UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 190 (LC)

LC-2023-11

**Royal Courts of Justice, Strand,
London WC2A**

8 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

HOUSING – CIVIL PENALTY – FTT Procedure – appellant claiming not to have received final penalty notices – appeal brought more than two years after sending of notices – FTT refusing to extend time and striking appeal out – s. 249A and Sch 13A, Housing Act 2004 – r.27(2), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN

MR IPOLOTAS NAUJOKAS

Appellant

-and-

FENLAND DISTRICT COUNCIL

Respondent

**Re: 11 Kings Walk,
Wisbech,
Cambridgeshire**

Martin Rodger KC, Deputy Chamber President

1 August 2023

Dr Anton van Dellen, instructed directly, for the appellant
The respondent did not attend and was not represented.

The following cases are referred to in this decision:

BPP Holdings Limited v Commissioner for Her Majesty's Revenue and Customs [2017] UKSC 55

Denton v White [2014] EWCA Civ 906

Introduction

1. How should the First-tier Tribunal (Property Chamber) (the FTT) deal with an appeal against a civil financial penalty where the appeal is lodged long after the penalty was imposed and where the appellant's explanation for the apparent delay is that he did not receive the notice?

2. That is the question which arises in this appeal against a decision of the FTT given on 25 October 2022 by which it struck out an appeal by Mr Ipolotas Naujokas against financial penalties sought to be imposed on him by Fenland District Council under section 249A, Housing Act 2004. Final penalty notices had been sent to his home address but his appeal was lodged 25 months after the date they should have been delivered, long after the 28 days allowed by rule 27(2) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

3. Mr Naujokas's explanation was given to the FTT by his counsel, Dr Van Dellen, who also represented him at the hearing of the appeal. In written representations he explained that it was his client's case that the final notices had never arrived, or at least had never reached him. The FTT was unimpressed by that explanation, and by the form in which it was given, and proceeded to strike the appeal out.

4. Permission to appeal was subsequently given by this Tribunal. The respondent, Fenland District Council (the Council), chose not to attend the hearing at which Mr Naujokas was represented by Dr Van Dellen.

The facts

5. On 20 February 2020 housing officers visited a house in Wisbech and came to the conclusion that it was an unlicensed HMO. There appeared to be nine people living there in six separate households, each occupying one room as their main residence. The Council's officers also found a number of fire and safety deficiencies.

6. On 2 April 2020 the Council posted two notices of intent to impose financial penalties under section 249A, Housing Act 2004 to the property, addressed to Mr Naujokas, who was believed to be the person managing the HMO. The notices informed him of the Council's intention to impose a penalty of £17,000 for breaches of the Management of Houses in Multiple Occupation Regulations 2006 and a further penalty of £7,000 because he was managing an unlicensed HMO. An improvement notice was also served by the same method.

7. Mr Naujokas was living at the property and received the three notices. He is from Lithuania and does not speak English. He took the notices to an advice centre and on 1 May 2020, through an interpreter, he telephoned the Council about them. The Council agreed to extend the time for him to make representations about the proposed penalty.

8. No representations were received by the Council and on 21 May 2020 it issued two final notices confirming the penalties proposed in the original notices of intent. These were

sent by first class post addressed to Mr Naujokas at the property and at a second property in March with which the Council understood he also had connections.

9. Mr Naujokas says he did not receive the final notices addressed to him, and that that is why he did not exercise his right of appeal.

10. The following month the Council became aware that Mr Naujokas had moved to a different address in Wisbech and on 26 August 2020 it sent copies of the final notices to him at that address. Mr Naujokas says that he did not receive those notices either. At the hearing of the appeal Dr Van Dellen offered various suggestions why the final notices might not have been received by Mr Naujokas at any of the three addresses to which they were sent, but it is not necessary for me to express any view on them.

11. In December 2020, about eight months after he had received the original notices of intention, Mr Naujokas again sought advice. The circumstances in which he did so were not explained and, of course, his instructions to his counsel are privileged. But for whatever reason Dr Van Dellen sent a letter to the Council's Head of Housing by email on 26 December 2020. In it he said that he had seen the three notices served on Mr Naujokas on 2 April 2020 (i.e. the two notices of intent and the improvement notice) and asked that they be withdrawn, because Mr Naujokas had been the tenant of the property and could not be liable for a licensing offence or responsible for fire safety defects. Dr Van Dellen did not ask for copies of any document and did not refer to the final notices.

12. Mr Brown, the Council's officer responsible for the matter, responded with a lengthy email of his own on 5 January 2021. That email was not shown to the FTT, nor was it included in the bundle for the appeal hearing, but only emerged during the appeal in response to the Tribunal's questions. In it Mr Brown explained that final notices imposing civil penalties totalling £24,000 had been served at the property and at the address in March on 21 May 2020. He also asked Dr Van Dellen to provide signed authorisation from Mr Naujokas so that the Council could communicate with him about the matter.

13. The Council's request for a signed authorisation received no immediate response. More than a year later, on 19 February 2022, Mr Naujokas signed a letter confirming that Dr Van Dellen was indeed his representative. That was shortly after the Council had transferred the matter to a debt recovery firm who sent a number of letters to Mr Naujokas demanding payment of the outstanding penalty. Those letters were not shown to the FTT or produced on the appeal, but I was told that one sent on 3 February 2022 referred to the date the final notice had been served and the amount of the penalties.

14. Although Dr Van Dellen had Mr Naujokas' authority to communicate with the Council, he did not do so for a further five months. On 20 July 2022 he lodged a notice of application (an appeal) with the FTT against the penalties and it was only when the FTT asked for copies of the notices that Dr Van Dellen responded to the Council's request of 5 January 2021 by sending the authorisation. The explanation for these long delays which Dr Van Dellen gave at the hearing was that communication with Mr Naujokas is always difficult because instructions have to be taken through an interpreter.

15. The Council sent copies of the final notices to Dr Van Dellen on 29 July 2022. It is Mr Naujokas' case that that was the first occasion on which he or his representative had received them.

16. The file was shown to the FTT Judge, and on 19 August 2022 a member of staff wrote to Dr Van Dellen pointing out that the notice of application appeared to be more than two years late. She referred to the FTT's power to extend time but pointed out that the delay was extreme and that the Judge proposed to strike the application out. She then continued:

> "The applicant may make representations to the tribunal as to why the proceedings should not be struck out. These must include an explanation for the delay. Any representations must be made by 31 August 2022 after which the file will be passed back to the Judge."

17. The response to that invitation came on 14 September 2022 in the form of an email from Dr Van Dellen. He said this:

> "The reason that the appeal has been filed is that the respondent was requested to provide a copy of the notices. These were only provided by the respondent on 29 July 2022. Any prejudice that has been caused to the appellant by the respondent only providing these notices on 29 July 2022, rather than prejudice caused to the respondent. Further or alternatively, it is in the interest of justice for the appellant to be granted an opportunity to appeal the notices, as the respondent is seeking to enforce the notices."

18. In a separate email sent on 17 September 2022 Dr Van Dellen suggested that the time for appealing should run from 29 July 2022, the date the final notices were said first to have been received.

19. The Council provided the FTT with a certificate of service confirming that the final notices had been posted on 21 May 2020.

The FTT's decision

20. The FTT struck out the application pursuant to Rules 9(2)(a) and 9(3)(e) of the FTT's rules. The first of those provisions allows the FTT to strike out proceedings if the tribunal has no jurisdiction. The second applies where the FTT considers that the proceedings have no reasonable prospect of success.

21. In a short decision the Judge referred to the facts and to the account given by the Council of how the final notices were served, before continuing:

> "In response, the applicant's representative stated that the notices posted in 2020 were not received. No witness statement was provided by the applicant with an explanation to back up that claim or dealing with the delays set out in paragraph 7 above [a reference to the passage of time between the Council's

request for a signed authorisation for it to discuss the matter with Dr van Dellen and the provision of that document on 21 July 2022]."

Having referred to the rules 9(2)(a) and (d), the Judge went on:

"11. The tribunal is satisfied that the notices were sent to the applicant at the property on 21 May 2020. The challenge is that the notices were not received but no witness statement was provided by the applicant to explain why (for example, evidence that he had left the property at an earlier date) and no explanation was given for the other delays in the case despite the order to do so.

12. In the circumstances the applicant has failed to provide good reason as to why the tribunal should extend time in this case and the tribunal has no jurisdiction to hear the appeal. Alternatively, the extreme delay in making the application is an abuse of process and it is appropriate to strike the matter out for that delay.

13. I have taken into account the large amount of the penalties, but again no evidence was provided by the applicant as to his financial circumstances and it was not clear whether the penalties will ever be recovered by the respondent."

The appeal

22. In his grounds of appeal, Dr Van Dellen advanced a variety of points: the FTT had been wrong to suggest that it did not have jurisdiction; it had been wrong to say that the appellant had not provided a good reason, as his non-receipt of the notices was such a reason; the notices were not provided until 29 July 2022, so time for bringing an appeal should start from that date; no prejudice had been caused to the respondent; the FTT had failed adequately to have regard to the amount at stake or the underlying merits of the appeal.

23. This is an appeal against the exercise by the FTT of a discretion whether to allow the appeal to proceed or to strike it out. The limits of an appellate tribunal's role when asked to review such an exercise of discretion are well-known. They were explained by Lord Neuberger PSC in *BPP Holdings Limited v Commissioner for Her Majesty's Revenue and Customs* [2017] UKSC 55 (a case about non-compliance with procedures in the FTT Tax Chamber) at [33]:

"However, the issue whether to make a debarring order on certain facts is very much one for the tribunal making that decision, and an appellate Judge should only interfere where the decision is not merely different from that which the appellate Judge would have made, but is a decision which the appellate Judge considers cannot be justified. In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 para 33:

"An appellate Judge should not interfere with case management decisions by a Judge who has applied the correct principles and who has taken into account matters that should be taken into account and left out of account

> matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."
>
> In other words, before they can interfere, appellate Judges must not merely disagree with the decision. They must consider that it is unjustifiable".

Of course, those observations emphasise the respect which is due to a discretionary decision made by a Judge "who has applied the correct principles". That prompts the question: what are the correct principles when an appellant claims not to have received a final penalty notice and relies on that fact as justifying the bringing of an appeal long after the 28 day time limit imposed by rule 27(2)?

24. The Judge considered that the relevant principles were those applicable to a decision to strike out proceedings either because the FTT lacks jurisdiction (a mandatory ground under rule 9(2)(a)) or because the proceedings are an abuse of process (a discretionary ground under rule 9(3)(d)).

25. For his part, Dr Van Dellen argued that the appropriate principles should be borrowed from the civil courts and were to be found in the decision of the Court of Appeal in *Denton v White* [2014] EWCA Civ 906. In that case the Court of Appeal gave guidance on the application of CPR rule 3.9, which is concerned with relief from sanctions. It commended a three-stage assessment. The first stage was to identify and assess the seriousness or significance of the failure to comply with the particular rule, practice direction or order which had been breached. The second stage was to consider why the failure or default had occurred. The third stage was then to consider all the circumstances of the case, so as to enable the court to deal justly with the application. Dr van Dellen submitted that the FTT had failed to give proper consideration to the third of these stages.

Discussion

26. In *BPP Holdings* the Supreme Court acknowledged that the CPR do not apply to tribunals but noted the extent to which similar principles had gained acceptance since *Denton v White.* Lord Neuberger summarised the position, at [26]:

> "In a nutshell, the cases on time-limits and sanctions in the CPR did not apply directly, but the tribunals should generally follow a similar approach."

27. Without disagreeing in any way with that statement of principle, I nevertheless do not consider that *Denton v White* provides useful guidance in this case. Nor do I consider that the FTT asked itself the right question. In my judgment this is not a case about relief against sanctions, nor it is a case about the exercise of the power to strike out.

28. The issue in this case turns on a question of fact, namely, when did time begin to run for Mr Naujokas to appeal the civil penalty notices? The FTT found that time ran out on 20 June 2020, because that was the date 28 days after the date of posting of the notices. But it reached that conclusion before it considered Mr Naujokas' explanation. The first question it asked itself in paragraph 12 was whether the appellant had provided a good reason why

it should extend time in this case. Respectfully, I do not think that was the right starting point. Whether to extend time involves an exercise of discretion. A decision as to the date on which time began to run, and whether it had expired when a notice of application was served, is not a discretionary decision, and it requires a finding of fact.

29. Section 249A, Housing Act 2004 authorises the imposition of a financial penalty where it is satisfied beyond reasonable doubt that a person's conduct amounts to a relevant housing offence. Section 249A(6) introduces schedule 13A dealing with matters of procedure, including the procedure for imposing financial penalties and for appeals.

30. Schedule 13A provides for the service of a preliminary notice of intent, the right to make representations and the service of a final notice once the housing authority has decided to impose the financial penalty. Paragraph 6 then provides:

> "If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty."

Paragraphs 7 and 8 explain what information is to be contained in the final notice, including "information about rights of appeal".

31. The requirement that the authority must "give the person a notice" must be read in the light of section 233, Local Government Act 1972 which provides for the service of notices by local authorities. So far as material, it provides as follows:

> "233. Service of notices by local authorities
>
> (1) Subject to subsection (8) below, subsections (2)-(5) below shall have effect in relation to any notice, order or other document required or authorised by or under any enactment to be given to or serve on any person by or on behalf of the local authority or by an officer or the local authority.
>
> (2) Any such document may be given to or served on the person in question either by delivering it to him, or by leaving it at his proper address, or by sending it by post to him at that address.
>
> (3) …
>
> (4) For the purposes of this section and of section 26 of the Interpretation Act 1889 (service of documents by post) in its application to this section, the proper address of any person to on whom a document is to be given or served shall be his last known address…"

32. Section 26 of the Interpretation Act 1889, referred to in section 233(4), is in substantially the same terms as section 7 of the Interpretation Act 1979 and provides as follows:

> "26. Meaning of service by post
>
> Where an Act asked after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression was used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document,

and unless the contrary is proved to have been effected at the time of which the letter would be delivered in the ordinary course of post."

33. In this case it is now acknowledged that the address to which the first of the notices sent in May was sent was the "proper address" of Mr Naujokas for the purpose of section 233(4), in that it was his home address. The FTT was entitled to be satisfied on the basis of the evidence provided by the Council that the final notices were sent to that address on 21 May 2020. The effect of section 26, 1889 Act, is therefore that service was deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post "unless the contrary is proved".

34. If Mr Naujokas were to prove that the notice sent to him on 21 May 2020 had not been received at that address (or possibly, if received, had been intercepted by some other person after it arrived in the house but before it reached him) then the Council would not have given him a final notice. The consequence would be that Mr Naujokas would not have been subject to a civil penalty until the later date when service was effected on him. His authorised representative received a copy of the final notice on 21 July 2022, and if no notice had been served before that date the appeal which was lodged on 20 July 2022 will not have been out of time. There would be no need for any other explanation and no question of relief against sanctions or a discretionary extension of time. The fact that Mr Naujokas and his legal representative were aware that a notice had been served because they were told as much in January 2021 and again in February 2022, would be irrelevant. Until a final notice is properly served time for appealing does not begin to run and there is no onus on the intended recipient to begin an appeal.

35. Where does that leave the FTT's decision? In my judgment, it is open to challenge on three grounds. The first is that the Judge asked herself the wrong question, namely, whether Mr Naujokas had provided a good reason why time should be extended in his favour. For the reasons I have explained there was a prior question of fact, namely, whether despite having been posted to Mr Naujokas' proper address, the final notices had nevertheless not been given to him. If the answer was that he had not, he offered no other explanation for the delay and the FTT's decision to refuse an extension of time would have been unimpeachable. If the answer was that he had, the question of an extension of time did not arise. The onus of proving that the notices had not been received, was on Mr Naujokas. He maintained that he had never been given the final notices. The question for the FTT was whether it believed him or not.

36. The second legitimate challenge to the decision concerns the way in which the Judge dealt with Mr Naujokas' case that he had never been given a final notice. She was critical of the fact that he had not made a witness statement in paragraphs 9 and 11 of the decision. Instead, "the applicant's representative stated that the notices posted in 2020 were not received". But the case officer's letter of 19 August 2022 had said nothing about a witness statement. Instead it had invited the applicant to "make representations to the tribunal as to why the proceedings should not be struck out". It does not seem to me to be fair for the Judge to have placed weight on the absence of a witness statement, when the tribunal's own invitation (addressed to his lawyer) was to provide representations.

37. The Rules acknowledge the distinction between evidence and argument, and between a witness statement and "submissions" (which I take to be synonymous with

"representations"). Rule 18(1) gives examples of how the FTT's case management powers may be exercised: it may give directions as to, at (c), "issues on which it requires evidence or submissions" and, at (d), "the nature of the evidence or submissions it requires". By rule 18(1)(g) directions may be given as to "the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given orally at a hearing, or by written submissions or witness statement.

38. The directions given by the FTT were not well adapted to the critical issue in the case. If the FTT had wished to prescribe the manner in which any evidence was to be given it had power to do so. It could have required Mr Naujokas to produce a witness statement, supported by a statement of truth (with the result that a criminal sanction would apply if the witness statement contained material which was known to be false) or to attend at a hearing to give oral evidence, or both. It did not do that but instead gave him an opportunity to make "representations". That is what Dr Van Dellen did on his behalf and I do not think it was open to the FTT to disregard or diminish those representations merely because they did not come in the form of a witness statement. It is true that the explanation given was no more than an assertion and did not speculate about why the notice might not have been received, but that is not inconsistent with the assertion being true as the maker of the statement may have had no other information to offer. The representations still needed to be assessed, and a decision made whether the explanation was true. The Judge did not undertake that exercise.

39. Finally, in explaining the background to the decision, at paragraph 7, the Judge referred to Dr Van Dellen's email of 26 December 2020 and said that it asked for a copy of the notices. The same point was made by the Judge when she refused permission to appeal, saying that she had received no explanation why Mr Naujokas had waited until July 2022 to request copies of the notices "having first instructed a representative to request copies in December 2020". But Dr Van Dellen's email contained no request for copies of any document and referred instead to the fact that the writer had seen the three notices served on 2 April 2020 (the notices of intent and the improvement notice). The fact that copies of final notices were not requested is supportive of Mr Naujokas' case. It was consistent with his claim that he did not receive the notices during 2020 that his representative made no mention of them in December that year and did not ask for further copies. The Judge appears to have misread the email and not to have appreciated that it was capable of assisting, rather than undermining, the appeal.

40. I should also say something about the procedural aspect of this appeal. The Judge evidently found some difficulty relating the circumstances of the case to the terms of rule 9. She relied on rule 9(2)(a) on the grounds that the tribunal did not have jurisdiction and alternatively on rule 9(3)(d) on the grounds that the extreme delay in making the application meant that it was an abuse of process. Neither of those provisions is appropriate to the question in this case.

41. Rule 26(1) provides that an applicant must start proceedings before the tribunal by sending or delivering a notice of application. The procedural requirement in rule 27(2) to start the proceedings within 28 days of the date on which the decisions "was sent to the applicant" presupposes that the giving of the notice was successfully achieved; the Rules cannot override the substantive requirement of paragraph 6 of Schedule 13A, 2004 Act that a final penalty notice must be given to the applicant. If that requirement has not been

complied with there is nothing for the applicant to appeal against. If it has been complied with, and an appellant does not start proceedings by sending a notice of application within 28 days, the relevant rule is rule 6(3)(a) which gives the FTT power to extend or shorten the time for compliance, even if the application for an extension is made after a time limit has expired.

42. In considering whether to exercise the power to extend time the guiding principle is found in rule 3 which describes the FTT's overriding objective to deal with cases fairly and justly. When a significant sum is in issue, as in this case, and when the issue of fact on which the right to appeal may turn depends on the credibility of the evidence of the recipient of a notice about the time he received it, it may be difficult for the FTT to reach a fair and just decision without giving the recipient the opportunity to give oral evidence.

Disposal

43. For these reasons I allow the appeal, set aside the decision and remit the matter to the FTT for further consideration. I direct that within 2 months the appellant must file with the FTT and serve on the Council a full statement of the evidence he relies on in support of his case that he did not receive the final notices. When filing that statement he should inform the FTT whether he would like to have the opportunity to give oral evidence. The Council should then say whether it wishes to cross-examine the appellant on his evidence. It will be for the FTT to give any further directions and to determine the form of the hearing, but it should take account of the parties' preferences when making that decision.

Martin Rodger KC

Deputy Chamber President

8 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.