Neutral Citation: **[2023] UKUT 00252 (TCC)**

Case Number: UT/2022/00090

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building, London

PROCEDURE – reinstatement by FTT of appeal after automatic strike out for failure to comply with "unless directions" – Martland *test – whether FTT decision perverse in failing to take account of relevant factors – whether FTT misdirected itself in law by taking account of an irrelevant factor (the burden of proof) in deciding whether to reinstate –yes on both grounds – appeal allowed*

Heard on: 17 July 2023
Judgment date: 16 October 2023

Before

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

MICHAEL BREEN

Respondent

Representation:

For the Appellants: Christopher Stone, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Ross Birkbeck, Counsel

DECISION

INTRODUCTION

1. This is an appeal by the Appellants ("HMRC") against the decision of the First-tier Tribunal (the "FTT") (Judge Amanda Brown QC) released on 29 March 2022 ("the Reinstatement Decision"). This decision reinstated the appeal of the Respondent ("Mr Breen") which had been automatically struck out following the failure to comply with an (unpublished) "unless direction" given by Judge Jane Bailey ("the Unless Order") issued on 10 November 2020.

2. HMRC appeal on two grounds. In summary, the first ground is that the Reinstatement Decision was perverse because the FTT held, contrary to the evidence, that there had been no requirement for Mr Breen to provide a list of objections and a list of witnesses prior to the Unless Order. The result was that the FTT failed to take full account of Mr Breen's previous non-compliance. The second ground of appeal is that the FTT erred in taking into account an irrelevant factor and/or misdirected itself in law, by deciding to allow the application because the burden of proof in the underlying appeal lay upon HMRC.

3. HMRC appeal with the permission of the FTT.

4. For the reasons given below, we allow HMRC's appeal, set aside the Reinstatement Decision and remake that decision.

APPLICATION TO ADMIT MANUSCRIPT NOTES OF *EX TEMPORE* DECISION

5. The FTT at the conclusion of its hearing gave an *ex tempore* decision. Mr Birkbeck, who appeared for Mr Breen before the FTT and before us, applied for his contemporaneous manuscript note of the *ex tempore* decision to be admitted. Mr Birkbeck submitted that even if the Reinstatement Decision contained an error of law as contended by HMRC, the manuscript note would show that the error was not a material reason for the FTT's decision.

6. Mr Stone, who appeared for HMRC before the FTT and before us, opposed the application. He submitted that it was necessary to look at the written decision of the FTT which set out its final reasons. He was not contending that Mr Birkbeck's manuscript note was inaccurate but rather that it was not appropriate to look to look at manuscript notes of an *ex tempore* decision when there was a subsequent fully reasoned written decision.

7. We refused Mr Birkbeck's application. In our view, an *ex tempore* judgment or decision is binding in terms of the result but not as regards the detailed reasons. It is the final fully reasoned written decision of the FTT that is the appealable decision and will be a decision prepared by the FTT having had the opportunity to reflect on the evidence and the law relevant to the issue in question. Moreover, there will be cases in which it is necessary or appropriate for the FTT to give an *ex tempore* decision (e.g. cases of urgency) and it is undesirable that the FTT should be deterred from doing so lest what is said by the FTT in the course of a less than complete *ex tempore* decision should be used to construe or call into question its more carefully reasoned written decision.

THE FACTUAL BACKGROUND

8. The procedural history which underlies this appeal is quite involved. It is fully set out in the Unless Order and is summarised in the Reinstatement Decision. For the purposes of this

appeal, and because both of these decisions are unpublished, we have described in greater detail than would usually be necessary the main features of the history, in order to set out the background to our decision.

9. Mr Breen's appeal concerned income tax assessments for the tax years from 1996/97 to 2011/12. Following a statutory review the amount of tax in dispute was £942,131.68. The assessments followed an HMRC investigation into Mr Breen's tax affairs in 2012. In short, HMRC considered that Mr Breen was liable to tax on undeclared income and gains. Mr Breen's contention was that there was no UK tax liability because he had an Irish domicile and because the relevant work giving rise to the disputed income had been undertaken outside the UK.

10. In the Reinstatement Decision the FTT stated that the assessments mentioned above were issued under section 29 Taxes Management Act 1970 on the basis that Mr Breen had *deliberately* failed to bring relevant income into account in the relevant tax years. In the course of the hearing before us, Mr Stone pointed out, and we did not understand it to be in dispute, that some of the assessments (for the years ended 5 April 2009, 2010, 2011 and 2012) had been issued on the basis that Mr Breen had been *careless* in failing to bring his income into account.

11. During HMRC's investigation, Mr Breen had failed to comply with an information notice issued in 2014 resulting in penalties for non-compliance. Also in 2014, Mr Breen informed HMRC that much of the relevant documentation was no longer available.

12. In 2016, Mr Breen failed to provide answers to HMRC's questions about his family and background that were designed to clarify his domicile status. In other words, there was a history of non-compliance by Mr Breen in the course of the investigation.

13. HMRC's review decision was issued on 29 September 2017 and the deadline for appealing to the FTT was 29 October 2017.

Appeal to the FTT

14. Mr Breen's appeal was received by the FTT on 3 November 2017. Mr Breen said that he did not consider the tax assessed was due and indicated that he would "provide further detail/explanation once I have appointed a representative."

15. A resubmitted appeal was received by the FTT on 27 November 2017. The Appellant indicated that the appeal was not late because he had incorrectly understood the date from which the time for appealing ran. He also explained that he had been working in the United States for much of October 2017 and this had contributed to his delay in appealing.

FTT's request for grounds of appeal

16. The FTT acknowledged receipt of the late appeal and assigned it to proceed under the Standard Category. However, the FTT wrote to Mr Breen and requested that he provide the grounds for his appeal (as required by Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

17. On 19 January 2018, the FTT received a letter from Mr Breen dated 18 January 2018 in which he provided a further explanation of why his appeal was late.

18. However, on 15 February, the FTT wrote to Mr Breen seeking clarification of the grounds on which he was appealing in order that HMRC could produce a Statement of Case. The FTT

requested a reply within 14 days. That deadline expired on 1 March 2018. By an email dated 27 February 2018, Mr Breen sought a further 14 days to provide his grounds of appeal. He said that bad weather on 27 February 2018 had prevented him from attending a meeting with his adviser and that the meeting had been postponed to the following week. On 5 March 2018, the FTT emailed Mr Breen and HMRC to grant the requested extension of time.

19. On 14 March 2018, Mr Breen emailed the FTT with his grounds of appeal. Those grounds were that at all material times Mr Breen was domiciled in Ireland and that the relevant services provided by Mr Breen (resulting in the funds in his Swiss bank account) were provided outside the UK.

HMRC's Statement of Case

20. On 18 May 2018, HMRC sought an extension of time to serve their Statement of Case. HMRC had not been sent an earlier direction to serve their Statement of Case and did not know of the fast approaching deadline. This extension of time was granted (and Mr Breen was copied in on this extension). The FTT noted that Mr Breen, in his notice of appeal, had requested correspondence by post, but that he had recently corresponded by email. The FTT therefore asked Mr Breen whether he would prefer correspondence by post, but no reply was received to that email.

21. On 20 June 2018, HMRC sought a stay of the appeal to allow discussions to take place. The FTT extended the deadline for HMRC's Statement of Case (copying both parties) to 12 October 2018 to permit those discussions. HMRC applied for a further extension on 20 September 2018 and on 11 October 2018 the FTT further extended the deadline to 13 December 2018 (informing HMRC by email and Mr Breen by post). On 26 November 2018, HMRC requested a further extension which was granted and both parties were informed in the same manner as before.

22. The new deadline for HMRC to file their Statement of Case was 18 January 2019 but they filed the document with the FTT (and copied to Mr Breen) three days late on 21 January 2019.

23. Next, on 16 February 2019, Mr Breen emailed the FTT stating:

> "I write to request a 60 day extension to the date for filing of my Reply in answer to HMRC's Statement of Case for the following reasons:
>
> 1. I did not receive HMRC's Statement of Case on the due date;
>
> 2. I need time to source and instruct a firm of solicitors to represent me and such firm will in turn require time to source and instruct counsel; and
>
> 3. I have been corresponding with HMRC in an attempt to see if we can agree on the narrowing of the matters in issue in order to save court time and costs."

24. HMRC emailed the FTT indicating that HMRC did not object to the extension requested by Mr Breen.

The Directions of 6 March 2019

25. On 6 March 2019, the FTT issued directions to both parties. Direction 1 provided as follows:

> "1. **List of documents**: Not later than 19 April 2019 each party shall:

> a. send or deliver to the other party and the Tribunal a list of the documents in its possession or control which that party intends to rely upon or produce in connection with the appeal ("documents list"); and
>
> b. Send or deliver to the other party copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so."

26. At the same time, the FTT sent Guidance Notes to Mr Breen which explained what was required in order to comply with the Directions.

HMRC's application for an extension to the deadlines in Directions 1 to 4

27. On 17 April 2019, HMRC applied for an extension of time to the deadline of 19 April 2019, confirming that the proposed extension had been suggested to Mr Breen but that he had not responded. Apparently, HMRC's email to Mr Breen went into his spam email folder. The extension was granted by Judge Poole on 8 of May 2019 (and confirmation of this was posted to Mr Breen at the time).

28. On 8 May 2019, Judge Poole agreed to HMRC's application for an extension of the deadlines set out in the directions of 6 March 2019. This was communicated to Mr Breen by letter, which explicitly referred to HMRC's application dated 17 April. Mr Breen did not contact the FTT to say that he had not received a copy of HMRC's application. The fresh deadline for compliance with Direction 1 was 31 July 2019.

29. On 4 June 2019, HMRC requested a re-categorisation of the appeal from Standard to Complex, setting out their reasons for the request. HMRC referred to having contacted Mr Breen on 21 May 2019 but without receiving a response. It appears that HMRC's emails went into Mr Breen's spam email folder.

HMRC's application for re-categorisation of the appeal

30. On 27 June 2019, the FTT wrote by letter to Mr Breen and asked him to provide his representations on HMRC's application of 4 June 2019. On 16 July 2019, Mr Breen emailed the FTT (but did not copy HMRC) stating that he had received the letter of 27 June 2019 but had not received the email of 4 June 2019 from HMRC. Mr Breen explained that, as a result of a telephone call with HMRC, he had become aware of HMRC's April 2019 application. Mr Breen would also have been aware of the April 2019 application from the terms of the FTT's letter of 8 May 2019.

31. On 31 July 2019, HMRC emailed the FTT with their list of documents and confirmed that the list had been served on Mr Breen on the same day. Apparently, HMRC's list of documents was sent by post to Mr Breen.

32. Mr Breen did not file his list of documents with the FTT by the 31 July 2019 deadline.

33. On 16 August 2019, the FTT wrote by letter to Mr Breen enclosing a copy of HMRC's applications of 17 April 2019 and 4 June 2019, requesting that Mr Breen make his representations on the applications within 14 days i.e. by 30 August 2019.

34. On 23 September 2019, the FTT wrote again to Mr Breen, noting that there had been no response to their letter of 16 August and asking for a response within a further 14 days i.e. by 7 October 2019.

35. On 7 October 2019, the FTT received a letter dated 2 October 2019 from Mr Breen which enclosed a copy of a letter dated 3 September 2019. This letter of 3 September 2019 contained a complaint by Mr Breen that HMRC did not have his permission to correspond by email and that the applications they made should have been sent by post. Mr Breen asked the FTT to direct that HMRC must correspond with him by first class post. Mr Breen stated that he would be flying to Ireland the next day to visit his mother and that he would be working abroad until 25 September. He asked for an extension of time until 31 October 2019 in order to take legal advice on HMRC's application.

36. In neither his 3 September 2019 letter nor his 2 October 2019 letter did Mr Breen refer to not having received the copy applications sent by the FTT on 16 August 2019. Mr Breen did also not refer to any reason for his own failure to provide his list of documents, nor did he request an extension of time to comply with Direction 1.

37. The FTT wrote to Mr Breen (with a copy to HMRC, asking them to confirm that they would correspond with Mr Breen by post only) on 28 October 2019, granting his application for more time to respond.

38. The FTT's letter of 28 October 2019 did not reach Mr Breen by 30 October 2019 because, on that date, Mr Breen wrote to the FTT to complain that he did not know the extension that he had requested had been granted. He asked for "a reasonable period of time" to respond to "all matters raised by HMRC" and stated that he did not feel that he was in a position to say how long he would need to respond when he had not seen "all the matters raised by HMRC" in correspondence. This was despite the FTT having posted copies of both of HMRC's applications to Mr Breen on 16 August 2019.

39. On 26 November 2019, the FTT posted a letter to Mr Breen, drafted on the instructions of Judge Dean. Mr Breen was directed that the new deadline for him to provide his representations on HMRC's application to re-categorise the appeal as a complex appeal was 9 December 2019. No response was received from Mr Breen by the expiry of the deadline and no explanation has been provided for his failure to comply with Judge Dean's direction.

40. There was further correspondence between Mr Breen and the FTT in December 2019. Mr Breen complained about HMRC's use of email rather than post for communications and said that HMRC's application for re-categorisation had not been enclosed with the FTT's letter of 26 November. However, this was because a copy of this application had already been sent to the Appellant by letter on 16 August 2019. A further copy of HMRC's re-categorisation application of 4 June 2019 was sent to Mr Breen by the FTT on 13 January 2020 and again on 24 January 2020, noting that Mr Breen's response had been outstanding for six months, and directing that he provide his comments on that application by 7 February 2020.

41. By a letter dated 6 February 2020 Mr Breen objected to the re-categorisation of the appeal, stating that although there was a significant amount of money at stake he considered the "facts relating to [the domicile of his father and himself] are very straightforward." Mr Breen also stated "contrary to what HMRC claim domicile is not a particularly complex area of law." In response to HMRC's suggestion in their application that there were numerous documents, and possibly numerous witnesses, Mr Breen stated:

> "The correct position is that there are not many documents involved in this matter and part of the reason for this is because it relates to matters that took place more than 20 years ago."

42. On 6 March 2020, the appeal was referred to Judge Bailey to decide HMRC's re-categorisation application. Judge Bailey noted that there were fewer than 120 documents on HMRC's list of documents and she agreed with Mr Breen that there was limited information concerning the number of witnesses. She also agreed with Mr Breen that appeals concerning domicile were lengthy rather than inherently complex. She therefore dismissed HMRC's application.

43. However, in reaching her decision on re-categorisation, Judge Bailey noted that HMRC had filed a list of documents but that no list of documents had been filed by Mr Breen. She noted the length of time which had elapsed since directions were originally issued and directed that Mr Breen's list of documents should be filed no later than 27 March 2020 i.e. 21 days after the issue of her re-categorisation decision.

The pandemic

44. On 23 March 2020, the UK went into lockdown as a result of the Covid-19 pandemic.

45. On 31 March 2020, the FTT received a letter dated 26 March 2020 from Mr Breen. Mr Breen noted that he had not received HMRC's list of documents and sought an extension of 12 weeks to provide his list of documents. Mr Breen stated that his daughter was vulnerable to Covid-19 and that he and his family were shielding. Consequently, he was unable to go to the post office to buy stamps or post letters. Mr Breen said that it had been his intention to obtain legal advice and to travel to Ireland "to obtain further information regarding the domicile point" but "this has simply not been possible". Mr Breen asked for "leniency" with regard to deadlines and asked for a further 12 weeks to provide his list of documents. He also asked that he be granted further time if the period of lockdown was extended.

46. Mr Breen, in this application, did not explain what action he had taken to prepare his list of documents between 6 March 2019 (when the FTT issued Directions) and 26 March 2020, nor did he explain why being unable to leave his home would prevent him from listing the "not many documents" which were in his possession or control and that were relevant to the appeal.

47. In the Unless Order, Judge Bailey noted that Mr Breen did not explain why it had not been possible for him to take legal advice between 3 November 2017 and 26 March 2020, given that he has stated as long ago as 3 November 2017 that he would instruct a legal representative. Mr Breen also did not explain why he had not travelled to Ireland during this lengthy period to obtain the further domicile information, or (given that he had told the FTT he would be in Ireland in September 2019 to visit his mother) why he did not conduct his domicile research when he was in Ireland.

48. Due to the pandemic, the FTT issued two general stays. These had the effect of extending all FTT deadlines by 14 weeks (two weeks longer than the extension Mr Breen had requested). Therefore the fresh deadline for Mr Breen to file his list of documents was 3 July 2020.

49. The UK's lockdown was largely lifted on 4 July 2020[1] and shielding for vulnerable individuals ceased on 1 August 2020.

50. Next, on 2 September 2020, the FTT wrote to the parties on the instructions of Judge Popplewell. In this letter, Judge Popplewell noted that Mr Breen had not met the original

[1] The Unless Decision refers to lockdown being lifted on 4 July 2019, but we think this is a typographical error for 4 July 2020.

deadline for providing his list of documents, that he had not provided his list of documents in the period since the expiry of the requested additional 12 weeks, and that the UK-wide lockdown imposed on 23 March 2020 had generally been lifted. Judge Popplewell expressed his opinion that the appeal was ready to be listed for hearing and he issued a number of Directions.

Judge Popplewell's Directions

51. The first of Judge Popplewell's Directions was that Mr Breen should provide his list of documents no later than 15 September 2020.

52. Judge Popplewell also directed both parties, within 14 days, i.e. by 16 September 2020, to provide the FTT and each other with the answers to five questions: (1) whether this appeal should be heard on the papers, (2) whether the appeal was urgent, (3) whether oral evidence would be given by the party replying, (4) an outline of the factual assertions made by the other party which the party replying did not agree, and (5) whether the appeal was suitable for a telephone or video hearing and, if not, why not. Judge Popplewell suspended compliance with the remainder of the Directions of 6 March 2019 pending compliance with his Directions of 2 September 2020.

53. Mr Breen did not file and serve his list of documents by Judge Popplewell's deadline of 15 September 2020.

54. On 16 September 2020, HMRC complied with Judge Popplewell's directions, answering each of the five questions, and explaining that the absence of Mr Breen's list of documents meant they could not give precise answers to the three questions regarding the bundles. HMRC noted that the absence of Mr Breen's list of documents also meant that they were unable to complete their witness statements as they did not know the case that they were required to meet and requested that the FTT either proceed on the basis that Mr Breen would produce no documents or that the FTT issue an "unless" Order.

55. The FTT did not receive a response from Mr Breen to the listing information by 16 September 2020, and so there was no compliance with Judge Popplewell's directions.

Judge Popplewell's Decision – the First Unless Order

56. On 25 September 2020, the FTT file was referred back to Judge Popplewell. Judge Popplewell noted that Mr Breen had not complied with either part of his Directions of 2 September 2020, and he issued an Unless Order ("the First Unless Order"). The terms of the First Unless Order were as follows:

> "IT IS DIRECTED that the appellant having failed to comply with the Directions issued on 2 September 2020 to provide his list of documents and copies of those documents on which he intended to rely in this appeal in accordance with the Directions issued on 6 March 2019 and in particular Direction 1 of those Directions; and to provide information to the Tribunal to consider whether this matter should be decided on the papers, by telephone or at a video hearing, the Tribunal DIRECTS that UNLESS the appellant no later than 5 p.m. on 15 October 2020 complies with the aforesaid Directions to provide his list of documents and copies of those documents and provides the information requested by the Tribunal regarding the listing of this matter then these proceedings MAY be STRUCK OUT without further reference to the parties."

57. The First Unless Order was posted to Mr Breen on 25 September 2020.

58. On 2 October 2020, the FTT received a letter from Mr Breen dated 29 September 2020 which was a late response to Judge Popplewell's directions issued on 2 September 2020 and not a response to the Unless Order. In this letter Mr Breen reiterated that his daughter's health condition, as well as his own, meant that they were both vulnerable to Covid-19. He asked for leniency with regard to the imposition of deadlines. Mr Breen also stated that he had wished to explore the possibility of legal representation and also to travel to Ireland, and he had not been able to do that during lockdown, or since. Mr Breen noted that he had received HMRC's list of documents but not the documents themselves, and asked the FTT to direct HMRC to provide a copy.

59. In response to the questions in the 2 September 2020 letter, Mr Breen initially asked for more time to respond to the direction to provide listing information but, in case that additional time was not granted, stated as follows:

> "I believe a paper or telephone or video hearing would not be appropriate or indeed satisfactory given the points and nature of the matters in contention. Accordingly, it is my position that there are a great number of very significant issues (both of fact and law) in dispute between the parties including but not limited to issues of witness evidence. It is my contention that the respondent's witnesses should be subject to cross-examination in person. If this were not permitted then I believe I would be unfairly prejudiced as a direct result of the nature of the hearing. In short I am stating that I believe it is of vital importance given the matters in dispute that this hearing is an in person hearing."

60. As Judge Bailey later observed, Mr Breen did not state whether he would call oral evidence and did not outline the factual assertions made by HMRC that he did not accept. Judge Bailey accepted, however, that it was implicit that the Appellant did not consider his appeal to be urgent.

61. In a letter dated 29 September 2020, Mr Breen stated that he was not in a position to provide his list of documents and so he could not respond in relation to the size of the bundles. Mr Breen asked for the directions to be suspended for a period of 12 weeks from the suspension of the first lockdown until it was safe for a high-risk individual to travel safely. Mr Breen asked the FTT to bear in mind the Convention for the Protection of Human Rights and fundamental freedoms, without specifying which particular rights he had in mind.

62. Further letters were received by post from Mr Breen on 7, 21 and 27 October 2020. Mr Breen expressed concern about the consequences for himself and his daughter if he stopped shielding, and stated that he was asking for more time to seek legal representation as "the issues involved in this case are very complex and I feel I require expert legal advice and input in order that I may be given the opportunity of putting forward my best defence." On 21 October 2020, the FTT received a letter dated 14 October 2020 in which Mr Breen complained that he had yet to receive a response to his 1 October 2020 letter and that he wished to receive a reply at the "Court's earliest convenience."

63. HMRC emailed the FTT on 23 October 2020 to oppose Mr Breen's request for a stay on the basis that it was effectively open-ended and in the light of the lack of progress over the previous three years it was unlikely that further delay would help in progressing the appeal.

64. On 27 October 2020, Mr Breen complained about the FTT's delay in responding to his previous letters and he considered that he had no option but to file a "draft list of documents".

He sought permission to add to this list once he had a legal representative and once he had obtained further documents. Mr Breen's draft list of documents listed just four documents: his four Irish passports which spanned a period 1981 to 2022. He referred to his previous correspondence for the reasons why he wanted to be granted more time to obtain further documents.

65. On 28 October 2020, HMRC emailed the FTT to oppose the suggestion that Mr Breen should be allowed to add to his list at a later date, pointing out that HMRC would be unable to complete their witness statements if there remained a risk of further material being produced at a later date.

The Unless Order

66. As a result of Mr Breen's failure to comply with Judge Popplewell's First Unless Order, the matter came before Judge Bailey, who considered whether to strike out Mr Breen's appeal. References in this section are to paragraphs of the Unless Order.

67. Judge Bailey noted at [70] that there was an obligation on Mr Breen to progress his appeal in a reasonable manner and without undue delay. The judge noted that the original deadline for Mr Breen to produce his list of documents was 19 April 2019. The FTT had then extended this deadline to 31 July 2019. Judge Bailey considered that there had been no explanation whatsoever for Mr Breen's failure to provide his list of documents by the extended 31 July 2019 deadline. Then at [71] Judge Bailey said:

> "It is also helpful to reiterate what it was that was required of the Appellant in …Judge Popplewell's Unless Order. There are two aspects. The more recent non-compliance was a result of the Appellant's late and incomplete listing information in response to Judge Popplewell's Directions of 2 September 2020. I will look at this aspect first. The more serious non-compliance, lasting for about 15 months, is the Appellant's failure to file and serve his list of the documents."

68. Judge Bailey noted that there was no explanation provided as to why Mr Breen failed to comply with Judge Popplewell's Directions of 2 September 2020 and that he should provide his listing information by 16 September 2020. Mr Breen had in his letter of 29 September 2020 belatedly provided responses to 3 of the 5 questions. However Mr Breen did not provide an outline of the factual assertions made by HMRC that he did not accept and he did not state whether he would call witnesses. Judge Bailey noted that Mr Breen had not answered the question whether he would be calling oral evidence and, if so, by whom. It was inconceivable, stated Judge Bailey, that Mr Breen should not know, by this stage, whether he would himself give evidence and whether he would call on anyone else as a witness.

69. Judge Bailey then addressed what she considered to be "the more serious non-compliance" i.e. Mr Breen's non-compliance with Direction 1 which required Mr Breen to file and serve a list of documents in his possession or control or on which he would rely at the hearing. Judge Bailey dismissed the various reasons for non-compliance. As regards Mr Breen's wish to instruct a legal representative she noted that Mr Breen's assertions about the complexity of the appeal were inconsistent and that Mr Breen was capable of recognising whether or not he needed representation at an earlier stage. Indeed, in Mr Breen's notice of appeal he had stated that he intended to appoint a representative. Mr Breen had used lack of representation as an explanation for delayed compliance – an explanation which Judge Bailey rejected. There was no explanation as to why Mr Breen had not used the almost 2 ½ years

between 3 November 2017 and 23 March 2020 (when lockdown began) to instruct a legal representative.

70. Judge Bailey also rejected at [86] Mr Breen's explanation that he was still shielding as an explanation for the delay in compliance. Furthermore, at [87] Judge Bailey rejected Mr Breen's suggestion that he could not currently travel to Ireland in order to obtain further information from that country.

71. At [89] Judge Bailey said:

> "I am sorry to say that I am left with the strong impression that the Appellant has not given the progression of his appeal sufficient priority during the period 3 November 2017 to 23 March 2020. I can see that the Appellant responded (albeit after the Tribunal deadlines) when he realised he was not receiving emails from HMRC in the spring of 2019 but the Appellant has not complied with the Tribunal directions posted to him in March 2019 and he has not provided any explanation for not complying with Direction 1 on time. The explanations the Appellant has provided for his later non-compliance and for needing more time – that he was working abroad, that he was visiting family, that he had not yet instructed a representative – all indicate that the Appellant considered that these Tribunal proceedings could continue to be pushed back as being less important than other matters in his life. Unfortunately, the pandemic then struck. No one could have foreseen that this would occur, and it was no doubt a shock to the Appellant, as it was to everyone else. The Tribunal granted two general stays, totalling 14 weeks, to enable parties to adjust to their new circumstances and to work out how they could comply with Tribunal directions."

72. At [92]-[93] Judge Bailey set out her conclusion:

> "92. I now have to decide whether the Appellant's non-compliance is sufficiently serious to justify striking out this appeal.
>
> - In respect of the Appellant's failure to provide the information required by Judge Popplewell, there was belated partial non-compliance and I do not consider that this non-compliance was sufficiently grave to justify striking out the appeal.
>
> - In respect of the Appellant's failure to provide his list of documents, given the length of the non-compliance and the Appellant's continued failure to provide a definitive list, I consider that this non-compliance is sufficiently serious to justify striking out this appeal. However, given the Appellant's extremely belated attempt at compliance on 27 October 2020, I have decided to give the Appellant [Mr Breen] one last chance to comply with the Directions previously issued.
>
> 93. I stress to the Appellant that this is his last opportunity to produce his definitive list of documents and to provide the information required by Judge Popplewell. I am going to issue a further Unless Order but, unlike Judge Popplewell's Order, this Order will take effect automatically if there is no compliance."

73. To emphasise the stark choice facing Mr Breen, Judge Bailey said at [96]:

> "Therefore, the choice available to the Appellant now is as follows: he can comply with the Unless Order set out below, and his appeal will proceed, or he can choose not to comply, and the appeal will be struck out as a result of

> that non-compliance. I cannot state the position any more bluntly. I hope the Appellant will take this opportunity so that he can proceed with his appeal."

74. At [98] Judge Bailey gave the following directions:

> "I DIRECT as follows:
>
> UNLESS the Appellant, no later than 5 p.m. on the fourteenth day from the date of release of this decision, files with the Tribunal and serves on HMRC:
>
> a) a written final list of the documents in his possession or control which he intends to rely upon or produce in connection with the appeal,
>
> b) a document setting out the factual assertions made by HMRC in their Statement of Case with which the Appellant does not agree, and
>
> c) a document setting out whether the Appellant intends to call oral evidence at the hearing of this appeal and, if so, by whom,
>
> THEN these proceedings WILL be STRUCK OUT without further reference to the parties."

75. In order that "there can be no confusion", Judge Bailey *inter alia* made the following points clear at [99]:

> "…
>
> – It is the Appellant's choice to use postal communications rather than email, and therefore it is his responsibility to ensure that he replies with sufficient time for the Tribunal and HMRC both to receive his response by the stated deadline. If no response is received by the deadline, the appeal will be struck out automatically. That will be the case even if a response was posted the day before but not received until the day after. If the Appellant chooses to use email on this occasion to ensure he meets the deadline then his email must be received by 5 p.m. on the fourteenth day.
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> …
>
> –This is the Appellant's last chance to respond. As the Appellant has already failed to comply with one Unless Order, no extensions of time will be granted to the deadline in this Unless Order. If the Appellant does not meet this deadline, the appeal will be struck out."

76. The Release Date of Judge Bailey's decision was 10 November 2020.

77. Mr Breen received Judge Bailey's decision containing the above-mentioned Directions on 16 November 2020.

78. Mr Breen served the documents specified in the Directions on 28 November 2020 i.e. four days after the date specified for compliance with the Directions.

79. Consequently, Mr Breen had failed to comply with the terms of Judge Bailey's Unless Order, with the result that the appeal was struck out on 24 November 2020.

80. HMRC asked the FTT to confirm that the appeal had been struck out and by an email dated 3 December 2020 Mr Breen stated that he believed that he had complied with the terms of Judge Bailey's Unless Order, having provided all the relevant documents to the FTT within 14 days of the *receipt* of the Unless Order. He pointed out that a further lockdown had been imposed and that he had continued to be unable to appoint legal representation.

81. Mr Birkbeck was appointed on 28 December 2020 to represent Mr Breen.

82. On 11 January 2021, Mr Breen was formally notified that the appeal had been struck out and of his right to apply for reinstatement.

83. On 5 February 2021, Mr Breen made an in-time application for reinstatement of his appeal and filed a witness statement in support of his application.

THE REINSTATEMENT DECISION

84. Mr Breen's reinstatement application was heard by the FTT on 21 March 2022.

85. References in this section and the remainder of this decision to paragraphs in the form FTT[x] are to paragraphs of the Reinstatement Decision.

86. In addition to his witness statement, Mr Breen gave oral evidence. The focus of that evidence was to provide an explanation for the four day period between the expiry of Judge Bailey's Unless Order and the service of the documents required by it: FTT[5]. Mr Breen explained that he believed that he had 14 days from the receipt of the decision and the Unless Order and that he had not appreciated that the terms of the Direction required compliance within 14 days of the release date. He said that he had understood that compliance required that the FTT received the list of documents, points of dispute and identification of witnesses before the expiry of the stated 14 days and not the date on which he sent them, but still believed that the warning about the vagaries of the postal system did not include the postal delay from the issue of the Direction to its receipt by him. He believed that he had until 30 November 2020 to comply and so had complied.

87. The FTT made the following findings of fact at FTT[7](1)-(9):

> (1) Mr Breen had, over a considerable period, failed to give proper attention to the conduct of his appeal.
>
> (2) Mr Breen had provided no reason for not appointing legal representation before 5 February 2021, despite having indicated an intention to do so in 2017, and as such there was no reason for his failure to appoint a representative other than apathy.
>
> (3) In the period from 6 March 2019 to 16 November 2020 Mr Breen made no serious attempt to locate relevant documents which would support his position that he was not UK domiciled. There was nothing which had prevented him doing so and he had provided no explanation for his conduct. As such, again there was no reason for this conduct.
>
> (4) Mr Breen was obstructive and almost belligerent with both HMRC and the FTT in his communications with them, and his refusal to accept electronic communication even during the pandemic hampered effective communication between the parties and the FTT.
>
> (5) Judge Bailey's Unless Order was received by Mr Breen on 16 November 2020, and he appreciated that he would lose his right to continue his appeal unless he complied.
>
> (6) Mr Breen believed that he had until 30 November 2020 to comply, and used his best endeavours to do so, compiling a list of documents, preparing a note of objection (which the FTT said was a document not previously required of him) and considering

whom to call as witnesses. In making this finding, the FTT took account of the documents (including Mr Breen's letters of 28 November 2020 and 3 December 2020) and the oral evidence. On balance, and by reference to all the evidence, the FTT considered Mr Breen's email dated 28 November 2020 (serving the documents on the FTT) was drafted in terms that did not lead to a necessary conclusion that Mr Breen was aware he had missed the deadline (as asserted by HMRC). There was a degree of ambiguity in the language and the FTT considered that HMRC's reliance on the fact that Mr Breen had once been a solicitor as evidence that it was crafted in recognition of a failure to comply was inappropriate. The FTT accepted Mr Breen's oral testimony that if it were right that Mr Breen had understood the terms of the Unless Order to require compliance by 24 November 2020, the FTT considered that Mr Breen would have complied or sought an in-time application for extension and/or made "an application when serving".

(7) Mr Breen had, by 28 November 2020, provided all three documents required under the terms of the Unless Order.

(8) It was not until receipt of HMRC's email of 3 December 2020 that Mr Breen was aware of his failure to meet the terms of the Unless Order.

(9) Mr Breen had appointed Mr Birkbeck to represent him in this appeal. Mr Birkbeck was to be paid up front for such representation and Mr Breen had the funds to pay him. This evidence was set out in Mr Breen's witness statement and not subject to cross-examination.

88. At FTT[9]-[12] the FTT applied the test provided for by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") in considering Mr Breen's application for reinstatement of his appeal. It was common ground before us that this was the correct test to apply. Essentially, *Martland* laid down a three stage test to be applied to the breaches of the Unless Order: (1) was the delay serious? (2) what were the reasons for the delay? and (3) a consideration of all the relevant circumstances. In considering the third stage of the *Martland* test particular importance was 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.

89. The FTT also referred, at FTT[13], to the decision of this Tribunal in *Chappell v The Pensions Regulator* [2019] UKUT 2009 ("*Chappell*"), which concerned an application to reinstate an appeal following a strike out. *Chappell* provides guidance in applying the usual *Martland* test when considering an application to reinstate an appeal struck out for non-compliance with an unless order. First, when considering the first stage of the *Martland* test it is necessary to take account of previous breaches in compliance which led to the granting of an unless order. In addition, the Tribunal should generally take no account of the merits of the underlying appeal where the appeal had been struck out for failure to comply with directions and orders, save in the limited situation where the appellant's case is "unanswerable", such that it would merit HMRC being debarred from resisting the appeal.

90. Applying *Martland* and *Chappell* to the facts, the FTT said this, at FTT[17]-[24]:

> **"APPLYING MARTLAND**
>
> 17. In the context of reinstatement the first two components of the *Martland* test require the Tribunal to consider what led to the appeal being struck out and determine the seriousness and significance of the failure.

> 18. In this regard there is no real dispute that a failure to comply on or before the deadline of an unless order is serious and significant.
>
> 19. There is somewhat more of a dispute as regards the reason for default/delay and the relevant period for which a reason is required. However, it is quite plain, by reference to *Chappell*, that the Tribunal is required to consider the whole period of non-compliance in relation to the matter or matters which led to the strike out.
>
> 20. The terms of Judge Bailey's unless order required the Appellant to provide 1) a list of documents; 2) points of objection and 3) an indication of who he intended to call as witnesses. It did not require the provision of the information previously directed to be provided by Judge Popplewell.
>
> 21. The Appellant had been first required to provide a list of documents by 31 July 2019 and had not done so, accordingly the relevant period of delay regarding the list of documents was almost 26 months and not only 4 days. As contended by HMRC and by reference to the findings of fact, the Appellant provided no reason (never mind a good one) for the 26-month failure to provide a list of documents. It is immaterial, at this stage of the *Martland* test, what gave rise to the failure to comply with the Judge Bailey unless order taken alone.
>
> 22. There had been no previous requirement on the Appellant to provide the points of objection. The delay in provision the points of objection was therefore 4 days and there had been no previous non-compliance to take account of. The Tribunal has found (for the reasons stated at paragraph 7(6)) that the Appellant understood that he was required to comply with the unless order by reference to the date of receipt rather than the date of release and that he believed he had complied. The Tribunal accepts that the length of the delay is short and that there is, at least, an adequate explanation for the delay.
>
> 23. The Tribunal did not have before it the full terms of the directions of 6 March 2019. The terms of the direction requiring service of a list of documents[2] appeared consistent with the general case management directions given by the Tribunal, though it is noted that they were the directions of Judge Poole and not a tribunal caseworker. The usual directions for case management provide for the exchange of witness statements and would not usually be in the precise form adopted by Judge Bailey. Neither party addressed the Tribunal on the specific terms of the direction, or the failure to comply however, it would appear that on its precise terms it was a new direction and would therefore be considered in the same way as the direction to provide points of objection i.e. the delay was short, and the reason given was adequate.
>
> 24. On the basis of the above it is necessary to progress to stage 3 only as regards the failure to serve a list of documents prior to 28 November 2020 in breach of an unless order."

91. The FTT then proceeded to consider the third stage of the *Martland* test.

92. At FTT[27] the FTT considered the burden of proof and said:

> "However, this is an appeal against assessments where HMRC (somewhat unusually in tax appeals) bear the burden of proof. It is not a case where, in the context of an appeal, the assessments stand unless the Appellant can show

[2] Before us we understood that both parties accepted that the reference to "a list of documents" was a mistake and that the FTT intended to refer to a list of witnesses. We agree.

> they are wrong. HMRC must show both that the Appellant deliberately failed to self assess for income/gains on the basis of Irish rather than UK domicile. The burden also rests with HMRC on the question of domicile but on the Appellant to show that the income was not UK source income. Both of those issues are highly significant."

93. The FTT at FTT[28] considered it important that Mr Breen had complied (albeit late) with Judge Bailey's Unless Order and that there was not continued non-compliance.

94. At FTT[29] the FTT noted that in *Chappell* it was considered relevant that the Appellant in that case had not established that there could be any confidence in future compliance. In the present case, Mr Breen had appointed Mr Birkbeck as his legal representative, who confirmed to the FTT that he would ensure future compliance.

95. The FTT concluded at FTT[30] that Mr Breen's appeal should be reinstated:

> "The Tribunal gave extemporary judgment in this matter. The balancing exercise was a fine one. HMRC's submissions were well made. The Appellant's conduct in this appeal has been abhorrent. Had such behaviour been in connection with an appeal where the Appellant bore the burden of proof and/or had there not been allegations of deliberate behaviour (which in part gives rise to the burden of proof being on HMRC) the Tribunal would have refused the application to reinstate. However, by the finest of margins the Tribunal considered that it was in accordance with the overriding objective to act justly and fairly appropriate that the matter be reinstated."

GROUNDS OF APPEAL

96. HMRC has appealed against the Reinstatement Decision on two Grounds, which are as follows:

Ground 1

97. The FTT reached a perverse finding on the evidence before it that there had been no previous requirement for Mr Breen to provide a list of objections and list of witnesses. Accordingly, it failed at the third stage of the *Martland* test to take into account the full extent of Mr Breen's non-compliance. There had been two further serious and significant breaches for which Mr Breen failed to provide any explanation.

Ground 2

98. The FTT erred in taking into account an irrelevant factor and/or misdirected itself in law by deciding to allow the application because the burden of proof in the underlying appeal was on HMRC.

SUBMISSIONS AND DISCUSSION

Ground 1

99. Mr Stone referred to the FTT's findings at FTT[22] and FTT[23] to the effect that there had been no previous requirement (i.e. before Judge Bailey's Unless Order) to provide points of objection or a list of witnesses. This finding was, he said, perverse in the light of the evidence before the FTT, particularly Judge Bailey's decision at [54], summarising the effect of Judge Popplewell's case management direction dated 2 September 2020. Judge Bailey said that Mr

Breen had been directed to answer five questions, including: "(3) whether oral evidence would be given by the party replying, and (4) an outline of the factual assertions made by the other party which the party replying did not agree." At [57] Judge Bailey had noted that the appellant did not comply in time with that direction.

100. Furthermore, Mr Stone noted that the terms of Judge Popplewell's First Unless Order dated 25 September 2020 required Mr Breen to "provide information to the Tribunal to consider whether this matter should be decided on the papers, by telephone or at a video hearing." Mr Stone submitted that this was a reference to the five questions which the appellant had been ordered to answer on 2 September 2020.

101. In addition, at [62], Judge Bailey found that following the First Unless Order, Mr Breen had expressly or impliedly answered three of the five questions, but had still failed to state whether he would call oral evidence and had not outlined the factual assertions made by HMRC that he did not accept.

102. Consequently, Mr Stone submitted that the only finding open to the FTT was that the requirement to provide a list of objections and information about witness evidence had formed part of Judge Popplewell's Directions of 2 September 2020 and his First Unless Order of 25 September 2020. This had been the basis on which HMRC's case was presented before the FTT and the FTT's conclusion was, therefore, perverse.

103. Accordingly, the FTT, at the third stage of the *Martland* test, should have had regard to these further breaches. The FTT had, therefore, failed to have regard to a relevant factor, namely the full extent of Mr Breen's non-compliance. This was a material error, in Mr Stone's submission, because the FTT had allowed Mr Breen's reinstatement application "by the finest of margins."

104. Mr Birkbeck referred to the decision of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 ("*BPP*") at [33] where Lord Neuberger, delivering the judgment of the Court, said:

> "In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, para 33:
>
> > "[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable."

105. Furthermore, earlier in his judgment at [21] Lord Neuberger said:

> "However, it would nonetheless be appropriate for an appellate court to interfere with [the FTT's decision], if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached."

106. Mr Birkbeck argued that the FTT had clearly taken into account the Directions of 2 September 2020 and the First Unless Order. He submitted that:

(1) the FTT "must have considered" the First Unless Order to override and replace the Directions of 2 September 2020; and

(2) the FTT "must have considered" that the requirement to provide points of objection was not "information...regarding the listing of the matter", but instead referred only to matters concerning how the hearing should be conducted and its urgency i.e. conventional listing information. The First Unless Order was, therefore, referring only to paragraphs 1, 2 and 5 of the Directions of 2 September 2020.

107. In short, Mr Birkbeck argued that Judge Popplewell, by his First Unless Order. abolished the broader requirements of his Directions of 2 September 2020, but these broader requirements were then reinstated by Judge Bailey in her Unless Order.

108. Moreover, said Mr Birkbeck, there was no failure by the FTT to take into account Judge Popplewell's Directions of 2 September 2020 and the First Unless Order of 25 September 2020, because those matters were referred to at FTT[3](10)-(11).

109. Mr Birkbeck said that the FTT had considered the implications of Mr Breen's history of non-compliance but weighed against it three factors:

(1) Mr Breen had (eventually) complied with the FTT's directions;

(2) It was likely that he would comply in the future; and

(3) The nature of the accusations (deliberate behaviour), and the burden of proof (which lay upon HMRC).

110. Those three factors had tipped the balance in favour of Mr Breen and led the FTT to order reinstatement of his appeal.

111. We reject Mr Birkbeck's submissions.

112. At FTT[22]-[23] the FTT said:

> "22. There had been no previous[3] requirement on the Appellant [Mr Breen] to provide the points of objection. The delay in provision [of] the points of objection was therefore 4 days and there had been no previous non-compliance to take account of. The Tribunal has found, for the reasons stated at paragraph 7(6)) that the Appellant understood that he was required to comply with the unless order by reference to the date of receipt rather than the date of release and that he believed that he had complied. The Tribunal accepts that the length of the delay is short and that there is, at least, an adequate explanation for the delay.
>
> 23. The Tribunal did not have before it the full terms of the directions of 6 March 2019. The terms of the directions requiring service of a list of documents [sic][4] appeared consistent with the general case management

[3] i.e. prior to Judge Bailey's Unless Order.

[4] As explained above, it is evident from the rest of the paragraph, and the parties agreed, that the FTT intended to refer to a list of witnesses rather than a list of documents.

> directions given by the Tribunal, though it is noted that they were the directions of Judge Poole and not a tribunal caseworker. The usual directions for case management provide for the exchange of witness statements and would not usually be in the precise form adopted by Judge Bailey. Neither party addressed the Tribunal on the specific terms of the direction, or failure to comply however, it would appear that on its precise terms it was a new direction and would therefore be considered in the same way as the direction to provide points of objection i.e. the delay was short, and the reason given was adequate."

113. It is clear to us, for the reasons given by Mr Stone, that at FTT[22]-[23] the FTT had overlooked the fact that a note of points of objection and information about witnesses had been required by Judge Popplewell's Directions of 2 September 2020. It is in our view not possible sensibly to read Judge Popplewell's First Unless Order in the restricted sense suggested by Mr Birkbeck. When Judge Popplewell referred to the requirement on Mr Breen to provide "the information requested by the Tribunal regarding the listing of this matter", the only reasonable inference is that this was referring back to his Directions of 2 September 2020 and to the five matters listed therein. It is highly implausible that Judge Popplewell in the First Unless Order reduced or set aside certain of the requirements of his Directions of 2 September 2020, but without saying so. There was no reason for him to forgive the breach of those directions, only for Judge Bailey in the Unless Order subsequently to reintroduce them.

114. Accordingly, the FTT's findings, at FTT[22], that there had been no previous requirement on Mr Breen to provide the points of objection and at FTT[23] that the requirement to provide a list of witnesses was "a new direction", were findings that it was not open to the FTT rationally to reach.

115. We accept Mr Stone's submission that the result of the FTT's errors at FTT[22] and [23] was that the FTT did not take account of a relevant matter, being the full extent of Mr Breen's non-compliance, as the FTT had correctly directed itself to do by reference to *Chappell*. In fact, the failure to provide the listing information constituted a breach of three orders of the Tribunal and a delay of nearly 26 months – breaches which were serious and significant and for which Mr Breen was found to have offered no reason other than in relation to his late compliance with Judge Bailey's Unless Order.

116. Mr Birkbeck submitted that even if the FTT had fallen into error, that error was not one which had sufficient causative effect on its decision to make any difference to the third stage of the *Martland* analysis. He said that the FTT had taken a very dim view of Mr Breen's non-compliance but had balanced this against the three factors referred to at paragraph 109 above. The fact that the FTT made its decision "by the finest of margins" did not mean that any additional factor going against Mr Breen would have tipped the balance. The discretion which was exercised by the FTT was not "a numbers game". At the third stage of the *Martland* test the FTT weighed Mr Breen's behaviour against the factors which pointed the other way. There was no compelling reason to think that the outcome would have been different if at the first stage the FTT had found differently in respect of the extent of the breaches in relation to the points of objection and/or list of witnesses.

117. We also reject Mr Birkbeck's argument on this issue, and we disagree with the approach which he suggested. Having found that the FTT reached a finding which was not open to it and which resulted in it failing to take account of a material matter, the test to be applied is that set out by Henderson LJ in *Degorce v HMRC* [2017] EWCA Civ 1427 ("*Degorce*"). The issue in that case was whether the taxpayer, who had participated in a film scheme, was carrying on a trade. The FTT made an error of law in not taking account of the taxpayer's other film-related

activities. The Upper Tribunal nevertheless declined to exercise its discretion to set aside the decision. In the Court of Appeal the taxpayer argued that the Upper Tribunal had misstated the test as requiring that if the evidence had been approached correctly "[The FTT's] doing so would, or at least might, have affected the outcome". Henderson LJ considered (at [95]) that the test of materiality will have a:

> "…crucial, and usually decisive role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT…."

118. He continued (also at [95]):

> "At least in case of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision is set aside."

119. We do not think that the test adopted by Henderson LJ in *Degorce* ("might… have made a difference to [the] decision") is different from that put forward by Lord Neuberger in *BPP Holdings* set out above ("unless the appellate court was quite satisfied that the error made no difference to the decision"). It seems to us that both Lord Neuberger and Henderson LJ were effectively adopting the same test.

120. In our view, noting that the FTT reached its decisions by "the finest of margins", we cannot be satisfied that, if the FTT had taken account of the failure of Mr Breen to comply with Judge Popplewell's Unless Order and his Directions of 2 September 2020 in respect of the note of objections and the list of witnesses, this might not have made a difference to the decision. In our view, adopting Henderson LJ's language, we consider it to be clear that the failure to take account of these factors might have made a difference.

121. We therefore allow HMRC's appeal on Ground 1. We consider below what this means for the disposition of this appeal.

Ground 2

122. At FTT[27] and [30] the FTT took account at the third stage of the *Martland* assessment of the fact that the burden of proof in the underlying appeal was on HMRC. The FTT said:

> "27. However, this is an appeal against assessments where HMRC (somewhat unusually in tax appeals) bear the burden of proof. It is not the case where, in the context of an appeal, the assessments stand unless the Appellant can show they are wrong. HMRC must show both that the Appellant deliberately failed to self assess for income/gains on the basis of Irish rather than UK domicile. The burden also rests with HMRC on the question of domicile but on the Appellant [Mr Breen] to show that the income was not UK source income. Both these issues are highly significant.
>
> …
>
> 30. The Tribunal gave extemporary judgment in this matter. The balancing exercise was a fine one. HMRC's submissions were well made. The Appellant's conduct in this appeal has been abhorrent. Had such behaviour been in connection with an appeal where the Appellant bore the burden of proof and/or had there not been allegations of deliberate behaviour, which in

> part gives rise to the burden of proof being on HMRC) the Tribunal would have refused the application to reinstate. However, by the finest of margins the Tribunal considered that it was in accordance with the overriding objective to act justly and fairly appropriate that the matter be reinstated."

123. It is clear from FTT [30] that the issue of the burden of proof was a material factor in the FTT's decision. It is, however, conspicuous that the FTT did not explain why the burden of proof was relevant to its decision. It is unsatisfactory that the FTT's reasoning was so abbreviated.

124. Mr Stone submitted that, by analogy with *Chappell* (which followed the decision of the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495), the FTT had erred when taking the burden of proof into account. In *Chappell* Judge Herrington said:

> "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….""

125. Mr Stone noted that in *Global Torch*, the Supreme Court upheld the decision to strike out the defendant's defence to a $6 million claim notwithstanding the fact that the burden of proof lay upon the complainant, which he said was the equivalent position of HMRC in the present case i.e. HMRC were the compliant party. Mr Stone also referred to the following observations by Lord Neuberger at [30] in *Global Torch*:

> "30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way."

126. Mr Stone argued that there was no reason why the party bearing the burden of proof should be held to any higher or lesser standard of compliance with orders and directions or, conversely, why the other party should be relieved of its non-compliance because it does not bear the burden. Further, in *BPP Holdings* the fact that the burden of proof lay upon the taxpayer was not identified as a factor which supported HMRC's appeal against a debarring order. In any event, in a decision which the FTT described as made by the "finest of margins" this was not remotely comparable to a situation in which a party was entitled to summary judgment (the exception to which Lord Neuberger referred in *Global Torch*).

127. Mr Birkbeck noted that at FTT[30] the FTT had not based its decision solely upon the burden of proof but also took into account the fact that there were allegations of deliberate behaviour. Moreover, the question as to which party bore the burden of proof was not part of

the merits of the appeal in relation to the *Martland* test. The burden of proof gave no indication as to which party was likely to win. There was no reason why the placement of the burden of proof could not be taken into account at the third stage (i.e. "all the circumstances") of the *Martland* test.

128. Neither party was able satisfactorily to explain why, in a decision whether to reinstate an appeal which had been struck out, the burden of proof was either relevant or, when taken together with the issue of "deliberate behaviour", was treated by the FTT as determinative. Certainly, the FTT gave no indication why this should be so and why it was a matter of such importance at the third stage of the *Martland* test.

129. In our view, the burden of proof should not have been treated as a material factor in assessing whether Mr Breen's appeal should be reinstated after a considerable history of non-compliance. Insofar as the FTT may have seen the burden of proof and the allegation of deliberate behaviour as relevant to the likelihood of Mr Breen succeeding in his appeal, that is perilously close to considering the merits of the substantive appeal (in a situation where it was not suggested that a strike-out on the basis of no reasonable prospect of success would be forthcoming), contrary to the guidance given by *Chappell*[5]. Whatever the FTT's rationale was, we accept Mr Stone's submission that, by analogy with the reasoning in *Chappell* and *Global Torch*, it was not an issue which the FTT should have taken into account since it effectively considers one component of the strength of the taxpayer's defence. In any event, we observe that it is not uncommon for the burden of proof to rest initially on HMRC to establish the validity of the relevant assessment (which may entail a number of hurdles in relation to a discovery assessment) or penalty, with the burden shifting to the taxpayer to displace the amount assessed once that burden has been discharged by HMRC. In agreement with Mr Stone, we do not consider that that is a material factor in deciding whether to reinstate an appeal which has been struck out for breach of an unless order.

130. The FTT therefore fell into error when taking the (initial) burden of proof into account in reaching its decision. Accordingly, we allow HMRC's appeal on Ground 2.

DISPOSITION

131. Since we have found that the FTT's decision contained material errors of law, we may (but need not) set it aside: section 12(2)(a) Tribunals, Courts and Enforcement Act 2007. If we do set aside the decision, we must either remit it to the FTT with directions for its reconsideration, or remake it: section 12(2)(b).

132. Mr Stone submitted that if HMRC's appeal was allowed on either or both grounds, the FTT's decision should be set aside and remade by this Tribunal. The underlying facts were clear and there was nothing to be gained by remitting the application to the FTT. Mr Birkbeck, however, submitted that if HMRC's appeal was allowed, the matter should be remitted to the FTT, which was the body already seized of the relevant facts.

133. In our judgment, we should set aside and remake the FTT's decision. None of the relevant facts is in dispute and there is little point in remitting the matter back to the FTT.

134. In remaking the decision we shall apply the three-stage *Martland* test, taking into account the guidance set out in the current context in *Chappell*. We will proceed on the basis that there

[5] At FTT[25(3)], the FTT noted, correctly, that as the strike-out was for non-compliance, the merits of Mr Breen's case were not relevant.

is no challenge to any of the FTT's findings of fact, except, of course, its finding that there had been no requirement prior to Judge Bailey's Unless Order for Mr Breen to provide a list of objections and list of witnesses.

135. At FTT[17]-[24], the FTT considered Stages 1 and 2 of the *Martland* approach together. It concluded in relation to the extent of the failure to comply that (1) as regards the requirement in the Unless Order to provide a list of documents, the relevant period of delay was 26 months, but (2) as regards the requirements to provide points of objection and a witness list, the delay was only 4 days. As we have set out above, the second conclusion was wrong. In relation to what it had found to be the delays in respect of points of objection and witnesses, the FTT concluded that the 4-day delays were "short"[6] and the reasons for delay were "adequate"[7].

136. At Stages 1 and 2 of *Martland*, taking into account the full extent of non-compliance, Mr Breen's conduct of his appeal has demonstrated a long history of non-compliance. There can be no doubt that the non-compliance was both serious and significant. There were two unless orders with which he had failed to comply and there was a long history of previous non-compliance with the Tribunal's requirements and requests. We have found that that the continued non-compliance related not just to a list of documents but also to an outline of the factual assertions made by HMRC that he did not accept and to the witness evidence to be produced.

137. As regards the failures to provide a list of documents, the FTT conclusion was as follows, at FTT[21]:

> "As contended by HMRC and by reference to the findings of fact, the Appellant has provided no reason (never mind a good one) for the 26-month failure to provide a list of documents. It is immaterial, at this stage of the *Martland* test, what gave rise to the failure to comply with the Judge Bailey unless order taken alone."

138. Taking into account our findings in relation to the failures to provide a list of points and list of witnesses, on the basis of the facts found by the FTT, this conclusion applies equally to those failures. In other words, there was no good reason for the very lengthy failure in those respects, and that was the relevant failure, not the failure to comply with the Judge Bailey order taken alone.

139. So, we conclude that the failure to comply with all three requirements for the relevant period was serious and significant, and there was no good reason for it.

140. Turning to Stage 3, we broadly agree with the FTT's comments at FTT[25], as follows:

> "In the context of the third stage the Tribunal notes:
>
> (1) The absence of any substantive reason for non-compliance with an unless order is a very strong indicator against reinstatement.
>
> (2) When undertaking the balancing exercise particular importance should be given to the requirement to enforce compliance.

[6] FTT[22] and [23].
[7] FTT[22] and [23], referring to the reasons given at FTT[7](6) regarding failure to comply with Judge Bailey's Unless Order.

> (3) As this matter was struck out for non-compliance, rather than on the basis of no reasonable prospects of success, the merits of the Appellant's case are not relevant.
>
> (4) Judge Bailey expressed her unless order as a final opportunity to comply.
>
> In that regard HMRC's submissions are accepted."

141. We also note the FTT's finding at FTT[26] that reinstatement would result in prejudice to HMRC.

142. The FTT also took into account (presumably as factors in favour of reinstatement) that Mr Breen had complied with Judge Bailey's directions by the time of the reinstatement hearing (FTT[28]) and that there was "significant reassurance" that there would be future compliance (FTT[29]).

143. For the reasons we have given, the FTT was wrong to have regarded the burden of proof/allegations of deliberate behaviour as significant factors in favour of reinstatement.

144. Taking into account our conclusions in relation to the three stages of the *Martland* test, in remaking the FTT's decision we have reached the clear conclusion that the application for reinstatement should be refused. Mr Breen's appeal therefore remains struck out.

CONCLUDING COMMENTS

145. Neither the Unless Order nor the Reinstatement Decision were published. Whilst we understand the desire to avoid publishing routine decisions of the FTT which establish no new principle or which may be of little wider interest, we consider that both the Unless Order and the Reinstatement Decision merited publication. The Unless Decision contains a detailed and instructive discussion of the exercise of the discretion of the FTT whether to strike out an appeal in circumstances where an "unless" order had been breached, balancing the various competing factors to be taken into account. Although we have held that the Reinstatement Decision contained errors, we think that that decision should also have been published because it contains an analysis of the balancing factors to be taken into account when approaching a decision whether to reinstate an appeal which had been struck out. We therefore encourage FTT judges to consider the publication of decisions in this area (strike- out and reinstatement applications) in order that other judges and the public can understand the decision-making process involved.

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

Release date: 16 October 2023