[2018] UKFTT 218 (TC)

TC06451

Appeal number: TC/2016/05802

VAT – default surcharges – cash flow difficulties allegedly caused by capital repayments being required by the Appellant's mortgagee and HMRC refusing repayment proposals for historic debts – whether or not a reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEWTON BUSINESS PARKS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN
MR JULIAN STAFFORD

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 8 February 2018

Mr Simon Charles, Counsel, for the Appellant

Mr Philip Jones, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. Newton Business Parks ("Newton") is a partnership between Mrs Gabriele Shaw and her husband Mr Christopher Shaw. As the name suggests, Newton carries on business in the rental and management of a business park. The appeal is against default surcharges for the late payment of VAT in the periods 02/15, 05/15, 08/15 and 11/15 ("the Disputed Periods"). The returns were also filed late for the periods 02/15 and 08/15. The surcharges are in the total sum of £26,811.70.

2. Newton has been in the default regime since the period 05/11. By virtue of Newton's payment history, the surcharges for the Relevant Periods were calculated at the rate of 15%. There is no dispute that this is the applicable rate. Similarly, there is no dispute as to the amounts of the surcharges or as to the defaults. These are set out in the following table:

Period:	*Due date where electronic payment:*	*Amount paid by due date:*	*Amount paid after due date:*	*Date return received:*	*Date of late payment:*	*Surcharge amount:*
02/15	7/3/15	£0.00	£48,618.52	23/9/15	24/3/16	£7,292.77
05/15	7/7/15	£0.00	£47,170.28	7/7/15	23/9/15	£7,075.54
08/15	7/10/15	£0.00	£46,575.00	13/4/16	24/4/16	£6,567.93
11/15	7/1/16	£0.00	£39,169.75	7/1/16	19/7/16, 23/9/16	£5,875.46

3. Newton requested a review of the default surcharges on 16 June 2016. By a letter dated 26 September 2016, HMRC upheld the decisions. Newton's Notice of Appeal is dated 26 October 2016 and, HMRC accept, was within time.

4. In essence, Newton's case is that it has a reasonable excuse for the defaults; namely, cash flow difficulties and an insufficiency of funds which was not reasonably avoidable. This reasonable excuse has two elements (which Newton relies upon both cumulatively and in the alternative); first, that the mortgagee of Newton's property required a refinance and repayment which was made in June and August 2014 and, secondly, that HMRC rejected (on Newton's case, unreasonably) a repayment plan, causing Newton to have to pay £200,000 in order for Mr and Mrs Shaw to avoid bankruptcy. HMRC does not accept that a reasonable excuse has been made out for any of the periods.

5. The parties (rightly) agreed that the burden of proof is upon Newton to establish a reasonable excuse and that the standard of proof is that of the balance of probabilities.

Evidence and Findings of Fact

6. The only witness evidence was from Mrs Shaw. She relied upon a witness statement which had been used in previous proceedings to set aside statutory demands served upon her, her husband and Newton by HMRC. She also gave oral evidence. We say at the outset that she was a helpful and credible witness.

7. There was no particular dispute of fact between the parties. As such, we make the following findings of fact based upon the witness evidence and documents before us.

8. Newton's main assets are the land and buildings that constitute the business park itself ("the Business Park"). The Business Park is a substantial property, comprising 17 acres and is leased to 40 tenants. The partnership's accounts for the year ended 31 March 2014 ("the 2014 Accounts") treat the land and buildings as having a value of £10,736,554. These were subject to a mortgage with Leeds Building Society ("Leeds") pursuant to a term loan facility of up to £6,500,000.

9. On 5 June 2013, Leeds wrote to Newton and informed them that the Business Park's value had reduced below the permissible loan to value ratios. Further correspondence followed and, in a letter dated 31 October 2013, Leeds informed Newton that it had obtained a valuation of the Business Park at £6,200,000, confirming that Newton was in breach of covenant, and requiring proposals for repayment of the whole outstanding mortgage. Newton disputed this valuation and, on 16 December 2013, issued a claim against Leeds for declaratory and injunctive relief to prevent any enforcement ("the Leeds Proceedings").

10. The Leeds Proceedings were adjourned in order to allow negotiations between the parties. Further valuations were obtained in the sum of £9,000,000 and £9,150,000. However, Leeds stood by their own valuation and insisted upon a capital repayment and refinance of the mortgage. Newton investigated refinancing the Business Park with other mortgage companies but were unable to do so at the short notice required by Leeds, primarily because of Mr Shaw's age (he was 73 at the time). In the event, Newton settled the Leeds Proceedings in March 2014 by agreeing to a new facility again in the maximum sum of £6,500,000 but requiring a capital repayment of £500,000 by 30 June 2014. The interest rate was higher than the previous facility, being 3% above LIBOR. In addition, Newton agreed to pay Leeds' legal costs of £80,000 and incurred their own legal cost of £40,000.

11. Newton duly paid Leeds £450,000 on 30 June 2014 and the remaining £50,000 (accepted late by Leeds) in August 2014. Newton raised the money for the costs and capital payment partly from Mr and Mrs Shaw obtaining personal loans and through their own assets and partly from the quarterly rents received from tenants.

12. In mid-2014, Mr and Mrs Shaw sought to raise money by seeking a re-mortgage on a farmhouse property ("the Farmhouse"), which they owned outside the partnership, which was valued at approximately £900,000 and was subject to a mortgage with Cumberland Building Society of £225,000. Although they were offered a mortgage in principle, this did not proceed because of Mr Shaw's age. In February 2015, Mr and

Mrs Shaw placed the Farmhouse on the market at a price of £885,000. This was reduced to £850,000 in May 2015 but failed to sell.

13. On 12 February 2015, Mr and Mrs Shaw made proposals to HMRC for a payment plan in respect of their personal self-assessment liabilities, together with Newton's PAYE, NIC, VAT and Climate Change Levy liabilities, which totalled £444,917.97. A timetable for payments was included. This payment plan was accepted by HMRC in a letter dated 20 February 2015, which included the following:

> "May I finally remind you, that this is the very last opportunity that I am able to afford you, to bring yours and Mr Shaw's tax affairs totally up to date ad should any of the payments not be made by the due dates, or met on presentation, as shown above, I will have no alternative other than to cancel this arrangement and commence fresh proceedings on yourself and Mr Shaw and winding up proceedings on Newton Business Parks. This action would be by way of service of statutory demands under Section 268(1)(a) and (b) of the Insolvency Act 1986 and may result in you being made bankrupt and the partnership being wound up."

14. This payment plan was not met and was cancelled by HMRC. On 17 April 2015, Newton proposed a revised payment plan which involved selling the Farmhouse, providing security until sale and making regular monthly payments (albeit that the monthly payments were in unspecified sums). This offer was rejected by HMRC on 21 April 2015.

15. On 22 May 2015, HMRC served statutory demands against Newton in the sum of £277,428.67, Mrs Shaw in the sum of £277,428.67 and Mr Shaw in the sum of £418,764.99 ("the Statutory Demands"). Mr and Mrs Shaw and Newton applied to set aside the Statutory Demands on 9 June 2015 ("the Set Aside Applications").

16. By a letter dated 9 June 2015, Newton again offered the Farmhouse as security to HMRC, a payment of £50,000 on 23 June 2015 and a further £50,000 every quarter month thereafter until the sale of the Farmhouse, in addition to the payment of any new tax liabilities as they fell due. HMRC rejected this proposal on 12 June 2015. This refusal included the following:

> "Your clients' offer to pay £50,000.00 on 23 June 2015 and further payments of £50,000 every quarter month thereafter is unacceptable to HM Revenue and Customs. It could take in excess of 24 months to clear the debt in full, plus any interest accrued thereon, should the property not have a timely sale. However, any payments made by Mr and/or Mrs Shaw, in the meantime, will be allocated generally on account of the above debt, but only payment in full will result in the statutory demands being withdrawn.
>
> Mrs Shaw has made many promises to me in the past for bringing all tax affairs up-to-date and whilst I acknowledge that she has made inroads, she has sadly not been able to maintain the arrangements agreed. It is for this reason that HM Revenue and Customs will not enter into a formal Time to Pay arrangement with Mr and Mrs Shaw."

17. The offer of security was again made in September 2015 and again rejected by HMRC.

18. Mr and Mrs Shaw paid £200,000 towards their and Newton's collective liabilities between 26 June 2015 and 24 September 2015. HMRC's ledger (which has not been disputed by Newton within this appeal) shows that the payments comprised the following sums: £20,000 on 25 June 2015; £5,000 on 26 June 2015; £5,000 on 30 June 2015; £5,000 on 3 July 2015; £5,000 on 5 July 2015; £5,000 on 13 July 2015; £5,000 on 16 July 2015; £5,000 on 5 August 2015; £5,000 on 7 August 2015; £8,000 on 8 September 2015 and £132,000 on 23 September 2015. This £200,000 was in addition to £23,000 paid prior to making the April 2015 and June 2015 repayment offers (being £10,000 paid on 9 April 2015, £8,000 paid on 13 April 2015 and £5,000 paid on 17 April 2015).

19. The Set Aside Applications were heard and granted by Deputy District Judge Causton on 25 September 2015. In essence, he held that HMRC had unreasonably refused the repayment offer in June 2015. Deputy District Judge Causton stated as follows:

> "[5] Then it is said that: "Referring to your client's request to accept a charge on the property, the reasons that they were not prepared to accept it was that they had more than enough time to raise the finance, no guarantee of when payment would be made. Tax is a statutory debt which should be paid by the legal due date and it would be unfair on other tax payers who do pay on time." Therefore, statutory demands, they said, would shortly ne issued, which they did. Therefore, we need to look at the reasonableness of that refusal and I accept Mr Doyle's submissions on behalf of the applicants that a reasonable creditor in the position of HMRC should not have refused this offer. I have to look at it in the round and at all the grounds, using my discretion and it is always the case in a case like this that there is going to be no guarantee of when the property will be sold, but there is an intention to sell and since then, in fact, the property has been reduced in value and put on the market for a lower value. Therefore, there is obviously an intention to sell and it actually works against HMRC's interests to refuse this offer and incur further costs in bankruptcy when the property is going to be sold at some point in the near future.
>
> [6] Indeed, £200,000 has been paid since May and I do need to look at the situation as at the date of the hearing. Therefore, whilst that is an act of brinkmanship to a certain degree, the explanation [that] has been provided was that the payment of £132,000 was made because it coincided with the quarterly rent from the business. Therefore, I can understand why there has been a delay in making that payment. If the property is sold and the payment is made then this will do away with the necessity to go down the bankruptcy route and incur all those costs. In page 30 of the witness statement Pearson then made another offer, in fact, on behalf of the applicants on 9th June saying that they had been instructed to set aside the statutory demands and enclosed the application with the witness statement of Gabriele Shaw, and they said that they had reduced the asking price of the property and that the agents were optimistic that

an offer will be generated over the summer months. They said they were instructed to give an undertaking to pay the debt from the net proceeds of sale, which is something they had indicated in April. However, nonetheless, they also said they would pay £50,000 on 23 June 2015 and a further £50,000 every quarter. However, in fact, they had exceeded that because they paid more than that in total.

[7] Again, my understanding is that this was rejected and I have to turn to page 33 of the exhibit. There is no mention in the letter from HMRC of 12th June to the offer regarding the undertaking to pay. It is really only referring to the offer to pay £50,000 on 23rd June and the further payments of £50,000 at every quarter. It says that they would take 24 months to clear the debt. When we are talking about such large sums, the fact that HMRC are going to be paid, according to that offer, then, again, I feel that that offer should have been accepted. In the circumstances, it was unreasonable not to do so and there are no reasons, really, given here for refusing that offer other than that Mrs Shaw has made promises in the past, and it is interesting there that HMRC only refer to Mrs Shaw having made promises in the past for bringing tax affairs up to date and that she has sadly not been able to maintain the arrangements. It is for this reason it is said that they will not enter into a formal time to pay arrangement with Mr and Mrs Shaw. Therefore, they do not seem to have considered Mr Shaw's position there, only Mrs Shaw appears to be referred to in that letter and obviously he is also a debtor, as is the partnership, so they do not seem to have taken that into consideration.

[8] Then we also have the letter from 24th September when the larger amounts have been paid, which points out that the creditor is not obliged to take security. That is true; they are not obliged to but they should not act unreasonably in considering an offer made, in my judgment. Once again, they also take into account irrelevant considerations when rejecting any offers. In fact, it is rejecting the offer of security again. They say: "HMRC were not set up to administer property deals to pay tax debts. The main function of HMRC is to collect tax, not to act as an institutional lender." I do not think that, in my judgment, the Shaws and Newton Business Parks partnership themselves were asking HMRC to administer the property deal. HMRC would be administering the property deal if they made them bankrupt. However, they were not being asked to administer the property deal. That would be undertaken by the Shaws' solicitor, not HMRC and they were not being asked as an institutional lender, they were being asked to accept security over the property. Therefore, that is incorrect to say that they were being asked to act as an institutional lender.

[9] Again, they mention that it would be unfair on other taxpayers who do pay their tax on time and often in difficult circumstances. However, it has been pointed out by Mr Doyle that if that was the case then to act fairly to all taxpayers HMRC would be unable to accept any charges over properties, which they do accept. I also bear in mind Mrs Shaw's second witness statement, to which there has not been a response from HMRC. Having said that, it was only served on 24th September, so I am not criticising them for not responding. Nonetheless, factually speaking there is no response to it in the file. In that witness statement Mrs Shaw

> explains that, as I have said earlier in my judgment the property was placed on the market at £885,000. This was a forced sale because they intended to repay the money to HMRC. It was then reduced to £855,000. It was then reduced to £785,000 and they have been advised not to auction the farmhouse, but nonetheless, Mr Doyle has indicated that that would be what they would do in order to pay off this debt. The farmhouse was then reduced further and an indicative offer has been received on 18th August, but in the upper £600,000s and someone else has advised that they wish to consider making an offer.
>
> [10] There is an indication there that the property is likely to be sold soon. She says in paragraph 7, "The farmhouse will, I have no doubt, sell within a short period of time and we want to sell it and pay off our debt as quickly as possible." That has been also what Mr Doyle has submitted in his submissions that the Shaws are embarrassed by the situation they face and that they wish to settle their debts as quickly as possible. Therefore, in those circumstances I am going to set aside the statutory demands."

20. HMRC's ledger shows that no more payments were made until after the due date of the last of the returns in issue within this appeal (the next payment being £48,618.52 on 24 March 2016 and being referable to the 02/15 return). Similarly, further correspondence has passed between Mr and Mrs Shaw and HMRC, including a complaint about HMRC's conduct. However, these are again after the date of the last of the returns in issue within this appeal.

21. We note that Mr and Mrs Shaw also own other properties outside the partnership and did so throughout the events described above. In particular, they own a large hall ("the Hall"), which is mortgage free and was valued in 2014 as being in excess of £10,000,000. They also own two gatehouses ("the Gatehouses") in the Hall's grounds, valued at £500,000 each. The gatehouses were mortgaged in the sum of £300,000 each.

22. Mrs Shaw was asked during her oral evidence whether or not she had considered obtaining a mortgage of the Hall and the Gatehouses. She said that brokers had acted for her and Mr Shaw in mid-2014 who knew that they wanted to raise money as they were in debt, which included looking at the Hall. Lloyds had been offered security upon the Hall but Lloyds refused it. She said that no commercial lender would lend to them as a result of Mr Shaw's age, that to get a mortgage on the Hall would take months and that they were not offered one. We find as a fact that Mr and Mrs Shaw, and Newton, did not make any attempt to raise finance on the Hall or the Gatehouses other than to ask Lloyds to accept it as security for a refinance of Newton's whole facility. This is for the following reasons. First, the detail given about this in oral evidence was very limited. Secondly, no evidence at all was given in Mrs Shaw's witness statement about attempts to raise finance upon the Hall or the Gatehouses. Thirdly, the evidence which she did give treated the Hall and the Gatehouses as part of the attempts to refinance Newton's facility. There was therefore no evidence of any attempts to obtain an additional loan (as distinct from a refinance of the Leeds facility) secured on the Hall which could be used to pay HMRC. Fourthly, there was no evidence as to whether finance could have been raised on Mrs Shaw's beneficial interest in the Hall or as to whether or not the ability to do so would have been affected by Mr Shaw's age. Fifthly,

no attempts were made to seek finance on the Hall or the Gatehouses in April, June or September 2015 when it was clear that HMRC would not accept the proposed payment plans. Sixthly, Mrs Shaw's evidence that it was not possible to mortgage the Hall at short notice in 2014 was an acknowledgement that it was in principle possible if further time was available.

23. Further, we find that there were no attempts at all during the relevant times to sell the Hall. Although Mrs Shaw said that a buyer could not be found, this was based upon attempts to do so in 1996 and no evidence was given to suggest that there were any more recent attempts at sale.

24. There were no attempts to sell the Gatehouses, although it appears that it would have been difficult to do so with vacant possession by virtue of their occupancy.

25. Mrs Shaw's only evidence as to the reason for the late returns for the periods 02/15 and 08/15 was that the financial upheaval was causing administrative difficulties. She also said that she was ill at this time. We accept this evidence as far as it goes (which, in any event, was not challenged by HMRC). However, no further details were given as to why this prevented the filing of the returns.

The Legal Framework

26. There was no dispute as to the relevant legal framework.

27. Section 59 of the Value Added Tax Act 1994 ("VATA 1994") provides as follows.

> "59. The default surcharge
>
> (1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –
>
> (a) the Commissioners have not received that return, or
>
> (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,
>
> then that person shall be regarded for the purposes of this section as being in default in respect of that period.
>
> (1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.
>
> (2) Subject to subsection (9) and (10) below, subsection (4) below applies in any case where –
>
> (a) a taxable person is in default in respect of a prescribed accounting period; and
>
> (b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the

purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

5 (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its
10 extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) and (10) below, if a taxable person on whom a surcharge liability notice has been served –

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

15 (b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

20 (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that –

25 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

30 (d) in relation to each such period after the third, the specified percentage is 15 per cent.

35 (6) For the purposes of subsection (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

40 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge –

45 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to

expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day."

28. Section 71(1) of VATA 1994 provides as follows:

"71. Construction of sections 59 to 70

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance or any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse."

29. HHJ Medd QC gave the following guidance in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234 as to what constitutes a reasonable excuse:

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

30. It is clear from section 71(1)(a) of VATA 1994 that insufficiency of funds cannot itself be a reasonable excuse. However, the cause of the insufficiency of funds is capable of constituting a reasonable excuse. This turns upon whether or not the cause of the insufficiency of funds was reasonably avoidable, as emerges from the judgments of Nolan LJ and Lord Donaldson in *Customs and Excuse Commissioners v Steptoe* [1992] STC 757.

31. Nolan LJ stated as follows at 768:

> "I remain of the view which I expressed in *Salevon* that as a general rule one can trust the commissioners and the tribunal to determine whether in any given case, and having regard to the scheme of the legislation including s 33(2)(*a*), a reasonable excuse for non-payment exists. I would not accept that the reasonable excuse must necessarily involve a wrongful act by another person. My references in *Salevon* to 'the wrongful act of another' and to the distinction between 'the trader who lacks the money to pay his tax by reason of culpable default and the trader who lacks the money by reason of unforeseeable and inescapable misfortune' were directed to the facts of that case. They cannot be regarded as an all-purpose test of what constitutes a reasonable excuse. The test is to be found in the words of ss 19(6)(*b*) and 33(2)(*a*) read in the context of the statutory scheme for the collection of value added tax. As a general rule this scheme has a highly beneficial effect on the cash flow of traders. If I may quote again from my judgment in *Salevon* (at 911) -
>
>> '... the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of "reasonable excuse" must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally

be hard put to it to invoke s 19(6)(*b*). In other words he will be hard put to it to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian.'"

5 32. Similarly, Lord Donaldson stated as follows at 770:

> "The difficulty which then arises is that Parliament has not specified what underlying causes of an insufficiency of funds which lead to a default are to be regarded as reasonable or as not being reasonable. Prima facie the legislative intention is the same as in the context of s 33(2)(b). This is that, save in so far as Parliament has given guidance, it is initially for the commissioners to decide whether the underlying cause constitutes a reasonable excuse and for the tribunal to decide this on an appeal. That said, there must be limits to what *could* be regarded as a reasonable cause. Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.
>
> Scott LJ on the other hand is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable."

Submissions

Newton

33. Mr Charles helpfully summarised his submissions by what he called two "headline points". First, Leeds' decision to call in its facility and to require a refinance which included a capital repayment was an unexpected and unplanned for event which could not have been avoided by diligent foresight. The financial consequences for Newton were severe. Secondly, HMRC's decision to serve the Statutory Demands and refusal to accept repayment proposals created a "do or die" position for the partnership, leading to payments of £200,000 between May and September 2015 which removed the ability to meet the VAT liabilities for the Disputed Periods.

34. Expanding upon the significance of Leeds' decision, Mr Charles submitted that it was possible to look at the impact of historical matters as the reasonable excuse need not have arisen in the period in question, albeit that its effect in causing the insufficiency of funds must be current. In this regard, he relied upon the First-tier Tribunal decisions

of *Struebel (t/a Two Stroke to Turbo) v HMRC* [2014] UKFTT 177 (TC) and *Aardvark Excavations Ltd v HMRC* [2008] STI 488. We have considered these cases but do not propose to set out the extracts which Mr Charles referred us to as Mr Jones did not dispute these principles.

5 35. In turn, Mr Charles submitted that the effects of Leeds' approach were still current at the time of the Disputed Periods. This had been an unexpected event, which deprived Newton of cash flow. He drew an analogy with the First-tier Tribunal decision of *JMS Aggregate Supplies v HMRC* [2011] UKFTT 426 (TC) in which the appellant was held to have a reasonable excuse for its default because its bank had withdrawn support. He
10 also drew an analogy with the First-tier Tribunal decision of *MSD (Darlington) Ltd v HMRC* [2007] STI 382 in which the appellant was held to have a reasonable excuse because it had been let down by a supplier, which caused problems with cash flow.

36. In respect of the repayment offers, Mr Charles submitted that HMRC's decision not to accept the repayment offers in April, June and September 2015 were unexpected
15 events. Whilst Mr Charles noted that Deputy District Judge Causton had found that HMRC had acted unreasonably in refusing these offers in the context of the Set Aside Applications, he emphasised that this appeal is not a review of whether or not HMRC's decision was unreasonable but simply whether or not their decision gives rise to a reasonable excuse. He said that this did give Newton a reasonable excuse because it
20 deprived Newton of £200,000 of cash flow which could have been used to pay VAT liabilities as they fell due given that the total sum due in the Disputed Periods was £178,743.

37. The high point of Mr Charles' submissions in respect of the late returns for the 02/15 and 08/15 periods was that the financial and other difficulties had caused Newton
25 to, as he put it, "take its eye of the ball."

HMRC

38. Mr Jones accepted that, in principle, Leeds' decision had caused substantial problems for Newton. However, he submitted that this cannot provide a reasonable excuse for an indefinite period and any reasonable excuse had been exhausted by the
30 time of the Disputed Periods. By the Disputed Periods, the insufficiency of funds was no longer unavoidable as Newton, through Mr and Mrs Shaw, could have raised money through Mr and Mrs Shaw's other assets. In particular, no realistic efforts had been made to raise money by refinancing or selling the Hall, which was mortgage free and worth £10,000,000.

35 39. Mr Jones did not accept that HMRC's refusal to accept a payment plan was a reasonable excuse. He submitted that previous time to pay agreements had been agreed but not kept to by Newton. He also made the point that Newton had not applied for a time to pay agreement in respect of the Disputed Periods.

40. In short, Mr Jones' submission was that this was no more than an insufficiency
40 of funds and that that insufficiency cannot be said to have been unavoidable.

Discussion

41. We find that Newton does not have a reasonable excuse for its defaults in respect of any of the Disputed Periods. This is for the following alternative reasons.

42. First, in reaching our conclusion we bear in mind that the burden of proof to establish a reasonable excuse is upon Newton and that the standard of proof is on the
5 balance of probabilities. As such, it is for Newton to provide evidence which supports its case.

43. Secondly, Newton did not act reasonably in failing to file the 02/15 and 08/15 returns on time. Newton has not explained why the administrative difficulties or any illness caused this failure. Mr Charles candidly (and rightly) accepted that this was
10 because the financial difficulties had distracted Newton from its obligations. However, to use the formula in *The Clean Car Co Ltd* (see above), this was not a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found itself at the relevant time, a
15 reasonable thing to do. This is in itself sufficient to dismiss the appeal in respect of the 02/15 and 0815 periods. For completeness, however, we note that our reasons below in relation to the late payment of the VAT due applies to the whole of the Disputed Periods in any event.

44. Thirdly, Newton first knew of Leeds' decision in June 2013 and made the capital
20 repayment by August 2014. Mr and Mrs Shaw had already accepted that they would need to raise money upon or sell personal assets in order to meet their personal and partnership liabilities. However, as set out above, no attempt to raise money on the Hall or the Gatehouses was made other than through Lloyds as part of a refinance of Newton's liabilities. It was not reasonable for Mr and Mrs Shaw not to seek to mortgage
25 the Hall to raise funds to assist cash flow. In principle, they could have investigated a secured personal loan (as distinct from refinancing the whole of Newton's liabilities) or, if Mr Shaw's age was a difficulty, a mortgage of Mrs Shaw's interest in the Hall. It is for Newton to establish that the insufficiency of funds was unavoidable; it cannot do so in the absence of evidence that substantial efforts were made to investigate the
30 potential to raise such finance and in the absence of evidence that such finance would not have been available by the time of the Disputed Periods.

45. Fourthly, even if funds could not have been raised using the Hall as security, it was unreasonable for Mr and Mrs Shaw not to attempt to sell the Hall. The Statutory Demands were served on 22 May 2014 with the attendant risk of bankruptcy and so, by
35 that point at the latest, the situation was sufficiently serious to require extreme measures. Indeed, part of Mrs Shaw's evidence in the Set Aside Applications was that she and Mr Shaw had substantial unencumbered assets including the Hall. Again, the absence of any evidence from Newton as to whether or not the Hall could have been sold between 22 May 2014 and the Disputed Periods means that Newton have not
40 established that the insufficiency of funds was unavoidable.

46. For the avoidance of doubt, we make no findings as to whether or not Mr and Mrs Shaw ought to have raised finance upon or sold the Gatehouses as there would have

been no need to do so if this approach had been taken in respect of the Hall. We accept that the equity in the Gatehouses was far lower and that they were tenanted.

47. Fifthly, we agree with Mr Charles that it is not for this Tribunal to decide whether or not HMRC acted unreasonably in refusing to accept Newton's payment proposals. Instead, the fact that these were refused is a feature in considering whether or not there was a reasonable excuse. However, even taking Newton's case at its very highest and assuming that HMRC's approach was unreasonable, we find that this would still not constitute a reasonable excuse. We do not accept Mr Charles' submission that this was an unexpected event or analogous to a bank withdrawing support. The liabilities were validly owed and were already substantially overdue. Indeed, some liabilities pre-dated the difficulties with Leeds.

48. In considering this point, we do accept that, in principle, if HMRC requires payment of historic debts under the threat of bankruptcy such a requirement can in some cases give rise to a reasonable excuse for non-payment of newly accruing debts. In *Longstone Ltd v Commissioners of Customs and Excise* [2001] V & DR 213, Sir Stephen Oliver QC stated as follows at [16] and [17]:

> "[16] The second period raises different considerations. The large debt overhang from the first period and the Commissioners' actions to recover the arrears left Longstone with a simple choice. Either allow liquidation to follow or attempt to keep the core business intact at the expense of paying default surcharges. Had Longstone been credit-worthy it might have borrowed funds and so protected itself against those two extremes. But borrowing was not an option. The Commissioners imposed the full rigour of the penalty regime. In the letter of 3 August 1999 they said:
>
> > 'Whilst appreciating and sympathizing with the difficulties encountered by some businesses, the Commissioners of Customs and Excise cannot make exceptions which might lead to one business gaining an unfair commercial advantage over another.'
>
> [17] Imposing default surcharges, whilst at the same time taking recovery action in relation to outstanding tax liabilities, is a high risk strategy on the part of the Commissioners. It not only erodes the resources of the trader, it is capable also of furnishing that trader with a reasonable excuse for non-payment of current liabilities."

49. Crucially, however, in the present case the insufficiency of funds caused by the payment of £200,000 between May and September 2015 was avoidable if it was unreasonable for Mr and Mrs Shaw not to have solved Newton's cash flow issues by the time of the Disputed Periods. For the reasons which we have already set out, Mr and Mrs Shaw did not act reasonably in failing to solve these cash flow issues by either raising money on the Hall or selling the Hall.

50. Sixthly, if the June repayment proposal had been accepted, Newton would have had to pay £50,000 on 23 June 2015 and £50,000 every quarter thereafter as well as ongoing VAT liabilities. As such, it is wrong to say that the £200,000 paid between May and September 2015 would have solved the cash flow problems which prevented the payments for the Disputed Periods; at best, this would only have provided funds for

the 05/15 and 08/15 periods and so cannot itself be a reasonable excuse for the 02/15 and 11/15 periods. The 02/15 period was due on 7 March 2015 and so pre-dated the repayment proposal. £50,000 would then have been paid on 23 June 2016, £47,170.28 on 7 July 2015 in respect of the 05/15 period, £50,000 on 23 September 2016 and £46,575 on 7 October 2015 in respect of the 08/15 period.

51. Seventhly, Newton did not provide any analysis of its cash flow for the period from August 2014 (when the capital payments to Leeds were made) to the Disputed Periods in order to make good the assertion that no funds were available.

52. Before concluding, we make the point that we do not accept Mr Jones' argument that Newton should have asked for a time to pay agreement in respect of the Disputed Periods. HMRC had made it clear since April 2014 that no further time to pay agreements would be entered into and it was reasonable for Newton to treat this as also applicable to the Disputed Periods.

Disposition

53. It follows that we dismiss the appeal.

54. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 18th APRIL 2018