UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appellant: The Commissioners of Her Majesty's Revenue and Customs	**Tribunal ref: FTC/42/2013**
Respondents: Apollo Fuels Limited & others and Brian Edwards and others	

DECISION NOTICE

1. This decision notice is given in respect of an application by the Respondents for permission to make an application for costs out of time and also for a direction that HMRC pay the Respondents' costs of the appeal. The appeal in question resulted in the decision of this Tribunal released on 26 February 2014 ([2014] UKUT 95 (TCC)). The appeal was dismissed. The application is brought pursuant to rule 10(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which provides that the Upper Tribunal has the power to make a direction that the unsuccessful party to an appeal of that kind must pay the costs incurred by the successful party.

2. Rule 10(5) provides that an application for a costs direction must be made in writing, and be accompanied by a schedule of the costs claimed. Rule 10(6) states that the application must be made within a month of the release of the decision. The Respondents did not make the application until 7 May 2014, considerably after the deadline provided in the Rules had elapsed. In their letter of 7 May 2014 GBAC who acted for the Respondents explained that since HMRC have lodged a further appeal from the Upper Tribunal's decision to the Court of Appeal, they assumed that the costs of the Upper Tribunal hearing and the Court of Appeal hearing would be dealt with by the Court of Appeal when it disposed of the further appeal. However, when they sought HMRC's agreement to leaving the question of costs over until then, HMRC refused to agree. At that stage the Respondents made the current applications.

3. HMRC wrote to the Tribunal on 20 May 2014 opposing the application. They point out that the application for costs is made six weeks late and this is not a trivial breach. They referred in that letter to the decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 ('*Mitchell'*) and invited the Tribunal to consider this application in accordance with the principles set out in that case. These principles were applied by the Upper Tribunal in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC). In the latter case the Tribunal held that it should consider all the circumstances of the case when considering an application to extend time for compliance with a rule but that the need to enforce compliance with the rules should carry greater weight than the other issues in

the case. In effect, the Tribunal in *McCarthy & Stone* imported the stricter approach of the High Court to enforcement of the rules into the Tribunal's procedure.

4. Following the making of the Respondents' application, the decision of the Upper Tribunal in *Leeds City Council v Revenue and Customs* [2014] UKUT 350 (TCC) ('*Leeds*') was released. That concerned an application for costs made by HMRC a few days after the time limit in the Rules had expired. That application was fully argued by counsel at an oral hearing before Judge Colin Bishopp. In his decision he declined to follow *McCarthy & Stone*. He referred to the fact that *Mitchell* followed an amendment to the rule 3.9 of the Civil Procedure Rules dealing with the grant of relief from sanctions. The amendment placed greater emphasis on the need to enforce compliance with rules, practice directions and orders as a factor that the court should take into account. Judge Bishopp noted the important differences that remain in the wording of the overriding objective set out in CPR rule 1.1 and the wording of the overriding objective in rule 2 of the Upper Tribunal Rules. Judge Bishopp said:

> "15. A comparison of the two texts reveals some important differences. Although CPR rule 1(2)(d) and Upper Tribunal rule 2(2)(e) are differently worded, they mean, in my view, substantially the same thing. However, the CPR go on to refer at rule 1(2)(f) to the obligation to enforce compliance with rules, practice directions and orders. That obligation is absent from the Upper Tribunal rules which instead, by rule 2(2)(c), require the tribunal to avoid unnecessary formality and to seek flexibility. Thus although the different rules have (among others) the common objective of avoiding unnecessary delay, they do not approach the task in quite the same way.
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> 16. For some years it has been the practice in this Chamber, and in the Tax Chamber of the First-tier Tribunal, to look to the CPR for assistance on matters about which the tribunal rules are silent. As Judge Sinfield said [in *McCarthy & Stone*], the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances.
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> 18. It is plain that the changes to the overriding objective of the CPR and to rule 3.9 were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts: …. The Tribunals Procedure Committee, which is charged with the duty of drafting the rules of procedure used in the tribunals (see the Tribunals, Courts and Enforcement Act 2007 s 22(2)) has not, so far, thought fit to introduce similar changes to the Upper Tribunal rules. It may do so at some time in the future, or it may not. It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their

adoption in the Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce significant changes in practice without warning."

5. Judge Bishopp therefore held that the criteria to be applied in determining an application for relief from sanctions were still those set out by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) ("*Data Select*"). Morgan J held that as a general rule, when a tribunal is asked to extend a time limit, it should ask itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

6. I respectfully agree with the approach adopted by Judge Bishopp. The proper course for the Upper Tribunal is to follow the practice as described in *Data Select* unless or until changes were made to the Upper Tribunal Rules to reflect the changes to the CPR. I gather from the letter sent by HMRC on 16 October 2014 in response to the letter from the Respondents which drew the *Leeds* decision to my attention that HMRC now accept that the *Data Select* criteria are the appropriate ones.

7. As to the purpose of the Rule, the aim of imposing a time limit for an application for costs is to require the successful party in the litigation to assert his entitlement to costs promptly and to give his opponent the assurance that after the limit has expired, no claim will be made. However, in this case, HMRC knew that these proceedings were not yet at a close since they themselves are pursuing an appeal to the Court of Appeal. They were not drawing a final line under these proceedings after the deadline for the application for costs had expired, even though they may have thought they were safe from a direction that they pay the Respondents' costs.

8. The reasons for the delay are understandable – the Respondents' advisers say that they have never brought an appeal before the Upper Tribunal or filled in an application for costs. Although of course professional advisers should acquaint themselves with the Rules, their assumption that once the judgment in their favour had been challenged on appeal, they should wait for the Court of Appeal's decision before dealing with costs of the Upper Tribunal hearing was not wholly unreasonable.

9. The delay in bringing the application is considerably longer in this case than it was in *Leeds.* However, there will be no real injustice to HMRC in having to pay the costs as they must have expected an application to be made after the judgment was released. On the other side, there would be a serious injustice to the Respondents if they are deprived of their costs to which they are otherwise clearly entitled. HMRC acknowledge that if I refused to extend the time, this will result in a windfall for HMRC.

10. I am satisfied that it is right in this case to extend the time for making an application for costs and to direct HMRC to pay the Respondents' costs of the appeal. The Respondents included a costs schedule with their letter of 7 May detailing total costs including VAT of £17,429. HMRC have not raised any points on the schedule

provided so I will direct that the total amount should be paid – subject to the parties agreeing whether VAT should be included or not.

11. I should also point out that HMRC explain in their letter of 20 May 2014 why they refused to agree to the Respondents' suggestion that costs of the Upper Tribunal appeal should be dealt with by the Court of Appeal. CPR 44.10(4) provides that where the lower court has not made an order for costs, the appellate court may, unless it dismisses the appeal, make orders about the costs of the proceedings in the lower court as well as the costs of the appeal. This means that if there is no order for costs of the Upper Tribunal and the Court of Appeal dismisses HMRC's appeal, the Court of Appeal will not be able to order HMRC to pay the Respondents' costs of the Upper Tribunal proceedings.

Disposal

12. I therefore grant the Respondents an extension of time for making an application for costs until 7 May 2014 and I direct that HMRC pay the Respondents' costs of the proceedings as set out in the Schedule of Costs provided under cover of the Respondents' letter of 7 May 2014.

Signed: **MRS JUSTICE ROSE** **ROYAL COURTS OF JUSTICE, CHANCERY DIVISION** **Date: 28 October 2014**
Issued to the parties on: 05 November 2014