



Appeal number: CRR/2018/0001

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
CHARITY**

**DAVID SWETTENHAM
HELEN KING**

Applicants

- and -

**THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 31 December 2018

**RULING ON APPLICATION TO
APPEAL MADE OUT OF TIME**

1. I refuse to grant an extension of time in this case. The Notice of Appeal will not therefore proceed to determination.

REASONS

2. The Applicants' Notice of Appeal is dated 14 December 2018. It seeks to appeal the Charity Commission's decision to open an inquiry into the charity of which the Applicants are the sole remaining trustees. This decision was made on 27 September 2017, so the application is made over a year late.
3. Since the opening of the inquiry, I have determined one appeal against temporary protective orders in relation to this charity¹, and I am soon to determine a further appeal against the Charity Commission's

¹ <http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%2010%20January%202018.pdf>

recent decision not to discharge those orders. Whilst Mr Swettenham has thus been engaged in active litigation throughout the fifteen-month duration of the statutory inquiry, he has chosen not to challenge the inquiry itself until this late stage. Ms King appears to have been involved throughout (having sent numerous e mails and personally attending the oral hearing) and there is no suggestion that her circumstances differ materially from those of Mr Swettenham in making this application.

4. I note that the Applicants do not have the benefit of legal representation in making this application, but also that they have been informed where and how to obtain free legal advice. They do not seem to have availed themselves of that opportunity, although this application raises issues which might have benefitted from a lawyer's input.
5. Pursuant to rule 26(1)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the present application was made out of time because it was not received by the Tribunal within 42 days of the relevant decision. Under rule 5 (3) (a) I have a discretion to extend the period of time for lodging a Notice of Appeal.
6. I invited the Charity Commission's comments on the application and note that by e mail dated 21 December it indicated that it opposes the admission of the appeal out of time. I have suspended the requirement for it to prepare a Response pending my determination of this application to proceed out of time.
7. In considering how to exercise my discretion, I have considered the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) in respect of the criteria to be applied by the Tribunal when deciding whether to allow an appeal to proceed out of time. I have also considered the Upper Tribunal's decision in *BPP University College of Professional Studies v HMRC* [2014] UKUT 496 (TCC) in which the *Data Select* principles were applied. (*BPP* was considered further in the Court of Appeal and the Supreme Court, but on a different point).
8. In *Leeds City Council*, Judge Bishopp (CP) commented at [19] that:

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

9. This is a reference to the following passage in Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks 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.

10. Applying those principles, I have had regard to the following factors. Firstly, I find that the purpose of the time limit in relation to an application to the Tribunal is to preserve the important principle of finality. The Charity Commission was entitled, in view of the absence of an appeal made within the time limits, to regard the matter of the opening of the inquiry as closed.
11. Secondly, the period of delay in making this application was one year and five weeks. I find this to be a very significant period of delay. Indeed, it is so significant a period of delay that there would need to be an extraordinarily good reason for me to allow this appeal to proceed. I look to the Applicants to provide such a reason.
12. Thirdly, the Applicant's explanation for that delay, as set out in annexe A2 to the Notice of Appeal, is that the Applicants now know more about the Charity Commission's processes than they did in September 2017 and wish to challenge the allegedly flawed decision-making which led to the decision

to open the inquiry. I do not find this explanation to provide the necessarily strong grounds for extending time. It does not explain when the Applicants first became aware of the matters they now wish to raise and why they have waited until now to raise them. I note that the outcome the Applicants state they wish to achieve from challenging the inquiry is said in the Notice of Appeal to be the automatic revocation of the protective orders through the quashing of the inquiry. The application therefore appears to be an additional means of challenging the orders which are already *sub judice*.

13. Fourthly, the consequences to the parties of granting an extension of time would be the ability for the Applicants to challenge the inquiry, but that must be weighed against the not inconsiderable resource (financial and time) implications of re-opening a matter which was reasonably regarded by the Charity Commission (and the Tribunal) as concluded. Those implications must be regarded as particularly significant where, as here, a second appeal against protective orders is already on foot, so the existing appeal would have to be delayed in order to consider first the appeal against the inquiry. I note here that significant preparatory work had already been undertaken by both parties and the Tribunal in relation to the protective orders appeal before this Notice of Appeal was lodged. The bundles are in preparation and the Tribunal has already issued two interlocutory rulings in that appeal.
14. Fifthly, the implications for the parties of not extending the time limit are that the matter remains closed so far as the Charity Commission is concerned but that the Applicants would have lost their opportunity to challenge the opening of the inquiry. However, they remain entitled to challenge the protective orders which they acknowledge to be their main objective, so it is difficult to see how they would be materially impacted if this second application did not proceed. I remind myself of the Decision of the Upper Tribunal (Tax and Chancery Chamber) in *Regentford Limited*² [2014] UKUT 0364 (TCC) in which it was said that ...*"it would generally be inappropriate for the FTT to directed (sic) the Respondent to end an inquiry in circumstances where there are significant causes for concern about a charity."* I also remind myself of my conclusion at paragraph [64] of my Decision concerning Mr Swettenham's earlier appeal that: *"...I am satisfied that there has been both misconduct and mismanagement in the administration of the Charity arising from the unauthorised remuneration paid to Mr Swettenham and Ms King. ...I have relied upon the Appellant's own admission that the remuneration was not authorised in accordance with the Charity's constitution.... It is difficult to see how he could have argued otherwise, given the incontrovertible fact that he and Ms King were the only trustees in post for that period and that they authorised the remuneration for themselves...."* In these circumstances, my assessment is that any challenge to the opening of this inquiry must be regarded as having an extremely low prospect of success.
15. Having weighed all the relevant considerations into the balance, I now conclude that it is fair and just to refuse to grant an extension of time in this case. The factors relied upon by the Applicants for extending time are in my view insufficiently weighty to justify re-opening this particular dispute so long after the time for appealing has so passed.
16. The Tribunal will shortly determine the latest appeal against the protective orders, but this application will proceed no further.

(Signed)

Dated: 31 December 2018

**Alison McKenna
Chamber President**

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² <https://assets.publishing.service.gov.uk/media/575be03de5274a0da3000033/Regentford-v-CCEW.pdf>

