TC04565

Appeals numbers: TC/2009/16362; TC/2011/1712 & TC/2013/1109 and others (as listed in the Schedule to this Decision Notice)

PROCEDURE – application for reinstatement of withdrawn appeal – Rule 17(3) - applications for reinstatement of struck-out appeals – Rule 8(5) – approach to be adopted to Rule 2 overriding objective in context of reinstatement applications

FIRST-TIER TRIBUNAL
TAX CHAMBER

VAULTDAWN LIMITED **Appellants**
AND OTHERS (as listed in the Schedule to this Decision Notice)

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Judge Peter Kempster
Ms Elizabeth Bridge

Sitting in public at Bedford Square, London and RCJ, Strand London on 30 June and 21 November 2014

For the Appellants:
Ms Anne Redston of counsel, instructed by The Independent Tax and Forensic Services LLP ("ITL"), for Vaultdawn Limited, Stanford Industrial Concrete Limited and GH Sumner Limited

Mr Daniel Burgess of counsel, instructed by Pricewaterhouse Coopers LLP ("PwC"), for Lydonford Limited, Jo-Y-Jo Limited, Strata Double Glazing & Joinery Limited, Unilathe Limited and Cookes Furniture Limited

Mr Turkington (director) for Turkington Livestock Systems Limited

The other Appellants (Allsigns International Limited, Groundwork Landscapes Limited and Parkway Engineering Services Limited) did not appear and were not represented

For the Respondents:
Ms Aparna Nathan of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs

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DECISION

1. The background to these proceedings is set out below. Vaultdawn Limited ("Vaultdawn") applies pursuant to Tribunal Procedure Rule 17(3) for reinstatement of its appeal which was withdrawn on 4 November 2013. The other Appellants apply pursuant to Tribunal Procedure Rule 8(5) for reinstatement of their proceedings which were stuck out on 17 January 2014.

2. For completeness, at the hearings we also considered Rule 8(5) reinstatement applications made by two other parties: Sandys Discount Warehouse Limited (TC/2011/1391) (represented by Mr Burgess) and Central Networks & Technologies Limited (TC/2012/8097 & 8099) (represented by Mr Ian Gregory of BM Howarth Limited). Both applications derived from the same background as the applications by the Appellants, and both were granted but for reasons which do not affect the Appellants' applications.

3. After the hearings we invited written closing submissions from the parties, following which we would decide whether a further hearing would be appropriate. We consider that with the benefit of those further submissions we are able to determine the matters before us without the need to list any continuation hearing.

Background

4. This background, which we understand is uncontroversial, is drawn from our perusal of the Tribunal's case files.

5. By Directions issued on 26 March 2012 the Tribunal (Judge Kempster, who is a member of the current panel) designated the appeals of Vaultdawn and another appellant (Taylor Ryan Limited) as "lead cases" pursuant to Tribunal Procedure Rule 18 in relation to a "common issue of fact or law" stipulated in those Directions, and identified and stayed certain other appeals as "related cases". The Appellants other than Vaultdawn were amongst those related cases. Those Directions were the outcome of a case management hearing in Birmingham on 12 March 2012 at which the lead cases and most of the related cases were represented by Ms Ana-Maria Chira of Montpelier Group (Tax Consultants) Limited ("Montpelier").

6. There was a further case management hearing in Birmingham on 24 July 2013 at which the lead cases and most of the related cases were again represented by Ms Chira of Montpelier. Following representations from the parties on draft directions discussed at that hearing, by Directions issued on 11 September 2013 Judge Kempster made further case management directions and set down the hearing of the lead cases for 11-14 November 2013 at Bedford Square, London.

7. On 4 November 2013 the Tribunal received an email from Montpelier stating:

> "I am instructed to advise the Tribunal and HMRC that after careful consideration, Montpelier wishes to withdraw the appeals made on behalf of our clients, Taylor Ryan Ltd and Vaultdawn Ltd. Please accept this email as a formal request to withdraw these appeals."

8. On 7 November 2013 the Tribunal's Registrar sent an email to Montpelier stating:

> "… the recent correspondence from the parties … has been considered by Judge Kempster, who has instructed me to write as follows.
>
> 1. The emails from the Lead Case Appellants' representative dated 4 November 2013 are taken as a notice of withdrawal of the Lead Case Appellants' case in the proceedings, pursuant to Rule 17(1).
>
> 2. In the absence of any reinstatement application within the relevant time period (Rule 17(4) refers), the appeals of the Lead Case Appellants (being case references TC/2009/16362, TC/2010/3064, TC/2011/816, TC/2011/1712, and TC/2013/1109) will (after the expiry of that period) be formally dismissed.
>
> 3. As the appeals will be dismissed without "a decision in respect of the common or related issues", the Tribunal needs to determine what directions must be given under Rule 18(6) in respect of the Related Appeals. The Tribunal will consider representations from both HMRC and the taxpayers' representatives. As both parties have the date already reserved for the anticipated substantive hearing of the lead cases, a case management hearing will be held at 10.00 on Monday 11 November at Bedford Square. That hearing will also address any other outstanding case management matters."

9. On 7 November 2013 the Tribunal received an email from Montpelier stating:

> "I am instructed to advise the Tribunal that we have stood down counsel to save costs however Montpelier's view is that Montpelier will write to the stayed appellants asking for their consent to withdraw the appeals. We respectfully ask the Tribunal and Judge Kempster if [they] would consider to direct this, if HMRC agree, to avoid the need for a case management hearing."

10. On 8 November 2013 the Tribunal received an email from Montpelier stating:

> "We refer to the withdrawal of the appeals of Taylor Ryan Ltd and Vaultdawn Ltd due to be heard on Monday, 11th November 2013. We note that instead, a case management hearing is to be held at the same time. Please accept these written representations in respect of the case management hearing instead of our attendance as we have instructed counsel to stand down.
>
> We suggest and note that HMRC agrees that;
>
> 1. Montpelier will write to the stayed appellants advising them to withdraw their appeals.
> 2. If the appeals are not withdrawn within 28 days they shall be struck out unless an appellant wishes to make separate representations to the tribunal.
>
> We would be grateful if the tribunal could issue directions accordingly."

11. By Directions issued on 14 November 2013("the Unless Directions") Judge Kempster stated:

> "1. I have considered the correspondence from the parties in the lead case litigation which led to the cancellation of the substantive hearing

of the lead cases scheduled to begin on 11 November, and subsequent emails from those parties. I have concluded that the case management of these proceedings – both in relation to the lead cases and the related cases – should be as follows. I also give formal directions as set out below.

The Lead Cases

2. On the basis of the information available to me, I do not accept HMRC's contention that the provisions of s 54 TMA 1970 may be relevant. Section 54 requires formal agreements between HMRC and the taxpayers, and I understand there are no such formal agreements.

3. HMRC have confirmed that they accept the discovery assessments raised on Vaultdown Limited for the accounting periods ended 31 October 1999 and 31 October 2002 [originally stated as 2000 but formally corrected subsequently] were invalid; accordingly, the appeals against those particular assessments will be allowed. My comments in para 4 below relate to the other aspects of the Lead Case appeals.

4. As communicated to the parties by email on 5 November, the emails from the Lead Case Appellants' representative dated 4 November are taken as a notice of withdrawal of the Lead Case Appellants' case in the proceedings, pursuant to Rule 17(1). Normally, that would conclude the proceedings without any further action by the Tribunal; however, as these are the lead cases under a Rule 18 Direction, I consider it is best to formalise the position by issuing a decision notice dismissing the appeals (being case references TC/2009/16362, TC/2010/3064, TC/2011/816, TC/2011/1712, and TC/2013/1109 – except for the discovery assessments described in para 3 above) ("the Formal Lead Case Decision"). That will be issued after the expiry of the deadline for any reinstatement application - which I calculate to be 2 December 2013 (Rule 17(4) refers).

5. HMRC have given notice of their intention to make an application for costs. The normal deadline for such an application is given by Rule 10(4) but in order to accommodate the procedure set out above, I shall use the case management power in Rule 5(3)(a) to direct that the deadline is extended to 10 January 2014.

The Related Cases

6. All bar one of the Related Cases have the same representative as the Lead Case Appellants: Montpelier. Montpelier have stated they intend to advise their clients to withdraw their respective appeals. The Tribunal will write to the representative of the other appellant (Acorn Packaging Limited) to inform them of developments and enquire how they intend to proceed.

7. I do not accept the suggestion by HMRC that it would be appropriate to strike out the Related Cases as having no realistic possibility of success. The effect of the Formal Lead Case Decision will be that the Lead Case appeals are dismissed without consideration by the Tribunal of the merits of the appeals. I consider that means the Lead Case appeals will be dismissed without "a decision in respect of the common or related issues" - Rule 18(6) refers.

8. I consider the appropriate directions to give under Rule 18(6) in respect of the Related Cases are that the appellants should state whether they intend to continue the proceedings or instead withdraw,

with a deadline for reply of 10 January 2014, and that a failure to reply will result in the appeal being struck out (Rule 8(1)) refers).

9. After issue of the Formal Lead Case Decision the reference on the Tribunal's public website to Rule 18 Directions will be amended to record that the Taylor Ryan Rule 18 lead cases were dismissed without a decision in respect of the common or related issues.

Other Cases

10. The Directions issued on 11 September 2013 identified two groups of appeals (Class 1A NIC issues and Regulation 80 determinations) that were removed from being Related Cases, and were issued with new reference numbers to be case-managed separately – see paras 7 and 8 of those Directions. The parties should liaise to confirm to the Tribunal whether those matters are to be continuing proceedings.

Directions

The Tribunal DIRECTS:

1. The emails from the Lead Case Appellants' representative dated 4 November 2013 constitute a notice of withdrawal of the Lead Case Appellants' case in the proceedings, pursuant to Rule 17(1).

2. A formal decision notice recording the dismissal of the Lead Case Appellants' appeals (save as already conceded by the Respondents) will be issued in due course.

3. The deadline in respect of any application for costs in relation to the Lead Case proceedings is extended to 10 January 2014.

4. No later than 10 January 2014 each of the Related Case Appellants (being those appellants listed in the Appendix to the Directions issued on 11 September 2013) shall state in writing to the Tribunal (with a copy to the Respondents) whether they intend to continue the proceedings or instead withdraw their case. Failure to comply with this Direction by any Related Case Appellant will result in that person's appeal being STRUCK OUT without further reference to the parties."

12. By a Notice issued on 17 December 2013 the Tribunal stated:

"Further to the Directions issued on 14 November 2013, as corrected by the Note issued on 18 November 2013:

1. The appeals by Vaultdown Limited against the discovery assessments for the accounting periods ended 31 October 1999 and 31 October 2002 are ALLOWED.

2. Save as stated in paragraph 1 above, the remainder of the appeals by Taylor Ryan Limited and Vaultdown Limited are DISMISSED.

3. The parties are reminded of the 10 January 2014 deadline set by Direction 3 (costs) and Direction 4 ("unless" direction on the Related Cases)."

13. On 9 January 2014 the Tribunal contacted Montpelier to ascertain progress and on 14 January 2014 (ie after the 10 January deadline) the Tribunal received an email from Montpelier stating:

"Please be advised that we confirm that all appeals are withdrawn."

14. On 17 January 2014 Judge Kempster issued an order in respect of the related case appellants ("the Strike Out Order") which stated:

> "**STRIKING OUT ORDER**
>
> The Appellants having failed to comply with Direction 4 of the Directions issued on 14 November 2013, which warned that noncompliance would result in these proceedings being struck out without further reference to the parties, the Tribunal ORDERS that these proceedings are NOW STRUCK OUT.
>
> Each Appellant has the right to apply to the Tribunal within 28 days after the date of issue of this Order for their proceedings to be reinstated."

15. Applications for reinstatement of proceedings were submitted by the Appellants or their respective new representatives (ie not Montpelier) as follows:

> 4 February 2014 - GH Sumner Limited ("Sumner")
>
> 10 February 2014 - Vaultdawn; Groundwork Landscapes Limited ("Groundwork")
>
> 12 February 2014 - Stanford Industrial Concrete Flooring Limited ("Stanford")
>
> 14 February 2014 - Turkington Livestock Systems Limited ("Turkington LSL"); Lydonford Limited ("Lydonford"); Jo-Y-Jo Limited ("Jo-Y-Jo"); Strata Double Glazing and Joinery Limited ("Strata"); Unilathe Limited ("Unilathe")
>
> 3 March 2014 (being within an extension of time granted by the Tribunal) – Parkway Engineering Services Limited ("Parkway")
>
> 19 May 2014 – Cookes Furniture Limited ("Cookes")
>
> 25 June 2014 – Allsigns International Limited ("Allsigns")

Law

16. The relevant parts of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) are as follows.

17. Tribunal Procedure Rule 2 provides:

> "**Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case,
>
> the complexity of the issues, the anticipated costs and the resources of the parties;

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

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

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

18. Tribunal Procedure Rule 8 provides (so far as relevant):

"**Striking out a party's case**

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

…

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

…"

19. Tribunal Procedure Rule 11 provides:

"**Representatives**

(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person (other than an appointed representative) who accompanies a party in accordance with paragraph (5).

(7) In this rule "legal representative" means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland."

20. Tribunal Procedure Rule 17 provides:

"**Withdrawal**

(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

The Approach to be adopted by the Tribunal in considering the applications

21. We received submissions from all parties on the important subject of the correct approach to be adopted by us in applying the overriding objective in Rule 2 to the applications before us. Those submissions referred us to a number of relevant decisions of the Court of Appeal and the Upper Tribunal, which have set out the law in this area and are in broad agreement but with some points of distinction. Rather than recite the various submissions we set out below the approach which, after careful consideration of the submissions and all the authorities, we have adopted in determining these proceedings.

22. When determining whether to grant a discretionary remedy, such as the power to reinstate proceedings withdrawn (Rule 17(3)) or struck out (Rule 8(5)), the approach to be followed by this Tribunal was summarised by the Upper Tribunal (Morgan J) in June 2012 (when considering an application to file a late appeal) in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) (at [37]):

> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time …"

23. Since *Data Select* there has been a number of developments which are fully described by the Upper Tribunal (Judge Bishopp) in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), but in summary:

(1) CPR 3.9 was amended in April 2013.

(2) The Court of Appeal in November 2013 gave its decision on the effect of the new CPR 3.9 in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537.

(3) The Upper Tribunal (Judge Sinfield) in January 2014 considered and applied *Mitchell* in *HMRC v McCarthy & Stone Developments Ltd (& anor)* [2014] UKUT 0196 (TCC).

(4) The Court of Appeal in July 2014 clarified its statements in *Mitchell* in *Denton and others v TH White Ltd and another* [2014] EWCA Civ 906.

(5) The Upper Tribunal (Judge Bishopp) also in July 2014 considered all the above in *Leeds City Council* and declined to follow *McCarthy & Stone.*

24. All the above cases are from superior courts and tribunals and, therefore, are all binding on this Tribunal. Where there are conflicting decisions of the same court or tribunal – as there are here with the Upper Tribunal decisions in *McCarthy & Stone* and *Leeds City Council* – then we must decide which one to follow. The main points of difference concern the fact while both old and new CPR 3.9 required a court to "consider all the circumstances … including …", the list of factors to be considered (which it must be emphasised in both cases was/is not exhaustive) was different, and the explanations by the Court of Appeal in *Mitchell* and *Denton* of how that should be interpreted and applied. In *Leeds City Council* Judge Bishopp (at [12-19]) carefully explained why he decided that the change to the new form of CPR 3.9 was not to be followed by the Upper Tribunal (and thus by close analogy, this First-tier Tribunal)

and, therefore, why he was taking a view different from that of Judge Sinfield in *McCarthy & Stone* (who, as will be seen from the above chronology, did not have the advantage of the Court of Appeal decision in *Denton*). We respectfully concur with the reasoning of Judge Bishopp, and with his conclusion (at [19]):

> "In my judgment therefore the proper course in this tribunal, until changes to the [Tribunal Procedure] rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*."

25. In the same month that *Leeds City Council* was decided, the Upper Tribunal (Proudman J) specifically considered the approach to be adopted on determination of a reinstatement application in *Pierhead Purchasing Ltd v HMRC* [2014] UKUT 0321 (TCC). Proudman J also reached the conclusion (at [24]) that "all the circumstances need to be considered and there should be no gloss on the overriding objective." She stated (*ibid*):

> "I was asked by Mr Jones [counsel for the taxpayer] to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case [*Former North Wiltshire DC v. HMRC* [2010] UKFTT 449 (TC)] that the matters they took into account are relevant to the overriding objective of fairness."

26. Proudman J summarised those criteria (at [23]) as:

> "1. The reasons for the delay, that is to say, whether there is a good reason for it.
>
> 2. Whether HMRC would be prejudiced by reinstatement.
>
> 3. Loss to the appellant if reinstatement were refused.
>
> 4. The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
>
> 5. Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained."

27. That is the approach we shall adopt to the applications currently before us.

The evidence before the Tribunal

28. As well as several bundles of documents we also took oral evidence from (1) Mr Kenneth Thompson (a director of Vaultdawn); (2) Ms Joanna Carey (a director of Sumner); (3) Mr Turkington (a director of Turkington LSL); and (4) Mr Ben Roseff (a tax senior manager at PwC).

29. We deal here with a couple of objections received on the matter of admissibility of evidence which were dealt with summarily at the hearing but we record briefly for good order.

(1) HMRC objected to significant parts of Mr Roseff's evidence on the grounds that it strayed into the realms of opinion evidence, which should only be permitted in expert evidence and no application had been made to adduce expert evidence, and into the realms of argument and submissions on matters of law. HMRC submitted that all parts of Mr Roseff's evidence that were not

confined to matters of fact should be inadmissible. The Tribunal determined that, in accordance with the wide discretion afforded the Tribunal under Rules 5 and 15 (in particular, Rule 15(2)(a)), Mr Roseff's evidence should stand as presented but the Tribunal's evaluation of that evidence would bear in mind the distinction between those parts which were matters of fact within the witness's knowledge, and all other matters.

(2) The Appellants represented by PwC objected to the admission of a letter from Montpelier to Vaultdawn's then accountants dated 1 November 2013 – this was the letter that described why the lead cases had been withdrawn, referred to at [32] below. To the extent that the basis of the objection is that the letter enjoyed some form of privilege, that privilege belongs to Vaultdawn and as the letter was submitted by Ms Redston on behalf of Vaultdawn any applicable privilege was waived. We also note that the letter is specifically referred to (as an enclosure) in the 18 June 2014 letter from Montpelier to PwC (see [30] below) that was included (without the enclosure) as exhibit "BR13" to Mr Roseff's first witness statement. To the extent that the basis of the objection is that the contents of the letter should not inform the matter of what was known at the relevant time by persons other than Vaultdawn and its advisers (including the Appellants represented by PwC), we concur.

30. It is convenient to quote here the texts of three letters from Montpelier that were in evidence before us. First, a letter dated 18 June 2014 from Montpelier to PwC:

> "We understand that you act for the following (collectively "the appellants").
>
> Sandys Discount Warehouse Limited
>
> Jo-Y-Jo Limited
>
> Strata Double Glazing Limited
>
> Unilathe Limited
>
> Lydonford Limited
>
> Cookes Furniture Limited
>
> The appellants were related cases in relation to the Rule 18 lead cases of Taylor Ryan Limited ("TR") and Vaultdawn Limited ("'VL").
>
> On 1st November 2013 we wrote to TR and VL (copies attached) explaining exactly why their appeals were withdrawn. Regrettably, but perhaps fortunately for the appellants, the person in charge of the matter, Ms Ana Maria Chira, advised the Administration Department of the withdrawals and asked them to follow up with letters similar to TR and VL but this was overlooked. Consequently while the FTT wrote to other appellants advising of the strike out we as their adviser did not. That oversight may well now open up an opportunity for reinstatement as we discussed.
>
> I hope that the above is of assistance."

31. Secondly, a letter dated 5 November 2014 from Montpelier to ITL, which is similar to the above letter but amplifies some points:

> "We understand that you act for the following (collectively "the appellants").
>
> GH Sumner Limited ("GHS")

Stanford Industrial Concrete Flooring Ltd ("SICF")

Vaultdawn Ltd

Two of the above appellants were related cases in relation to the Rule 18 lead cases of Taylor Ryan Limited ("TR") and Vaultdawn Limited ("VL").

On 1st November 2013 we wrote to TR and VL (copies attached) explaining exactly why their appeals were withdrawn. Regrettably, but perhaps fortunately for GHS and SlCF (but not VL) the person in charge of the matter, Ms Ana Maria Chira, advised the Administration Department of the withdrawals and asked them to follow up with letters similar to TR and VL but this was overlooked. Consequently while the FTT wrote to other appellants advising of the strike out we as their adviser did not. That oversight may well now open up an opportunity for reinstatement. Please however note that in our opinion for the reasons set out in our letter to TR and VL dated 1st November 2013 the appeals will fail. Consequently save for a procedural point we do not see the purpose of reinstatement. Further we would be concerned that the FTT might regard any reinstatement application as an abuse if its real purpose is time to seek a negotiated settlement with HMRC.

I hope that the above is of assistance."

32. Thirdly, the letter referred to in both the above, from Montpelier to Vaultdawn's accountant (Mr Lowe) dated 1 November 2013:

"**Vaultdawn Limited ("the company")**

As you know the appeals of the company for the years ended 31st October, 1999, 2000, 2001 and 2002 are due to be heard before the First Tier Tax Tribunal on 11th – 14th November. For the reasons set out below it is our advice to withdraw the appeals. We apologise for forming this view so late but we have been looking at every possible angle to argue the case.

When the appeals were lodged we were of the view that it was based on the following grounds:-

1. Section 43(11) FA 1989 does not apply to deny a corporation tax deduction for monies left in the trust and not paid out as emoluments.
2. Section 43(11) does not apply as the trustee cannot be said to be holding the trust fund with a view to the payment of emoluments as it could provide benefits in other ways from emoluments.
3. Section 43(11) does not apply because the trustee of the employee trust is not an intermediary.
4. The discovery assessments are not valid.
5. No National Insurance as gratuitous transfers were made by the trustee.

Each of the above views was supported by counsel at the time.

In 2005 the House of Lords found against the taxpayer (Dextra Accessories) in relation to (1) and (2). We then took a similar case to the Commissioners in Sempra Metals (our client) in 2007 and while we won on some points we lost on (1) and (2). That left us in the case of

> the company with (3), (4) and (5). However last year Smith Williamson took point (3) to the Tax Tribunal and lost in the case of B W Male & Sons Limited and point (4) concerning discovery was taken in the case of Boyer-Allan Investment Services Limited and lost. We have already advised you about (5) concerning National Insurance in the case of Knowledgepoint who succeeded in their appeal to the First Tier Tax Tribunal but this was reversed by the Upper Tribunal.
>
> The above has left us in a very difficult position by in effect having five existing judgments which do not help us. Consequently after careful consideration with counsel it is our view that the company should withdraw the appeals. However that is not necessarily the end of it as there are good reasons for arguing that the company should obtain the corporation tax deduction for all prior year contributions in its year ended 31st October 2006. We do not however know whether the company paid corporation tax in that year or since. If the company would like us to look at running this argument separately please let us know.
>
> We attach herewith copies of the Dextra, Sempra and Male and Boyer judgments for your information.
>
> Regrettably we need to withdraw the appeal by noon on Monday to avoid costs issues.
>
> Kind regards"

Mr Thompson's evidence

33. Mr Kenneth Thompson, a director of Vaultdawn, stated:

(1) Mr Thompson and his fellow directors were electricians and had no expertise in tax matters. The company relied on professional advice and support in its tax affairs.

(2) Mr Thompson had prepared a witness statement for the hearing of the company's appeal listed to be heard from 11 November 2013. Prior to that contact from Montpelier had been minimal; if the company wanted to know of progress then it had to chase Montpelier.

(3) On 4 November 2013 Montpelier contacted the company's accountant (Mr Nick Lowe) to seek authority to withdraw the appeal. Mr Lowe had had no involvement in the EBT arrangements put in place by Montpelier.

(4) On 9 November 2013 Montpelier contacted Mr Thompson to tell him the appeal was being withdrawn and he was no longer required to attend as a witness. He was relieved at not having to attend but did not understand what was meant; he believed the company had little choice in the matter, and he had no time in which to seek a second opinion or further advice. He felt badly let down by Montpelier who had not explained the reasons or consequences of withdrawal.

34. In cross-examination by Ms Nathan for HMRC, Mr Thompson denied that he had authorised Montpelier to withdraw the appeals; he stated that he thought the hearing was still going ahead until two days before the hearing.

Ms Carey's evidence

35. Ms Jo Carey, a director of Sumner, stated:

(1) Ms Carey had no expertise in tax matters. The company relied on professional advice and support in its tax affairs.

(2) Contact from Montpelier had been minimal; if the company wanted to know of progress then it had to chase Montpelier. Ms Carey was under the impression that the company's appeal was to be heard on its own merits; she was unaware that it was linked to the appeals of other taxpayers. She had liaised with Montpelier before booking her holidays to make sure they did not clash with any hearing dates. She was told the appeal was in a long queue of cases.

(3) In mid-2013 the company met with Mr McKay of HMRC who was very helpful. In late 2013 the company instructed ITL with a view to resolving the appeals without litigation. In early 2014 Mr McKay mentioned to ITL that the appeal had been struck out. That was the first the company knew of it; the company had not been informed by Montpelier. Ms Carey attempted to clarify matters with Montpelier and had spoken with Mr Gittins on 22 January 2014 but had never received a detailed explanation until Montpelier wrote later in 2014.

(4) The action taken by Montpelier was without the knowledge or instruction of Sumner. Sumner felt badly let down by Montpelier who did not explain in detail the reasons for or consequences of the striking out of the appeals. Had Sumner been kept properly informed then it could have sought further advice and support.

(5) The EBT had been set up by Manx Trust, who later became Montpelier, as part of remuneration planning arrangements. There was never any suggestion that the tax authorities might question the arrangements. Montpelier had dealt with everything on the company's behalf and charged fees for it. The company had stopped using the EBT in about 2003 when it became apparent that HMRC were taking an interest in the arrangements.

36. In cross-examination by Ms Nathan for HMRC, Ms Carey was shown an engagement letter between Manx Trust and Lydonford (one of the other Appellants) dated 27 February 1998, which gave a detailed technical description of the operation of the EBT arrangements and stated, "One condition that we make of all our structures is that we defend these on your behalf. This because we feel best placed to defend our schemes. No extra charges are made for these defence costs to you and will be entirely borne by ourselves. … During the course of operation of any of our schemes we would insist that we defend these for you." Ms Carey accepted that Sumner's EBT was established around the same time but did not recall any engagement letter although there were terms & conditions from Manx Trust, which were in evidence.

Mr Turkington's evidence

37. Mr Turkington, a director of Turkington LSL, stated:

(1) Mr Turkington was not an accountant. The EBT had been established in around 1997, before he became a director. He was not aware of any terms of engagement. The company had stopped using the EBT about 2008.

(2) Montpelier had set up the scheme and dealt with everything. He did not recall any charges for dealing with HMRC. He had been unaware that the company had a live appeal before the Tribunal until he was contacted by PwC

in February 2014 to be told that an appeal had been struck out. He then contacted the company's own accountants. The company had not been informed that Montpelier had dropped the company's appeal. His cousin had eventually been able to speak with Mr Gittins who had been curt and said there was no point in pursuing the appeals and all the cases had been dropped.

38. In cross-examination by Ms Nathan for HMRC, Mr Turkington was shown the same engagement letter as was shown to Ms Carey. Mr Turkington had not seen anything similar and noted that the schedule of charges was different from those paid by Turkington LSL.

Mr Roseff's evidence

39. Mr Ben Roseff, a tax senior manager at PwC, stated:

(1) In preparation for the June 2014 hearing he had telephoned Montpelier and spoken with Mr Gittins about the background. Mr Gittins said that in 2013 he had looked at whether the listed cases could go ahead and after conference with counsel felt he had to withdraw. He had promised further information but nothing had been supplied despite chasing. Mr Roseff had other clients who had used Montpelier in the past and he was not surprised by Montpelier's lack of communication. By the time of the November 2014 hearing Mr Roseff had seen the letter from Montpelier to ITL dated 5 November 2014.

(2) Several former clients of Montpelier now represented by PwC appeared to be unaware that their appeals had been stood behind the lead cases and were bound by those cases (under Rule 18). None of the clients appeared to have been informed of progress by Montpelier. The dispute had been going on for over a decade and it was not unusual to have long periods with no interaction.

(3) PwC's own analysis of their clients' situation indicated there were prospects of success in the former appeal proceedings. He felt that some assessments were out of time; there were contradictory assessments; and some cancelled each other out. In some cases there appeared to be double charges to tax – details were in the schedules to his second witness statement. He considered that if the appeals stood struck out then there could be a windfall gain to HMRC. Because of time limits and other restrictions it would be difficult to achieve symmetry.

(4) If the appeals were reinstated then he felt s 54 agreements (ie contractual settlements) could be reached with HMRC. That would be preferable for all parties rather than going to court.

Permission to make applications out-of-time

40. Three of the applications before us were made late: those of Vaultdawn, Cookes and Allsigns. We deal first with the matter of whether we should (pursuant to Rule 5(3)(a)) extend the relevant time limits so as to grant permission for the respective applications to be admitted late.

41. For Vaultdawn Ms Redston submitted that the company was not notified directly by the Tribunal of the withdrawal and thus the company did not grasp the significance of the position until after the 28 day deadline stipulated in Rule 17(4). Vaultdawn had acted promptly upon becoming aware of the true situation.

42. For Cookes Mr Burgess submitted that his client accepted that its application was out-of-time. Cookes had continued to rely on Montpelier (unlike the other Appellants) who failed to advise on relevant matters. Thus although Cookes did receive directly the Strike Out Order, it assumed Montpelier would take the necessary steps. Cookes did act promptly once it (through its newly appointed advisers) became aware of the true situation. Little prejudice would be caused to HMRC by allowing the application in late because HMRC needed to address exactly the same arguments in relation to the other Appellants.

43. We had no representations from Allsigns.

44. For HMRC Ms Nathan opposed any extensions of time on the grounds that there was insufficient justification for exercise of the Tribunal's discretion to admit the late applications.

45. We have concluded that, on balance, all three late applications should be admitted. Although the delays were not "trivial" (over two months for Vaultdawn, over three months for Cookes, and over four months for Allsigns) we are satisfied that each appellant did apply to the Tribunal promptly once, following appointment of new professional advisers, it became aware of the situation it was in. We feel it would be disproportionately harsh to refuse even to hear the arguments put forward by those appellants in support of their respective applications, especially as (as pointed out by Mr Burgess) those arguments would anyway have to be addressed by HMRC in relation to the other appellants. Accordingly, we admit the three late applications out of time, pursuant to Rule 5(3)(a).

Appellants' case

Appellants Allsigns, Parkway and Groundwork

46. Prior to the hearing the Tribunal received letters from Allsigns and Parkway stating that they did not intend to attend the hearing but were content to align themselves with the other Appellants.

47. No representations were received from Groundwork.

Appellants Vaultdawn, Stanford and Sumner

48. For Vaultdawn, Stanford and Sumner Ms Redston submitted as follows.

The Tribunal had failed to notify the withdrawal pursuant to Rule 17(2)

49. Rule 17 allows a party to give written notice of withdrawal to the Tribunal, and requires the Tribunal to give written notification to each party. The withdrawal notice was given by Montpelier, not Vaultdawn, and the notification was given to Montpelier, not Vaultdawn. Rule 11(4) allows "a person" who receives notice of appointment of a representative to provide documents to that representative instead of the represented party. "Person" was not defined in the Rules and was not wide enough to include the Tribunal; thus the Tribunal was required to notify Vaultdawn (rather than just its representative, Montpelier) and therefore the notification requirement in Rule 17(2) had not been satisfied.

The Tribunal's decision notice dated 17 December 2013 was invalid

50. The Unless Directions recorded that a withdrawal notice "Normally … would conclude the proceedings without any further action by the Tribunal; however, as these are the lead cases under a Rule 18 Direction, I consider it is best to formalise the position by issuing a decision notice dismissing the appeals …". The 17 December 2013 Notice was the document issued to dismiss the appeals. Rule 29 required that a hearing be held before making a decision which disposes of proceedings, unless the parties consented to the matter being decided without a hearing, and the Tribunal considered it was able to decide the matter without a hearing. Neither Vaultdawn nor (so far as Vaultdawn was aware) Montpelier had consented to determination of the appeal without a hearing

51. Further, the 17 December 2013 Notice did not comply with the requirements of Rule 35(2)(b):

> "a decision … which finally disposes of all issues in proceedings … a decision notice which … notifies the party of any right of appeal against the decision and the time within which, and the manner in which, the right of appeal may be exercised."

The appeals should be reinstated

52. It was clearly in the interests of justice and in accordance with the overriding objective for the appeals to be reinstated.

53. Mr Thompson as a director of Vaultdawn accepts that he was told by Montpelier that Vaultdawn's appeal was to be withdrawn. Montpelier did not ask the consent of Vaultdawn. Further, Vaultdawn was not notified by the Tribunal of the withdrawal and thus Mr Thompson did not grasp the significance of the position until after the 28 day deadline stipulated in Rule 17(4).

54. Each of Sumner and Stanford:

(1) Did not give its consent to Montpelier withdrawing its appeal;

(2) Was unaware that Montpelier had withdrawn its appeal; and

(3) Was unaware of the Unless Directions until it received the Strike Out Order.

55. The above was supported by the following:

(1) The explanation provided by Montpelier in their letter to ITL dated 5 November 2014 (see [31] above).

(2) In December 2011 Sumner had instructed ITL to engage on its behalf with HMRC's EBT Settlement Opportunity; those discussions were ongoing at the time of the Strike Out Order; this was entirely contrary to Sumner consenting to the withdrawal of its appeal by Montpelier.

(3) Ms Carey's evidence was that Sumner was unaware of the strike out of its appeal until Mr McKay of HMRC's EBT Settlement Team informed her on 20 January 2013, two days before it received the Strike Out Order. Ms Carey did contact Montpelier but was not told about the November hearing, only that the case was in a long queue. She denies ever seeing any contractual term that Montpelier would have control and conduct of the appeal proceedings.

(4) On 17 December 2012 (a month after the Unless Directions) Montpelier sent to Stanford information concerning the HMRC Isle of Man Disclosure Opportunity – there was no mention of the Unless Directions.

(5) On 18 March 2014 Montpelier sent Stanford an invoice (for £250) which was challenged by Stanford, "I haven't spoken to anyone for 12 months and there hasn't been any work done on our behalf for longer than that. I was beginning to think that Montpelier had stopped trading."

56. Although it was accepted that HMRC was not under an obligation to corresponded with Stanford in relation to the proceedings, HMRC had written to Stanford on 23 May 2013 inviting settlement of the appeals under the EBT Settlement Opportunity, stating "if you do not respond by 28 June 2013 I will assume that you are not interested in settling the appeals and I will continue to progress your case within the terms of our published Litigation and Settlement Strategy".

57. In making the Unless Directions the Tribunal relied on Montpelier's statement that it "will write to the stayed appellants advising them to withdraw their appeals". Montpelier did not honour their commitment. When the Tribunal took the trouble to check with Montpelier, Montpelier advised the Tribunal "all the appeals are withdrawn". Montpelier had not obtained the consent of their clients to that course of action. The Tribunal made its decision to strike out the appeals on the basis of incorrect and misleading information. Montpelier had said they intended to obtain consent to withdraw – so were clearly aware that they did not have capacity to do so themselves but required client instructions – but failed to do so.

58. The appellants were unaware of the Unless Directions. That was the reason they had not complied with the Unless Directions. Per Lord Dyson MR in *Mitchell* (at [43]): "Good reasons are likely to arise from circumstances outside the control of the party in default." That was exactly the situation here, where the appellants did not know what was happening between Montpelier, the Tribunal and HMRC. Proper justice would not be done if a party was bound by a withdrawal made without their consent.

59. There was significant prejudice to the appellants if the proceedings remained struck out. They had acted promptly to reinstate the proceedings as soon as they became aware of the Strike Out Order.

60. "Old" CPR 3.9 specifically required a court to consider, as part of all the circumstances whether the failure to comply was caused by the party or its legal representative. Here, Montpelier's failure was the cause of the problem.

61. In the Unless Directions Judge Kempster had specifically considered and dismissed the possibility of striking out the related cases as having no reasonable prospect of success. Thus it was incorrect for HMRC to argue that the appellants' cases had no merits.

62. HMRC were wrong to argue that it would be abusive to reinstate the appeals if the appellants were considering settling the dispute under the EBT Settlement Opportunity; far from being abusive Rule 3 required the Tribunal to bring to the attention of the parties alternative dispute resolution procedures and even "facilitate the use" of such procedures. Whether the appellants chose to follow such procedures – for example to use the EBT Settlement Opportunity – was a matter for them

subsequently but that possibility could not be a reason to refuse the reinstatement applications.

63. HMRC overstated their case as to the likely outcome of the substantive lead case appeals; there was sufficient argument for a taxpayer to dispute the applicability of the authorities such as *Dextra* and *Sempra*. The effect of the strike out is to deny the appellants a deduction for contributions to the relevant EBTs. If there was also a disallowance for PAYE/NIC purposes then there was a risk of additional taxation. Further, there was a strong likelihood of errors in the assessment figures and technical errors in the calculations.

64. An action against Montpelier would not be an adequate alternative remedy. It was understood that at the relevant times the directors of Montpelier had been under arrest and charged with criminal offences concerning tax matters.

Appellants Lydonford, Jo-Y-Jo, Strata, Unilathe and Cookes

65. For Lydonford, Jo-Y-Jo, Strata, Unilathe and Cookes Mr Burgess submitted as follows.

66. The appellants seek reinstatement of their appeals on the ground that they were entirely unaware of the Unless Directions, having not been informed of them by Montpelier.

67. In emails dated 2 April and 15 May 2014 Mrs Angela Southern (senior client manager at Montpelier) stated to Mr Ben Roseff and Mr Jamie Richards at PwC: "I can confirm that Montpelier did not contact the clients mentioned prior to their Tribunal cases being struck out."

68. The letter from Mr Gittins at Montpelier dated 18 June 2014 (see [30] above) gave some background. Efforts by PwC to obtain a formal witness statement from Mr Gittins had proved fruitless.

69. The disputes had been ongoing for over a decade, during which time there were lengthy periods when no progress was apparently being made. Therefore the appellants did not consider it was unusual for there to be no communication from Montpelier for some time.

70. The Tribunal should have regard to CPR 3.9. The relevant failure was caused by a party's representative only. The Tribunal should have regard to where "a party was not consulted and did not give his consent to what the legal representatives had done in his name" – per Peter Gibson LJ in *Training in Compliance v Dewse* [2001] Cr App Rep 46, at [65].

71. The Tribunal should consider the detriment which the appellant will suffer by the proceedings being brought to an end, and weigh that against the impact on the other party: *Hayden v Charlton* [2011] All ER (D) 57 (Jul). An action against the representative does not, in most cases, offer a suitable alternative because there is "a real reduction in the value of [the] claim" (*Welsh v Parnianzadeh* [2004] All ER (D) 170 (Dec) per Mance LJ) as well as the additional delay and expense involved. Further, Montpelier was based in the Isle of Man.

72. The Unless Directions were not a sanction for non-compliance but instead a normal case management decision to determine matters.

73. The first question per *Mitchell* was, whether the breach was trivial? If not, was there a good reason for the default? Here the breach by the appellants was trivial – or at least not "serious" or "significant". The fault lay with Montpelier. There had, so far as the appellants are aware, been no other breaches of Tribunal directions or orders. Little or no prejudice would result to HMRC from the appeals being reinstated; HMRC were faced with fighting the same case against other taxpayers who had used the same scheme.

74. The fact that the appellants remained amenable to settlement of the disputes was proper and laudable, rather than counting against them. It was not correct that no attempts had been made to settle. PwC had been instructed by Jo-Y-Jo some months prior to January 2014 to negotiate its EBT liabilities with HMRC. Sumner was now apparently in the same position. Until publication in August 2012 of HMRC's technical analysis, there was no definitive view of what settlement terms might be acceptable to HMRC.

75. The assessments are significantly in excess of the actual tax liabilities even if HMRC's contentions are correct. HMRC's calculations ignore the effect of interest, benefit in kind charges on PAYE paid by the company under s 222 ITEPA 2003, and charges under the "disguised remuneration" legislation at Part 7A ITEPA 2003. The calculations therefore do not show a complete or accurate picture of the total cash cost to the appellants (and the beneficiaries under s 222) of taking all the relevant tax charges into account.

Respondents' case

76. For HMRC Ms Nathan submitted as follows.

77. The background to these proceedings was the participation by the appellants in a marketed tax avoidance scheme using employee benefit trusts. The Tribunal had identified two lead cases and some 25 related cases, all governed by formal Rule 18 directions. On the deadline day for the lead cases to serve their skeleton arguments, appeal bundles and witness statements for the substantive hearing of their appeals (listed for three days), the lead cases withdrew their appeals by notification by an email from Montpelier. HMRC had costs applications against the lead case appellants, which were being handled separately by the Tribunal. The Tribunal rescheduled the first day of the trial as a case management hearing but that did not take place as Montpelier were unwilling to attend. Both sides made written submissions, after which the Tribunal issued the Unless Directions. Despite a chaser from the Tribunal, Montpelier did not respond until after expiry of the deadline in the Unless Directions. The subsequent Strike Out Order reminded the related case appellants of their right to apply for reinstatement, and the applicable deadline (Rule 8(6) refers), and was sent to each appellant (as well as Montpelier).

Vaultdawn's application

78. One of the two lead cases (Vaultdawn) had applied for reinstatement of its withdrawn appeal (Rule 17(3) refers) but outside the applicable time limit (Rule 17(4) refers).

79. In order for the Tribunal now to give itself jurisdiction over Vaultdawn's withdrawn appeal, the Tribunal must act consistently with the overriding objective in Rule 2. HMRC contended that reinstatement would not be just and fair, for the following reasons:

(1) HMRC did not accept that Vaultdawn was not contacted by Montpelier in advance of the withdrawal. It was notable that no representative from Montpelier appeared as a witness. Montpelier's 4 November 2013 email to the Tribunal was clear that "I am instructed to advise the Tribunal …". Mr Thompson (a director of Vaultdawn) had been due to give evidence in person at the substantive hearing of Vaultdawn's appeal and so he would have been informed by Montpelier that he was no longer required. Therefore, it was reasonable to suppose that he was at the very least aware that the appeal was being withdrawn.

(2) The dismissal of the appeal had resulted not from an administrative step (cf *Sheppard v IRC* [1992] STC 460 at 464) but from a formal order given by a Judge, and so should not be overturned lightly.

(3) Reinstatement of the appeal would result in delay in the collection of taxes that had become due and payable as a result of the withdrawal.

(4) Even if reinstated, the appeal had little chance of success given the state of the case law on employee benefit trust avoidance schemes: *Macdonald v Dextra Accessories Ltd* [2004] STC 339; *JT Dove v RCC* [2011] SFTD 348; *Sempra Metals Ltd v RCC* [2008] STC (SCD) 1062 ; *HMRC v Knowledgepoint 360 Group Plc* [2013] UKUT 7 (TCC)). That was clearly the opinion of Montpelier – who was the promoter of the scheme – who stated that following the above cases it was "left in an impossible position". There would just be yet further delay in collecting taxes properly payable.

(5) Mr Roseff's evidence sought to persuade the Tribunal that there was some risk of double taxation if the appeal was not reinstated. That was incorrect. Vaultdawn's clear grounds of appeal were that the scheme arrangements did not constitute the payment of earnings. Now it was being suggested that HMRC should accept that there *had* been a payment of (employer deductible) earnings, but without that point having been specifically pleaded. Further, HMRC had not raised PAYE assessments and such assessments may now be time-barred – thus rather than there being double taxation there was actually a risk of a tax windfall arising to Vaultdawn. If the arrangements did amount to payment of earnings then the result of the appeal remaining withdrawn was a fair one. Moreover, any corporation disallowance was a matter of timing; if and when the EBTs make distributions then employer deductions would normally be available. There were further objections to the purported effects of employer and employee NICs.

(6) The real reason why Vaultdawn sought reinstatement of its appeal was not in order to progress the appeal to a substantive determination by the Tribunal but instead in order to place itself in what it perceived to be a more favourable position in settlement negotiations with HMRC. Permitting reinstatement in such circumstances would be an abuse of the Tribunal process, and thus contrary to the overriding principle.

(7) Vaultdawn is really seeking a second bite at the cherry; it had the opportunity to be in dialogue with HMRC with a view to reaching a settlement

when its appeal was extant but by withdrawing clearly gave up its ability to settle. It should not now be permitted to use the Tribunal procedure to resurrect its appeal in order to re-establish a basis for reaching a settlement.

(8) Vaultdawn had misunderstood the proper role of the Tribunal (and the courts) in promoting alternative dispute resolution. Tribunals and courts are encouraged to promote such procedures in relation to matters over which they have jurisdiction. Here the appeal had been formally withdrawn and thus there was no matter before the Tribunal.

(9) Vaultdawn had referred to the difficulty of a negligence action against Montpelier because of its location in the Isle of Man, and suggested this would therefore not offer an adequate alternative remedy. The appellants should not be relieved of the consequences of their own freely taken decision to engage an adviser outside the jurisdiction.

Applications by the related cases

80. These appeals were struck out (pursuant to Rule 8(1)) for non-compliance with the Unless Directions. That Rule was designed to prevent abuse of process and, while the striking out must be proportionate (*Biguzzi v Rank Leisure* [1999] WLR 1926 at 1933), it was a sanction for non-compliance. Thus the related cases were seeking relief from sanctions. HMRC contended that reinstatement would not be just and fair, for the following reasons:

(1) There was no doubt that there had been non-compliance with the Unless Directions.

(2) Montpelier was the authorised representative for the appellants and its acts are to be regarded as the acts of the appellants: *Training in Compliance* at [66] per Peter Gibson LJ. The arrangements between Montpelier and the appellants were unclear. Mr Rosoff's evidence was that the appellants were unconcerned by lengthy periods of non-communication from Montpelier. It was clear that the appellants played a very passive role and relied on Montpelier to have conduct of the progress of the appeals. If it was being argued that HMRC and/or the Tribunal had some duty to correspond with the taxpayers as well as Montpelier then that was clearly incorrect and unjustified; it was not up to HMRC and/or the Tribunal to make up for the appellants' inattention to their own affairs.

(3) HMRC did not accept that Montpelier did not contact the appellants before the 10 January deadline. The various pieces of subsequent correspondence put in evidence (some belatedly) were from persons at Montpelier (Mr Gittins and Mrs Southern) who were not the person with conduct of the appeals (Ms Chira). There was also a discrepancy that PwC appeared to have been appointed in December 2013 to negotiate a settlement, which was at a time when the substantive hearing of the lead case appeals (if it had occurred as planned) would have already concluded.

(4) Even if the appellants prove their case that they were not consulted by Montpelier, the Tribunal must have regard to the effect of reinstatement upon the other parties. The least unfair result overall may be that the appeals remain struck out: *Hayden v Charlton*.

(5) The Tribunal was entitled to consider the merits of the defence and, for the same reasons as set out at [79(4)] above, the appeals had little chance of

success given the state of the case law on employee benefit trust avoidance schemes.

(6) As with Vaultdawn, the real reason behind the application was not to progress the substantive appeals to determination by the Tribunal, but instead to seek some perceived negotiating advantage. The appellants had had many years in which to seek to reach a settlement with HMRC but had failed to do so and had preferred to proceed by way of litigation. Having realised that litigation was unlikely to produce the result they desired, they now sought a means to reach settlement. As with Vaultdawn, this would be an abuse of the Tribunal process. As with Vaultdawn, the appellants had misunderstood the proper role of the Tribunal in promoting alternative dispute resolution.

(7) Reinstatement would also prejudice the position of the general body of taxpayers in that the tax that became due and payable upon the Strike Out Order would once more be the subject of a dispute. There would just be yet further delay in collecting taxes properly payable.

(8) There was a risk that reinstatement would undermine the finality attained in relation to the many follower cases in other tax avoidance scheme litigation, by opening the doors to the follower cases seeking reinstatement and deferral of taxes properly payable. That was inconsistent with the administration of justice

(9) The comments above refuting the alleged risk of double taxation were reiterated in relation to the related case appellants. If it was being suggested that there were material differences between the various taxpayer appellants involved then that ran contrary to their willingness to be included as Rule 18 related cases in the original litigation.

Consideration and Conclusions

81. We do not accept Ms Redston's submission (see [49] above) that the Tribunal failed to notify the withdrawal pursuant to Rule 17(2), because Rule 11(4) did not apply to the Tribunal. On the contrary, we consider that the purpose of Rule 11(4)(a) is to require (not merely permit) everyone involved in the proceedings – parties, representatives, witnesses, and the Tribunal – to communicate with a party's duly appointed Rule 11 representative rather than the represented party.

82. We do not accept Ms Redston's submission (see [50-51] above) that the Tribunal's decision notice dated 17 December 2013 was invalid. As explicitly stated in the Unless Directions (at para 4), the subsequent document was merely for the sake of good order given that the proceedings (and those of two dozen other parties) were being conducted within the framework of formal Rule 18 directions, and was deliberately held back until after expiry of the deadline for any reinstatement application. Vaultdawn's withdrawal disposed of the proceedings, and there was no need for any hearing.

83. As stated above (at [27]) we will determine the applications before us by applying the criteria identified by Proudman J in *Pierhead Purchasing*, while bearing in mind her caution that those are not "set in stone".

84. It is convenient for us first to make certain findings of fact, as some of these are relevant to more than one of the criteria.

(1) Although neither Ms Carey nor Mr Turkington recalled having seen an engagement letter from Manx Trust in the form of that sent to Lydonford, we reasonably infer that the Lydonford letter was typical of the documentation that Manx Trust would have used for all its clients taking up the EBT scheme back in the late-1990s. Their lack of recall is not surprising given that the arrangements were entered into almost twenty years ago; that neither Ms Carey nor Mr Turkington are finance professionals; that Mr Turkington was not a director at that time; and that at least part of Ms Carey's recollection seems to have been prompted by a telephone conversation with Mrs Southern at Montpelier where Ms Carey was told that there were no contracts being used back then, which is clearly incorrect given the Lydonford letter. We find that terms similar to the contents of the Lydonford letter (see [36] above) would have governed the relationship between Manx Trust, subsequently Montpelier, and all its clients taking up the EBT scheme, including all the Appellants. In particular, and as is common practice with scheme promoters, the agreement from the outset was that Montpelier (as it became) would have conduct of the defence to any challenge to the scheme.

(2) In relation to Vaultdawn, we find that the account of events given by Mr Thompson in his witness statement was incomplete, although we do not suggest that was deliberate. We had in evidence an email from Mr Nick Lowe (accountant) to Ms Chira at Montpelier dated 1 November 2013 (apparently in reply to an email from Ms Chira) stating "Ken [Thompson] and I are interested in the exposure on the company by withdrawing the appeals" and then asking detailed questions on the amounts and years of assessment. Ms Chira replied at 10.34 on 4 November giving some information (including a table of corporation tax liabilities between 1997 and 2002 totalling over £0.5 million) and asking for a reply "before noon today whether you agree to withdraw the appeals so we can notify the HMRC and the Tribunal." Seventy minutes later Mr Thompson emailed Ms Chira, "I am still in shock regarding the late decision from Montpelier to recommend dropping the appeal. I still need to know the implications either way … We were told by Mr Gittins … at the outset of this that [Manx Trust] as it was then known, would fight this to the highest court in the land. … Please contact me asap to discuss this very urgent matter …". We find that Montpelier did contact Vaultdawn with a view to obtaining consent to withdraw, and that the company was well aware that withdrawal was being recommended. We accept Mr Thompson's evidence that he did not give express consent to Montpelier to withdraw the appeals.

(3) We are satisfied, and so find, that none of the Appellants expressly authorised Montpelier to withdraw their respective appeals.

The reasons for the withdrawal (in Vaultdawn's case) or non-compliance (in the cases of the other Appellants)

85. We note the repeated comment that the Appellants feel badly let down by Montpelier and its conduct of the proceedings while they were extant. Montpelier (or its officers) did not appear as a witness before us, and thus neither we nor the parties have had the opportunity to hear an explanation from Montpelier, or to make a complete evaluation of the conduct of the proceedings by Montpelier. However, PwC did attempt to persuade Montpelier to provide some form of formal evidence in support of the applications (or at least, by way of explanation of the background), and

the outcome of that was the 18 June 2014 letter, which we read together with the similar letter dated 5 November 2014 to ITL (see [30 & 31] above).

86. Having considered all the evidence and submissions we note the following points. First, this is not a case where reinstatement is being sought because a representative has failed to engage with the proceedings. Montpelier appeared at two case management hearings on behalf of all its clients and participated in the formulation of the Rule 18 arrangements for the various appeals. Montpelier acted decisively (if rather late in the day) to withdraw the lead case appeals before the substantive hearing. It did so after consultation with counsel on the merits of the appeals and on the basis of a detailed consideration of the prevailing relevant case law – see the 1 November 2013 letter to Vaultdawn's accountants (see [32] above). Similarly for the related case appeals, although they were struck out under Rule 8(1) for non-compliance, Montpelier confirmed in its 14 January 2014 email that those appeals were also withdrawn. By 14 January those appeals were already dead because of non-compliance with the Unless Directions, but again it is clear that Montpelier had in mind that the related case appeals were to be withdrawn – and we consider it reasonable if not obvious to conclude that was for the same reasons as for the lead case appeals.

87. Secondly, although we have found that none of the Appellants expressly authorised Montpelier to withdraw their respective appeals, that does not mean that Montpelier was necessarily acting beyond its brief. We have also found that it was a term of the scheme arrangements that Montpelier would have conduct of the defence to any challenge to the scheme. That is supported by the conduct of the Appellants during the proceedings, as borne out by the evidence of Mr Thompson, Ms Carey and Mr Turkington; everyone was more than content to leave everything in the unsupervised hands of Montpelier, and that was not out of indifference or indolence but rather because that was everyone's understanding: that Montpelier were in the driving seat as promoter of the EBT scheme and tasked with defending HMRC's challenges to its efficacy. We do consider that, in our opinion, most professional firms would keep their clients rather better informed of developments than Montpelier appear to have done; also, that it was discourteous for Montpelier to have informed the Tribunal that it was writing to its clients when, apparently, it did not then do so. However, we cannot say that Montpelier did not have reason to believe that the decision to abandon the defence of the scheme did not lie with Montpelier itself.

88. Thirdly, we do not accept the Appellants' submission that, even if Montpelier was acting without instructions then that should persuade the Tribunal that it would be appropriate to reinstate the proceedings. We derive much assistance on this point from the following Court of Appeal authorities.

(1) In *Training in Compliance* Peter Gibson LJ stated (at [65]) (emphasis added):

> "There is no doubt that the Civil Procedure Rules give the court greater powers, enabling the court to choose between a wider range of remedies and sanctions, and that in the exercise of its powers the court must have regard to the overriding objective which recognises the principle of proportionality. The Civil Procedure Rules relate to the making of a wasted costs order against legal representatives, as had the Rules of the Supreme Court; but *I see no justification for Mr Pooles' submissions on the Civil Procedure Rules requiring the court to draw distinctions between a party and his legal representatives. Of course, if*

> *there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to that as a fact, though it does not follow that that would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting*. However, in the present case there is in fact no evidence at all as to what the defendant knew of the action or inaction on his behalf taken by those representing him. In my judgment, therefore, in this case there is even less scope for making an order against the legal representatives which would leave the defendant himself without any sanction against them."

89. In *Mullock v Price (t/a Elms Hotel Restaurant)* [2010] All ER (D) 11 (Jan) Ward LJ stated (emphasis added):

> "[19] Goldring LJ gave limited permission to appeal, limited only to the ground whether the circuit judge was correct in upholding the decision that the Defendant did act promptly. That is therefore the only issue before us.
>
> [20] CPR 13.3(2) is in terms not dissimilar from CPR 39.3 which allows a judgment to be set aside if the party failed to attend the trial. Under that rule, as expressed in 39.3(5)(a), the court may grant the application to set aside only if the Applicant "a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him." So there we do find that the Rules provide for prompt action after a certain event, namely his finding out that judgment had been entered. Those words are absent from CPRT 13.3(2), and the question is whether a similar meaning should be given to 13.3(2) or whether it can extend more widely than that. The issue is really whether a party can rely on the actions or inactions of those who represent him.
>
> [21] In that regard there is a contrast to be drawn between these rules and CPR 3.9 permitting relief from sanction where the court will consider all the circumstances including under subparagraph (b) whether the application for relief has been made promptly, but under that rule the court can also have regard to whether the failure to comply was caused by the party or his legal representative, which suggests that a failure by the legal representative may provide adequate excuse.
>
> [22] I am not satisfied that that is to be imported into 13.3. I note that in the case of *Training in Compliance Ltd v Dewse* [2001] Cr App Rep 46 Peter Gibson LJ said in para 66, as is noted incidentally in the notes to CPR 3.9(2):
>
> > "Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to the fact, though it does not follow that that

> would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

I respectfully agree. It seems to me wrong that a party should shield behind his representatives.

> [23] I say that it is wrong essentially for two reasons. First, the language of CPR 13.3 is explicit: it requires "the person seeking to set aside the judgment" to make the application promptly. So it focuses on that person's action. *Secondly, the Civil Procedure Rule in fact impose duties on the parties to the litigation, and it seems to me that must mean the parties themselves irrespective of the help and advice they are or are not receiving. Their duty under CPR 1.3 is this "The parties are required to help the court to further the overriding objective."* One of those objectives is of course to ensure that the case is dealt with expeditiously, and I am therefore quite satisfied that it was the duty of Mr Price, a personal duty, to ensure that the case was dealt with expeditiously and in the particular circumstances of this case to act promptly to set aside any judgment entered in default of his having put in his appearance.
>
> [24] Here it is beyond question that the Defendant knew that judgment had been entered against him, he knew that there was an order for interim payment, he had as I said had the bailiffs there to enforce that order and he knew that it had been paid by the brokers. Furthermore he knew that application was being made and had been made successfully to enter a final judgment against him. In my judgment it behoved him to act promptly from the time that he was aware of the judgment having been entered against him. That was his obligation, to deal expeditiously with the matter. To delay for two years, or almost two years, can by no stretch of the imagination be a prompt application to set aside the judgment.
>
> [25] I am thus quite satisfied that the circuit judge was wrong. He took into account an irrelevant factor, namely the reliance on the brokers. His error therefore entitles this court to interfere with the exercise of discretion he otherwise made and which might in other circumstance have been appealable. In the exercise of my discretion I would allow the appeal against his order and restore the District Judge's dismissal of the application to set this judgment aside."

90. From *Training in Compliance* we understand that there is no justification for drawing distinctions between a party and its representative; that we should take account as a fact of any lack of client consent but that that is not conclusive; and that the effect on the other party (here, HMRC) is equally important. From *Mullock* we understand that the obligation to co-operate with the Tribunal (Rule 2(4) refers) is on

the Appellants "irrespective of the help and advice they are or are not receiving"; and that "a party should not shield behind his representatives".

91. Fourthly, we understand the point made by the Appellants that an action against Montpelier may not be an adequate alternative remedy. We make no comment as to whether any such action would be well founded or justified. We consider the fact that Montpelier is based outside the jurisdiction is irrelevant to the matters before us; it was certainly clear to the Appellants when they appointed Montpelier under Rule 11. There is also again the question of the position of the other party, HMRC. We consider the point was addressed by the Court of Appeal in *Hayden v Charlton* where Toulson LJ stated (at [42]) (emphases added):

> "This leads me to another consideration. If the appeals are dismissed, the claimants will have the opportunity of some redress against their former solicitor. *I recognise that a negligence claim against his firm is a far from perfect remedy*, because it is not the equivalent of a judgment declaring that the defendants' allegations are false, *but it at least some remedy*. *If the actions are restored, the defendants will have no remedy against the prejudice which they have already suffered* in the two respects which I have identified, namely, the burden and strain of conducting the litigation and the prolongation of the uncertainty of the litigation in a matter affecting their freedom of speech. *They have no right to claim compensation for these matters from the claimants' former solicitor*, nor can they be adequately compensated by an award of costs."

Whether HMRC would be prejudiced by reinstatement

92. If the proceedings are reinstated then HMRC would be obliged to pick up conduct of their case from where they left it in November 2013. That was shortly before the start of the substantive hearing, so it is reasonable to assume that HMRC had their case against Vaultdawn fully prepared at that time. There would inevitably be some extra work involved in reading back into the proceedings but that is, we consider, something that could be adequately dealt with by an award of costs. Further, there are other users of the scheme who still have open proceedings before the Tribunal (see [2] above) and thus this is not a matter on which HMRC have completely "closed their files".

Loss to the Appellants if reinstatement were refused

93. We understand that there are considerable amounts of tax in dispute; in particular the EBTs were used for a number of years and so each user would face an aggregate liability for the life of the EBT. For example, it appears that an estimate of the corporation tax for Vaultdawn was in excess of £0.5 million (see [84(2)] above).

94. The Appellants go further than this. They argue, and Mr Roseff produced schedules designed to demonstrate, that if the Appellants are not given the opportunity to defeat the corporation tax assessments then there is a risk – at least for some of the Appellants – that there would be some form of double-counting of liabilities. HMRC deny this, and Ms Nathan's submissions on this point are summarised at [79(5)] above. Each side, in effect, claims that the other stands to obtain an unjustified windfall unless we determine these applications in their

respective favour. We consider the answer on this point is that if the lead case appeals had been heard as planned in November 2013 then the outcome of that decision – whichever way the Tribunal decided (and it would also bind the related cases under Rule 18) - would leave the parties with the same problem as they now identify in relation to the matter of reinstatement. What the Appellants have really identified, following additional analysis by PwC, is that a determination of the corporation tax liabilities alone does not completely dispose of all the potential tax and NIC implications of the EBT scheme.

The issue of legal certainty and whether reinstatement would be prejudicial to the interests of good administration

95. We do not accept HMRC's submission that reinstatement would unfairly deprive the Treasury of taxes that were properly payable following the withdrawal or strike out of the appeals. Rules 8 and 17 expressly contemplate the resumption of proceedings where the Tribunal decides to reinstate them; if reinstated and pending determination of the resumed proceedings, the tax liability would still be in dispute.

96. The Appellants are candid that they wish to be able to attempt to negotiate a settlement of the dispute with HMRC; in particular they may be eligible to participate in the EBT settlement opportunity offered generally by HMRC. Indeed, several of the Appellants have already started that process (using agents other than Montpelier), although it is apparent from the correspondence in the bundles that those negotiations understandably ground to a halt when the appeals were withdrawn or struck out. HMRC claim that reinstatement of the proceedings purely to open an avenue for negotiation amounts to an abuse of the Tribunal process. The Appellants claim that (under Rule 3) the Tribunal is obliged to facilitate the use of ADR procedures, and that would be accommodated by a reinstatement of the proceedings. We do not agree with the Appellants on this point. While proceedings are underway then the terms of Rule 3 are relevant but here there are, currently, no proceedings – the appeals have been withdrawn or struck out. If the proceedings were to be reinstated then Rule 3 would again be relevant to the resumed proceedings. But we do not accept that the encouragement of ADR by Rule 3 should be interpreted by us as a factor in favour of reinstating what are currently spent proceedings. If the *only* objective of the reinstatement applications was to provide an opportunity to participate in the EBT settlement opportunity then we would concur with HMRC that that would count against the Appellants. However, we are satisfied that the Appellants' intentions are not so confined; we asked each of Mr Thompson, Ms Carey and Mr Turkington what were their intentions if reinstatement were granted and all confirmed their respective company's intention to pursue its appeal on the basis of its own merits. Our conclusion is that we should view the reinstatement applications independently of the potential benefit to the Appellants of being able (or not) to participate in the EBT settlement opportunity.

Consideration of the merits of the proposed appeals so far as they can conveniently and proportionately be ascertained

97. We start this point by emphasising the words "so far as [the merits] can conveniently and proportionately be ascertained". It is not necessary or appropriate for us to attempt to determine the outcome of the proceedings if they were to be reinstated. We are, however, obliged to consider the merits of the appeals. Both sides have put forward various arguments as to why they would eventually be successful if

the proceedings were reinstated. HMRC point to the previous case law on the subject of EBTs. The Appellants consider the scheme used can be distinguished (either in law or on its facts). However, we consider the most important guidance on the merits of the appeals can be obtained from the EBT scheme promoter: Montpelier. As we have already stated, Montpelier decided to withdraw after consultation with counsel on the merits of the appeals and on the basis of a detailed consideration of the prevailing relevant case law. That analysis was set out in the 1 November 2013 letter to Vaultdawn's accountants (see [32] above). The designer and promoter of the scheme (who had, presumably, a significant interest in its success) decided, after taking counsel's advice, to "throw in the towel" shortly before the substantive hearing of the lead cases. As succinctly stated by Ms Nathan in her closing submissions, "The letter of 1 November 2013 simply corroborates HMRC's view and [shows] that the architect of the arrangements that are the subject of the appeals was also highly doubtful of their prospects of success". One year after that letter, Montpelier were of the same opinion (Montpelier's letter to ITL dated 5 November 2014 (see [31] above): "… in our opinion for the reasons set out in our letter … dated 1st November 2013 the appeals will fail. Consequently save for a procedural point we do not see the purpose of reinstatement." We conclude that the appeals are not sufficiently merit worthy to justify reinstatement.

Conclusion

98. Having carefully considered the *Pierhead Purchasing* criteria we have concluded that, on balance and for the reasons set out above, it would not be appropriate to exercise our discretion to reinstate the appeals.

Decision

99. The reinstatement applications of all the Appellants are REFUSED.

100. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 6 AUGUST 2015

SCHEDULE
(Being a list of the Appellants)

Reference	Name	
TC/2011/03870 and TC/2012/4198	Allsigns International Ltd	
TC/2011/03900 and TC/2011/05179	Cookes Furniture Ltd	
TC/2011/01858	Groundwork Landscapes Ltd	
TC/2010/01283	Jo-Y-Jo Ltd	
TC/2012/01967	Lydonford Limited	
TC/2011/07779	Parkway Engineering Services Ltd	
TC/2012/04707	Stanford Industrial Concrete Flooring	
TC/2010/06997	Strata Double Glazing & Joinery Ltd	
TC/2013/09026	G H Sumner Limited	
TC/2010/06405 and TC/2011/06220	Turkington Livestock Systems Ltd	
TC/2011/03875 and TC/2012/07206	Unilathe Ltd	
TC/2009/16362; TC/2011/1712 and TC/2013/01109	Vaultdawn Limited	

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