Neutral Citation: **[2023] UKUT 00063 (TCC)**

Case Number: UT/2021/000166

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

PROCEDURE – appeal against FTT's refusal to reinstate appeal after automatic strike-out following unless order refused – whether application to vary unless order should have been determined or taken into account – whether FTT erred in not seeking submissions on variation application from parties - appeal dismissed

Heard on: 17 January 2023
Judgment date: 12 March 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE ASHLEY GREENBANK

Between

D X LINGAJOTHY t/a FLYING DRAGON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Quinlan Windle, Counsel, instructed by Duncan Ellis Solicitors

For the Respondents: Bayo Randle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant appeals against a decision of the First-tier Tribunal (Tax Chamber) ("**FTT**") dated 11 January 2021 (the "**FTT Decision**"). The FTT Decision was made without a hearing with the consent of the parties under Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**FTT Rules**").

2. In the FTT Decision, the FTT refused to reinstate the appellant's appeal against certain discovery assessments and a closure notice after it had been struck out automatically for non-compliance with a direction which had required her to file a duly signed witness statement by a specified date ("**the Unless Order**"). On the same day as compliance was due, the appellant's then representative applied to vary the Unless Order ("**the variation application**") (although the parties dispute whether the variation application was filed in time i.e. by 5pm on that day).

3. With the permission of the Upper Tribunal, the appellant argues the FTT erred in its determination of the appellant's reinstatement application by failing:

(1) first to determine her variation application (because, if that had been granted, the Unless Order would not have been breached and reinstatement would not have been required);

(2) to take account of the variation application (which had included an unsigned witness statement) in assessing whether the breach of the Unless Order was serious or significant;

(3) to seek submissions from the parties on the variation application (which was on the tribunal's file but not referred to in either party's submissions).

BACKGROUND/ FTT DECISION

4. The appellant's underlying appeal concerned her income from a take-away restaurant. She appeals against discovery assessments for the tax years ending 5 April 2014 and 5 April 2015 and a closure notice for the tax year ending 5 April 2016 and associated penalties with the sum of approximately £160,000 at stake.

5. Given the nature of the grounds of appeal against the FTT Decision, we focus on the procedural and compliance history of the proceedings in the run-up to the strike out of the underlying appeal, and in relation to the listing of the reinstatement application.

6. The FTT noted the following chronology (paragraph references (noted in the format FTT[xx]) are to those in the FTT Decision). Where appropriate, we have included additional background all of which is derived from documents that were before the FTT:

(1) The appellant, who at the outset, was represented by CTM Tax Litigation Ltd ("**CTM**") notified her appeal to the FTT on 6 August 2018 which was a day late (FTT [2]). The notice included a request for permission to bring the appeal late. There is no indication that HMRC objected to the appeal being brought out of time.

(2) On 27 November 2018, following service of HMRC's statement of case, which was received by the FTT on 26 October 2018, the FTT issued case management directions requiring the parties to provide lists of documents (by 11 January 2019), and witness statements (by 8 February 2019). The directions then set deadlines for listing information (22 February 2019) and for HMRC to provide document bundles (8 March 2019). At the same time the FTT asked the appellant to provide a signed authorisation of

representative form, which the appellant provided giving the name and contact details of a legal secretary at CTM.

(3) HMRC filed its list of documents late (on 17 January 2019). HMRC also filed its witness statement late (on 12 February 2019). The statements were unsigned. Both filings were accompanied by retrospective applications for extension of time, the first based on a refusal of the appellant's ADR application and the second on illness (FTT [9] and [11]). HMRC indicated it would provide a signed witness statement on request.

(4) On 23 January 2019, the FTT wrote to CTM, to inform them the list of documents was overdue (FTT [10]). Allan Brown of CTM replied on 27 February 2019 to request a copy of the correspondence on the FTT file explaining there had been IT problems as a result of which client files and correspondence had been deleted or lost (FTT [14]). The FTT e-mailed him the correspondence on 9 March 2019 (FTT [16]).

(5) On 5 March 2019, the FTT issued the appellant, with what would turn out to be the first of four "unless orders". The order recited the appellant's continuing failure to comply with the 27 November 2018 directions, her failure to reply to the 23 January 2019 letter (although as noted above it appears this was replied to) and directed that unless the appellant "no later than 5pm on 2 April 2019" confirmed her intention to proceed with the appeal then the proceedings could be struck out. Mr Brown confirmed, on the day of the deadline, that the appellant did wish to continue (FTT [17]).

(6) The second "unless order" was issued on 18 April 2019. The FTT, again recited the continuing failure to comply with the directions regarding lists of documents and witness statements. The order required those items to be provided and confirmation the appellant still wished to continue with her appeal "no later than 5pm on 10 May 2019" warning that otherwise the appeal could be struck out (FTT [18]). Liban Ahmed of CTM replied on the day of the deadline confirming the appellant did wish to continue her appeal, and explained that she would be relying on the documents on HMRC's list. He mentioned that the appellant would be the only witness and that a draft witness statement was being completed. (FTT [19])

(7) The third "unless order" was issued on 1 June 2019 by Judge Poole and sent to the e-mail address of the legal secretary whose details the appellant had given on her notice of appeal form (FTT [20]). It required the appellant to deliver her witness statement to HMRC and confirm to the FTT that she had done so "no later than 28 days after the date of release of the directions" (failing which the appeal could be struck out). In the recitals the judge explained, regarding the outstanding witness statement that "This should have been done some time ago…". While he stated that he noted the difficulties referred to in the appellant's representative's e-mail he also said that it was important the appellant give the matter "appropriate attention and priority".

(8) No witness statement having been received, HMRC wrote to the FTT in an e-mail at 15.37 on 18 July 2019, copying Mr Brown, to ask the FTT to consider striking out the appeal. Mr Brown responded the same day in an e-mail at 16.06 to say he had not received Judge Poole's order and that they were in the process of proofing the appellant for her witness statement. The direction was re-sent. Mr Brown apologised for the delays explaining his poor health was a substantive factor. He asked to be allowed to complete the draft of the appellant's witness statement and serve it on HMRC and the FTT by 4pm on 1 August 2019.

(9) Mr Brown then sought an extension of a further 21 days due to his ill-health in his e-mail of 26 July (FTT [22]). Two weeks after that further deadline expired, Mr Brown e-mailed the FTT on the 29 August 2019 to confirm the witness statement was drafted

and awaited the appellant's signature. He asked that all future correspondence be sent to Mr Ahmed (FTT [23]).

(10) On 24 September 2019, and HMRC having by then requested on 18 September 2019 to strike out the appeal, the FTT (Judge Poole) issued the Unless Order which was the fourth unless order (FTT [24] and [25]). The direction was that unless the appellant's witness statement was delivered "duly signed" so as to be received by both the FTT and HMRC "not later than 14 days after the date of release" of the directions then the proceedings would "automatically and without further order be struck out". In the event the appeal was not struck out the directions provided a timetable for the provision of the remaining directions (listing information, the relevant hearing window, and preparation of the bundle). The directions also provided the standard rubric that any party could apply for the directions to be amended, suspended or set aside or for further directions. The 14-day deadline expired on 8 October 2019 (FTT [25]).

7. The chronology in the FTT Decision then continued:

> "26. 8 October 2019: The appeal was automatically struck out
>
> 27. 8 October 2019: Liban Ahmed applied to the Tribunal for variation of the Unless Order to allow for filing of an unsigned witness statement dated 4 September 2019 (included with the request), advising that the appellant was in China due to the ill health of her father and that CTM had not been able to contact her to obtain her signature to the statement.
>
> 28. 18 October 2019: Tribunal confirm to CTM that the appeal had been automatically struck out and advising that any application for reinstatement should be made within the next 28 days (that is, by 15 November 2019)."

8. The 18 October 2019 confirmation that the appeal had been automatically struck out (FTT [28]) took the form of a letter from the FTT to Mr Ahmed, which stated Mr Ahmed's e-mail of 8 October 2019 had been referred to Judge Poole and that the judge had instructed the FTT to write as follows to Mr Ahmed in the following terms:

> "…Unfortunately, as Direction 1 of the Tribunal's Directions issued on 24 September 2019 was neither complied with nor varied before it took effect, the appeal has automatically been struck out in accordance with that Direction.
>
> The only way forward for the Appellant is by way of an application for reinstatement. Judge Poole has indicated that as long as an application is received within the next 28 days, explaining the reason for non-compliance and attaching a copy of the signed witness statement, then he would be minded to grant the application. Any later application would be considered on its merits, but a convincing explanation for the delay would be needed"

9. The FTT Decision chronology continued by noting that, on 19 November 2019, CTM submitted an out of time reinstatement application, which included a copy of the signed witness statement, advising the application was late because they had not received the signed witness statement until 15 November 2019. The eight-page witness statement was dated 4 September 2019. HMRC objected to the reinstatement application on 9 December 2019 (FTT [29] and [30]).

10. On 2 January 2020 (both parties agree the FTT's reference to 2 November 2020 was an error), the appellant's new representative (L&L Law) sent a further request for reinstatement of the appeal (including a statement made by the appellant dated 31 December 2019), to which HMRC objected on 14 February 2020 (FTT [31] and [32]). As can be seen from a letter from

the FTT to L&L Law of 17 January 2020, L&L Law came on record as the appellant's new representative on 3 January 2020.

11. The FTT's subsequent attempt to list an oral hearing (stated to be in respect of the appellant's application to reinstate her appeal) by asking for the parties' listing information in the FTT's letter of 12 March 2020 came to a halt with the issue of the general stay of proceedings (precipitated by the COVID pandemic) issued on 24 March 2020. The FTT then made enquiries in May 2020 whether the parties would consent to a hearing on the papers which they did. Directions were made on 17 June 2020 requiring the parties to file their lists of documents, submissions, and for the appellant to file her bundle of documents. Once these steps had been worked through, and the appellant had filed her skeleton argument on 2 December 2020, the FTT proceeded to determine the matter, issuing its decision on 21 April 2021.

12. It is worth highlighting the circumstances which meant the following source documents were not before us:

(1) No copy of the variation application 8 October 2019, and in particular the e-mail in which it was sent, was made available to us. We are told the FTT's record of it was destroyed in accordance with its retention of records policy. The appellant was not copied it, and her solicitors (L&L Law) were unable, despite enquiries to CTM, to obtain a copy. HMRC also did not have a copy of it and say this suggests they were not copied in on the application.

(2) We were not shown a copy of either of the appellant's reinstatement applications filed by, first CTM, and then L&L Law. But neither the appellant nor HMRC suggests that there was any mention in these of the 8 October 2019 variation application. (In L&L Law's case that was because, as mentioned above, they were not aware of it).

13. The FTT then set out the relevant FTT Rules (Rule 2 (overriding objective) and Rule 8 (striking-out and reinstatement) and outlined its legal approach). As set out in *Dominic Chappell v the Pensions Regulator* [2019] UKUT 209 (TCC) ("***Dominic Chappell***"), this entailed application of the three-stage approach summarised in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***"), the source for which was *Denton v TH White Ltd* [2014] EWCA Civ 906 ([35]-[39]) ("***Denton***").

14. That three-stage approach was as follows. Stage 1 (the stage with which this appeal is primarily concerned with given the limited scope of the grounds on which permission has been granted) was to consider the seriousness and significance of the breach. Stage 2 required the reasons for the breach to be established and Stage 3 an evaluation of all the circumstances of the case. (*Martland* [40]). (The FTT also noted (in FTT [39]) that the UT in *Dominic Chappell* ([95]) had held that the tribunal should consider the underlying breach and the failure to carry out the obligation which was imposed by the original direction or rule and extended by the unless order when assessing the seriousness and significance of that breach.)

15. Having given permission for the reinstatement application to be filed late (it was due on 15 November 2019 but not filed until 19 November hence four days late), the FTT considered the three stages above in turn. It dealt with Stage 1 as follows:

> "46.…the first matter to consider is the seriousness and significance of the failure to comply with the directions to provide a witness statement, and the failure to comply with unless orders.
>
> 47. The purpose of the original direction to provide witness statements, which is standard in proceedings such as these, is to ensure the parties are aware of the other parties' evidence so that they are able to prepare properly and

> efficiently for a hearing. Failure to comply with that direction is clearly a serious matter and significant in that it effectively prevents there being any substantive hearing.
>
> 48. I note that the appellant supplied a signed witness statement, as required by the Unless Order of 24 September 2019, with the application for reinstatement."

16. Under Stage 2 the FTT discussed the appellant's submission that she had been let down by her adviser by reference to the general propositions it derived from *HMRC v Katib* [2019] UKUT 189 (TCC) ("***Katib***") that 1) a failure by an adviser was unlikely to amount to a good reason for a failure to comply 2) the appellant's lack of litigation expertise was insufficient to displace the general rule the appellant should bear the consequences of her representative's failings and 3) the litigant should expect to provide a full account of exchanges and communications with the adviser (FTT [49]-[52]). The FTT noted the appellant's case referred only to the period September – October 2019 and did not address what enquiries she had made of her advisers on progress during the one year that followed her notice of appeal being filed on 6 October 2018. She was aware of the deadlines having been sent the directions personally on 27 November 2018 but did not provide evidence of enquiries of what needed to be done as might reasonably be expected. The FTT also mentioned "the appeal was struck out after repeated failure to comply with various Unless Orders issued between March and September 2019" (FTT [54]). (As Mr Windle, for the appellant, pointed out, that last observation was not accurate as the first March unless order (confirming the appellant's intention to proceed with the appeal) was complied with.)

17. Under its Stage 3 discussion, the FTT noted the following factors:1) The appellant's lack of follow up on progress and compliance with her advisers which meant there was no reason not to attribute her representative's actions to her. 2) Some of the delays may have arisen because the appellant provided the tribunal with an e-mail address of the legal secretary at the firm. 3) While there had been delays on HMRC's part, these were "in the main" after the appeal was struck out and HMRC had requested extensions of time with reasons. 4) Although the appellant would suffer financially if denied reinstatement, this would apply in most reinstatement cases and did not outweigh the delays and the lack of a good reason for the delays. 5) The substantive appeal was not unanswerable and therefore the merits of the appeal should not be taken account of (point 5 stemmed from the test regarding when merits were relevant as set out in *Dominic Chappell*) (FTT [55]-[60]).

18. The FTT then concluded as follows (at FTT [61]) and went on to refuse the application:

> "Evaluating all the circumstances and being conscious that I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and, most relevantly in this case, that time limits should be respected, I do not consider that there are any circumstances which displace the seriousness and significance of the failures which led to the appeal being struck out and the fact that there was no good reason shown for those failures."

GROUNDS OF APPEAL

19. The UT (Judge Richards, as he then was) granted permission on the following specified grounds:

> (1) By determining the appellant's application to reinstate her appeal without determining the variation application which, if allowed, would have meant that the appellant was never in breach of the Unless Order.
>
> (2) By leaving out of account:

(a) [the variation application] (…accompanied by an unsigned copy of the witness statement…); and/or

(b) the fact that the appellant provided a signed copy of the witness statement by 19 November 2019

when assessing the seriousness or significance of the appellant's breach of the Unless Order.

(3) By failing to invite submissions from the parties on the relevance or otherwise of the variation application in circumstances where it would have been apparent to the FTT that (i) the appellant's advisers would not have been aware of that application given that it was made by her previous adviser and (ii) HMRC would not have been aware of that application since it was not on its face copied to HMRC.

LEGAL TEST ON APPEAL FOR CASE MANAGEMENT DECISIONS

20. As the Upper Tribunal recently set out in *NTK Leisure Limited v HMRC* [2022] UKUT 00289 (TCC) (which also concerned an appeal in relation to a reinstatement application following a strike-out), a decision on reinstatement involves the exercise of discretion by the FTT in relation to a matter of case management.

21. The Upper Tribunal will accordingly be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions unless the judge has failed to apply the correct principles, failed to take into account matters which should be taken into account, or has left out of account matters which are relevant, or the Upper Tribunal is satisfied the decision is plainly wrong. This reflects the observations of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 in relation to case management decisions under the Civil Procedure Rules but which were quoted with approval by the Supreme Court in *BPP Holdings Ltd & Ors v HMRC* [2017] UKSC 55 (at [33]), which was a case involving case management discretion under the FTT Rules, in that case a debarring order (the equivalent sanction to a strike-out in relation to respondents to appeals).

22. There is no issue here regarding the grounds of appeal falling with the above restrictions. As Mr Windle explained, Grounds 1 and 3 allege errors of principle, and Ground 2 is a challenge based on the FTT failing to take account of a relevant matter.

GROUNDS OF APPEAL

Ground 1 – FTT erred in failing to first determine variation application

23. The appellant's first ground of appeal is that the FTT erred by failing to determine the variation application before considering the reinstatement application. This ground is based on the premise that, if the variation application had been successful, it would, in effect have had retrospective effect so that the Unless Order would not have been breached and there would not have been any need for reinstatement.

24. This principle is derived from the decision of Alexander Nissen QC (sitting as a deputy High Court judge) in *Everwarm Ltd v BN Rendering Ltd* [2019] 4 WLR 107 ("***Everwarm***"). That case concerned an application for extension of time for compliance with an unless order, where the application was made before the deadline for compliance, but was not heard until after that deadline. In that case, the deputy judge drew a distinction between the applicable tests for determining in-time and out-of-time applications for an extension of time for compliance with an unless order. In short, in-time applications did not engage the principles concerning relief from sanctions (because if granted there had been no breach), whereas out-of-time applications did. The deputy judge decided that the application in question should be

treated as an in-time application even though it was not heard until after the unless order would have taken effect. In doing so, the deputy judge confirmed that, if the extension of time was granted, the claim would be treated in retrospect as if it had never been struck out (*Everwarm* [15]).

25. *Everwarm* was a decision on the application of the Civil Procedure Rules. It was common ground between the parties that the principle should apply equally in this case. Both parties also proceeded on the basis that the variation application could only have this retrospective effect if it was made in-time. In other words, the variation application had to have been made before the deadline by which the appeal was automatically struck-out by the Unless Order. But it did not matter if the FTT did not determine that in-time variation application until after that deadline.

26. It thus becomes key to establish whether the variation application was in-time. As no time was specified in the order, it is common ground that the effect of Rule 12 of the FTT Rules is that the Unless Order needed to be complied with by 5pm on 8 October 2019.

27. Mr Windle accepts that the appellant bears the burden of proof of showing the application was in-time[1]. He submits that it was an error for the FTT not to make a clear finding on the time at which the variation application was made. He also submits that for various reasons it is more likely than not that the variation application was made by 5pm on 8 October 2019 and therefore in-time. The application was focussed on the Unless Order and in the belief it had not already taken effect. It attached an unsigned witness statement dated 4 September 2019, which consequently could not be expected to have required additional work on 8 October 2019. All things being equal, it was more likely that the application was sent before 5pm which was towards the end of the working day rather than after 5pm. Two of the three previous unless orders were complied with on time, and even in relation to the third, Mr Brown at CTM complied with it as soon as he became aware of it.

28. We disagree with Mr Windle's assertion that the FTT failed to make a finding on whether the variation application was in-time. As Mr Randle argued, the FTT made that finding. It did so when setting out the chronology of proceedings as it did, where it made a finding of fact that the variation application was made after the appeal was struck out. The FTT's findings indicate the application, although sent on the day of the deadline, was out of time. That is clear from the way the FTT first found that the appeal was automatically struck out before mentioning the variation application (see [7] above]).

29. Mr Windle argued it was wrong to attach significance to the FTT's ordering of points. He submits this section of the FTT's decision was simply a recitation of the documents and the FTT did not give thought to whether the application was in-time or not. We reject those arguments. The fact the appeal was struck out automatically was specifically noted within the chronology. That was not a recitation from a document and illustrates the FTT was applying some judgment to make its findings. The information the FTT set out in relation to the variation application (in particular, that it attached an unsigned statement dated 4 September 2019) suggests the FTT saw the e-mail Mr Ahmed sent in rather than was reporting what was said somewhere else. Neither party had mentioned the variation application in their submissions and, although the 18 October 2019 letter written on Judge Poole's instructions mentioned the 8 October 2019 e-mail, it had not given any details of the date of the unsigned witness statement. The FTT's chronology quite deliberately set out the events, as might be expected, in the order they occurred. The FTT would not have set out the order of the events as it did if the e-mail was sent before 5pm.

[1] See authorities referred to in [32] of *Everwarm*

30. We would, in any case, have rejected the suggestion that on the balance of probabilities the variation application was sent in before 5pm on 8 October 2019. We acknowledge that the FTT's 18 October 2019 letter written on Judge Poole's instructions does not explicitly rule out the possibility the application was in-time because it might be read as simply saying that by 5pm the FTT had not made any variation before the automatic strike out. However, on balance, we consider the instruction set out in the letter that applying for reinstatement was the "only way forward" is more consistent with the judge having ruled out the need to consider whether there was any possibility that the variation application, if successful, might have prevented the breach occurring in the first place. That suggests that the application although stated to be received on 8 October 2019 was received out of time. Although CTM did comply with two unless orders there were also a number of times when it replied late. Its history of responding to deadlines would, at best, be neutral on the issue. It certainly would not in our view tend towards suggesting the application was in-time.

31. For these reasons, in our view, the FTT made a finding of fact that the variation application had been submitted after the Unless Order had taken effect to strike out the appeal and so out-of-time. On the facts before it, the FTT was entitled to reach that conclusion. It follows that the variation application could not have had retrospective effect to prevent the breach of the Unless Order. It was not therefore an error of law for the FTT to consider the reinstatement application without first determining the variation application; the Unless Order had taken effect and the appeal had been struck out. The only avenue available to the appellant to continue her appeal was to make an application for reinstatement.

32. Our conclusion on those issues is sufficient to dismiss this ground of appeal. However, even if it could be said that the application was in time, there would, in the particular circumstances of this case, have been no error in the FTT Decision under appeal in the FTT not determining it for the reasons Mr Randle advanced. The hearing that was listed before the FTT concerned the appellant's application to reinstate her appeal. Although the FTT was clearly aware of the variation application (having made a finding regarding it at FTT [27]), the FTT was entitled to consider the application was not being pursued or had been abandoned. The variation application was not mentioned either in the reinstatement application made by CTM on 19 November 2019 or in the further reinstatement application made by L&L Law on 2 January 2020. The FTT was entitled to assume the appellant's new representatives were aware of the documents the previous representative had filed. It would not have had any reason to know L&L Law were not aware of it. In any case CTM obviously knew about the variation application which they themselves had made. The FTT might reasonably expect that, they would alert the FTT to that application if it was considered that it still needed to be determined. Mr Windle argued the representatives would have taken their lead from the FTT's letter of 18 October 2019 that reinstatement was the "only way forward". That may or may not be correct but does not undermine the point that the FTT could reasonably expect that if a party, and all the more so a represented party, disagreed with the FTT's proposed course, it would say so.

Ground 2 – failure to take into account variation application /unsigned witness statement when assessing seriousness and significance of breach

33. The appellant's second ground of appeal relates to the application by the FTT of the first stage of the test in *Martland*. In summary, the appellant says that the FTT erred in law by failing to take into account, in deciding the seriousness or significance of the appellant's breach for the purposes of the reinstatement application, the fact that the appellant had made the variation application and submitted an unsigned witness statement within hours of the deadline for the Unless Order.

34. For the purpose of this ground, both parties proceeded on the basis that the 8 October 2019 variation application attaching the unsigned witness statement was filed after the Unless Order took effect. Mr Windle says that the FTT erred in its application of the *Martland* test by focussing on the receipt of the signed witness statement on 19 November 2019. Mr Windle accepts that there was a breach of the Unless Order in two ways, firstly because the statement was late (by a matter of hours) and secondly because it was unsigned (which failure was remedied by 19 November 2019). Mr Windle argues the FTT should have considered whether, taken together, these failings were serious or significant. This was particularly relevant as the FTT considered the need for the witness statement was so that HMRC were aware of the appellant's evidence so they were able to prepare properly and efficiently for the hearing. However, neither the absence of a signature nor the unsigned witness statement being provided a few hours late detracted from HMRC's ability to prepare for the hearing. (Regarding paragraph b) of this Ground (see [19] above), Mr Windle accepted that the FTT did consider the fact that the appellant provided a signed witness statement by 19 November 2019.)

35. Mr Randle submits that any failure by the FTT to consider the appellant's provision of an unsigned witness statement late was not unreasonable and did not affect the FTT's decision on Stage 1 of the *Martland* test. The FTT's focus was on the true breach: the appellant's failure to meet the Unless Order requirement for a duly signed witness statement by the specified deadline. The appellant did not meet that requirement until six weeks after the deadline passed. Even if the FTT could have considered the earlier filing of the unsigned witness statement at Stage 1 of the *Martland* test, it had broad discretion not to. The Stage 1 test was a relatively low threshold as was clear from its function, which was to decide the level of time spent on Stages 2 and 3.

36. Both parties' positions acknowledge the fact the order breached was an unless order, pointed on its face to the breach being serious and significant. That conclusion was in line with the observations of the Court of Appeal in *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153 ("***British Gas***") (at [41]) where Jackson LJ explained:

> "The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the Draconian sanction of strike out)."

37. Both parties recognised however that the "unless" nature of the order was not determinative. Again, that conclusion was consistent with Jackson LJ's observation in the paragraph following that above, that not every breach of an unless order is serious or significant. It is also helpful to note that the Court of Appeal's preceding discussion on the assessment of seriousness and significance in relation to unless orders was the source for the proposition the FTT in the current case noted from *Dominic Chappell* (see [14] above), that in order to assess the seriousness and significance of breach of an unless order, it is necessary to look at the underlying breach. Jackson LJ explained:

> "39…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 [X] was given.
>
> 40. In my view the phrase "the very breach" in paragraph 27 of *Denton*, when applied to an unless order, means this: the failure to carry out the obligation which was (a) imposed by the original order or rule and (b) extended by the unless order."

38. With the above in mind, we do not think the consideration under Stage 1 should be as narrowly focussed solely on the breach of the Unless Order as HMRC's position suggests. At the level of principle, the appellant's case, correctly in our view, suggests the taking of a broader perspective of looking not just at the breach of the Unless Order but the underlying breach.

39. The ground of appeal is that the FTT did not take into account the provision of an unsigned statement on 8 October 2019 in the Stage 1 test. Taking the provision of that statement into account would, we note, be consistent with the need to analyse the underlying breach, namely the failure to comply with the tribunal's directions, standard in this type of case, to serve witness statements on the other party before the hearing is listed. We therefore agree with Mr Windle that the provision of the unsigned witness statement would, in principle, be of potential relevance. The FTT did not however take the unsigned witness statement into account at Stage 1. It wrongly focused on the breach of the unless order (to the exclusion of the underlying breach). That, in our judgment, represented an error of law.

40. That error of law would mean we have to decide whether or not to set aside the FTT decision (s12 Tribunal Courts and Enforcement Act 2007). We should only not set aside the FTT decision having found an error if we think the error was not material.

41. For the reasons below the error, in our view, was clearly not material, in the sense that it might have made a difference, to the assessment of seriousness or significance under Stage 1, so as to warrant setting the FTT Decision aside.

(1) The preceding order and the unless order required the appellant to serve the witness statement *on HMRC*. It did not do so until 19 November 2019 (when the signed statement was served). There was thus no effect on the length of delay in correcting the breach (and therefore its seriousness) – particularly in light of FTT's reasoning for purpose of serving witness statements. Moreover, even if HMRC had been served with the unsigned witness statement on 8 October 2019 that was still, in the context of the underlying breach, many weeks after the deadline specified in the third unless order. (We take this deadline to be 15 August 2019 being two weeks before 29 August 2019 – that was the date Mr Brown e-mailed the FTT and in relation to which the FTT said was two weeks after the extended deadline had expired (FTT [23] summarised at [6(9)] above)).

(2) In any event, a breach of an unless order is "undoubtedly a pointer towards" the breach being considered serious and significant (*British Gas* ([41]). In this case, taking account of prior breach(es) simply makes the position worse as it is evidence of successive breaches of the same requirement. The fourth unless order was the culmination of a series of escalating steps the tribunal took, in case-managing the matter, which all in one way or another related to the same failure. This is not thus a point about the appellant's general compliance history (which as was made clear in *Denton* [27] was better addressed at Stage 3) but successive non-compliance with the same obligation. Even putting the situation at its lowest, this was the breach of the third of a series of unless orders which the tribunal made which required compliance by 15 August 2019. A conclusion that the breach was serious and significant is all the more apparent given the breach of the second unless order concerned the same issue – failure to serve witness statements. In addition, although the first unless order was complied with, it is relevant to note that the unless order only came about because of non-compliance with the tribunal's directions which had included the service of witness statements.

(3) The Unless Order also specifically required the appellant to serve a *signed* witness statement. As the FTT correctly took into account, that requirement in the unless order was not complied with. (The test in *British Gas*, which requires the tribunal to consider

the failure to carry out the original obligation, does not mean that the tribunal should not consider failure to comply with the unless order as well (see [40])). That requirement for signature was important given the appellant's past failures.

42. Mr Windle advanced a number of other arguments for why the breach was not serious or significant. He argues the fact that HMRC were allowed to file unsigned witness statements indicates the signature requirement cannot have been viewed as that important. He suggested the FTT had only been prompted to make that a requirement by Mr Brown's e-mail of 29 August 2019 which had flagged the witness statement had not yet been signed. He also relied on minutes from the published FTT Tax Chamber and UT Tax and Chancery Chamber Users Group Annual Meeting of 13 April 2021 which emphasised the tribunal's informality and flexibility. In response to a question regarding whether witness statements were required, and if they were so needed, what minimum requirements they needed to meet, the minutes recorded the FTT's response as:

> "…A general requirement that a witness statement must be produced, or if produced, must meet minimum requirements could constitute a barrier for many tribunal users, especially litigants in person"

43. We disagree that any of these points help the appellant. None of them alter the analysis above that the FTT's error in failing to take account of the unsigned witness statement in its consideration of the Stage 1 test was not an error that was material. As Mr Randle pointed out, HMRC were not made the subject of unless orders. They had made clear when writing to the tribunal and copying the appellant, that signed witness statements would be provided upon request. The FTT's requirement for a duly signed witness statement (in circumstances where Mr Brown had indicated he had a draft unsigned statement) highlights rather than detracts from the importance the FTT placed on delivery of a signed statement. If an unsigned statement had been regarded by the FTT as adequate we would expect the FTT to request a copy of that be delivered rather than take the trouble to issue an unless order specifying a signed copy was required. There was nothing unreasonable about the insistence on a signed witness statement in that it would provide the reassurance that the witness had had the opportunity to consider the contents. It would reduce the risk of parties making the preparations on an erroneous view of the evidence. As for the user group minutes, even if these are taken at face value as evincing a considered policy position they are clearly talking about general requirements and are obviously subject to the specifics of the actual direction which is made and which will take account of the particular circumstances of the case. Here, the appellant was not a litigant in person and the particular background was that the FTT had specifically required the witness statement to be duly signed.

44. We also reject Mr Windle's submission that it was not serious or significant that the witness statement was filed the day of the deadline but after 5pm because in contrast to the preceding unless orders a specific time on the particular date was not stated. He argued it was not unreasonable for representatives (such as CTM) who were not lawyers to assume they would have the whole of the day to file. Given that a person's status as a litigant in person does not generally provide a good reason for failing to comply with rules[2], it cannot be that representatives (who are instructed for their expertise (as observed in *Katib* at [59])), whether legally qualified or not, would be held to a lower standard. Taking account of the potentially severe consequences of not meeting the deadline, it would reasonably be expected that a representative on the receiving end of the Unless Order would not make any assumptions about the deadline but would check the position in good time.

[2] See *Martland* [47]

45. We accordingly are in no doubt that, even if the FTT erred in failing to take account of the unsigned witness statement in conjunction with the filing of a signed one on 19 November 2019, that error was not material to its decision at Stage 1 of the *Martland* test that the breach should be considered both serious and significant. We will therefore not set aside the FTT decision on this ground.

Ground 3 – failure to request submissions from parties on variation application

46. The focus of this ground, as refined in Mr Windle's submissions, was in the FTT not having requested submissions from the parties on the variation application. (It was inferred the FTT had access to the application as the front of its decision recorded that the documents the FTT had regard to were those held on the tribunal file.) It is argued that the FTT ought to have directed submissions on the variation application given the application's potential relevance to the FTT's decision, and because neither party had referred to the variation application in their submissions. (Mr Windle, rightly, in our view, did not emphasise the aspects of the ground which alleged the FTT should have known that neither the appellant's new advisers, nor HMRC were aware of the 8 October 2022 application.)

47. Mr Windle relied on the authority of Employment Appeal Tribunal decision in *Balls v Downham Market High School & College* [2011] IRLR 217 at [7], where Lady Smith said, regarding an Employment Tribunal's consideration of an application for strike out:

> "I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially."

48. In so far as *Balls* suggests that there is an obligation on the judge to have regard to the tribunal file, to identify any relevant material and to seek submissions from the parties if there is any matter to which the parties have not referred, then we do not consider that should apply to the FTT (Tax Chamber).

49. The starting point will be that in making decisions, in circumstances where the parties have had the opportunity to make their representations, the judge will expect the parties to identify the issues on which a decision is required and to refer to the documents from the file which are considered to be relevant to those issues (because either they have come from the party, or if not, they have been copied to them by the tribunal or the other party). In this case, we can see detailed directions were issued to flush out the submissions and the documents each party intended to rely on.

50. To impose an *obligation*, in these circumstances, to consider the file to see if there is anything relevant in it which the parties have not referred to puts an unwarranted burden on judicial resource. Parties may reasonably be assumed to know what they have filed and because they are routinely expected to copy the other side on any communications with the tribunal to know what the other party has filed. Practical difficulties arise in that judges will not necessarily have ready access to the full file because the file may be located in a different location to where the judges sit. Even if accessible, the files can in some cases contain volumes of correspondence and applications stretching over a number of years.

51. Mr Windle, perhaps in recognition of these concerns, did not go to the extreme of suggesting that the FTT should be expected to peruse the file to identify any relevant material and then put all documents not referred to by the parties back to the parties for submissions. He put the obligation more narrowly: the tribunal should seek submissions where there was a document on the file that was considered potentially relevant such that it warranted mention in the FTT's decision.

52. In our view the relevant principles, grounded as they are in the fairness of giving parties the opportunity to deal with information the tribunal relies on, but which the parties have not had the opportunity to comment, require no elaboration. The application of the principles will depend on the particular facts. If the judge sees material on the tribunal file, which the judge considers relevant, in the sense that the FTT proposes to take account of it when making its decision, and it is clear one or more of the parties has not seen it (for instance because the material has not emanated from the parties, or if it did, it is clear that it was not copied to the other) then of course the FTT ought to invite submissions from the parties on it. As *Balls* indicates that is part of the normal duty to act judicially.

53. Applying the above to the facts, it should be noted that the challenge raised under the preceding grounds is that the FTT did not in fact consider the variation application relevant. On that basis it is difficult to see how any separate error arises over and above that alleged in the preceding grounds (which we have dismissed) in the FTT not seeking submissions. We do not consider the fact that the FTT mentioned the application in its decision as significant. The FTT clearly did not rely on it in its reasoning.

DECISION

54. The appellant's appeal is dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE ASHLEY GREENBANK

Release date

13 March 2023