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UT (Tax & Chancery) Case Number: UT/***xx***/20***xx***

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London EC4A 1NL

Heard on:11 and 12 June 2025
Judgment date: 30 July 2025

Procedure – extensions of time for appealing – adequacy of FTT's reasons – errors in the application of Martland v HMRC and HMRC v Katib – validity of the Martland approach to extensions of time

Before

THE HONOURABLE MR JUSTICE MARCUS SMITH
JUDGE JONATHAN CANNAN

Between

(1) MEDPRO HEALTHCARE LIMITED
(2) KALVINDER RUPRAI

Appellants

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Quinlan Windle and Sam Glover, instructed by VAT Advisory Services Ltd

For the Respondents: Joseph Millington, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

A. INTRODUCTION

(1) Background

1. By a decision dated 30 October 2023, following a two day hearing taking place on 18 and 20 October 2023, the First-Tier Tribunal (Tax Chamber) (the **FTT**) resolved a number of applications (the **Decision**). Three of the applications are material for present purposes:

> (1) *Application TC/2022/13237.* This was an application by Mr Kalvinder Ruprai for permission to bring a late appeal against a personal liability notice issued by HMRC making Mr Ruprai liable to pay 100% of a penalty issued to Aver Healthcare Limited (**Aver**).
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> (2) *Application TC/2022/13510.* This was an application by Medpro Healthcare Limited (**Medpro**) for permission to bring a late appeal against a penalty issued by HMRC on 15 March 2022 and upheld by HMRC following review on 28 April 2022.
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> (3) *Application TC/2022/13511.* This was an application by Mr Ruprai for permission to bring a late appeal against a personal liability notice issued by HMRC making Mr Ruprai liable to pay 100% of the penalty issued to Medpro.

2. The notice of appeal in **Application 13237** (as we shall refer to the application at ([1(1)]) was submitted 70 days late; the notices of appeal in **Application 13510** ([1(2)]) and **Application 13511** ([1(3)]) were each 5 months and 17 days late.

3. The penalties imposed were substantial: £43,698.19 in the case of Application 13237; and £1,019,538.26 in the case of Applications 13510 and 13511.

(2) The law regarding extensions of time

4. In each case, the FTT refused the Appellants (as we shall refer to Mr Ruprai and Medpro collectively) permission to bring an appeal out of time. The Value Added Tax Act 1994 (**VATA**) contains various time-limits within which appeals against HMRC decisions must be brought. For present purposes, the relevant provision is section 83G VATA. The time limit is generally 30 days from the date of the decision being challenged or from the conclusion of a statutory review of that decision. Section 83G(6) provides that the tribunal can extend time:

> "An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so."

5. Two points need to be stressed:

> (1) Section 82 VATA defines "tribunal" as the FTT. The power in section 83G(6) is thus specifically conferred on a specialist tribunal, the FTT.
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> (2) The discretion in section 83G(6) is entirely unfettered ("…if the tribunal gives permission to do so…").

6. In *Martland v. HMRC*,[1] the Upper Tribunal articulated the following approach when considering applications for permission to appeal out of time. It is appropriate to set out the relevant paragraphs in full:

> "**[44]** When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:[2]
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> > **(1)** Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
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> > **(2)** The reason (or reasons) why the default occurred should be established.
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> > **(3)** The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of all the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
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> **[45]** That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select*[3] will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

7. At [46] of *Martland*, the Upper Tribunal considered the extent to which regard should be had to any obvious strength or weakness of the applicant's case. It is unnecessary to consider this aspect of *Martland* any further.

8. In *HMRC v. Katib*,[4] the Upper Tribunal considered the relevance in the *Martland* analysis of failures by a taxpayer's professional advisor or advisors. *Katib* applied the *Martland* three-stage consideration, and identified as a Stage 2 factor the fact that the taxpayer, as in the present appeal, had (i) retained a professional advisor who (ii) had fallen short and (iii) thereby failed to ensure that the taxpayer complied with the relevant time limits:

> "**[53]** The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.
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> **[54]** It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems Ltd v. Coventry City*

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[1] [2018] UKUT 178 (TCC).

[2] Ie *Denton v. TH White Ltd*, [2014] EWCA Civ 906.

[3] We will consider these cases when considering Ground 4.

[4] [2019] UKUT 189 (TCC).

Council, [1997] 1 WLR 1666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:

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

…

[56] …we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

9. In *Katib*, the Upper Tribunal set aside the decision of the FTT because it had failed to give proper force to the importance of respecting statutory time limits. It went on to re-make the decision and found on the facts that the general rule was not displaced and that the adviser's conduct did not carry much weight at Stage 3.[5]

(3) Other matters not material to this appeal

10. There were other matters before the FTT in the present case which are not appealed before us. In brief, HMRC had an application to strike out Medpro's appeal if permission was granted for a late appeal and to strike out an in-time appeal by Medpro against a different assessment. Both applications were dismissed by the FTT. HMRC was seeking a strike out on the basis that those appeals had no reasonable prospect of success.

(4) The grounds of appeal

11. The Appellants seek to appeal the Decision on four grounds. Permission to appeal was given by the Upper Tribunal on all four Grounds of Appeal. Permission to appeal in respect of Grounds 1, 2 and 3 was granted on the papers; permission in respect of Ground 4 was granted only after the application was renewed orally:

> (1) *Ground 1*. The FTT erred in law by not considering the third stage of the process set out in *Martland*. Although the FTT had set out the relevant law in *Martland*, it is contended that:
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> > "[t]here is no indication that the FTT carried out the balancing exercise required by *Martland*. There is no discussion in the FTT's reasoning other than the delay and the reason for that delay. Indeed, there is no reference at all to "circumstances" or "balancing exercise"

[5] See [59] and [60]

after FTT/[75]. This is despite both parties having made submissions on the relevant circumstances in their skeleton arguments and oral submissions. The most reasonable conclusion is that, despite having correctly directed itself, the FTT failed to apply the third stage of the approach set out in *Martland*. This is an error of law."

(2) *Ground 2.* The FTT erred in law by not considering whether the unusual circumstances in the appeals justified a departure from the "general rule" in *Katib* or, if it did consider whether a departure was justified, by concluding that it was not justified:

> "The FTT Decision stated that it was unacceptable for a professional adviser to overlook the possibility of an appeal without considering whether Mr Ruprai should be held responsible for the actions of his professional adviser during a period of serious ill-health. There is no indication that the FTT considered whether, in the unusual circumstances of Mr Ruprai's case, any failings by Mr Patel [Mr Ruprai's professional adviser] should be regarded as failings of Mr Ruprai…This was an error of law and given the weight that the FTT attributed to Mr Patel's actions, a highly material one."

(3) *Ground 3.* The FTT erred in law by giving insufficient reasons for its decision to refuse the late appeal applications in respect of the issues covered by the first two grounds:

> "If contrary to Grounds 1 and 2, the FTT did carry out the balancing exercise required by *Martland* and did consider whether the general rule set out in *Katib* applied on these facts, it provided no (and therefore insufficient) reasons for these issues. The FTT's conclusions are stated with no further explanation. Indeed, in respect of [Application *13510*] and [Application *13511*] the FTT does not even purport to give reasons, it says its reasons are "similar" to those which relate to [Application 13237] without seeking to explain which reasons were the same and which were different."
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> "In the absence of a reasoned Decision, the [Appellants] are not able to challenge the FTT's conclusion and the absence of reasons is a self-standing error of law."

(4) *Ground 4.* The general rule laid down in *Katib* is wrong in law and the FTT erred by applying it. The Upper Tribunal should depart from the decision in *Katib*. It is said that:

> "An application for permission to bring a late appeal to the FTT is not analogous with the question of whether a litigant's case should be struck out for breach of an "unless" order".

12. Ground 4 was, as pleaded, a narrow (but very significant) attack on the correctness of the Upper Tribunal decision in *Katib*. It is said that the Upper Tribunal in *Katib* improperly constrained the FTT's discretion to extend time for out-of-time appeals. HMRC pointed out in their Respondents' Notice that the Upper Tribunal in *Martland* and other cases had treated applications for late appeals as analogous to relief from sanctions under the Civil Procedure Rules (the **CPR**) for breach of an unless order. In that case, any attack on *Katib* must also involve an attack on *Martland* and a number of other Upper Tribunal decisions.[6]

13. The first three grounds of appeal are closely related, but it is appropriate to consider Ground 3 first (lack of reasons), followed by Ground 1 (failure properly to consider *Martland* Stage 3) and then Ground 2 (misapplication of the general rule in *Katib*). Ground 4 – whether the Upper Tribunal has taken a wrong turn in *Martland* and subsequent cases – is a distinct point, which we consider last.

[6] It would have been easy for HMRC to take a technical pleading point on the manner in which Ground 4 had been framed. Such a technical objection was expressly eschewed by HMRC. We are grateful to counsel on both sides for their impressive arguments on Ground 4.

(5) Remedy if this appeal is allowed

14. At the outset of the hearing, we indicated that if we were to allow the appeal, we would not be minded to remake the Decision, but would remit it to the FTT. The Appellants and HMRC would – in an ideal world – have wanted to save time and expense by having us remake the Decision (a sentiment we share). However, it was recognised that remaking the Decision would not be straightforward. Both parties agreed with this approach. In the event, the day and a half allocated for the appeal was fully utilised in submissions on the four grounds of appeal and there would have been no time to hear detailed submissions on how we should remake the appeal.

15. We are grateful to both parties for the quality of their submissions and the care with which they were presented.

B. THE DECISION

(1) A necessary starting point

16. Grounds 1, 2 and 3 are all concerned with the manner in which contentious matters before the FTT were considered and resolved. Grounds 1 and 2 allege a substantive failure to consider matters relevant to the FTT's discretion on whether to extend time. Ground 3 concerns the alleged absence of reasoning in the Decision. All three Grounds require a consideration of the Decision.

17. The Decision was not published by the FTT. We understand this was because of sensitivity about Mr Ruprai's ill-health, which was a factor raised in the applications to extend time and referred to in the Decision. We have sought to ensure that relevant findings of the FTT described in this decision can be understood without the need to annex a copy of the Decision.

18. It is helpful at the outset to set out in full the FTT's reasoning at the end of the Decision which appeared under a heading "Decisions and Reasons". This includes the FTT's decision on the strike out applications which are not under appeal. We include those paragraphs because the circumstances in which the FTT refused HMRC's applications to strike out are relevant to an understanding of the Decision as a whole:

> "**[110]** HMRC has applied to strike out Medpro appeal TC/2021/19779. The grounds of appeal as stated in the Notice of appeal dated 23 December 2021 are:
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> > "An assessment and subsequent review has not correctly considered that there was no product supply upon which VAT has been accounted and paid. The interpretations have all been based on the basis of the VAT 4 year rule. HMRC has been provided details of this and so there is no option to let the tribunal decide."
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> **[111]** Following the judgment in *Fairford Group plc* quoted in paragraph 29 above I must avoid conducting a 'mini' trial but I should also consider the five principles set out in *Easyair Ltd (t/a Openair) v. Opal Telecom Ltd* quoted at paragraph 29 above.
>
> **[112]** Mr Windle, on behalf of Medpro has put forward an argument adopted by the Court of Appeal in *Brunel Motor Company (in administrative receivership) v. HMRC* that Article 90 of the Principle VAT Directive allows for cancellation of a supply. This argument gives rise to my belief that "a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

[113] I therefore refuse HMRC's application to strike out Medpro appeal number TC/2021/19779 as there is an arguable case put forward by Mr Winkle (sic).

[114] HMRC issued a Notice of Penalty Assessment to Aver and the Aver PLN[7] to Mr Ruprai on 21 February 2022. A review of the Penalty Assessment was requested by Aver on 18 February 2022 but this request did not refer the Aver PLN. The review upheld the Penalty Assessment which was appealed by Aver to this tribunal within time on 20 April 2022.

[115] On 25 May 2022 HMRC wrote to Kishens [Mr Patel's firm] to ask whether they required a review of the decision to issue the Aver PLN to Mr Ruprai. Kishens requested a review by return. The decision to uphold the Aver PLN was issued to Mr Ruprai with a copy to Kishens on 18 July 2022.

[116] HMRC issued a Statement of Case on 7 September 2022 which included the following:

"At the time of this Statement of Case, it is unknown if KR has appealed the Respondents' PLN decision."

[117] HMRC also wrote to Kishens on 22 September 2022 asking whether it was intended to appeal the Aver PLN. In his witness statement Mr Parel[8] states:

> "Unfortunately, however, this was overlooked"

and in his oral testimony to the Tribunal said it was "an oversight".

[118] Mr Ruprai appealed the PLN decision to this Tribunal on 26 October 2022 which was 70 days late. Applying the three stage test set out in *Martland* I consider the delay of 70 days to be serious and significant and the reason for the delay to be negligent (sic). Adopting the decision in *Katib* at paragraph 54:

> "54…failures by a litigant's adviser should generally be treated as failures by the litigant."

[119] Although Mr Ruprai provided sick notes covering much of the period between April 2021 and August 2022 he had instructed Kishens to deal with HMRC on his behalf. In assessing the reasons for the late appeal I find it unacceptable that a professional adviser should overlook the possibility of an appeal, especially so after Kishens was asked on more than one occasion whether it was going to appeal the Aver PLN. Accordingly I refuse Medpro's application for permission to bring a late appeal (TC/2022/13237).

[120] It was agreed by both parties that Medpro's application for permission to bring a late appeal (TC/2022/13510 and Mr Ruprai's application (TC/2022/13511) would stand or fall together as there was no evidence to distinguish between them. For similar reasons to those outlined in paragraph 119 I refuse both Medpro's application and Mr Ruprai's application for permission to bring late appeals (TC/2022/13510 and TC/2022/13511). The delay in bringing these two appeals is even longer than the delay in respect of the appeal in TC/2022/13237.

[121] I consider Medpro has an arguable case under Ground 1 of appeal TC/2022/13510. Thus if my decision to refuse permission for Medpro to appeal is overturned on appeal, I refuse HMRC's application to strike out Ground 1. This accords with principle: it would be surprising and contrary to principle if Medpro and Mr Ruprai were in a worse position with regards to the penalties because

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[7] Ie a Personal Liability Notice.

[8] Sic: obviously a reference to Mr Patel.

of Mr Ruprai's commendable decision to pay tax that they had a good argument HMRC was too late to collect.

[122] In summary:

(1) HMRC's application to strike out Medpro's appeal TC/2021/19779 is refused.

(2) I refuse Mr Ruprai's application for permission to bring a late appeal TC/2022/13237.

(3) I refuse Medpro's application for permission to bring a late appeal TC/2022/13511;

(4) I refuse Mr Ruprai's application for permission to bring a late appeal TC/2022/13511; and

(5) If I am overturned on appeal in respect of my decision to refuse permission for Medpro to bring a late appeal, I refuse HMRC's application to strike out Ground 1 of Medpro's appeal."

(2) The body of the Decision

19. The structure of the Decision leading up to the above passages may be described as follows:

(1) Background findings together with very brief references to the oral evidence of Mr Ruprai and Mr Patel.

(2) A description of the eight assessments, penalties and personal liability notices under appeal. This included the three appeals for which the Appellants were seeking an extension of time.

(3) The legal framework for a strike out.

(4) The legal framework for appeals out of time with reference to *Martland* and *Katib*.

(5) References to statutory provisions in VATA and authorities relevant to the strike out application for the in-time appeal and whether that appeal had a reasonable prospect of success.

(6) Medpro's submissions on the strike out application.

(7) Authorities in relation to whether any delay in appealing was serious or significant.

(8) Quotes from *Katib* in relation to reliance on an adviser as a reason for the delay.

(9) Quotes from *Martland* and other authorities as to the balancing exercise at Stage 3.

(10) A summary of the background to the Aver PLN, HMRC's submissions as to why time should not be extended for that appeal and a summary of the background to the two other late appeals.

(11) A summary of the parties' submissions as to why Medpro's appeal in Application 13510 should be struck out if time is extended.

20. Self-evidently, FTT/[110]-[122] appear at the end of a long decision. Counsel for the Appellants, Mr Windle made clear when opening the appeal, that he and his clients had recently identified that much of the Decision from FTT/[1] to [109] had been cut and pasted from the written submissions of the parties. The point does not feature in the Grounds of Appeal, but was relied on as part of the context to Ground 3 (failure to give adequate reasons). This was a

significant new point for HMRC to deal with but to Mr Millington's credit he was content to deal with the point and did not seek an adjournment. We are satisfied that there was no unfairness to HMRC and Mr Millington was able to marshal his arguments effectively.

21. It is common ground that the majority of the Decision has been taken from the written skeleton arguments presented to the FTT prior to the hearing by counsel for the Appellants and HMRC. This was confirmed by an agreed marked-up copy of the Decision which was prepared by the parties, which we have relied upon but which (for the reasons given in [17] above) we do not annex to this decision. It is fair to say that much of what was taken from the skeletons was background facts which were not in dispute and summaries of the law in respect of which there is no issue.

22. The Decision does not acknowledge that almost all of FTT/[1] to [109] was taken from the parties' skeleton arguments. FTT/[4], which is one of the few original paragraphs in that part of the Decision, states "I am grateful to both counsel for their helpful summaries of these appeals". However, that does not amount to an acknowledgment that most of the Decision is not in the FTT's own words or its own consideration of the evidence and the authorities.

23. There were some editorial changes made by the FTT. These were, however, almost exclusively changes to render the parties' text consistent with the style of an FTT decision. The following paragraphs are illustrative of what we consider to be significant matters.

24. It is notable that there is an asymmetric use of the written submissions. On points where HMRC were successful, HMRC's submissions are recorded. On points where the Appellants were successful, the Appellants submissions are recorded. The losing side's submissions have not been set out or dealt with elsewhere in the Decision.

25. There are occasional, very brief references to the oral evidence adduced before the FTT. FTT/[7] records Mr Ruprai's evidence that he was confused as to whether it was necessary to appeal various HMRC decisions and that Mr Patel thought it was not necessary to appeal the decisions. FTT/[117] records the oral evidence of Mr Patel that his failure to appeal the Aver PLN in time was "an oversight". However, the Decision as a whole does not reference the oral evidence. That may be because it was not of assistance to the FTT; but, equally, it may be because the written submissions relied on by the FTT could not anticipate what would be said orally in evidence. Either way, we cannot be sure that the oral evidence was properly taken into account.

26. FTT/[55] is in a section which references authorities relevant to the strike out application and is taken from HMRC's written submissions. The submissions referenced *Brunel Motor Company Ltd v. HMRC*, citing the decision in the Court of Appeal but quoting from a subsequent decision of the Upper Tribunal in the same case. The footnotes in HMRC's written submissions made clear that they were relying on the Upper Tribunal Decision. However, the FTT deleted the footnotes and included what purports to be a quotation from the Court of Appeal, when in fact it comes from the Upper Tribunal.

27. The Decision contains headings which were generally those of the FTT, describing the content of the paragraphs under those headings. The description of the three stages in the *Martland* analysis – (i) "delay" (considered at FTT/[68], (ii) "reason for delay" (at FTT/[69]) and (iii) "all the circumstances" (at FTT/[70] to [75] – are inexplicably detached from the description of the "legal framework for appeals out of time" (at FTT/[30] to [37]).

28. Finally, Mr Windle submitted that FTT/[112] (quoted at [18] above) did not accurately represent the oral submissions made by him to the FTT, mischaracterising as a factual argument an argument that was, in fact a legal one. We were not taken to the transcripts to assess the force of this point, and for that reason place limited weight on it.

C. GROUND 3: FAILURE TO GIVE ADEQUATE REASONS

(1) The duty of a court or tribunal to give reasons

29. A court or tribunal must give reasons for its decision.[9] The duty is a function of due process, and therefore of justice.[10] The rationale for the duty has a number aspects:

> (1) Fairness requires that the parties, and especially the losing party, should be left in no doubt why they have won or lost. This is essentially a matter of open justice, and it might rightly be said that persons unrelated to the matter ought to be able to know why a decision has gone a particular way.
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> (2) In this jurisdiction, appeals are not by way of re-hearing but by way of challenge to the decision below on a point of law. Without reasons, the losing party will not know whether the FTT has misdirected itself and thus whether they may have an available appeal on the substance of the case.
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> (3) The requirement to give reasons concentrates the mind. If reasons are explained, the decision is much more likely to be soundly based.
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> (4) The duty to give reasons acts as a constraint on the judiciary's exercise of power.

30. A failure to give reasons is a free-standing ground of appeal. In other words, even if the conclusion is one that was open to the judge on the evidence and the law, and there is no indication of a failure to understand or any misdirection, the failure to give reasons for a decision or material part of a decision itself constitutes a good ground of appeal. Reasons are necessary, and not merely desirable, principally because of the rationale at [29(2)] above: without reasons, it is impossible to tell whether the judge has gone wrong on the law or the facts or wrongly approached the exercise of a discretion. The losing party would thereby be deprived of their chance of an appeal, unless an appeal based on lack of reasons is available as a ground of appeal.

31. What constitute insufficient reasons so as to expose the judgment to a successful appeal will be informed by the nature of the decision the judge has made. A judgment may well fall far short of the perfect or the perfectly expressed, and yet the reasons for it may be discernible.

32. The Court of Appeal in *Flannery* expressed the reach of the duty in the following terms:[11]

> "**(3)** The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather

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[9] *R v. Knightsbridge Crown Court, ex parte International Sporting Club (London) Limited*, [1982] QB 304; *R v. Harrow Crown Court, ex parte Dave*, [1994] 1 WLR 98; *Flannery v. Halifax Estate Agencies Ltd*, [2000] 1 WLR 377; *English v. Emery Reimbold & Strick Ltd*, [2002] EWCA Civ 605.

[10] *Flannery* at 381 and 382; *English* at [15], [18] and [19].

[11] At 382. In *English* at [17]-[18], it was similarly noted that adequacy of reasons were very fact dependent, and that there was no duty on a judge to deal with every argument presented.

than Y; indeed, there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

(4) This is not to suggest that there is one rule for cases concerning witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.

33. In *English*, the Court of Appeal stressed that adequacy of reasons should be calibrated by reference to what was needed in order to make the appeal process effective:

"**[19]** …if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

…

[21] When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."

34. The Senior President of Tribunals issued a Practice Statement in June 2024 setting out important principles on the giving of written reasons for decisions in the FTT. It emphasised that full use should be made of any tools and techniques that are available to swiftly produce decisions. As to giving reasons, it stated:

"**[5]** Where reasons are given, they must always be adequate, clear, appropriately concise, and focused upon the principal controversial issues on which the outcome of the case has turned. To be adequate, the reasons for a judicial decision must explain to the parties why they have won and lost. The reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the main issues in dispute. They must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law. These fundamental principles apply to the tribunals as well as to the courts.

…

[7] Stating reasons at any greater length than is necessary in the particular case is not in the interests of justice. To do so is an inefficient use of judicial time, does not assist either the parties or an appellate court or tribunal, and is therefore inconsistent with the overriding objective. Providing concise reasons is to be encouraged. Adequate reasons for a substantive decision may often be

short. In some cases a few succinct paragraphs will suffice. For a procedural decision the reasons required will usually be shorter.

[8] Judges and members in the First-tier Tribunal should expect that the Upper Tribunal will approach its own decisions on appeal in accordance with the well settled principle that appellate tribunals exercise appropriate restraint when considering a challenge to a decision based on the adequacy of reasons. As the Court of Appeal has emphasised, a realistic and reasonably benevolent approach will be taken such that decisions under appeal will be read fairly and not hypercritically"

35. The Practice Statement post-dated the Decision, but it is appropriate to take into account the current guidance, which reflects much of the case law referred to above.

(2) The approach of an appellate court

36. As we have noted, the failure to give adequate reasons is a self-standing ground of appeal. However, where reasons are inadequate, and it has not been considered appropriate to follow the process for amplification of reasons described by the Court of Appeal in *English*,[12] the question arises as to how an appellate court should deal with the judgment. One course would be to allow any appeal where the reasons do not appear from the judgment. That course has not been taken. Instead, the Court of Appeal stated as follows:

"**[26]** …the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed…If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial". (emphasis added)

37. This is a difficult test to apply in practice. The line between (i) seeking to ascertain from the broader context the reasons for the judge's decision and (ii) unconsciously remaking the decision by considering materials that could and should have been referenced in the judgment, but were not, is an extremely fine one. The dangers are particularly great where the outcome of the judgment is one that was open to the judge as a matter of discretion or value judgment (as is the case here). Put another way:

(1) If the reasons for the decision can be ascertained from the wider context, then it is appropriate to dismiss the appeal (assuming no other defect in the decision).

(2) If the appellate court considers that the reasons are inadequate, but that the decision is nevertheless right, the appeal must be allowed and the decision re-made or remitted. This is because the appellate court may not, without allowing the appeal, substitute its judgment for the decision under appeal. Any other course would be unfair to the parties, who are entitled to a reasoned decision on the basis of arguments and evidence heard.

38. Mr Millington was rightly sensitive in his submissions to staying on the right side of this difficult line and he addressed us with great care on Ground 1.

39. To conclude, it is plain that a decision can fall very far short of what is ideal, and yet still enable its reasoned basis to be discerned. This is apparent from the Court of Appeal's conclusions

[12] At [22]-[25].

on some of the specific cases before it in *English*. Thus, the Court of Appeal dismissed the appeals and in two of the cases before it noted:

> "**[57]** The judge could have explained the issue and his reasoning process in comparatively few words. It is regrettable that he did not do so and that it has taken the appellate process and the assistance of counsel who appeared at the trial to enable us to follow the judge's reasoning. Having done so we conclude that this appeal must be dismissed."

and

> "**[89]** There were shortcomings in the judgment in this case. On a number of occasions we have had to consider the underlying material to which the judge referred in order to understand his reasoning. On one occasion … we failed to follow his reasoning even with the benefit of the underlying material. At the end of the exercise, however, we have been able to identify reasons for the judge's conclusions which cogently justify his decision. While he did not express all of these with clarity in his judgment, he made sufficient reference to the evidence that had weighed with him to enable us, after considering that evidence, to follow that reasoning with confidence."

(3) Copying written submissions

40. In *IG Markets Ltd v. Crinion*,[13] almost all of the judge's judgment was taken word-for-word from counsel's closing submissions. Those submissions were in effect the judge's first draft with some, but not much, material of his own drafting. The changes the judge made were classified under four heads:

(1) Purely mechanical changes necessary to convert submissions into a judgment.

(2) Some short introductory material at the beginning of the judgment informed by the fact that this was a judgment and not closing submissions.

(3) Some small stylistic and clarification changes.

(4) A limited number of "more substantial changes".

41. The Court of Appeal condemned this as bad practice:

> "**[16]** In my opinion it was indeed thoroughly bad practice for the judge to construct his judgment in the way that he did, essentially for the reasons given by Mr Cherry [counsel for the Appellant]. Mr Bob Moxon Browne, for the Respondent, submitted that if the judge accepted the entirety of Mr Chirnside's submissions, as he evidently did, and believed that they were well-expressed, there could be nothing objectionable in his adopting them as the basis of his judgment; to set out to paraphrase them would be a wasted labour. I do not accept that submission. I agree with Mr Cherry that appearances matter. For the judge to rely as heavily as he did on Mr Chirnside's written submissions did indeed risk giving the impression that he had not performed his task of considering both parties' cases independently and even-handedly. I accept of course that a judge will often derive great assistance from counsel's written submissions, and there is nothing inherently wrong in his making extensive use of them, with proper acknowledgement, whether in setting out the facts or in analysing the issues or the applicable legal principles or indeed in the actual dispositive reasoning. But where that occurs the judge should take care to make it clear that he or she has fully considered such contrary submissions as have been made and has brought their own independent judgment to bear. The more extensive the reliance on material supplied by only one party, the

[13] [2013] EWCA Civ 587.

greater the risk that the judge will in fact fail to do justice to the other party's case – and in any event, that will appear to have been the case."

42. That being said, even extensive "cutting-and-pasting" will not necessarily result in an appeal being allowed. The Court of Appeal concluded:

> "**[17]** However, to say that the judgment was defective, even seriously so, is not necessarily to say that there has been an injustice which requires the appeal to be allowed. The judgments in the three cases considered by this Court in *English* were very obviously defective, but the Court was able, in the end, by careful analysis of the judgment in the context of the evidence and submissions made, to satisfy itself that the judge had in each case properly performed his or her judicial function. Likewise in this case, if it is possible to demonstrate that, whatever the first impression created by the way he constructed his judgment, the judge did in fact carry out a proper judicial evaluation of the essential issues and did not simply surrender his responsibility to counsel, then the judgment should stand. This involves no qualification of the principle that justice must be seen to be done; but in deciding whether that is so it is necessary, at least in a case like this, to go beyond first impressions.
>
> **[18]** In the end, and not without some hesitation, I have come to the conclusion that the judgment in this case does show, when examined carefully in the context known to the parties, that the judge performed his essential judicial role and that his reasons for deciding the dispositive issues in the way that he did are sufficiently apparent…"

43. It might be said that there is a tension between what the Court of Appeal said in *IG Markets* in 2013 and what the Senior President of Tribunals said in June 2024 about making full use of tools and techniques to assist in the swift production of decisions. In reality, there is no such tension. It is perfectly possible to make use of tools and technology, including cutting and pasting, whilst observing the rules laid down in *English*, *Flannery* and *Crinion*. The critical underlying principle is that it must be clear from a fair reading of the decision that the judge has brought their own independent judgment to bear in determining the issues before them.

(4) The relevance of copying

44. There is no separate ground of appeal before us that incorporating counsels' written submissions into the Decision in the way that it did and without acknowledgment was such that the FTT had failed to exercise independent judgment and surrendered its judicial responsibility to counsel. Instead, the Appellants relied on the copying as part of Ground 3, which concerns the adequacy of the FTT's reasons.

45. We must look at the reasoning in the Decision in its wider context in working out whether the reasons for the Decision are adequate. It matters enormously whether or not the earlier parts of the Decision before the dispositive reasoning involve a proper evaluation of the legal framework, the evidence and the parties' submissions by the FTT more than merely cutting-and-pasting without judicial consideration.

46. This is not simply a question of *appearance*. It is a question of whether we can be satisfied that the FTT performed its essential judicial role. In this regard, we have taken into account the pressures on the FTT in dealing with a formidable amount of work, of great complexity and involving a great deal of documentation. The FTT is required to do so within short time frames. In this case the Decision was that of an experienced FTT judge and was released just 10 days after a 2-day hearing. Appellate tribunals should not forget the pressures of dealing with high-volume, high-pressure work at first instance. We have striven to take these pressures into account.

(5) Analysis

47. Unfortunately, in this case we must conclude that we are not satisfied that the Decision contains adequate reasons.

48. The dispositive parts of the Decision set out at [11] above are not reasoned. So far as Application TC/13237 is concerned, the relevant paragraphs are FTT/[114] to [119]. It is clear from these paragraphs that the application to bring a late appeal was being refused, but the Decision does not identify the route by which this conclusion was reached. As a minimum, the FTT needed to identify:

(1) That it had a broad discretion under section 83G(6) of the VATA to permit late appeals which it was required to approach on the basis of *Martland* and *Katib*.

(2) The factors which it considered relevant in exercising its discretion.

(3) That it was balancing those factors in reaching its decision, ideally with some indication of the weight attached to the most important factors.

49. It is possible to discern that the FTT attached significance to (i) the failure of the Appellants' professional advisor Mr Patel (see FTT/[117] and [118]), which it described as "negligent" and (ii) to the delay (see FTT/[118]), which was described as "serious and significant". However, there is no sense of what weight (if any) was given to Mr Ruprai's ill-health. That factor is mentioned at FTT/[119], but there is no indication as to why the fact that Mr Ruprai had instructed Kishens meant that Mr Ruprai's ill-health was to be given little or no weight, if that is how the FTT viewed it.

50. There is some overlap between Ground 3 and Grounds 1 and 2. Our conclusion on Grounds 1 and 2 is that we cannot be satisfied that the FTT carried out the balancing exercise required by *Martland* or that it considered whether to disapply the general rule described in *Katib*. To a large extent our conclusions on those grounds arise because the FTT has not explained its reasoning in relation to the balancing exercise or why the general rule should not be disapplied.

51. If we were to try and infer the FTT's thought processes, we would actually be re-making the decision rather than working out the FTT's reasons for its decision. We recognise, as the Senior President of Tribunals says, that in some cases a few succinct paragraphs will suffice. Indeed, that would have been the case here if the paragraphs had set out what factors were taken into account and that a balancing exercise was conducted taking into account all the circumstances. We do not consider that we are reading the dispositive paragraphs, or the Decision as a whole, hypercritically. Indeed we have gone out of our way not to do so and to apply a reasonably benevolent approach.

52. This is our conclusion without reference to the "cutting-and-pasting" identified by Mr Windle. Our principal difficulty with the approach of the FTT is that the submissions taken from counsels' skeleton arguments in relation to an extension of time at [83] of the Decision are the submissions made on behalf of HMRC. There is no indication on the face of the Decision that the written and oral submissions of the Appellants were taken into account by the FTT or, if they were, why the case of the Appellants was rejected. Nor does the Decision reflect to any significant extent the oral evidence given on behalf of the Appellants or any findings of fact in relation thereto. Where a tribunal has properly set out the law, an appellate tribunal may be able to infer that the tribunal has correctly applied the law. We cannot do so in this case because it is not clear from the Decision that the FTT properly applied its mind to the Appellants' case.

53. The reasoning as regards Applications 13510 and 13511 is even shorter (see FTT/[120]). The FTT identifies that the delay in those appeals was even longer and that "for similar reasons" those applications were refused. Our conclusion as regards these Applications is therefore the same.

54. In the circumstances, we consider that the reasoning of the FTT is inadequate and we must therefore allow the appeal on Ground 3.

E. GROUND 1: FAILURE TO CARRY OUT THE *MARTLAND* BALANCING EXERCISE

(1) Matters not considered as part of Ground 1

55. The structured approach to the discretion imposed by *Martland* is set out at [6] above. Ground 4 in this appeal will entail consideration of the correctness of the approach in *Martland*. For the purposes of Ground 1, however, the question is whether the FTT erred in law in failing to follow the approach in *Martland*.

(2) Analysis

56. It was common ground before us that the Decision correctly articulates, and in some detail, the *Martland* structured discretion. Thus, FTT/[68] sets out the law regarding delay (*Martland* Stage 1); FTT/[69] sets out the law regarding the reasons for the delay (*Martland* Stage 2); and FTT/[70]-[75] sets out the law regarding consideration of all the circumstances and the balancing exercise (*Martland* Stage 3). The analysis is very good and has been taken from HMRC's written submissions.

57. FTT/[76]-[100] contain (under the heading "Background to the Late Appeals") a detailed description of the factual background. This is important in terms of an input into the exercise of the *Martland* discretion. Thus, for example, FTT/[82] recites a short paragraph from the grounds of appeal about Mr Ruprai's ill-health (which it is not necessary for us to repeat), and that it was not considered necessary to appeal the Aver PLN. In contrast, FTT/[83] sets out HMRC's detailed submissions as to why time to appeal the Aver PLN should not be extended. As we have noted, there is no reference to the Appellants' written or oral submissions The section as a whole is certainly fact-heavy, although apart from [82] and [83] almost all of it is non-contentious background derived from the written submissions.

58. We cannot be satisfied that the dispositive section at FTT/[110] to [122] properly considered Stage 3 of the *Martland* structured discretion.

59. The dispositive section of the Decision does not specifically refer to Stage 3. There is no reference to the balancing exercise at Stage 3 or to taking into account all the circumstances of the case. At FTT/[118] the FTT does refer to the three stage test in *Martland* but then refers only to Stage 1 and Stage 2. Of course, this is a function of the FTT's failure to give reasons, and we take this into account when considering this ground of appeal.

60. The Decision finds, rightly, that in all three cases there had been a serious and significant delay: see FTT/[118] in the case of Application 13237 and FTT/[120] in the case of Application 13510 and 13511. *Martland* Stage 1 has been considered: but establishing the length of the delay is a fairly straightforward computational exercise.

61. We are in some doubt as to what consideration the FTT gave to *Martland* Stage 2. A failure to consider *Martland* Stage 2 was not a specific ground of appeal. However it is necessary, in order to understand whether *Martland* Stage 3 was properly considered, to go through all stages of the *Martland* structured discretion. It is, therefore, necessary and appropriate to consider *Martland* Stage 2.

62. *Martland* Stage 2 requires the FTT to establish the reason or reasons why the default occurred. This requires more than just a narrative of the factual background, although that will be important. What is required is a list of the factors that the FTT has found to be in play, possibly with a brief description of their significance. In this case, it is possible to appreciate that the FTT was looking to two factors in particular, (i) Mr Ruprai's ill-health, and (ii) the incompetence of his professional advisor. But we are unsure as to whether this is the complete list. For instance, Mr Ruprai advanced arguments about the intensity of HMRC's investigation and the amount of work this entailed for both Mr Ruprai and Mr Patel. There is no indication that this has been considered by the FTT as a reason for the delay. The process of establishing the reasons for the default is the essence of *Martland* Stage 2. This process is unavoidable if the balancing in *Martland* Stage 3 is to be properly undertaken. The failure properly to consider *Martland* Stage 2 is thus a strong indicator that the FTT did not properly consider *Martland* Stage 3.

63. The FTT's approach meant that it disabled itself from conducting a meaningful *Martland* Stage 3 assessment. The balancing exercise requires consideration of all the circumstances with the relevant factors being clearly identified and at least some assessment of their weight. No such analysis appears to have been undertaken here, nor could it have been given the failure to engage with *Martland* Stage 2.

64. It does not appear from the Decision that the FTT properly conducted the balancing exercise at Stage 3 of *Martland*. We therefore allow the appeal on Ground 1.

F. GROUND 2: FAILURE TO CONSIDER WHETHER THE "GENERAL RULE" IN *KATIB* SHOULD BE DISAPPLIED

65. Ground 2 asserts a failure on the part of the FTT to consider, as part of the *Martland* Stage 3 balancing exercise, whether the general rule described in *Katib* ought to be disapplied. *Katib* is considered at [8] above. FTT/[118] cites the "general rule" but does not consider whether to disapply that rule in context of Stage 3.

66. It was necessary for the FTT to make findings of fact as to the reasons for the delays at Stage 2 before considering those reasons in the balancing exercise at *S*tage 3. In the case of professional advisors who have failed their clients, the effect of the general rule in *Katib* is to attach no weight to this factor, when present. This is a general rule of guidance, intended to ensure a consistent approach. However, it is recognised that the facts of any particular case may require a derogation from the general rule. *Katib* did not seek to give guidance as to when the general rule might be disapplied. All the circumstances of the case must be identified and considered.

67. In the case of Mr Ruprai and Mr Patel, it may very well be that there were no factors justifying a departure from the general rule expressed in *Katib*. That may have been an outcome that was open to the FTT. However, FTT/[118] simply recites the general rule and fails to consider at all whether that general rule should apply in the instant case. In short, given that the Appellants were relying on the failures of Mr Patel in support of the applications, the FTT should have said why (on the facts of this case) this was a matter of little or even no weight when

considering *Martland* Stage 2. That conclusion would then have fed into the overall balancing exercise at *Martland* Stage 3.

68. It does not appear from the Decision that the FTT properly considered whether the general rule in *Katib* ought to be disapplied. We therefore allow the appeal on Ground 2

69. We note for the sake of completeness that further guidance on this issue was given by the Upper Tribunal in *Uddin v. HM Revenue & Customs*,[14] although it does not appear that the FTT was referred to *Uddin*. In *Uddin*, the taxpayer alleged that he had been misled by his adviser. The Upper Tribunal stated at [30]:

> "…a client will always rely on their advisers, but their adviser's failings are still laid at their door. Why the adviser failed and how they led their client to continue to rely on them is not relevant to the *Martland* analysis, unless the client can show that they did whatever a reasonable taxpayer in that situation would have done (which would generally be to make sufficient efforts to keep tabs on the adviser and make sure that matters were on track)…"

G. GROUND 4: THE LAWFULNESS OF THE APPROACH IN *MARTLAND* AND *KATIB*

(1) The essence of the point

70. Ground 4 represents a bold attack, not only on *Katib* but on the *Martland* structured discretion as a whole, including a number of Upper Tribunal decisions which have followed *Martland*, such as *Uddin*.

71. Ground 4, as framed, contended that the Upper Tribunal in *Katib* had wrongly applied the approach in the CPR to reliance on an adviser in the context of relief from sanctions for breach of an unless order. The essence of the point was that the discretion given to the FTT by section 83G(6) VATA was not and could not be analogous to the jurisdiction under CPR 3.9 to give relief from sanctions, because (as a matter of construction) the discretion of a court or tribunal is differently framed in those two provisions. It followed that this was also an attack on the approach in *Martland* which drew the same analogy.

72. Mr Windle recognised that as a matter of judicial comity we should follow previous decisions of the Upper Tribunal unless we are "convinced" that they are wrong. He submitted that those decisions were "clearly wrong" and that we should make a finding to that effect.

73. The CPR themselves are made by way of statutory instrument *SI 1998 No3132* as amended from time-to-time. Rule 3.9 of the CPR originally comprised a non-exclusive list of matters for the court to take into account on an application for relief from sanction. It is unnecessary to set out the original rule, but it is quoted in *Martland* at [37].

74. CPR 3.9 was subsequently materially amended to read as follows:

> "**(1)** On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

[14] [2023] UKUT 99 (TCC).

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

75. The new CPR 3.9 obliges courts applying the CPR to place particular emphasis on factors (a) and (b). This was the conclusion of the Court of Appeal in *Denton v. TH White Ltd*:[15]

> "…we cannot accept the submission of the Bar Council that factors (a) and (b) in the new rule should "have a seat at the table, not…the top seats at the table", if by that is meant that the specified factors are not to be given particular weight."

76. The Appellants' point is that the old version of CPR 3.9 was a non-exclusive list of factors which are balanced by the judge in the individual case. The weight to be given to a factor was left to the judge in the particular circumstances of the case. The new version of CPR 3.9 involves a direction to look at all the circumstances, plus two factors which are to be accorded *ex ante* particular weight. When the time for weighing the relevant factors in the individual case arises, of course the judge will exercise their discretion judicially. But it would be an error of law to fail to appreciate when exercising the discretion that the two factors set out at CPR 3.9(1)(a) and (b) must be accorded a particular weight, a seat not just at the table, but a "top seat at the table".

77. The rule change in CPR 3.9 was intended to make a difference, rendering it harder to obtain relief from sanctions than previously had been the case. That fact is reflected in the jurisprudence that has emerged regarding the ambit of the CPR 3.9 regime. The logic of the rule-change means that there is a clear distinction between cases falling within CPR 3.9 and cases falling outside that regime, which has itself been the subject of careful judicial scrutiny. Thus, in *Yess (A) Electrical Ltd v. Warren*,[16] the Court of Appeal considered the borderline between applications involving relief from sanctions falling within CPR 3.9 and applications falling outside that regime, governed by the overriding objective.[17] The careful differentiation of these two cases by Birss LJ is not a point before us. The critical point is that the distinction is of importance because, in a marginal case, an application for relief from sanctions under CPR 3.9 might fail, whereas simply applying the overriding objective it might succeed. That is the whole point of factors (a) and (b) not just having seats at the table, but top seats.

78. It is likely that the effect of CPR 3.9 would be difficult to identify in the individual case. But it is not open to us to proceed on the basis that the distinction between cases falling within CPR 3.9 and cases falling outwith CPR 3.9 is a distinction without a difference. The difference might be illustrated by viewing applications for relief from sanctions as a class. Suppose, under the old regime, there were annually 1,000 applications for relief from sanction, with a success rate of 400 (ie 600 failed). Under the new regime, one would expect the success rate to fall, all other things being equal, because the weight given to the two factors tips the balance in favour of refusing relief.

79. Mr Windle made the uncontroversial point that statutory powers like those governed by section 83G(6) VATA do not fall within the CPR *at all*, and certainly not within CPR 3.9. We accept that is the case. He went on to contend that *Martland* has improperly embedded within the discretionary power under section 83G(6) VATA the *ex ante* additional weight to be attached to the two CPR 3.9(1) factors. The result is that the *Martland* approach obliges the FTT *ex ante* to apply greater weight to those two factors than might otherwise be the case. That, Mr Windle

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[15] [2014] EWCA Civ 906 at [33].

[16] [2024] EWCA Civ 14.

[17] At [1].

submitted, was impermissible given that there had been no change in the statutory wording of section 83G(6) VATA. In other words, the change in the CPR to permit a more robust approach to refusing relief from sanctions was in no way reflected in the jurisdiction we are exercising, namely the power under section 83G(6) VATA.

80. In making that submission, Mr Windle placed considerable reliance on the Court of Appeal's decision in *Cowan v. Foreman* which we consider below.

(2) The HMRC position

81. Mr Millington mounted a robust defence of the Upper Tribunal decisions in *Martland* and *Katib*. In short, he submitted that the Upper Tribunal in both those cases had been entitled to draw an analogy between applications to extend time for appealing to the FTT and applications for relief from sanctions. He submitted that the analogy was an apt one, even though section 83G(6) VATA was concerned with the failure to commence appeal proceedings in time, whereas CPR 3.9 is concerned with sanctions for a failure to comply with a rule or an order in proceedings that have already been commenced.

(3) Analysis

82. The starting point must be the relevant statutory provision, in this case section 83G(6) VATA. This provision must be construed in context, in order to understand the nature of the power that has been conferred on the "tribunal".

83. Section 83G(6) VATA provides that "[a]n appeal may be made after the end of the period specified…if the tribunal gives permission to do so". This is an extremely wide power. Obviously, it must be exercised pursuant to a judicial discretion, which is (so far as the express terms of the statute is concerned) wholly unfettered.[18] That being said:

> (1) Considerable assistance can be derived from the context. Appeals represent a late stage in disputes between a taxpayer and HMRC. Before one gets to an appeal, there will typically have been an enquiry by HMRC, decisions including assessments, and possibly statutory and non-statutory reviews of those decisions. The process can take a long time. Quite *how* this should inform extensions of time is a matter that can be debated - but there can be no doubt that the process within which appeals sit is relevant in construing the nature of the power to extend time.
>
> (2) Also relevant is the "venerable principle" that taxpayers should only pay in tax what they owe, and are entitled to due process to challenge decisions requiring them to pay tax. Of course, this is right: but how it goes to inform the manner in which a discretion to extend time should be exercised is less clear.

84. We were referred to the decision of the Court of Appeal in *Cowan v. Foreman*,[19] which was concerned with the time limit for making applications for provision under the Inheritance (Provision for Family and Dependants) Act 1975. Section 4 provided that the time limit for making an application was six months from the date on which probate was granted. At first instance, Mostyn J refused an application to bring a claim out of time. In doing so, he considered

[18] The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 when first introduced provided that the power to extend time was under rule 5(3)(a) of those rules. If that was the case, the relevant provision to construe would have been rule 5(3)(a) and the Appellants' submissions on Ground 4 could not succeed. This appears to have been a drafting error that was corrected to make clear that the power to extend time did not derive from the Rules.

[19] [2019] EWCA Civ 1336.

that the time limit applied in order to avoid delay in the administration of estates, but also to protect beneficiaries from being vexed by a stale claim and to spare the court from being burdened by stale claims. He stated:

> "A robust application of the extension power in section 4 would be consistent with the spirit of the overriding objective, specifically CPR 1.1(2)(d) (dealing with the case expeditiously), 1.1(2)(e) (allotting the case an appropriate share of the court's resources) and 1.1(2)(f) (enforcing compliance with rules). It would also echo the ever-developing sanctions jurisprudence exemplified by *Denton v. TH White Ltd*, [2014] 1WLR 3926. The fact that the time limit is contained within the statute rather than in a procedural rule is also of significance."

85. One of the grounds of appeal was that the judge had erred in drawing an analogy between the jurisdiction to grant relief from sanctions and the power under section 4. The Court of Appeal upheld this ground of appeal. By way of summary, the Court of Appeal held at [43] – [46]:

> (1) The concept of stale claims had little relevance in the context of the 1975 Act. Section 4 exists for the purpose of avoiding unnecessary delay and complications in the administration of estates. It is not designed to protect the court from stale claims.
>
> (2) The judge was wrong to say that a robust application of the extension power is necessary. Nothing in section 4 requires such an approach. References to CPR 1.1 were not relevant. They are concerned with managing a claim proportionately and fairly once it had been commenced.
>
> (3) There is no disciplinary element to section 4. It is not to be enforced for its own sake. It is designed to bring a measure of certainty for personal representatives and beneficiaries. The rationale in *Denton* is that court rules should be obeyed and once commenced litigation should proceed expeditiously, at proportionate cost and without wasting court resources.

86. Mr Windle submitted that the Upper Tribunal in *Martland* and *Katib* had similarly adopted a test that was inapt when considering the question of extensions of time to permit out-of-time appeals.

87. If the essence of Ground 4 was that the *Denton* analogy was inapt to this type of case, then we would have no hesitation in dismissing Ground 4:

> (1) <u>If</u> the only question arising under Ground 4 was the aptness of the analogy with CPR 3.9, then our conclusion would be (i) that the analogy is clearly apt, and (ii) that even if we disagreed with the aptness of the analogy, we would not regard the Upper Tribunal in *Martland* (and the other cases since *Martland*) as having been "clearly wrong" in drawing upon that analogy. We consider the *Martland* approach to be an apt one for deciding whether extensions of time under section 83G(6) VATA should or should not be granted.
>
> (2) The problem, which we address below, is that the *Denton* approach was only possible because of the drafting change to CPR 3.9 and there has been no such change in the statute. This is nothing to do with "aptness" and everything to do with statutory construction.

88. Accordingly, we reject this strand of Mr Windle's argument. We consider the *Denton* test to be apt for the exercise of the discretion under section 83G(6) VATA. Furthermore, to be absolutely clear, we consider the three stage structure of the discretion at [44] of *Martland* (quoted at [6] above) to represent an unimpeachable approach.

89. Furthermore, the Upper Tribunal is clearly entitled to give guidance on the exercise of discretion to the FTT: see *BPP Holdings Ltd v. HMRC*.[20] Where a provision is as open-textured as section 83G(6) VATA, the need for such guidance is clear, if the dangers of inconsistent decisions and unpredictability are to be avoided. Guidance on the exercise of discretion to extend time has emanated from the Upper Tribunal on a number of previous occasions: *Advocate General for Scotland v. General Commissioners for Aberdeen City*;[21] and *Data Select Ltd v. Revenue and Customs Commissioner*[22] are two good examples. Both cases draw on the lessons from analogous jurisdictions, but it is clear that in giving guidance they were doing so as a United Kingdom Tribunal to the FTT, itself a United Kingdom tribunal.

90. So far, therefore, we accept HMRC's submissions in relation to Ground 4. But these submissions do not address the essence of the Appellants' point, which was not primarily one of aptness but of permissibility. The question is whether the approach (however apt) is *permitted* as a matter of the statutory construction of section 83G(6) VATA. If (and that is the reading of the case-law following *Martland*) *Martland* has elevated the two special CPR 3.9(1)(a) and (b) factors to a more prominent position at the "top table" in the manner described at [75] above, then that approach needs to be justified by or at least not be inconsistent with the words of the statute.

91. What is clear from the statute is that: (i) the relevant factors are open-ended; and (ii) the statute does not contain any direction as to *ex ante* weighting. The issue under Ground 4 is whether such *ex ante* weighting is permissible. The only reason the Court of Appeal in *Denton* could elevate some factors above other factors was because it was construing CPR 3.9. Both parties accepted that *Martland* had the same effect of elevating the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with (in this case) the statutory time limit for making an appeal.

92. Regrettably, and despite considerable effort, it is at this point that we find ourselves unable to reach a consensus as to Ground 4. Marcus Smith J would, for reasons that are set out below, allow the appeal on Ground 4, whilst Judge Cannan would, for reasons also set out below, dismiss the appeal on Ground 4. Given our lack of consensus on Ground 4, Marcus Smith J has a casting vote and the appeal on Ground 4 will therefore be allowed.

(4) Reasons for allowing the appeal in relation to Ground 4: Marcus Smith J

93. In *Martland*, the Upper Tribunal stressed the fact that its discretion stemmed from statute and was specifically conferred on the FTT:[23]

> "…In deciding whether or not to permit a late appeal, the FTT is exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all. It is not exercising some case management discretion in the conduct of an extant appeal…".

94. The Upper Tribunal considered the previous law with care (at [23] to [36]), before turning to CPR 3.9 and *Denton* (at [37] to [43]). At [44] of *Martland*,[24] the Upper Tribunal set out the

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[20] [2017] UKSC 55.

[21] [2005] CSOH 135 at [6] and [22]-[23].

[22] [2012] UKUT 187 (TCC).

[23] At [18].

[24] Quoted at paragraph 6 above.

three-stage test. That paragraph says nothing about the *ex ante* weight to be attached to the factors being weighed and is unimpeachable.

95. The question is whether [45] of *Martland* (quoted at paragraph 6 above) goes further and in referring to the "particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected" was doing what the Court of Appeal did in *Denton*, and according these factors particular weight. Read on its own, it must be doubted whether *Martland* was doing this. *Martland* at [45] is not unequivocally clear, and can be read as merely stressing that these factors matter, as indeed they do. But there can be no doubt that the Upper Tribunal has subsequently followed the *Denton* approach not merely as to the structure of the discretion (ie the three-stage test) but also as to the (additional, extra) weight to be accorded to the CPR 3.9(a) and (b) factors (ie the "top table" point).[25]

96. I do not consider this to be a permissible approach in the case of extensions of time under section 83G(6) VATA. The rule change to CPR 3.9 enabled the Court of Appeal to take the approach it did in *Denton*. The wording in section 83G(6) VATA has not been changed and does not, when construed, permit this aspect of the approach in *Denton*. The Upper Tribunal's guidance in relation to the exercise of a statutory discretion cannot fetter the statutorily conferred discretion of the FTT, even as to the weighting of relevant factors. There is a fine line to be drawn between the structuring of a discretion and the imposing of an obligation on a tribunal, *ex ante*, in the evaluation of certain factors. The latter course is permissible only if mandated by a proper construction of the power being exercised.

97. The wording of section 83G(6) VATA is clear: it tracks not the "new version" of CPR 3.9 but the old version. The Upper Tribunal has placed a fetter on the discretion of the FTT which is not justified by the terms of section 83G(6) VATA. The Upper Tribunal cannot, in the case, by way of binding guidance, direct the FTT as to what weight to place on particular factors when it is considering, in all the circumstances, whether to extend time for appealing. The factors in the old CPR 3.9 and the approach described by the Upper Tribunal in *Data Select* and *Aberdeen City* provide sufficient guidance for the FTT to exercise its discretion, as does [44] (but not [45]) of *Martland* itself.

98. The question is whether the Upper Tribunal's approach is "clearly wrong". Given the force of the point as advanced by the Appellants, and the frequency with which the FTT applies the *Martland* discretion, it is vital that this area of the law be clearly stated. It would be unfortunate for this lack of clarity to infect every application for an extension under section 83G(6) VATA. Given these factors, and the conclusion reached in relation to the construction of section 83G(6) VATA, Marcus Smith J concludes that the practice adopted in the FTT with regard to *Martland* and the section 83G(6) VATA power is clearly wrong. He would therefore allow the appeal on Ground 4 as well as on Grounds 1 to 3.

(5) Reasons for dismissing the appeal in relation to Ground 4: Judge Cannan

99. Judge Cannan is not convinced that *Martland* and *Katib* are wrong, and therefore as a matter of judicial comity he would dismiss the appeal on Ground 4. He would still allow the appeal on Grounds 1 to 3. Judge Cannan can see the force of the Appellants' argument on Ground 4, but considers that it is also arguable that *Cowan v. Foreman* can be distinguished. In particular, the time limit in section 83G(1) VATA and the discretion to extend time in section 83G(6)

[25] See *Katib* at [17]; *Uddin* at [3]; *HMRC v. Websons (8) Ltd*, [2020] UKUT 154 (TCC) at [45]; and *HMRC v. BMW Shipping Agents Ltd*, [2021] UKUT 91 at [26]–[28].

VATA were enacted in the context of a procedure which involves enquiries by HMRC, decisions including assessments, and possibly statutory and non-statutory reviews of those decisions. An appeal to the FTT against an assessment is one step in that procedure. The time limit in section 83G(6) VATA can be seen as analogous to a procedural rule in existing proceedings. Unlike *Cowan*, section 83G(6) VATA can be viewed as being designed to protect both HMRC and the tribunal from stale claims and to promote certainty and finality. Challenges should proceed expeditiously, at proportionate cost and in compliance with time limits. Hence the provision for statutory reviews which are aimed at avoiding the need for tribunal proceedings.

100. Construed in that context, Judge Cannan considers that *Martland* and *Katib* could be justified on the basis that Parliament, in giving discretion to the FTT, anticipated and intended that the Upper Tribunal would provide binding guidance on the exercise of that discretion in so far as it was considered desirable. Such guidance promotes consistent decision making by the FTT and the efficient conduct of the enquiry procedure. Arguably, the Upper Tribunal was entitled to draw an analogy with CPR 3.9 and could include guidance as to the weight to be attributed to specific factors. In *Cowan v. Foreman* the Court of Appeal acknowledged at [44] that the statutory power in that case had to be considered in context. It was construing a different time limit with a different statutory context.

101. As a matter of judicial comity, Judge Cannan would therefore have dismissed the appeal on Ground 4.

H. DISPOSITION

102. For the reasons given in this decision, the Appellants appeal is allowed on all grounds. We also remit the appeal to the FTT for re-hearing by a differently constituted Tribunal, that constitution to be determined by the President of the FTT. The extent to which use may be made of transcripts of evidence shall be a matter for the parties and the FTT.

The Honourable Mr Justice Marcus Smith
Judge Jonathan Cannan

Release Date: 30 July 2025