) The envisaged sale of the BHS Oxford Street store did not take place until April 2016 thereby failing to generate £50 million working capital that was vitally needed.

(vi) A number of other properties not only took longer to sell than had been envisaged but were sold at an undervalue.

(vii) RAL injected no equity into BHS and no sustainable or long-term funding arrangement was ever put in place, as envisaged by RAL prior to the Sale.

(ix) Mr Chappell and his RAL colleagues failed to take adequate action to progress a solution to the issues facing the Schemes, not entering into any serious discussions with the Trustees until November 2015 and abdicating responsibility to others.

(5) In the period following the Sale, significant value was taken or diverted from the BHS business through a series of payments totalling £9,542,985 to Mr Chappell his family, his associates and RAL's advisers (paragraph 77).

58. At paragraphs 86 to 92 TPR contended that the Sale itself and the events following on subsequent to the Sale, and leading up to the ultimate administration of BHS, as described above, met the material detriment test that required to be satisfied for Contribution Notices to be issued, namely that the acts or failures have detrimentally affected in a material way the likelihood of accrued scheme benefits being received. At paragraph 91 TPR contends that analysis performed by KPMG shows that the immediate impact of the Sale was to very significantly impact on the estimated outcome analysis of the dividend to the Schemes were there to be an insolvency of BHS. In the same paragraph, TPR refer to the fact that at the time of the Sale, it was recognised by Deloitte (acting for the seller) and by the Trustees that a security package worth at least £55 million would need to be put in place in favour of the Schemes for the Trustees to be able to conclude that the Sale was not materially detrimental, or that any material detriment was adequately mitigated and none of that security was put in place, despite the board minutes of RAL which approved the entry into the Sale transaction noting the Trustees' view that the transaction was materially detrimental to the Schemes.

59. At paragraphs 94 and 95, TPR contended that the reasonableness test was met because it was not reasonable for Mr Chappell to be party to the act or series of acts on which the Regulator relies. In particular, TPR contends that Mr Chappell failed to show any or any adequate regard to the interests of the Schemes because he brought about the Sale without ensuring that adequate due diligence had been conducted in relation to the position of the Schemes, ignored his professional advisers' concerns about the limited nature of due diligence being conducted, and taking a reckless risk without sound basis that a resolution for the Schemes would be found. TPR contends that after the Sale, Mr Chappell did little if anything to attempt to bring about a pensions resolution and it was also unreasonable of Mr Chappell to facilitate the

extraction of over £9.5 million for the benefit of himself, his family, his associates and advisers, to the detriment of BHS and the Schemes. Furthermore, Mr Chappell was directly and closely involved in the Sale, its negotiation, the extent of due diligence, its final terms, and had a central role in the running of the business following the Sale, and the extraction of funds therefrom.

The Reply

60. In the Reply, Mr Chappell does dispute a considerable number of the provisions of the Statement of Case, but it is fair to say that often he provides merely a denial without any reasons for his disputing the provisions concerned or any indication of the matters on which he is going to rely to support his contentions.

61. In particular:

(1) At paragraph 30 of the Reply Mr Chappell, in response to TPR's contentions in paragraph 49 of the Statement of Case that Mr Chappell did little to investigate pensions matters or obtain an understanding of the pension situation, states that he "had a sound understanding of the pension situation" but gives no detail of how he obtained that understanding.

(2) At paragraph 37 of the Reply, in response to TPR's contentions in paragraph 65 of the Statement of Case, Mr Chappell states that "[TPR's] team was divorced from reality of how a pension settlement was going to come about."

(3) In response to TPR's contentions at paragraphs 67 to 76 of the Statement of Case that the fortunes of BHS and the position of the Schemes were damaged by the Sale and the way in which the business was conducted after the Sale, Mr Chappell:

(i) says "there is absolutely no evidence to corroborate the above statements";

(ii) denies that the persons RAL appointed to the board of BHS were inexperienced;

(iii) says that governance processes in line with best practice were implemented;

(iv) says that a realistic turnaround plan was developed and reviewed by Grant Thornton and denies that Grant Thornton treated this plan with some scepticism;

(v) says that a number of rent savings were achieved;

(vi) denies that the £50 million working capital to retained by the sale of the Oxford Street lease was vitally needed;

(vii) denies that any properties were sold at an undervalue, all sales being subject to independent valuation and that valuation reports "can be produced";

(viii) denies that RAL injected no equity into BHS, saying that the investment came from the vendor; and

(ix) refutes the contention that he and his colleagues failed to take adequate action to progress a solution to the pension issues, saying that was dependent on support from Taveta or Sir Philip Green who were primarily responsible for the pension deficit.

(4) At paragraph 70 of the Reply Mr Chappell disputes the KPMG analysis relied on by TPR at paragraph 91 of its Statement of Case but gives no reasons for disputing it. He says nothing about the security package that Deloitte had said needed to be put in place in favour of the Schemes of the Trustees to be able to conclude that the Sale was not materially detrimental to the Schemes.

(5) At paragraph 72 of the Reply Mr Chappell denies the qualitative assessment of material detriment, including the contention that the boards had insufficient experience and failed to implement a workable turnaround plan, contends that working capital for the business was found, blames TPR for the failure to engage with the problems presented by the Schemes in a timely manner and states that any value extracted from BHS was covered by RAL's equity injection.

(6) As regards the reasonableness test, Mr Chappell contends at paragraph 74 of the Reply that he brought significant commercial skill and expertise to ensure that the Sale itself did not make RAL liable for the accrued benefits of the Schemes and relied on the legal powers of TPR to hold the vendors to account. Mr Chappell disputes the quantum of funds identified by TPR as benefiting himself without providing any further detail.

62. I accept Mr Walmsley's submission that were the reference reinstated, and this document were to stand as Mr Chappell's Reply, then it would be expected that TPR would seek numerous further and better particulars of Mr Chappell's contentions in order that TPR might properly understand the evidence that it would need to produce in response to them.

The arguments of the parties in relation to the reinstatement application

63. In the absence of a skeleton argument from Mr Chappell in relation to the hearing of the application and any response from Mr Chappell or Mr Ring to the representations made by TPR to the reinstatement application, Mr Chappell's arguments are confined to the points made by Mr Ring in his letter of 14 December 2018, as summarised above, and the points that Mr Chappell made to me during the course of the hearing. These can be summarised as follows:

(1) The omission of the list of documents was not deliberate.

(2) In his original representations submitted on 10 July 2018 and the further representations submitted on 24 October 2018 Mr Chappell had explained that

the documents that would have appeared on the list were likely to be within the material already supplied by TPR.

(3) Mr Chappell did not appreciate the need to file a list of documents in circumstances where all the documentation was already in the possession of TPR and had already been listed.

(4) Mr Chappell had great difficulty in being able to, and lack of resources to be able to, review the documentation and, in his Reply, he had noted that he had no independent or separate documentation.

(5) Mr Chappell's list of documents comprises precisely the same documents as those listed by TPR.

(6) Mr Chappell also wishes to rely on the core documents provided by TPR on its list which were supplied as part of the Warning Notice procedure. Mr Chappell had produced the hyperlinked list that had been supplied with the Warning Notice which accordingly is also produced as part of Mr Chappell's list of documents. He said at the hearing that he thought he could not refer to the Warning Notice documents because of the restrictions on disclosure of those documents contained in PA 2004.

(7) The Reply was in compliance with the Rules if in fact there were no documents to be listed.

(8) Mr Chappell has a strong case. The documents disclosed by TPR demonstrate that the position of the Schemes is entirely as a result of Sir Philip Green doing nothing for years. The PwC audit on which TPR relies was misleading and whilst he was in control of BHS he acted in accordance with the Grant Thornton business plan.

(9) There were 14,000 documents which take a long time to read through. Mr Chappell had been swamped with document requests from TPR and he could not cope with all the documentation.

(10) Mr Chappell will now pursue the reference with vigour. He is prepared to resign from his job immediately so that he can devote all of this time to the matter.

64. TPR opposes the reinstatement application for the following reasons:

(1) Mr Chappell breached the terms of the Unless Order in that he failed to send with his Reply a list of all the documents on which he relies in support of his case and failed to set out in his Reply the reasons for disputing those matters in TPR's Statement of Case that he disputes.

(2) The burden is on Mr Chappell to persuade the Upper Tribunal that the right course is to reinstate the reference. In considering the application, the Upper Tribunal should apply the well-known *Denton* framework, with appropriate sensitivity to the Upper Tribunal context.

(3) Mr Chappell's breaches of the Unless Order are serious and significant. The breaches in question are fundamental to the effective and fair management

of the reference; further, underlying breaches were first committed on 10 July 2018, and even now have not been remedied.

(4) There are no or no good reasons for the breaches.

(5) In all the circumstances of the case, including taking appropriate account of the need to promote efficient litigation and compliance with rules, practice directions and orders, and the history of unacceptable conduct on the part of Mr Chappell in relation to this reference (as already found by the Upper Tribunal), the just course is for the reference to remain struck out.

Relevant legal principles to be applied in considering the reinstatement application

65. Rule 8 (1) (a) of the Rules provides that proceedings will automatically be struck out if the applicant has failed to comply with the direction that stated that failure by the applicant to comply with the direction would lead to the striking out of the proceedings.

66. The Unless Order provided that unless Mr Chappell sent or delivered to the Tribunal a written reply to TPR's Statement of Case in compliance with paragraph 5 of Schedule 3 to the Rules by 30 November 2018 then the proceedings "will be struck out without further reference to the parties."

67. Although Mr Chappell contends that the substance of the Reply did comply with paragraph 5 of Schedule 3 it is common ground that the failure to include a list of documents meant that the terms of the Unless Order were not met. Accordingly, the reference was struck out automatically as a result of the operation of Rule 8 (1) (a) on 30 November 2018.

68. Rule 8 (5) together with Rule 8 (6) provides that in those circumstances the applicant may apply to the Upper Tribunal in writing within one month of being notified of the striking out for the proceedings to be reinstated. That application was made on 14 December 2018 and was therefore in time.

69. In deciding whether to grant the reinstatement application, as required by Rule 2 (3) of the Rules, I must give effect to the overriding objective in Rule 2 (1) of the Rules to deal with cases fairly and justly. Rule 2 (2) of the Rule sets out a number of factors to which the Tribunal must have regard when exercising any power under the Rules, including the power to reinstate the reference that has been struck out. It seems to me, that in this case the following factors set out in Rule 2 (2) are relevant:

(1) avoiding unnecessary formality and seeking flexibility in the proceedings (Rule 2 (2) (b));

(2) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings (Rule 2 (2) (c)); and

(3) avoiding delay, so far as compatible with proper consideration of the issues (Rule 2 (2) (d)).

70. I should also have regard to Rule 2 (4) which provides that the parties must help the Upper Tribunal to further the overriding objective and cooperate with the Upper Tribunal generally.

71. Although the Civil Procedure Rules ("CPR"), and the cases on time limits and sanctions which have developed the courts' approach in applying the CPR do not apply directly in the Upper Tribunal, as established in *BPP Holdings Limited v HMRC* [2017] 1 WLR 2945 the Tribunal should generally follow a similar approach: see Lord Neuberger at [26].

72. Rule 3.9 of the CPRs represents the main point of connection between the specific procedural rules of the tribunals and the well-known and wider stream of authority on relief from sanctions and extensions of time in connection with the procedural rules of the courts.

73. Rule 3.9 now provides:

> "(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."

74. The key case setting out the approach the court should take in applying CPR Rule 3.9 is *Denton and others v TH White Limited and others* [2014] 1WLR 3926.

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

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

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

77. The Supreme Court in *BPP* implicitly endorsed the approach set out in Denton. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the First-tier Tax Tribunal (FTT). Accordingly, it can be seen why the Supreme Court said that the same approach should be applied in the Tribunals.

78. Consequently, in considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) at [43] considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say in the same paragraph:

> "Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

79. The Upper Tribunal then went on to set out how the three-stage process set out in *Denton* could be applied in the tribunal context at [44] to [47] as follows:

> "44….
>
> (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.

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

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

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the

applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

80. At [54] the Upper Tribunal rejected a submission that the merits of the underlying appeal are "ordinarily irrelevant" to any decision to admit a late appeal. That submission had been based on a statement by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495 where it said at [29 that "… the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues…". However, the Upper Tribunal said that *Global Torch* was concerned with a very specific case management decision (the strike out of proceedings for failure to comply with an unless order). The Upper Tribunal did not consider the point to apply to an exercise of judicial discretion as to whether it was appropriate for the FTT to assume jurisdiction over an appeal which had not been the subject of prior judicial consideration.

81. That statement therefore begs the question as to whether the merits of the proceedings is a relevant consideration on a reinstatement application in the tribunals.

82. In *Daniel Peters (otherwise known as Inkey Jones) v HMRC* [2019] UKUT 0058 (TCC), another case concerning a late appeal and where it was also argued on the basis of *Global Torch* that a tribunal should regard the merits of a late appeal as being irrelevant in the balancing exercise, the FTT agreed with the statement at [54] in *Martland* that what was said in *Global Torch* does not apply to the exercise of judicial jurisdiction which will determine whether or not jurisdiction arises. That statement therefore left open the question to what extent the merits of the proceedings were a relevant factor in applications for a relief from sanctions, such as an application for reinstatement.

83. That point was considered by the FTT in *Reno v HMRC* [2019] UKFTT 0184 (TC) where the FTT was considering whether to reinstate a reinstatement application which had been struck out because it had not been pursued which itself had been made following the striking out of proceedings as a result of non-compliance with an unless order.

84. The FTT adopted the approach set out by the Upper Tribunal in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 where Proudman J said at [23] that the criteria to be considered when deciding whether an appeal should be reinstated included consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained. At [19] the FTT referred to *Martland* and said that although the issue in that case concerned an application to make an appeal out of time it was clear from that case that the same principles applied when considering any relief from sanctions. The FTT therefore appeared to proceed on the basis that there is no difference in approach between what was said in *Pierhead Purchasing* and what was said in *Martland*.

85. However, with respect to the FTT, it appears to me that there is a difference in that in *Martland* the Upper Tribunal clearly drew a distinction as far as consideration of the merits of the case concerned, between a case involving a late appeal and where the tribunal had to consider whether it should assume a jurisdiction which it would not otherwise have had and a case involving a case management decision to impose a sanction in relation to proceedings in respect of which the tribunal already had jurisdiction.

86. In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuburger said at [29] of the judgment in that case:

> "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment…."

87. The case management issue in that case was ultimately whether to grant relief against breach of an unless order which had resulted in the proceedings having been struck out for non-compliance with the order. That is precisely the position in this case.

88. At [31] Lord Neuberger set out the rationale for providing an exception to the general rule that the merits were irrelevant in the following terms:

> "In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions…"

89. In financial services cases in the Upper Tribunal governed by Schedule 3 to the Rules, there is no provision for either party to apply for a summary judgment.

90. However, Rule 8 (2) (a) of the Rules contains a mandatory strike-out provision in circumstances where the Tribunal does not have jurisdiction in relation to the proceedings. Rule 8 (3) (c) contains a discretionary power for the Tribunal to strike out proceedings if it considers that there is no reasonable prospect of the applicant's case succeeding and there is a comparable provision for respondents (such as TPR) in Rule 8 (7) which enables the Tribunal to bar the respondent from taking any further part in the proceedings if the conditions and either Rule 8 (2) or 8 (3) are met.

91. It seems to me that these provisions are analogous to provisions for summary judgment contained in the CPRs.

92. Although Mr Walmsley submitted that much of Mr Chappell's case, as set out in the Reply was without merit, he did not go as far in his submissions to say that TPR will be justified in making a strike-out application were the proceedings to be reinstated, and in my view, he was correct not to take that course.

93. Focusing on the position of the applicant and applying by analogy Lord Neuburger's test of whether the applicant has an unanswerable case by reference to the provisions of Rule 8 of the Rules regarding strike-out, the Tribunal would need to consider whether the applicant's case, as set out in the reference notice and his Reply, identifies an unanswerable case in relation to an issue that would justify the making of a barring order against TPR. Examples of that might be where the Tribunal would have no jurisdiction because TPR's action was clearly time-barred or where as a matter of law it was clear that there was no basis for TPR's contentions that the outcome sought fell within the scope of the relevant legislation so that its case had no reasonable prospect of succeeding.

94. It follows from what I have said that I should not take account of the merits of the case to the extent laid down by Proudman J in *Pierhead Purchasing*. In that context, I observe that *Global Torch* was decided after *Pierhead Purchasing* and as it is a judgment of the Supreme Court I am of course bound to follow it, again applying the principle that the tribunals should adopt by analogy the approach taken in the courts to matters of this kind.

95. As regards the assessment of the seriousness of a breach in respect of which a sanction has been imposed, as Mr Walmsley submitted, the authorities in relation to CPR rule 3.9 demonstrate that although in considering applications for relief from sanctions, earlier breaches of orders committed during the course of the litigation are normally disregarded in determining the seriousness or significance of the breach in respect of which sanction was imposed, where the breaches are of a requirement contained in an "unless" order it is necessary, when assessing the seriousness and significance of that breach, to consider the underlying breach and the failure to carry out the obligation which was imposed by the original order or rule and extended by the "unless" order.

96. In *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 the court explained that this was justified because an "unless" order does not stand on its own. It observed at [38] that the court usually only makes an "unless" order against a party which is already in breach. It went on to say at [38] and [39]:

> "38…. the "unless" order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation. A party who fails to comply with an "unless" order is normally in breach of an original order or rule as well as the "unless" order.

> 39. In order to assess the seriousness and significance of a breach of an "unless" order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given."

97. At [41] the court observed that the very fact that X has failed to comply with an "unless" order is undoubtedly a pointer towards seriousness and significance. That was because X is in breach of two successive obligations to do the same thing and because the court has underlined the importance of doing that thing by specifying an automatic sanction in default.

98. Furthermore, as Mr Walmsley submitted, in *Khandanpour v Chambers* [2019] EWCA Civ 570 the Court of Appeal has clarified that where the unless order in question has been imposed as a result of failures to comply with more than one order over time, one looks at the whole sequence of failures as representing the "underlying breach", not merely the immediately preceding one: see [37] to [39] of the judgment.

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

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

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

Discussion

The seriousness and significance of the breach

102. I deal first with the failure to provide a list of all of the documents on which Mr Chappell relies in support of his case, as required by paragraph 5 (3) of Schedule 3 to the Rules. As I have said, there is no dispute that there was such a failure, but Mr Chappell seeks to argue that the breach has now been remedied as a result of Mr Ring's statement in his letter of 14 December 2018 that Mr Chappell wished to rely on the documents provided by the Regulator with the statement of case and the core documents provided with the Warning Notice, identified by means of the hyperlink references referred to above.

103. I do not accept that Mr Chappell has complied with his obligation to provide a list of the documents on which he relies to support his case as a result of the

statements made in the letter dated 14 December 2018. I agree with Mr Walmsley's characterisation that in so far as what was said was an attempt at compliance, it was nominal and superficial.

104. A statement that Mr Chappell wishes to rely on the documents already provided by TPR with the Warning Notice goes nowhere in terms of meeting the obligation. The attempt to add back all of these documents without any indication as to how Mr Chappell seeks to rely on them, in circumstances where those documents have been filtered by TPR as part of its exercise to ensure that only those documents on which it seeks to rely and which are relevant to the live issues which arise on the reference are before the Tribunal, not only fails to meet Mr Chappell's obligations but serves to increase both the cost of the proceedings and the ability to deal with the proceedings efficiently. Such an approach goes nowhere in enabling TPR to understand the basis on which Mr Chappell puts his case, which is the purpose of the requirement imposed by the Rules on the applicant to specify the documents on which he seeks to rely to support his case.

105. In any event, it is clear from the Reply that Mr Chappell does in fact seek to rely on documents that were not on TPR's list of documents. As referred to at [61] above, Mr Chappell says that various valuation reports can be produced "if required".

106. Mr Chappell did not indicate at the hearing that he proposed to take any further steps to remedy the breach. In those circumstances, applying the principles from the *British Gas Trading* and *Khandanpour* cases identified above, the relevant underlying breach was the failure to provide a list of documents on 10 July 2018 when the extended deadline for the filing of the Reply and list of documents was passed without an application for an extension of time. That means that the delay in complying with the obligation to provide a list of documents from the date on which it was due up to the point the reference was struck out was over 5 months. On any view, a delay of that length of time is both significant and serious.

107. The seriousness of the breach is aggravated by the fact that the breach continued in circumstances where I had clearly stated in the reasons I had given for the making of the Unless Order, as set out at [37] above, that compliance with the Unless Order was really Mr Chappell's final chance to comply with his obligations in relation to the filing of his Reply, in circumstances where he had allowed two previous deadlines to pass without explanation, conduct which I described as unacceptable. My reasons also made it absolutely clear that the Unless Order would not have been complied with unless the Reply complied with the requirements of the Rules.

108. The seriousness of the breach is further aggravated by the fact that it appears that the extensions were granted as a result of the Tribunal being misled as to the purpose for which the previous extensions had been sought. Mr Chappell presented the position as being that a heavy document review exercise was being undertaken involving two members of staff at Mr Ring's firm plus counsel: see my findings at [24] and [25] above. As Mr Chappell admitted at the hearing, no such document review was ever undertaken, nor, I infer, from what Mr Chappell told me at the

hearing about his lack of resources to pay lawyers was it ever seriously intended that such a review should take place.

109. Accordingly, what happened was that having had his final chance through the medium of the Unless Order to comply with his obligations in respect of the filing of the Reply and list of documents, at the last-minute Mr Chappell himself drafted a short Reply and sought to circumvent the obligation to provide a list of documents through the device which I have referred to at [102] above.

110. I now turn to the question as to whether the Reply, aside from the failure to provide the list of documents, complies with the requirement of paragraph 5 (2) (c) to Schedule 3 to the Rules in so far as it does not give reasons as to why Mr Chappell disputes the essential elements of TPR's case.

111. As I observed at the hearing, although it is the case that in general an applicant in person cannot excuse failure to comply with the Rules simply because he is unrepresented and cannot afford to pay lawyers, bearing in mind the requirement as part of the overriding objective to avoid unnecessary formality and seek flexibility in the proceedings and to enable the parties to be able to participate fully in the proceedings, the Tribunal will not insist on compliance to the letter where overall it is clear from the terms of the Reply what the applicant's case is and the basis on which the respondent's contentions in the Statement of Case are to be disputed. That is the bare minimum, because, as Mr Walmsley submitted, the requirement that reasons be given for disputing allegations in the Statement of Case serves an important function for the case management of references and on the particular facts of this case it will be important to understand what the nature of the dispute is over the material detriment test in order to determine what evidence may be required. Where any of those aspects are unclear but the Reply is accepted, then inevitably significant requests for further and better particulars will follow, thus adding to the potential cost and length of the proceedings and jeopardising their efficient case management.

112. As Mr Walmsley correctly submitted, TPR's case of material detriment as set out in paragraphs 91 to 93 of the Statement of Case has a number of facets to it. In particular, KPMG's analysis on the immediate impact of the sale of BHS in 2015 on the estimated outcome analysis were there to be an insolvency and the contemporaneous assessment that the security package of at least £55 million will be needed by way of mitigation in order to allow the conclusion that the sale of BHS was not immediately materially detrimental. As mentioned above, Mr Chappell sets out no basis on which he disputes the KPMG estimates neither does he say anything about the security package. In my view those are significant failings and, coupled with the other less serious matters referred to in my analysis of the Reply set out above, lead me to conclude that the failure to give reasons for the dispute is a significant and serious breach which, for the reasons I have set out above, has continued since 10 July 2018 and continues to this day.

113. Furthermore, for the reasons set out above, the seriousness of the failure is aggravated by the fact that the Tribunal was misled into believing that counsel was to

be involved in the drafting of the Reply which was one of the reasons why the various extensions were granted. Mr Chappell has admitted that counsel was not involved.

114. I therefore conclude that the failure to comply with the Unless Order was a serious and significant breach.

The reasons for the breaches

115. Mr Chappell's reasons for the breaches having occurred have changed over time. In the application made on 10 July 2018, it was clearly accepted that there would have to be a list of documents, even if the documents in question were already known to or had already been obtained by TPR. In his letter of 14 December 2018 Mr Ring said that the omission to provide a list of documents was not deliberate and that Mr Ring stated that Mr Chappell did not appreciate the requirement to file a list of documents in circumstances where all the documentation was already in the possession of TPR and had already been listed. I do not accept that explanation; it was clear from the application of 10 July 2018 that Mr Chappell was aware of what he needed to do in terms of producing a list of documents.

116. At the hearing, Mr Chappell advanced another explanation, namely that he thought he could not refer to the documents provided with the Warning Notice because of the statutory restrictions on disclosure of material associated with a Warning Notice. If, which I do not accept, Mr Chappell genuinely believed that then he should have sought to clarify the position with TPR but, as is apparent from the facts, Mr Chappell has not engaged with TPR at all at any stage in these proceedings.

117. Mr Chappell also pleads a lack of resource in being able to deal with the preparation of the list of documents. If the position was that he was expecting his lawyers to undertake the exercise, but because of lack of financial resource they could no longer be involved in the matter, then it was incumbent upon Mr Chappell, if he was intending then to carry out the exercise himself, to notify both TPR and the Tribunal of that change of circumstance and seek a further extension to enable him to carry out the exercise himself. Again, no communication of this nature was made, and as previously indicated, both the Tribunal and TPR had been proceeding on the basis that a heavy document review exercise was being undertaken, and that it was being undertaken by lawyers. As I have found, no such exercise ever took place following receipt of the Statement of Case, whether by the lawyers or by Mr Chappell himself.

118. Both at the hearing and previously, Mr Chappell has also referred to the fact that he has had no access to any documents of his own relating to the Schemes since he was locked out of BHS's premises following the commencement of the administration. However, insofar as Mr Chappell believed that there were documents in the administrator's possession that would assist his case, such as evidence of the steps taken during his stewardship of BHS to address the issues concerning the Schemes and he believed the administrators were being uncooperative in providing that material, he could have made an application to the Tribunal for disclosure of those documents under Rule 16 of the Rules, but no such application has been made.

119. In my view none of Mr Chappell's arguments provide a good reason for the failure to comply. As is apparent from the narrative of the events that have occurred since this reference was filed, Mr Chappell has failed at all material times to engage with and cooperate with both TPR and the Tribunal. I can only conclude that the Unless Order was not complied with because Mr Chappell took no serious steps to comply with his obligations under paragraph 5 of Schedule 3 to the Rules and his explanations as to what caused the failure to comply are neither plausible or adequate.

120. I therefore find that there is no good reason for the breaches that have occurred.

Evaluation of the circumstances of the case

121. As set out in *Martland*, I must now undertake a balancing exercise which will essentially assess the merits of the reasons given for the failure to comply with the Unless Order and the prejudice which would be caused to both parties by granting or refusing the reinstatement application.

122. I have found that there is no good reason for the failure to comply. That is a very strong factor in favour of not reinstating the reference.

123. As far as prejudice is concerned, there would be clear prejudice to TPR were the reference to be reinstated because it would then have to spend considerable resource in preparing for the reference in circumstances where it believed that the proceedings had come to an end.

124. In view of Mr Chappell's conduct to date, there could be no guarantee that the subsequent conduct of the proceedings would proceed smoothly in accordance with the further directions that will be necessary to bring the matter to a hearing. In that regard, it is notable that since the reinstatement application was listed, Mr Chappell and his advisers continued not to engage with either the Tribunal or TPR and failed without any prior explanation to comply with the directions which were made for this hearing, notably the requirement to produce a skeleton argument so that TPR could understand the basis on which Mr Chappell was seeking reinstatement of the reference.

125. Furthermore, as I have said, if I were to reinstate the proceedings now on the basis of the Reply as filed, then requests for further and better particulars would inevitably follow in order that TPR is in a position to prepare the necessary evidence. Mr Chappell's conduct to date suggests that there is a good chance that such requests would not be complied with satisfactorily were the Tribunal to endorse them. Further unless orders may then be necessary. Nothing that Mr Chappell said at the hearing gave me any confidence that his behaviour was likely to change. I could not take seriously his off-the-cuff comment at the hearing that he would immediately resign his job and devote himself entirely to pursuing the reference. It is therefore clear that it is highly likely that there would be significant prejudice to TPR in terms of costs and devotion of resources in preparing for a reference that, ultimately, may not be properly pursued. That is a very strong factor in favour of not reinstating the reference.

126. It is undoubtedly the case that there would be significant prejudice to Mr Chappell were I not to reinstate the application. TPR is seeking to impose liability on Mr Chappell for a very large sum of money. If the reference is not reinstated Mr Chappell will be deprived of the ability to challenge the issuing of contribution notices in the sum of about £9.5 million in circumstances where the Tribunal proceedings are the only opportunity for Mr Chappell to challenge TPR's findings through the judicial process. That is a strong factor in favour of reinstating the reference.

127. As far as the merits of Mr Chappell's reference are concerned, as I have indicated above, that point only becomes relevant if I were able to identify that there are unanswerable points that would lead to the determination of the reference in Mr Chappell's favour. I have not been able to identify any such points, and Mr Chappell has not drawn my attention to any such matters. The merits of the reference are therefore a neutral factor in this case.

128. Finally, I must give particular weight to the importance of efficient litigation and compliance with rules and orders. Mr Chappell has repeatedly failed to comply with directions culminating with the Unless Order which is also not been complied with. As I have also indicated, he has continued not to comply with the Tribunal's directions as regards the hearing of his reinstatement application. Unless a deadline is passed, he makes no attempt to respond to correspondence, either from TPR or the Tribunal. As I have repeatedly said, that conduct is unacceptable and demonstrates a fundamental failure to cooperate with TPR and the Tribunal, as required by the Rules. That conduct has undoubtedly impeded the efficient progress of this reference, as illustrated by the fact that very little progress has been made since the reference was filed over 17 months ago. I must therefore give strong weight to this factor in this case.

129. I conclude that the balancing exercise comes out firmly in favour of not reinstating the reference. In light of the fact that there is no good reason for the breaches, that there would be significant prejudice to TPR were the reference to be reinstated and the need to give strong weight to the importance of efficient litigation in compliance with rules and orders, the prejudice that Mr Chappell will undoubtedly suffer if the reference is not reinstated is strongly outweighed.

Conclusion

130. For the reasons set out above, the reinstatement application is dismissed and accordingly the proceedings in respect of this reference have come to an end.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 19 July 2019