Neutral Citation Number: [2026] EWCA Civ 14

Case No: CA-2025-002813

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Marcus Smith and Judge Jonathan Cannan
[2025] UKUT 255 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2026

Before :

LORD JUSTICE LEWISON
LADY JUSTICE WHIPPLE
and
LORD JUSTICE MILES

- -

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and -	
(1) MEDPRO HEALTHCARE LIMITED **(2) KALVINDER RUPRAI** **(3) AVER HEALTHCARE LIMITED**	**Respondents**

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- -

Howard Watkinson and Joseph Millington (instructed by **Solicitor to HM Revenue and Customs**) for the **Appellant**
Quinlan Windle and Sam Glover (instructed by **Wedlake Bell LLP**) for the **Respondents**

Hearing date : 17/12/2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19/01/2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal from the Upper Tribunal ("UT") is the approach to the exercise by the First Tier Tribunal ("FTT") of a statutory discretionary power to extend time for appeal. The decision of the UT (Marcus Smith J and Judge Jonathan Cannan) is at [2025] UKUT 255 (TCC), [2025] STC 1343. The UT itself gave permission to appeal.

2. In general, where a taxable person wishes to appeal on a question relating to VAT, an "appeal is to be made" before the end of the period of 30 days from the date of notification of the decision in which to do so; or, if there is a review by HMRC, 30 days from the conclusion of the review: VAT Act 1994 s 83 G (1) and (3)(b). But the FTT has a statutory discretion to extend time. That discretion is contained in section 83G (6) of the VAT Act 1994 which provides:

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

3. There are other taxing provisions which include the same power. Rule 20 (4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

> "(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

4. At [83] the UT correctly summarised the procedural landscape to which this power applied:

> "Appeals represent a late stage in disputes between a taxpayer and HMRC. Before one gets to an appeal, there will typically have been an enquiry by HMRC, decisions including assessments, and possibly statutory and non-statutory reviews of those decisions. The process can take a long time. Quite *how* this should inform extensions of time is a matter that can be debated - but there can be no doubt that the process within which appeals sit is relevant in construing the nature of the power to extend time."

5. In *Martland v HMRC* [2018] UKUT 178 (TCC), [2018] BTC 525 the UT (Judges Berner and Poole) set out what they considered to be the correct approach when the

FTT is considering an application to appeal out of time. That guidance was approved by the UT (Mann J and Judge Richards) in *HMRC v Katib* [2019] UKUT 189 (TCC), [2019] STC 2106.

6. The issue raised by HMRC on this appeal is not whether the guidance is flawed but whether it is permissible for the UT to formulate guidelines for the exercise of that discretion by the FTT attaching particular significance to certain factors. The answer to that question led to an unfortunate disagreement between the two judges of the UT in the decision under appeal. Marcus Smith J considered that it was impermissible for the UT to give such guidelines, whereas Judge Cannan considered that that was part of the function of the UT. Since Marcus Smith J had the casting vote, his view carried the day. But both members agreed that, if it was permissible for the UT to give such guidance, then the guidance given in *Martland* was appropriate.

7. However, by Respondent's Notice the Respondents argue that if the UT is entitled to give guidance to the FTT, the guidance in *Martland* is indeed flawed.

8. The right of appeal to this court (with permission) is a right under section 13 of the Tribunals Courts and Enforcement Act 2007 "on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision." Although, in general, appeals in civil cases are appeals against orders (rather than reasons for orders) that limitation has not been transposed into section 13; and in any event the UT does not make formal orders of the kind a court would make. Thus, even though it is common ground that, whatever the result of this appeal, the application for permission to appeal out of time will be remitted to the FTT, we are able to decide the points raised.

The outline facts

9. The question we are asked to decide is one of principle, so the detailed facts of the case do not matter. The Respondents are Medpro Healthcare Ltd and a director of Medpro. In early 2019 HMRC investigated Medpro's business. As a result of the investigation, HMRC issued a series of assessments, penalties and personal liability notices. The Respondents appealed, but three appeals were notified to the FTT more than 30 days after the review conclusion letters.

10. The FTT refused an extension of time. The Respondents appealed to the UT. There were four grounds of appeal. The UT allowed the appeal on all grounds and remitted the matter to the FTT. Ground 4 asserted that the general rule laid down in *Martland* and *Katib* was wrong in law, and the UT should depart from it. That was the ground on which the two judges of the UT disagreed, and it is only that ground which is the subject of HMRC's appeal.

The Martland guidance

11. The essence of the *Martland* guidance is in paragraph [44] and [45]. At [44] the UT said that the FTT could usefully follow the three stage test applied by the civil courts:

> "(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third

> stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

12. At [45] the UT said:

> "That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected."

13. The last point was reiterated in *Katib*. In that case the UT said at [17]:

> "We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, *as a matter of principle*, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion." (original emphasis)

14. The decision of the UT in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC), [2016] STC 1 (Judge Roger Berner and Judge Sarah Falk) made much the same point at [96]:

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected."

15. It is paragraph [45] of *Martland* and its endorsement in *Katib* that has borne the brunt of the criticism.

Is the UT entitled to give guidance to the FTT?

16. In *R (Jones) v First Tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48 Lord Carnwath described part of the rationale for the reorganisation of the tribunal system by the Tribunal Courts and Enforcement Act 2007 following the Leggatt Report. He explained at [41]:

> "Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce

> the risk of inconsistent results by different panels at the First-tier level."

17. That view was adopted by the White Paper which preceded the Act. Lord Carnwath went on to say at [43]:

> "Thus it was hoped that the Upper Tribunal might be permitted to interpret "points of law" flexibly to include other points of principle or even factual judgment of general relevance to the specialised area in question."

18. It is to be noted that Lord Carnwath referred not only to the interpretation of a specialised statutory scheme, but also the *application* of it. At [46] he referred to an article that he had written and quoted from it. The relevant part of the quotation is:

> "Arguably, 'issues of law' in this context should be interpreted as *extending to any issues of general principle affecting the specialist jurisdiction*. In other words, expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law *and practice* in that field." (Emphasis added)

19. The Supreme Court returned to the subject in *BPP Holdings Ltd v HMRC* [2017] UKSC 55, [2017] 1 WLR 2945. At [26] referring to *Jones*, Lord Neuberger repeated the point that it was "an important function" of the UT to develop guidance so as to achieve consistency in the FTT. He made that observation in the context of the imposition of sanctions for a procedural default. The whole paragraph requires to be quoted in full (minus some of the citations):

> "It is not for this Court to interfere with the guidance given by the UT and the Court of Appeal as to the proper approach to be adopted by the F-tT in relation to the lifting or imposing of sanctions for failure to comply with time limits (save in the very unlikely event of such guidance being wrong in law). We have twice recently affirmed a similar proposition in relation to the Court of Appeal's role in relation to the proper approach to be taken in such cases by first instance judges…. The guidance given by Judge Sinfield in *McCarthy & Stone* was appropriate: as Mr Grodzinski QC, who appeared for BPP pointed out, it is "an important function" of the UT to develop guidance so as to achieve consistency in the F-tT: …And, by confirming that guidance in this case, the Senior President, with the support of Moore-Bick and Richards LJJ, has very substantially reinforced its authority. In a nutshell, the cases on time limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach."

20. There are four important points to draw from this:

i) The first sentence clearly recognises that the UT is entitled to give guidance to the FTT as to the proper approach to the lifting or imposing of sanctions for failure to comply with a time limit. On the face of it, that would include a failure to comply with a time limit for an appeal.

ii) It is an important function of the UT to give guidance so as to achieve consistency in the FTT.

iii) Although the cases on time limits in the CPR do not apply directly, tribunals should generally follow a similar approach. The phrase "time limits" is not itself limited to any particular form of time limit.

iv) The guidance that was approved was guidance attaching significant weight to certain factors.

21. Although in *Martland* the UT referred to the decision of the Supreme Court in *BPP*, it is instructive to consider the decision of this court in the same case which was endorsed by the Supreme Court. The decision of this court is at [2016] EWCA Civ 121, [2016] 1 WLR 1915, and the constitution of the court included Ryder LJ, who was at the time the Senior President of Tribunals. At [15] Ryder LJ noted two decisions of the UT which pointed in different directions. The difference between the two was this. In one decision (*HMRC v McCarthy & Stone Ltd* [2014] UKUT 196 (TCC), [2014] STC 973) the UT considered that the approach of the civil courts should be followed, even though the CPR (and especially the revised version of CPR 3.9) did not apply to tribunals and there were differences between the way in which the overriding objective was framed in the CPR and the tribunal rules. In the other (*Leeds CC v HMRC* [2014] UKUT 350 (TCC), [2015] STC 168) the UT considered that, without a change in the tribunal rules, the previous practice should prevail.

22. At [16] Ryder LJ said:

> "The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795 and *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach."

23. That was a very general statement dealing with "cases in the tax tribunals". The question that Ryder LJ posed at [32] was this:

> "In the circumstance that the tax tribunal rules are silent on the question, did she [i.e. Judge Mosedale in the FTT] make an error in law in according the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders *significant weight* as part of her consideration of the overriding objective?" (Emphasis added)

24. His answer at [33] was that she did not.

25. Two further passages from Ryder LJ's judgment need to be quoted. First, he said at [35]:

> "The UT is a superior court of record. In like manner to the High Court, it can take its own view on interpretation and can develop its own precedent. The UT is not precluded from giving guidance on practice and procedure simply because the Tribunal Procedure Committee ("TPC") has not done so in the form of a rule. Furthermore, as I remarked at para 25 above, the UT's powers are not to be taken to be limited unless they are expressly so in the rules and they are not. Of course there is significant merit in identifying and implementing new practices and procedures through the TPC, not least to ensure that there is consultation in an appropriate case, that the implications, including the financial implications, of change are considered and there is both adequate notice of change and consistency in its application, but none of those factors militates against the UT giving guidance in an appropriate case. There is nothing about this case, or for that matter *McCarthy & Stone* or the *Leeds* decision, that suggests they were inappropriate cases in which interpretative guidance could be given."

26. Second, he said at [37] and [38]:

> "[37] There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of the FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rule Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> [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."

27. This decision plainly held that there would be a change of culture in the tax tribunals and that the approach in *Denton* should be followed, even though the tribunal rules were silent on the weight to be attributed to the various factors to be considered. It was this decision that the Supreme Court endorsed, although it is fair to say that in the Supreme Court at [9] Lord Neuberger said that the Supreme Court should not be taken as approving all its reasoning. Nevertheless, the position in this court is that, unless it is inconsistent with the decision of the Supreme Court, we must follow a previous decision of this court.

28. Both judges of the UT in this case accepted that, in principle, the UT is entitled to give guidance to the FTT. They said at [89] (footnotes omitted):

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

Does the fact that the power is a discretion conferred by statute make a difference?

29. Despite having accepted that the UT is entitled to give guidance to the FTT, the UT went on to say at [90]:

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

30. It was at that point that the two judges of the UT disagreed. The essential point that Marcus Smith J gave for holding that the UT had no power to give guidance to the FTT

about the weight to be placed on particular factors was that the statutory discretion was allocated to the FTT. Binding guidance on the weight to be attached to particular factors, in the absence of any change to the legislation, would amount to a fetter on the exercise of that discretion. At [94] he said that the three stage test as laid down in *Martland* at [44] said nothing about the weight to be given to particular factors. It was therefore unimpeachable. But at [95] he said:

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

31. At [96] he said:

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

32. He continued at [97]:

> "The Upper Tribunal cannot, in the case, by way of binding guidance, direct the FTT as to what weight to place on particular factors when it is considering, in all the circumstances, whether to extend time for appealing."

33. There may be thought to be some tension between Marcus Smith J's view that, on the one hand, the UT's guidance in *Martland* was appropriate, but on the other that the UT was not entitled to give it. Moreover, in *BPP* both this court and the Supreme Court approved guidance which did attach particular weight to what Marcus Smith J called "the CPR 3.9(a) and (b) factors" even though the tribunal rules were silent on the matter. I also find it difficult to identify which part of section 83G (6) Marcus Smith J thought

was *inconsistent* with *Martland*. As Mr Windle accepted, Marcus Smith J's view would mean that some FTT judges could attach significant weight to the statutory time limit and other FTT judges could refuse to do so.

34. There is, in my view, a useful analogy with the cases concerning the award of costs by magistrates. The statutory discretion to make a costs order is contained in section 64 of the Magistrates Court Act 1980, which relevantly provides:

> "(1) On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs- (a) on making the order for which the complaint is made, to be paid by the defendant to the complainant; (b) on dismissing the complaint, to be paid by the complainant to the defendant, as it thinks just and reasonable…"

35. The correct approach to the exercise of that power was considered by this court in *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40, [2010] 1 WLR 1508. At [58] Lord Neuberger MR (with whom Maurice Kay LJ agreed) described the power as giving the magistrates "an ostensibly unfettered discretion". But he went on to say at [59]:

> "The fact that section 64 contains no fetter on the magistrates' discretion as to whether, and if so to what extent, to award costs in favour of a successful party does not mean that a court of record cannot lay down guidance, or indeed rules, which should apply, at least in the absence of special circumstances. It is clearly desirable that there are general guidelines, but it is equally important that any such guidelines are not too rigid. There is a difficult, if not unfamiliar, balance to be struck, namely between flexibility, so a court can make the order which is most appropriate to the facts of the particular case and the circumstances and behaviour of the particular parties, and certainty, so that parties can know where they are likely to stand in advance, and inconsistency between different courts is kept to a minimum."

36. Lady Rose made a similar point in *Competition and Market Authority v Flynn Pharma Ltd* [2022] UKSC 14, [2022] 1 WLR 2972 at [94]:

> "I respectfully agree with Lord Neuberger MR's statement in the passage from his judgment in *Perinpanathan* [2010] 1 WLR 1508 that I have cited above, that even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances."

37. Although both those cases concerned an award of costs, I cannot see any difference in principle between a discretion to award costs and a discretion to extend time for appeal. Unfortunately, neither of these cases was drawn to the attention of the UT. Both cases clearly state that even where a statutory power is apparently unfettered, a superior court

of record may lay down guidance, or even rules, which apply in the absence of special circumstances. Nor does either Lord Neuberger or Lady Rose outlaw guidance which gives weight to certain factors.

Procedural or substantive?

38. Mr Windle accepted that it was open to the Upper Tribunal to lay down guidance for the FTT in the exercise of its procedural powers under the tribunal rules. That guidance could include guidance about whether or not to attach particular weight to certain factors to be taken into account. In the light of *BPP* that acceptance was inevitable. But, he said, that guidance was limited to guidance as regards cases that had already been started and were "in the system;" and could not be used so as to inform the exercise of a substantive right to begin proceedings at all. The taxable person had a right to appeal within the 30 day time frame; and a discretionary right to appeal after that with the FTT's permission. That was not a procedural matter. It was a question of substance. Where the UT had gone wrong was in equating an application for an extension of time to appeal (thus opening a gateway to an appeal) with a failure to comply with tribunal rules once a case had been started.

39. I found this distinction extremely hard to follow. In the first place the purpose (or at least one of the purposes) of section 83G is to prescribe part of the *procedure* for appealing against a decision by HMRC. It has little if anything to do with the question whether HMRC's decision was in fact correct, which would be the substantive issue in any appeal. Second, if the taxable person wishes to bring an appeal outside the statutory time period the application is to be considered under rule 20 (4) which is undoubtedly procedural. At the very least the UT must be entitled to give guidance to the FTT about how to exercise its power under that rule. In addition, the application requires the taxable person to specify the reason why the deadline was missed; and that requirement finds no place in section 83G itself. It was not suggested that that part of the rule was outside the rule making power. In practice section 83G and rule 20 (4) are part of a seamless process for bringing an appeal before the FTT.

40. Moreover, there are procedural decisions which have knock-on effects on the court's jurisdiction. One example, which Miles LJ gave in argument, is an application to serve a claim form outside the jurisdiction. If such an application fails, the court cannot entertain the claim.

Weighting

41. The concern expressed by Marcus Smith J was the fact that the *Martland* guidance attached significant weight to two factors which are not expressly mentioned in section 83G (6) without any change in the tribunal rules. Although he said at [97] that section 83G (6) "tracks not the new version of CPR 3.9 but the old version", the words of section 83G (6) do not, with respect, "track" either version.

42. Marcus Smith J also placed some reliance on the fact that it was the changes to CPR rule 3.9 which enabled *the court* to adopt the approach that it did in *Denton*. Up to a point that is true. But in *BPP* this court made it clear that, *in the tax tribunals*, a change in approach to non-compliance with time limits did not need to wait for a change in the rules before adopting the *Denton* approach, which itself gave guidance on the weighting to be attributed to the various factors listed in CPR rule 3.9. The court made it equally

clear that there was nothing in the wording of the relevant rules that justified a different approach between the civil court on the one hand and the FTT and UT on the other. There is, in my judgment, nothing *inconsistent* with the statutory power which would preclude that approach.

43. Indeed, the only clear clue to the policy underlying section 83G is that the legislature has specified a time limit. A time limit is not simply a target date; it is there to be respected. That in itself justifies the attribution of significant weight to it.

44. I also consider that Marcus Smith J's characterisation of the *Martland* guidance (as interpreted in *Katib*) as amounting to a fetter on discretion is overblown. The three-stage test described in *Martland* plainly requires the FTT to consider all the circumstances of the case. That expressly recognises that there is a judicial discretion to be exercised.

45. In my judgment, therefore, Marcus Smith J was wrong, and Judge Cannan was right. As the Respondents rightly accept, it makes no difference whether the discretionary power is created by primary legislation or secondary legislation. In either case a superior court or tribunal is entitled to give guidance about its exercise. But three points must be stressed. First, guidance is just that: guidance. Where a superior court or tribunal gives guidance to an inferior court or tribunal, the inferior court or tribunal may depart from it if it gives sound reasons for doing so. That is reflected in Lady Rose's reference to the absence of special circumstances. Second, as Lady Rose made clear, it is appropriate for an appellate court to lay down guidance even where a discretion appears to be unfettered. Third, in *BPP* the Supreme Court specifically approved the giving of guidance where non-compliance with time limits is in issue.

Is the *Martland* guidance appropriate?

46. As I have said, both judges of the UT considered that if the UT had power to give the guidance that it did, the *Martland* guidance was appropriate. They said at [88]:

> "We consider the *Denton* test to be apt for the exercise of the discretion under section 83G(6) VATA. Furthermore, to be absolutely clear, we consider the three stage structure of the discretion at [44] of *Martland* (quoted at [6] above) to represent an unimpeachable approach."

47. The Respondents' first line of attack is that the FTT's power to allow an appeal to proceed after the specified period of 30 days is not analogous to the grant of relief against sanctions. Mr Windle emphasises that section 83G (6) is not concerned with a failure to comply with a statutory time limit. Section 83G gives the taxable person the *right* to appeal within 30 days of an identifiable date and a discretionary right to appeal after that with the permission of the FTT. To my mind, that is a distinction without a difference. Section 83G (1) provides that an appeal "is to be made" within the time frame. That, in my view, is a statutory time limit. There is no difference of substance between that wording and the wording of CPR 52.12 which provides that the appellant "must file" an appellant's notice within the stipulated time frame. CPR r 52.12 gives a litigant the *right* to apply for permission to appeal within a specified time frame and a discretionary right to appeal after that with the court's permission. But it is now well-established that an application to invoke that permission is treated in the same way as

an application for relief against sanctions: *R (Hysaj) v SSHD* [2014] EWCA Civ 1633, [2015] 1 WLR 2472. Even where a litigant is entitled to appeal as of right (such as in a case of committal for contempt), the time limit still applies, and an application for an extension of time is treated in the same way: *Lakatamia v Su* [2019] EWCA Civ 1626.

48. In addition, the consequences of non-compliance with the statutory time frame in section 83G and non-compliance with CPR 52.12 are exactly the same. The appellant cannot appeal without permission. The analogy is, in my judgment, an appropriate one.

49. Mr Windle relies on the decision of the Outer House in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135, [2006] STC 1218, which concerned a similar provision contained, at that time, in section 49 of the Taxes Management Act 1970. At [22] Lord Drummond Young said:

> "Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament."

50. Thus, the Respondents argue that the proper analogy is with the court's power under section 33 of the Limitation Act 1980 to allow proceedings for personal injury to be brought after the expiry of a limitation period or to make a claim under the Inheritance (Provision for Family and Dependants Act) 1975. This argument does not, in my view, follow from what Lord Drummond Young actually said. Both the power to extend time under section 83G (6) and the similar power under CPR rule 3.1 (2) (a) are (in part) designed to allow legal proceedings to be brought even though a time limit has expired. The appeal court also has power under CPR rule 52.15 to vary the time limit for filing an appeal notice. Those powers fall within the context that Lord Drummond Young described. That case does not provide a reason why the approach to relief against sanctions in the civil courts should not be followed.

51. *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC), [2012] STC 2195 concerned the exercise of discretion by the FTT under section 83G (6) (i.e. the same provision with which we are concerned). Morgan J, sitting in the UT, said at [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."

52. At [35] he referred to the approach of this court in considering applications for an extension of time to appeal; and he plainly considered that it was an appropriate analogy. At [37] he said:

> "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 pursuant to section 83G(6) of VATA."

53. He went on to say that some of the cases stressed the importance of finality in litigation and that "that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision." Thus, he saw no difference in the approach to the exercise of discretion under section 83G and the approach to extending time for appeal under the CPR. On the contrary, as he observed at [34], applications for extensions of time of various kinds were commonplace.

54. CPR r 3.9 (in its original and current form) is concerned with the grant of relief against sanctions. Thus, Morgan J held that an application under section 83G (6) was to be treated in the same way as an application for relief against sanctions. In *BPP* in this court at [44] Ryder LJ noted with apparent approval that in *Data Select* (which the Respondents do not criticise) Morgan J applied the then version of CPR 3.9 by analogy.

55. It is important to stress that the Respondents do not suggest that *Data Select* was wrong. Since Morgan J plainly thought that an analogy with the practice of this court in considering applications for permission to appeal out of time was appropriate, I do not consider that the Respondents' reliance on cases decided under section 33 of the Limitation Act 1980 or claims under the Inheritance (Provision for Family and Dependants Act) 1975 supports their case. The power to allow a late claim to be brought under those Acts arises in very different circumstances; and the policy underlying those powers is very different to cases involving an appeal against an assessment to tax. The first of them concerns claims for personal injury; and the second concerns claims for financial provision out of an estate. Such claims are private litigation. They raise claims which have yet to be investigated. Here, by contrast, we are in the realm of public law; and the claim will already have been the subject of investigation. An appeal under section 83G is a true appeal against a decision already made.

56. I agree with the way that Judge Cannan put it in the UT in this case at [99]:

> "In particular, the time limit in section 83G(1) VATA and the discretion to extend time in section 83G(6) VATA were enacted in the context of a procedure which involves enquiries by HMRC, decisions including assessments, and possibly statutory and non-statutory reviews of those decisions. An appeal to the FTT against an assessment is one step in that procedure. The time limit in section 83G(6) VATA can be seen as analogous to a procedural rule in existing proceedings. Unlike *Cowan* [an extension of time under the Inheritance etc Act], section 83G(6)

> VATA can be viewed as being designed to protect both HMRC and the tribunal from stale claims and to promote certainty and finality. Challenges should proceed expeditiously, at proportionate cost and in compliance with time limits. Hence the provision for statutory reviews which are aimed at avoiding the need for tribunal proceedings."

57. In my judgment, if the UT is entitled to give guidance on the exercise of a statutory discretion (which, for the reasons I have given I consider that they are), then the UT in this case was correct in deciding that the *Martland* guidance, as amplified in *Katib*, was entirely appropriate.

58. I would add, finally, that even if there were any doubt about the guidance, it is not for this court to interfere unless the guidance is wrong in law.

Result

59. I would allow the appeal, and reject the point raised in the Respondent's Notice. The *Martland* guidance (as amplified by *Katib*) is appropriate. On the remittal of the application to the FTT, the FTT should proceed on that basis.

Lady Justice Whipple:

60. I agree.

Lord Justice Miles:

61. I also agree.