[2021] UKUT 0275 (TCC)

Application for permission to notify late appeal to HMRC – whether FTT made error of law in refusing permission – whether FTT engaged properly with strength of Appellant's case in carrying out its balancing exercise – held the FTT did make an error of law in failing to follow the guidance in Martland *and in failing to give reasons which properly supported its decision, but the FTT's decision was nonetheless a correct one in the light of the* Martland *criteria applied correctly – decision re-made on that basis.*

UPPER TRIBUNAL
TAX & CHANCERY CHAMBER

Appeal number: UT/2020/000352

BETWEEN

SHANE DE SILVA — **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

TRIBUNAL: JUDGE KEVIN POOLE
JUDGE ASHLEY GREENBANK

Sitting in public by way of video hearing on 22 October 2021

Julian Hickey, counsel, for the Appellant (direct access)

David English, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, with the permission of Judge Thomas Scott given following an oral hearing, appeals against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") issued in summary form on 18 February 2020, for which full findings of fact and reasons were issued on 20 May 2020 ("the Decision").

2. In the Decision, the FTT considered an application by the Appellant for permission to notify late appeals to HMRC in respect of certain assessments for income tax and associated penalty and surcharge determinations (HMRC having refused to accept such late appeals) and dismissed it.

THE FTT'S DECISION

3. There is no dispute about the facts background facts found by the FTT, as set out at [3] to [14] of the Decision:

> 3. In February 2013, HMRC requested self-assessment returns from Mr De Silva in respect of the tax years 2009/10, 2010/11 and 2011/12. In the same month, Mr De Silva appointed ADHI Accountants to assist him in completion of the returns.
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> 4. HMRC did not receive any of those self-assessment returns from Mr De Silva.
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> 5. The self-assessment tax return of Mr De Silva for the tax year 2012/13 was submitted on 1 November 2013 but was rejected as various pages were missing.
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> 6. On 18 November 2013, HMRC issued notices of assessment with respect to the tax years ending April 2005 to April 2012.
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> 7. On 22 November 2013, Mr De Silva telephoned HMRC and explained that there were inaccuracies contained within the notices of assessment of HMRC. The self-assessment notes of HMRC detail Mr De Silva stating that he did not owe the sums referred to and to his telling HMRC to take him to court.
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> 8. Subsequently, in February 2016, HMRC commenced legal proceedings against Mr De Silva in the County Court.
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> 9. On 1 August 2016, Deputy District Judge Apple ordered that blank self-assessment returns for the tax years 2005 to 2012 be provided to Mr Silva which were subsequently sent to him by HMRC.
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> 10. On 16 September 2016, self-assessment returns were provided by Mr De Silva for the tax years 2005-12 and 2013 which were rejected by HMRC.
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> 11. On 28 July 2017, HMRC obtained judgment in the County Court against Mr De Silva.
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> 12. On 17 August 2017, Mr De Silva appointed his current representatives (ASL Partners). On the same day, ASL Partners first notified HMRC of the intention of Mr De Silva to pursue an appeal.
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> 13. In December 2017, the judgment obtained against Mr De Silva was set aside to enable Mr De Silva to seek to make an appeal to the First-tier Tribunal (Tax Chamber).
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> 14. As stated above, on 6 February 2018, an appeal was submitted to the First-tier Tribunal (Tax Chamber) on behalf of Mr De Silva. HMRC objected to the application of Mr De Silva to make a late appeal.

4. After setting out extracts from the Upper Tribunal decision in *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 (TCC) ("*Martland*") and *The Commissioners for HM Revenue and Customs v Katib* [2019] UKUT 189 (TCC), the FTT moved on to its discussion of the case (which also included various findings of fact as to the events which were relied on as reasons for the Appellant's delay in appealing to HMRC).

5. At [20], the FTT recorded that "In the present case, it is not in dispute between the parties that the delay was anything other than serious and significant with the intention to appeal being notified to HMRC from 551 to 1338 days late." The correctness of this statement was not disputed before us.

6. It was also noted at [21] that HMRC had "commenced proceedings in the County Court in February 2016 to recover the monies outstanding. HMRC contends that it was only after the County Court proceedings had been instituted in 2016 that Mr De Silva took any steps in relation to the assessments."

7. From [22] to [34] of the Decision the FTT examined individually the various reasons that had been advanced for the delay. As there is no dispute about the FTT's evaluation of those various reasons, we consider them no further (beyond observing that we accept, as the parties have, the FTT's findings as to those reasons).

8. The FTT then moved on to its evaluation of the circumstances as a whole, and its overall conclusion, in the following seven paragraphs:

> 35. In relation to evaluating the circumstances of the case as a whole, Mr Hussain on behalf of Mr De Silva explained at the hearing that he had prepared tax calculations based upon invoices relating to Safe Hands Security Systems provided to him by Mr De Silva and obtained from Mr De Silva's own computer. That is the security and electrical services business of Mr De Silva that we were told he had been running since about 2009.
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> 36. We were told also by Mr Hussain at the hearing that the invoices relied upon by him and provided to him by Mr De Silva would have been available prior to the first of the assessments having been issued in late 2013. That renders it even more difficult to comprehend the delay by Mr De Silva in seeking to appeal against the assessments given the existence of the invoices at that point in time.
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> 37. The calculations of ASL Partners provided at the hearing putting forward alternative income tax calculations for Mr De Silva detail income from the self-employment of Mr De Silva in excess of £34,000 and £41,000 in the tax years 2009/10 and 2010/11 respectively (and similar figures in later years) which indicates that the self-employment of Mr De Silva was clearly generating income at a consistent level over a number of years with consequential income tax implications. Mr De Silva would clearly have been aware of that at the time that the income was generated as it was his own safety and electrical services business.
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> 38. Considering the circumstances as a whole, we find that there is little prejudice to Mr De Silva and that the merits of the appeal succeeding at first blush are dim.
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> 39. Applying the three-stage test in *Martland* and having considered the case of *Angel Parlour Ltd* [2019] TC 07093 to which we were referred by the representatives of Mr De Silva, we find that the reasons given by Mr De Silva plainly are not reasonable excuses for the lateness of Mr De Silva in filing an appeal.

> **DECISION**
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> 40. We have concluded, in all the circumstances of the case, that Mr De Silva has not given a sufficiently good reason for a serious and significant delay in making an appeal.
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> 41. We refuse Mr De Silva permission to make a late appeal.

THE APPEAL TO THE UPPER TRIBUNAL

The grounds

9. The ground of appeal for which permission was given was as follows:

> In considering all the circumstances of the case, as required at the third stage of the evaluation set out in *Martland v HMRC* [2018] UKUT 178 (TCC), the FTT reached a decision in relation to the merits of the Appellant's appeal which no reasonable tribunal could have reached on the facts and as a result reached a decision on the application for permission which no reasonable tribunal could have reached.

Summary of the arguments

For the Appellant

10. In argument before us, Mr Hickey submitted that in the Decision the FTT simply did not engage with the Appellant's case that there was no overall income tax liability at all for the years covered by the assessments, indeed the Appellant was due a small refund. He submitted that the accounts and computations for the business for the years 2009-10 to 2012-13 included in the documents bundle before the FTT, combined with the information provided there about the Appellant's earnings from employment over the period from 2004-05 to 2014-15, demonstrated clearly that the Appellant had a very strong case.

11. Mr Hickey had specific criticisms of the various paragraphs of the Decision in this regard. As to [35] and [36], it was clearly recorded that the FTT had been taken through the tax calculations prepared by the Appellant's accountants and had been informed that the business had been started in about 2009; the basis of the tax calculations was copy invoices provided by the Appellant from his computer. Instead of engaging with this as reinforcing the strength of the Appellant's substantive case, the FTT said that since those invoices would have been available before the first assessments were issued in 2013, this rendered it "even more difficult to comprehend the delay" in notifying the Appellant's appeal.

12. Then, at [37], the FTT had focused on the scale of the supposed income receipts of the Appellant's business in 2009-10 and 2010-11 and later years, arguing this "indicates that the self-employment of Mr De Silva was clearly generating income at a consistent level over a number of years with consequential income tax implications." He submitted the FTT had clearly confused income receipts with taxable profit, so undermining the validity of the unfavourable inference it seemed to draw from the scale of the figures.

13. Finally, in jumping to its stated conclusions at [38] that (a) there was "little prejudice to Mr De Silva" and (b) "the merits of the appeal succeeding at first blush are dim", there was nothing in the previous reasoning, or in the evidence before the FTT, that could support either conclusion.

14. Mr Hickey submitted that the FTT had clearly erred in law in reaching its conclusion, based on the facts it had found and the evidence before it. He submitted it had fallen into the trap referred to by the Court of Appeal in *Denton & others v T H White Ltd and another* [2014] EWCA Civ 906 at [38]:

> [38] It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*: see in particular para [37]. A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate.

15. He argued (implicitly submitting that the above comments made in the context of procedural non-compliance were equally relevant in the present context) that the FTT had reached a manifestly unjust and disproportionate decision. No reason was given as to why the information presented had been rejected. There was no indication of any prejudice that HMRC would suffer if the appeal was allowed to continue, and there was no mention of the enormous prejudice to the Appellant if it was not. By way of contrast, he referred to the decision of a different FTT in *Rashid v HMRC* [2020] UKFTT 0378 (TC), where there had been serious delay in notifying an appeal but the FTT had specifically engaged with a legal argument which might well undermine HMRC's case and had therefore given permission for the late appeal.

For HMRC

16. Mr English argued there was no error of law in the Decision. It could not be said (as Mr Hickey had) that it was "obvious" from the information provided in the bundle that there was no tax liability. Even on their face, the accounts which had been provided included a great deal of estimation. Further, the evidence underlying them was not tested in cross examination before the FTT because neither the Appellant nor his accountant had given evidence; and whilst there was no reason to believe the accounts did not fairly reflect the underlying information that had been supplied to the Appellant's accountants, that underlying information was entirely untested and unproven.

17. As to the FTT's reference to "income" rather than "profit", it was implausible to suggest that an expert tribunal would have got this basic point wrong; this was simply an example of the FTT not being required to go into the matter in detail and therefore glossing over it quickly. He pointed out that the Appellant had had a period of years to provide the necessary information and evidence, and the fact that neither HMRC nor the FTT had gone into a detailed consideration and rebuttal of what was provided simply reflected the fact that such an exercise was not required at this stage of the process. He also pointed out that the burden of proof lay on the Appellant, not HMRC, so any suggestion that the figures should be accepted at face value until HMRC had disproved them was misconceived. Finally, he pointed out the obvious prejudice to HMRC in having to re-open a matter which had been long considered closed in a situation where the Appellant had effectively caused the long delay. In short, he submitted that the FTT's finding that the prospects of success were "dim" was a perfectly reasonable one for it to have reached on the basis of the information before it, and its decision should therefore not be disturbed.

DISCUSSION OF THE APPEAL

18. A decision of the FTT may only be appealed to the Upper Tribunal on the basis of an error of law. Such an error may take many forms, but the classic formulation of Lord Ratcliffe in *Edwards v Bairstow* [1956] AC 14 is commonly regarded as authoritative:

> I think that the true position of the Court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case and in the body of it to set out the facts that they have found as well as

> their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. **But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law**. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur. *[emphasis added]*

19. In the present case, the argument being advanced by Mr Hickey on behalf of the Appellant was effectively that no FTT, acting judicially and properly instructed as to the relevant law, could have come to the determination under appeal (namely, that permission to notify late appeals should be refused). As part of that argument, he was implicitly arguing that in reaching the conclusions that there was "little prejudice to Mr De Silva" and that the merits of the appeal "at first blush are dim" without even engaging in its decision with the strength of the Appellant's underlying appeal, the FTT had given inadequate reasons for its decision; in consequence, the decision itself was fatally flawed.

20. In evaluating this latter point, we are mindful of the obligation of the FTT to give adequate reasons for its decision, failure to comply with which can, of itself, constitute a ground of appeal, as stated by the Court of Appeal in *in Flannery & Anor v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811:

> We make the following general comments on the duty to give reasons:
>
> (1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p. Dave*[1]) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts,

[1] *R v Harrow Crown Court ex p. Dave* [1994] 1 AER 315

> the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
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> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.

21. With these points in mind, we must address the following two associated questions:

(1) whether the FTT's decision to refuse permission for a late appeal was one which, on the facts found by the FTT, no tribunal could have reached if acting judicially and properly instructed as to the relevant law; and

(2) whether the FTT failed to provide adequate reasons for its decision that permission to notify a late appeal ought to be refused and, as part of (and apparently crucial to) that decision, for its findings that "there is little prejudice to Mr De Silva" and "the merits of the appeal succeeding at first blush are dim".

22. In addressing the first of these questions, it is important to remember the task that the FTT was required by the third stage of the *Martland* process to undertake, namely an evaluation of "all the circumstances of the case", involving "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", taking 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". (See *Martland* at [44(3)] and [45].)

23. The FTT referred to the three stage approach in *Martland*, and purported to apply it. In doing so, it expressed the view that the Appellant would suffer "little prejudice" (presumably if permission were denied). It did not explain the basis of this view. If it meant that it considered there was little prejudice for the Appellant in having to make immediate payment of the amounts in issue (which the FTT recorded as £65,463) then it is difficult to see how it reached this conclusion (and there is no explanation of it in the Decision). If, as is perhaps more likely, it meant that the prejudice to the Appellant was small <u>because</u> it considered the merits of his underlying appeal to be weak, it did not actually say so, nor did it explain <u>why</u> it considered the underlying appeal to be weak.

24. As was made clear in *Martland*, "any obvious strength or weakness" of the underlying appeal could be taken into account, as an Appellant with an unarguably strong underlying appeal would clearly suffer greater prejudice than an Appellant with a hopeless appeal if permission to pursue it belatedly were refused. Here, the FTT reached the view that "the merits of the appeal succeeding are at first blush dim", but without properly explaining why.

25. We therefore consider that the Decision contains errors of law, for the interlinked reasons that (a) it reached a decision which no tribunal, acting judicially and properly instructed as to the relevant law, could have reached on the basis of the reasons actually given; and (b) it failed to provide adequate reasons for the decision which it reached.

26. Having found the Decision to contain errors of law, the question then arises as to what this Tribunal should do about it. Under s.12 Tribunals, Courts and Enforcement Act 2007, we may set aside the Decision and either remit the case to the FTT for reconsideration or re-make the Decision ourselves. Whilst the power to set aside a decision in such cases is couched in permissive rather than mandatory terms, we consider it would be an unusual case in which this Tribunal found there to be an error of law in an FTT decision but did not set it aside and then proceed either to remit the matter to the FTT or re-make the decision itself in order to correct that error. We see no unusual factors in this case. We therefore set the Decision aside.

27. In the event that we set aside the Decision, Mr Hickey invited us to re-make it. He clearly considered that we had sufficient facts before us to do so. In the circumstances, we agree and therefore proceed to do so.

RE-MAKING THE DECISION

The approach

28. The issue before us is whether permission to notify a late appeal should be granted. That question should be approached in the way set out in *Martland*. This requires us to start from the position that permission should not be granted unless the Appellant satisfies us that it should be. The length of the delay must be established, and the reasons which have been advanced for it. We must then evaluate all the circumstances of the case, essentially carrying out a balancing exercise in which the length of the delay, the merits of the reasons given for it and the prejudice which would be caused to the parties by the grant or refusal of permission are assessed.

29. In carrying out that balancing exercise, we 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.

30. Any obvious strength or weakness in the Appellant's case can be taken into account, but without descending into a detailed analysis of the underlying merits of the appeal. In considering this point, evidence which is in dispute should not generally be taken into account and, we should add, evidence which is untested should not be assumed to be true.

The length of the delay and the reasons for it

31. We note the parties do not dispute that the period of delay with which we are concerned is between 551 and 1338 days (which is accepted as being "serious and significant"), nor is there any dispute as to the FTT's findings as to the reasons given for the delay and its view of those reasons as lacking any material merit, which we therefore adopt, subject to the following point.

32. At [39] of the Decision, the FTT referred to the reasons given by the Appellant for the delay, which it said "plainly are not reasonable excuses for the lateness…". The evaluation which the FTT was required to make was not whether the Appellant had a reasonable excuse for the delay, it was (as it had itself said at [19]) an evaluation of the "merit(s) of the reasons given for the delay". The assessment of "reasonable excuse" is something which the FTT carries out frequently in penalty appeals and the like, and it involves an extra step beyond evaluating the merits of the reasons advanced for the delay – namely a binary decision as to

whether it considers those reasons amount to a reasonable excuse for the default in question, or not. Here there is no such further step to be taken. The better way of expressing the FTT's actual assessment of the merits of the reasons given for the delay in the earlier part of the Decision would be to say that those reasons had little or no merit so far as the FTT was concerned. Mr Hickey did not seek to argue to the contrary and any such argument would have been doomed to fail, on the facts found by the FTT.

Overall evaluation

33. Turning finally to our overall evaluation of the case, the length of the delay and the lack of merit in the reasons given for it present the Appellant with a high hurdle if he is to satisfy us that we ought to permit a late appeal notwithstanding the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

34. If the appeal is permitted to proceed to a formal consideration by HMRC and, ultimately, to a substantive hearing before the FTT, then HMRC will suffer some prejudice because they will be required to devote time and resources to litigating a matter which they had quite reasonably thought was at an end long ago. On the other hand, since nearly all of the factual evidence in any such appeal will have to be provided by the Appellant, on whom the burden of proof rests to displace HMRC's assessments, the prejudice to HMRC would not be as great as it would be if the burden of proof lay on them.

35. So far as the Appellant is concerned, we were told that if he is not permitted to defend the appeal, he is likely to be made bankrupt and, if correct (which we are prepared to assume), this is clearly a significant prejudice for him. However, it is not qualitatively different from the prejudice which is faced by any person seeking to appeal a large tax assessment and of course the Appellant had in his own hands the means of avoiding that prejudice by lodging an appeal in good time when the assessments were first issued.

36. As to the underlying strength of the Appellant's case, it is clear that the Appellant and his professional adviser consider he has good grounds of appeal, but those grounds of course depend on a great deal of factual evidence which has not been produced or tested before a tribunal. It certainly cannot be said that the Appellant's case is "overwhelmingly strong" because its strength is dependant on a detailed exploration of the evidence, which has not been carried out (and, as was made clear in *Martland*, should not be carried out at this stage). However, the Tribunal must not focus solely (or even largely) on the potential strength of the Appellant's case; it is required to carry out a balancing exercise in which that is just one factor. As was said in *Martland* at [46]:

> 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.

37. If any appellant with a reasonably strong case could routinely ignore the statutory time limit for bringing an appeal on the basis that he or she could always bring a late appeal, the whole purpose of the statutory time limits would be nullified, and every late appeal application in such circumstances would become, by default, a hearing of the substantive appeal. If this were permitted, the FTT would be disregarding the "particular need… for statutory time limits to be respected", and its resources would be expended in carrying out the "detailed evaluation of the case" that *Martland* says should not be carried out.

38. In the present case, the Appellant has grounds of appeal with some potential merit but has simply failed, for no good reason, to respond substantively to the assessments raised against him for a period of between 551 and 1338 days after the statutory deadline. Even accepting that the consequences for the Appellant may be extremely serious, it seems to us that an evaluation of all the circumstances of the case, taking into account the particular need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected, can only lead to the conclusion that we should not grant permission to notify a late appeal.

39. We therefore set aside the Decision and re-make it, refusing permission to notify a late appeal for the reasons set out above.

Signed on Original

KEVIN POOLE	**ASHLEY GREENBANK**
TRIBUNAL JUDGE	**TRIBUNAL JUDGE**

Release date: 11 November 2021