[2017] UKFTT 0232 (TC)

TC05720

Appeal number: TC/2014/02333

PROCEDURE – non-appearance of Appellant – application to set aside decision – Rule 38 – whether in the interests of justice to set aside – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARY JOHN ROBB **Appellant**

- and -

NATIONAL CRIME AGENCY **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in North Shields on 28 February 2017

Mr Gary Robb appeared in person

Ms Ishaani Shrivastava of counsel instructed by the National Crime Agency appeared for the Respondents

DECISION

Background

1. This is an application to set aside a decision of the F-tT released on 16 September 2016 ("the Decision"). The Tribunal comprised myself and Ms Ann Christian and we dismissed the appeal for the reasons set out in the Decision. The Decision also set out in Annex 1 the procedural background to the appeal and at [5] the circumstances in which the Tribunal decided to proceed with the appeal in the absence of Mr Robb. For ease of reference I can repeat the procedural history and the reasons for proceeding with the hearing in the absence of Mr Robb as follows.

2. The Notice of Appeal was lodged on 29 April 2014 and the Respondents served their Statement of Case on 16 July 2014. On 17 July 2014 the Appellant applied for the appeal to be stayed for 6 months on medical grounds. The application was refused but directions were given for the provision of lists of documents and witness statements taking into account the Appellant's medical condition. Witness statements were due to be served by 9 January 2015.

3. On 8 January 2015 a witness statement made by the Appellant's brother, James Robb was served. However by letter dated 16 January 2015 solicitors instructed by the Appellant asked for an extension of time until 9 March 2015 to serve the Appellant's witness statements. The solicitors noted that they had recently been instructed and that the Appellant had been admitted to hospital for 2 days in early January 2015 with a heart condition.

4. The Tribunal released revised directions on 29 January 2015. However on 28 April 2015 the solicitors wrote to say that the Appellant remained very unwell with a heart condition and they were unable to take instructions from him in relation to his witness statement. The Tribunal stayed the proceedings until 30 June 2015.

5. On 17 July 2015, in the absence of any contact on behalf of the Appellant the Tribunal wrote to the parties indicating that it would list the appeal for hearing. On 10 September 2015 the Tribunal notified the parties that the hearing would take place on 22 October 2015.

6. The Respondents served their skeleton argument on 6 October 2015.

7. On 8 October 2015 the Appellant's doctor wrote to the Tribunal indicating that the Appellant had a number of health problems including an irregular heart rhythm which was being investigated. He asked if the hearing could be deferred because it coincided with an appointment at a cardiology department and so that the Appellant's heart condition could be addressed.

8. The Respondents objected to that application, noting that the date of the cardiology appointment had not been stated. The Tribunal appears to have contacted the Appellant's doctor and was told that there was no appointment on 22 October 2015. The Tribunal therefore refused the application although the Appellant was told that he could renew the application on the day of the hearing.

9. In the meantime, on 15 October 2015 the Appellant's solicitors notified the Tribunal that they were no longer instructed.

10. The Appellant's doctor emailed the Tribunal on 19 October 2015 stating that the Appellant had a hospital appointment on 23 October 2016 but that the stress of a hearing the previous day would not be advisable for him. In the circumstances the Tribunal postponed the hearing and gave directions dated 20 October 2015. Those directions provided that unless the Appellant served a witness statement setting out the evidence he intended to give by 27 November 2015 then he would not be entitled to rely on any evidence other than that contained in his brother's witness statement.

11. There was some suggestion that the Appellant did send a witness statement to the Respondents. On 6 December 2015 he emailed the Respondents to say that it had been posted. The Respondents replied to say that it had not been received by them and asked for a copy to be forwarded to them. No copy was ever received by the Respondents or by the Tribunal.

12. On 7 December 2015 the Tribunal notified the parties that the appeal would be heard on 2 February 2016.

13. The Appellant's doctor wrote to the Tribunal again on 29 January 2016 asking for a further postponement of the hearing for three months. It was said that the Appellant had had a planned cardiac procedure and was in a medically fragile state. He was due to be reviewed by the cardiology specialists in three months time. Reference was also made to a recent diagnosis of sleep apnoea syndrome.

14. The Respondents objected to that application on the basis that it was made very late in the day and the Appellant had failed to produce any witness statement in accordance with the previous directions. They also suggested that it was unlikely the Appellant's medical condition would have improved for a hearing to take place in three months time.

15. The Tribunal postponed the hearing and gave further directions released on 1 February 2016. The directions recited that it was considered necessary in the interests of justice for the appeal to proceed without further delay and whether or not the Appellant was fully able to participate in the proceedings. The directions included a request for dates to avoid in the period 3 May 2016 to 31 August 2016 and a direction that if the Appellant was unable to attend the final hearing in that period then he would be entitled to lodge written submissions with the Tribunal at least 7 days before the hearing.

16. The Appellant did not provide any details of his availability and on 10 February 2016 the parties were notified that the hearing would take place on 5 May 2016. The Appellant emailed the Tribunal on 24 February 2016 to ask: "please tell me my next court date". The Tribunal responded the following day re-sending the notice of hearing and confirming that the hearing was listed on 5 May 2016

17. The Appellant did not appear at the hearing. There had been no prior indication that the Appellant would not attend the hearing and the Tribunal decided to proceed in

his absence. The Appellant had not served any witness statement of his own evidence or any written submissions. An email was received during the hearing timed at 10.43am and contained an attached letter dated 5 May 2016 from the Appellant's doctor which stated as follows:

> " As you know, [the Appellant] has previously been granted an adjournment because of a serious cardiac condition for which he has now had treatment (a cardiac ablation), and he was reviewed by the cardiology team on the 3rd May 2016, when they reported that the procedure seemed to have been successful and he has a final review planned for 10th May 2016.
>
> Given his understandable anxiety about the situation, he does not feel able to make any reasonable preparation for his forthcoming tribunal and so I would be very grateful if some consideration could be given to him again, for a further adjournment so he can now begin to prepare for the hearing which he tells me he now feels able to do.
>
> Whilst he fully accepts that the matter may have to be heard in his absence, I would nevertheless be grateful if the Court might give consideration to a further adjournment and I would be happy to provide any further detail or clarification if you felt that would help."

18. In deciding to proceed in the absence of the Appellant the Decision noted that the Appellant had failed to serve his witness statement on the Respondents. The Tribunal's original directions required that witness statement to be served by 9 January 2015. Subsequent directions made it clear that if he did not serve his witness statement then he would be entitled to rely only on a witness statement of his brother which had been served. Further, the Appellant had been given an opportunity to lodge written submissions which he had not done. Whilst making allowances for the Appellant's medical issues, described above, the Tribunal did not consider that he had made any real attempt to engage with the Tribunal and the Respondents. He failed to progress his appeal expeditiously, avoiding unnecessary delay and cost as required by the Tribunal Rules. In the light of the procedural history and in all the circumstances the Tribunal considered that it remained in the interests of justice to proceed with the hearing.

19. The hearing continued in the absence of the Appellant. On 11 May 2016 the Tribunal wrote to the Appellant to say that his application for an adjournment had been refused and that the Tribunal would release a written decision in due course. The Decision dismissing the appeal was released on 16 September 2016.

The Application to Set Aside

20. The Appellant made an application to set aside the Decision by letter dated 6 October 2016, received by the Tribunal on 7 October 2016. The Appellant stated that he had wanted to attend the hearing.

21. In a letter dated 5 December 2016 the Appellant took issue with certain findings of fact recorded in the Decision and pointed to the absence of certain other findings of fact. He contended that:

(1) The Colosseum Club was at Stockton, not Sunderland (Cp [22] of the Decision. I acknowledge that the reference in this paragraph to Sunderland was an error)

(2) The Colosseum was raised by police in February 1996 at which stage it was closed down. Later in 1996 it was sold by Stockbury Developments Ltd to a church (Cp [23], [26], [27] and [33] of the Decision).

(3) Mr Mallin ran his own club, the New Blue Monkey in Sunderland. In 2007 Mr Mallin was jailed for 12 months following a criminal investigation. The Appellant was not part of that criminal investigation.

(4) The Appellant was not involved with Mr Mallin when he absconded to Northern Cyprus (Cp [26] and [27] of the Decision).

22. On 7 February 2007 the Appellant lodged a written outline of his arguments for the purposes of his application to set aside the Decision. The Appellant's principal argument is that the Decision failed to make the findings of fact now contended for by the Appellant and that he could not have had the taxable income for which he has been assessed. In relation to each year of assessment under appeal he contended as follows:

1994-95 - The Colosseum, initially called the Blue Monkey, was not purchased until January 1995. The Appellant was in jail at the time and was not released until March 1995 whereupon he went to Spain, returning to the UK in 1996. In 1995 Stockton Council prosecuted seven defendants in connection with running the Colosseum without a public entertainments licence. The Appellant was not a defendant in that prosecution and relies upon a letter from Cleveland Police dated 6 February 2017 to the effect that they had no record relating to the Appellant and the Blue Monkey.

1995-96 - The Appellant contends that he was in Spain for most of this tax year. He relies upon the witness statement of his brother James Robb which was in evidence at the hearing of the appeal which stated that the Colosseum was closed in October and November 1995. It was then raided by Cleveland Police in February 1996 and remained closed thereafter. The Appellant accepts that he was charged with permitting the premises to be used for supplying controlled drugs. However he contends that at the trial where James Robb was convicted of the same offence, the trial judge found that James was in charge of running the club.

1996-97 - The Appellant absconded to Northern Cyprus in September 1997. The Colosseum was sold by Stockbury Developments in October 1997 (although in his previous letter he stated that it had been sold in 1996). Thereafter there was no club open.

23. To the extent that this was not material referred to in the Decision it was not in evidence before the Tribunal. I shall infer that it would have been included in a witness statement from the Appellant if he had served one.

24. The Appellant also contended that Mr Mallin opened a club called the New Blue Monkey in Sunderland in October 1999 and was subsequently convicted of offences in relation to the running of that club. He claimed there was no link between the Appellant and Mr Mallin. Further, the Appellant contended that he never said that he was the beneficial owner of the Colosseum until 2001. In support of these contentions the Appellant relied on a witness statement of David Tracy of SOCA which was in evidence at the appeal hearing.

The Jurisdiction to Set Aside

25. The jurisdiction to set aside a decision which disposes of proceedings is in Rule 38 of the Tribunal Rules which provides as follows:

> " 38(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if--
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are--
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings.
>
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.
>
> (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

26. It is clear that the condition in Rule 38(2)(d) is satisfied. The question therefore is whether it is in the interests of justice for me to set aside the Decision. In exercising that jurisdiction I must give effect to the overriding objective of dealing with cases fairly and justly in Rule 2. I am mindful that Rule 2 provides as follows:

> "2(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."

27. I also have regard to the approach taken by the civil courts in cases of non-appearance by a party. That is governed Rule 39.3 of the Civil Procedure Rules ("CPR") which provides as follows:

" (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

…

(5) Where an application is made under paragraph … (3) by a party who failed to attend the trial, the court may grant the application 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;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

28. In *Bank of Scotland v Pereira [2011] EWCA Civ 241* Lord Neuberger MR as he then was gave guidance as to the application of that rule:

" 24. … An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in Regency Rolls Ltd v Carnall [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being

absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.

25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order.

26. The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal."

29. Ms Shrivastava who appeared for the Respondents referred me to a decision of the Court of Appeal in *Gentry v Miller [2016] EWCA Civ 141*. In that case Vos LJ, with the agreement of Beatson and Lewison LJJ said as follows in relation to applications to set aside under CPR 39.3:

" 23. It is useful to start by enunciating the applicable principles. Both sides accepted that it was now established that the tests in *Denton* were to be applied to applications under CPR Part 13.3 (see paragraphs 39-40 of the judgment of Christopher Clarke LJ in *Regione Piemonte v. Dexia Crediop Spa* [2014] EWCA Civ 1298, with whom Jackson and Lewison LJJ agreed). It seems to me equally clear that the same tests are relevant to an application to set aside a judgment or order under CPR Part 39.3.

24. The first questions that arise, however, in dealing with an application to set aside a judgment under CPR Part 13.3 [judgment in default of acknowledgment of service] are the express requirements of that rule, namely whether the defendant has a real prospect of successfully defending the claim or whether there is some other reason why the judgment should be set aside, taking into account whether the person seeking to set aside the judgment made an application to do so promptly. Since the application is one for relief from sanctions, the *Denton* tests then come into play. The first test as to whether there was a serious or significant breach applies, not to the delay after the judgment was entered, but to the default in serving an acknowledgement that gave rise to the sanction of a default judgment in the first place. The second and third tests then follow, but the question of promptness in making the application arises both in considering the requirements of CPR Part 13.3(2) and in considering all the circumstances under the third *Denton* stage.

> 25. I do not think that any different analysis applies under CPR Part 39.3. The court must first consider the three mandatory requirements of CPR Part 39.3(5), before considering the question of whether relief from sanctions is appropriate applying the *Denton* tests. Again, the sanction from which relief is sought is the order granted when the applicant failed to attend the trial, not the delay in applying to set aside the resulting judgment. The promptness of the application is a pre-condition under CPR Part 39.3(5)(a) and is considered as part of all the circumstances under the third *Denton* test."

30. The reference to Denton is to cases involving relief from sanctions following non-compliance with a rule or direction. The question of whether relief should be granted is determined by reference to a three stage approach which involves:

> (1) Identifying and considering the seriousness and significance of the default,
>
> (2) Considering why the default occurred, and
>
> (3) Evaluating all the circumstances of the case to deal with the application for relief justly.

31. The civil court jurisdiction was also considered recently by the Court of Appeal in *TBO Investments Ltd v Mohun-Smith [2016] EWCA Civ 403* in which the principles in Pereira were followed. Judgment was given in the month following Gentry v Miller but made no reference to it, or to Denton. It may be that the application of Denton is more apt where the non-appearance of a party is due to some reason other than medical reasons. In any event it is clear that in approaching an application to set aside it is necessary to take into account all the circumstances of the case and the overriding objective of dealing with cases fairly and justly.

32. The Master of the Rolls in TBO Investments distinguished the test to be applied in an application for an adjournment and the test whether to set aside judgment following non-appearance of a defendant and striking out of the defence. In that case the defendant's application for an adjournment on medical grounds was refused. The trial judge struck out the defence and entered judgment for the claimant. There was no trial on the merits. At [26] the Master of the Rolls said as follows:

> " 26. … [T]here is a material distinction between an application under rule 39.3(3) and an application for an adjournment of a trial. If the court refuses an adjournment, there will usually be a trial and a decision on the merits, although the unsuccessful applicant will be at a disadvantage, possibly a huge disadvantage, by reason of the absence of the witness or the party himself. Despite their absence and depending on the circumstances, it may still be possible for the disadvantaged claimant to prove the claim or the disadvantaged defendant to resist it. I accept that, in some cases, the refusal of an adjournment will almost inevitably lead to the unsuccessful applicant losing at trial. That is a factor that must be borne in mind when the court exercises its discretion in deciding whether or not to grant an adjournment. But if the application to set aside a judgment under rule 39.3(3) fails, the applicant will have had no opportunity whatsoever to have an adjudication by the court on the merits. This difference between an application under rule 39.3(3) and an application for an adjournment of the trial is important. Although it has not been articulated as the justification for generally

adopting a more draconian approach to an application for an adjournment than to an application under rule 39.3(5), in my view it does justify such a distinction. It follows that the judge should have applied the *Pereira* guidance rather than the *Levy* guidance in so far as there is a difference between the two."

33. Reference to the Levy guidance was to the decision in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) where Norris J took a robust approach to the weight to be attached to medical evidence relied on in support of an adjournment.

34. It is also necessary to consider the requirements of Article 6 of the European Convention on Human Rights. In TBO Investments the Master of the Rolls endorsed what he had previously said in *Estate Acquisition and Development Ltd v Wiltshire* [2006] EWCA Civ 533 at para [25]:

> " I recognise that it is undesirable to seek to define a "good reason" within the meaning of CPR 39.3(5)(b). But as Mummery LJ pointed out at para 12 of *Brazil's* case, it is necessary to interpret CPR 39.3(5)(b) (as all other rules) so as to give effect to the overriding objective of deciding cases justly: CPR 1.2(b). Moreover, it must be interpreted so as to comply with article 6 of the European Convention on Human Rights (right to a fair hearing). I refer to the judgment of Brooke LJ in *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 para 35. In my view, it is necessary to have both article 6 and the overriding objective in mind when interpreting and applying the phrase "good reason". It should not be overlooked that the power to set aside an order made in the absence of the applicant may only be exercised where all three of the conditions stated in CPR 39.3(5) are satisfied. In addition to the need to show a good reason for not attending, the applicant must have acted promptly and that he has a reasonable prospect of success. If the phrase "good reason" is interpreted too strictly against an applicant, there is a danger that the interpretation will not give effect to the overriding objective and not comply with article 6."

35. In the present case part of the appeal relates to a civil penalty for failing to notify chargeability to income tax. I shall assume that Article 6 and the right to a fair trial is engaged, although I did not hear argument on that point.

Reasons

36. For present purposes and based on the jurisdiction described above I shall approach this application by considering the following matters:

(1) Has the application to set aside been made promptly?

(2) Was there a good reason for the Appellant not to attend the hearing on 5 May 2016?

(3) Does the Appellant have a reasonable prospect of success in his underlying appeal?

(4) Is it in the interests of justice to set aside the Decision, taking into account all the circumstances including the need to deal with cases fairly and justly?

37. I am satisfied that the Appellant has made his application to set aside promptly. It was made within the time limit set out in Tribunal Rule 38(3). I must next consider whether he had a good reason for not attending the hearing.

38. The Appellant has not relied on any medical evidence to justify his non-attendance other than the letter dated 5 May 2016 received by the Tribunal on the morning of the hearing. That letter stated that because of anxiety about his cardiac condition, the Appellant did not feel able to make any reasonable preparation for the hearing. The request for an adjournment was to give the Appellant an opportunity to prepare for a hearing.

39. In the present case there has been a hearing on the merits, unlike the position in TBO Investments where the defence was simply struck out. Even without taking a robust approach to the medical evidence it is clear that the evidence said to justify the Appellant's non-attendance is inadequate. It does not address the question of whether the Appellant's condition was such as to prevent him from attending or participating in the appeal hearing. That is entirely separate from whether he had been able properly to prepare for the hearing. The non-appearance of the Appellant without prior notice meant that the Tribunal had no opportunity to consider what if any arrangements could be made to proceed in a fair manner. Further, the Appellant clearly accepted at the time that the hearing might have to proceed in his absence.

40. The doctor's letter must also be considered in the context of the procedural history of the appeal which is set out above. There is an obligation on parties to assist the Tribunal in dealing with appeals fairly and justly. That obligation applies equally to litigants in person as it applies to the Respondents. In *BPP Holdings Limited v Commissioners for HM Revenue & Customs [2016] EWCA Civ 121* the Court of Appeal was concerned with the Tax Tribunal's approach to non-compliance with Tribunal Rules and directions. The Senior President of Tribunals said as follows:

> " 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.
>
> 39. I found the approach of HMRC to compliance to be disturbing. At times it came close to arguing that HMRC, as a State agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour. I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not."

41. What was said in BPP was in relation to relief from sanctions for breach of a direction, but it seems to me that it is at least relevant to the present application. The procedural history in this appeal is one of repeated non-compliance by the Appellant over an extended period. Against that background, and in the absence of any medical evidence that the Appellant's condition prevented him from attending, I am not satisfied that the Appellant had any good reason not to attend the hearing. I consider that his non-attendance and the late application for an adjournment were further examples of his failure to engage in the proceedings.

42. I also take into account in this application that it is desirable for litigation in this Tribunal to be conducted efficiently and at a proportionate cost. The Appellant failed to warn the Tribunal that he had been unable to prepare his case and the first intimation that his medical condition had prevented him from preparing was the email received after the hearing had commenced. This was not the first time that a late or last minute application to postpone was made. There is no explanation as to why it was made so late.

43. Even if there was a good reason which prevented the Appellant from attending the hearing I am not satisfied that his appeal would have any real prospect of success. It is clear from the application and the Appellant's supporting arguments that he will invite the Tribunal at a new hearing to make different findings of fact as to his involvement in the Colosseum and his income therefrom. That evidence flatly contradicts what the Appellant said in his Holme House interview and in his Summary Defence in the civil recovery proceedings (see [26] and [27] of the Decision). The Appellant has previously been given opportunities to put forward the evidence on which he now seeks to rely. Witness statements were originally due to be served by 9 January 2015. The only witness statement served was that from James Robb. There is evidence that for some of the time between then and 27 November 2015 the Appellant may not have been well enough to give instructions for preparation of his witness statement. However the evidence certainly does not indicate that he was unable to give instructions throughout that period.

44. The directions given on 20 October 2015, following postponement of the hearing listed for 22 October 2015, gave a further opportunity for the Appellant to provide a witness statement on or before 27 November 2015. The sanction for non-compliance was that the Appellant would not be entitled to rely on evidence other than that contained in the witness statement of James Robb. There was no compliance with that direction, no explanation from the Appellant as to why he had not complied, and no application for an extension of time. Nor did the Appellant lodge any written submissions which he was permitted to do by the directions released on 1 February 2016.

45. At the hearing of the present application the Appellant said that he had been ill and on medication over an extended period and it was only now that he was in a position properly to engage in the proceedings. He wanted to adduce the material referred to in his letter dated 7 February 2017 and possibly evidence from other witnesses, including police officers involved in investigations into the Colosseum.

The Appellant stated that he had recently tried to get legal advice in connection with the appeal but he was unable to afford it.

46. There was no evidence before me to support the proposition that the Appellant had been unable to properly participate in the proceedings effectively since January 2015 when witness statements were first due to be provided. In particular there is no evidence that the Appellant was unable by reason of his medical condition to provide a witness statement in the period 1 July 2015 to 27 November 2015. I infer that the Appellant has chosen not to engage in the appeal process and it is only now that his appeal has been dismissed that he has shown any inclination to do so.

47. I do not consider that there is any real prospect that the Appellant would be able to obtain relief from the sanction preventing him from adducing any further evidence. Applying the Denton three stage test his failure to provide his witness statement or any evidence apart from James Robb was a serious and significant breach. There was no good reason for that breach. I take into account the circumstances as a whole, including that the Appellant was ill for some of the time and that there is a significant sum in dispute including assessments totalling £618,354 and penalties totalling £432,847. Against that there has been considerable delay and unnecessary cost caused by the Appellant's failure to engage in the proceedings.

48. Those factors are also relevant in considering all the circumstances and whether it is in the interests of justice to set aside the Decision. The Appellant has had previous opportunities to participate in the proceedings either by providing a witness statement or providing written submissions. He has failed to do so. I accept that some of the delay in the proceedings has been inevitable because of the Appellant's medical condition. However significant delay has been caused by the Appellant's failure to engage in the proceedings.

49. On balance I do not consider that it is in the interests of justice to set aside the Decision. Indeed it would be unfair and unjust to the Respondents if I were to do so.

Conclusion

50. For the reasons given above the application to set aside the Decision is refused.

51. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 20 MARCH 2017