

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2018] UKUT 342 (LC)

UTLC Case No: RAP/2/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD & TENANT – procedure – striking out

**IN THE MATTER OF APPEALS AGAINST DECISIONS OF THE FIRST-TIER
TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

MISS RACHAEL REID

Appellant

and

MRS KULWINDER KAUR

Respondent

**Re: 8 Benson Road,
Grays,
Essex.
RM17 6DL**

Before: His Honour Judge Nicholas Huskinson

Sitting at The Royal Courts of Justice, Strand, London WC2A 2LL

on

17 October 2018

The appellant appeared in person

There was no appearance by on behalf of the respondent

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There are no cases referred to in this decision

DECISION

Introduction

1. This is an appeal, pursuant to permission granted by the Upper Tribunal, against a decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) striking out the appellant's application to the FTT which she had made for a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016. The FTT's decision is undated but appears to have been taken on 13 February 2018 as that is the date of the covering letter to the parties enclosing a copy of the decision.

2. The sequence of events which led to the decision striking out the appellant's application can be summarised as follows.

3. By a document dated 19 November 2017 the appellant made an application to the FTT for a rent repayment order. It appears this document was received and filed on 30 November 2017 by the FTT. However the appellant had omitted to enclose the application fee of £100. As a result of this the FTT wrote to the appellant on 1 December 2017 pointing out this omission and stating that the FTT could not move forward with processing the application until the fee was received. The appellant did send a fee which was received by the FTT on 22 December 2017.

4. Accordingly it appears the FTT treated the application as properly before it on 22 December 2017.

5. In her application the appellant had completed box number 7 which dealt with availability and which invited a statement of any days on which the appellant would not be available. The appellant stated that the dates on which she would not be available were 22 January 2018 to 7 February 2018.

6. On 2 January 2018 the FTT issued a directions order for the management of the case. A copy of that order is not before me, but the substance of it is set out in the FTT's decision of 13 February 2018 which is the subject of the present appeal. Paragraphs 3 to 5 of the FTT's decision record the following in respect of the directions order:

“3. The Directions Order also carried the following information to the parties in bold type –

Important Note:

- These Directions are formal Orders and must be complied with
- They are made to assist the parties and the Tribunal in dealing with the application swiftly and economically
- Failure to comply with Directions could result in serious detriment to the defaulting party e.g. the Tribunal may refuse to hear all or part of that party's case and orders may be made for them to reimburse costs or fees thrown away as a result of the default

4. Direction 3 stated –

The Applicant must, by 5pm on 19 January provide to the Tribunal and copy to the Respondent a statement setting out the following information –

- (a) The date when the Improvement Notice was issued by the local authority;*
- (b) Full details of the alleged breach of the Improved Notice, including the date when the breach commenced and when it ended;*
- (c) Whether or not the Respondent has been convicted of any of the offences listed in section 40 of the Act at any time;*
- (d) Any conduct of the landlord which she considers the Tribunal should take into account;*

and must provide relevant evidence of the alleged breach, including a copy of the Improvement Notice and a copy of the tenancy agreement.

5. Direction 4 required Ms Kaur to respond to the application by 2 February and was followed by a warning –

Failure to comply with the above directions may result in the Tribunal striking out all or part of a party's case."

7. The appellant received a letter dated 4 January 2018 acknowledging receipt of her application and the payment. The appellant says (in her letter dated 7 February 2018) that as regards the directions order she had not seen that order but was not sure if that was her fault and whether she had put it down and misplaced it and "I have so much going on with the house at the moment it gets a little bit confusing".

8. The appellant did not by 19 January 2018 provide to the FTT (with a copy to the respondent) a statement setting out the information required by paragraph 3 of the directions order.

9. By a letter dated 26 January 2018 the FTT wrote to the appellant drawing attention to her failure to comply with paragraph 3 of the directions order, reminding her that the order indicated that failure to comply may result in the FTT striking out all or part of a party's case, and stating that the FTT proposed to strike out her application under rule 9(3) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 because of her non-compliance. The letter continued by informing the appellant that if she wished to make any representations as to why her application should not be struck out she must deliver them to the FTT's office by 5 PM on 2 February 2018.

10. The appellant had been away on holiday from 23 January 2018 returning on 7 February 2018 – i.e. she been away for the period she notified to the FTT as being dates on which she would not be available.

11. On returning home on 7 February 2018 the appellant saw the FTT's letter of 26 January 2018. She sent an email timed at 12:51 PM to the FTT explaining her position. She apologised for her failure. She attached what she understood was the information needed and expressed the hope that it was not too late to correct her mistake. The documents she attached (or attempted to attach) included her tenancy agreement and a scanned image of the improvement notice (and of a variation to the improvement notice). She stated that the respondent was convicted of the relevant offences at Southend Magistrates Court on 23 October 2017 and fined a total of £9000 (plus costs and surcharge) and she attached an attendance note from Mr Nick Ham of counsel at Drystone Chambers relating to this.

12. The FTT responded by email on 7 February 2018 saying that the only attachment included was the front page of the tenancy agreement. The FTT asked the appellant to send all the documents referred to in her email through to the tribunal again.

13. On 9 February 2018 by email timed at 11:53 AM the appellant sent as attachments the documents she understood the FTT had asked for. The email communications continued on Monday, 12 February 2018 which revealed further difficulty in the opening of attachments. The FTT invited the appellant to send a full copy of her tenancy agreement by post. The appellant also sent as an attachment a statement which she provided for the court case in October 2017. This attachment appears to be a substantial document to be found between pages 61 and 78 of the bundle before me. The FTT replied on 12 February 2018 at 1:17 PM stating that the FTT was unable to download large attachments. The FTT asked the appellant to wait until she had heard back from the tribunal before sending any more information or evidence.

14. The decision to strike out the appellant's application, being the decision the subject of the present appeal, was undated but appears (and I assume) to have been taken on 13 February 2018. In paragraph 6 to 13 the FTT gave its decision and reasons in the following terms:

“6. Ms Reid failed to comply with that Direction. The Chair instructed the case officer to write to her on 26 January, informing her of her failure and that the Tribunal proposed to strike out her application under Rule 9(3) because of her non-compliance. The letter gave her until 2 February to make any representations as to why the application should not be struck out.

7. Ms Reid replied by email on 7 February. She stated that she went on holiday on 23 January and returned in the early hours of 7 February. She said she had not seen the Directions Order but did not know if that was her fault because she just put it down and misplaced it; she had replied to the request for avoid dates that was in the letter which enclosed the Order. She apologised for the omission. Ms Reid then set out some details of the Improvement Order, but did not enclose a copy as directed, and she only enclosed the front page of her tenancy agreement.

8. The case officer contacted Ms Reid, pointing out the omissions and on 9 February, Ms Reid sent to the Tribunal a copy of an Attendance Note regarding Mr Kaur's conviction and a copy of the Improvement Notice. This note states that Ms Kaur had

pleaded guilty to breach of an improvement notice but gives no details of the date(s) of commission of the offence and does not refer to the property address.

9. The case officer checked with Ms Reid that all documents sent to the Tribunal had been copied to Ms Kaur and was told they had not because Ms Reid did not realise she had to do that.

10. Rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, provides that the Tribunal may strike out the whole or part of the proceedings or case if the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it.

11. The Directions are very clear as to what was required of Ms Reid and gave a clear warning of the need to comply and the consequences of failing to do so. Ms Reid failed to comply with them at all before she went on holiday on 23 January, with no excuse. Subsequently she failed to comply properly with reminders on two occasions and failed to copy documents to Ms Kaur as directed. The Tribunal cannot have any confidence that she will comply with directions in the future or provide an agreed bundle of documents for the determination of the application as directed. The application is therefore struck out under Rule 9(3).

12. In any event, the application was unlikely to succeed. The Attendance Note referred to above is between two persons whose identity and status is not known to us, it makes no mention of the dates of commission of the offence and does not identify the property address. It is not a witness statement and does not constitute proof of a relevant conviction to the standard required.

13. Under Rule 9(3) the applicant may apply for the proceedings to be reinstated. Such application must be made in writing and be received by the Tribunal within 28 days after the date on which this decision is sent to the applicant.”

15. The appellant sought permission to appeal from the Upper Tribunal without having first asked for such permission from the FTT. Ultimately this does not matter because in due course the Upper Tribunal granted permission to appeal by a decision dated 12 July 2018. A late application for permission to appeal was made by the appellant to the FTT this was refused.

16. The appeal was listed for a hearing which took place before me on 17 October 2018. The appeal had been ordered to proceed by way of a review of the FTT’s decision. At the hearing the appellant appeared in person. The respondent had submitted a respondent’s notice dated 23 July 2018 but thereafter she has played no part in the appeal. By an email sent to the Upper Tribunal on 16 October 2018 the respondent explained that she would not be attending the hearing.

Power for the FTT to strike out proceedings

17. The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 provides in rule 9 so far as is presently relevant as follows:

9. – Striking out a party’s case

- (1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.
- (2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal –
 - (a) does not have jurisdiction in relation to the proceedings or case or that part of them; and
 - (b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.
- (3) The Tribunal may strike out the whole or a part of the proceedings or case if –
 - (a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;
 - (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
 - (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;
 - (d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
 - (e) the Tribunal considers there is no reasonable prospect of the applicant’s proceedings or case, or part of it, succeeding.
- (4) The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph (3)(b) to (e) without first giving the parties an opportunity to make representations in relation to the proposed striking out.
- (5) If the proceedings or case, or part of them, have been struck out under paragraph (1) or (3)(a), the applicant may apply for the proceedings or case; or part of it, to be reinstated.
- (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

Discussion

18. As a preliminary observation it may be noted that the appellant's application was treated as validly before the FTT on 22 December 2017 (date that fee was received) and that it was struck out on 13 February 2018. The intervening period included Christmas and the New Year and also a period from 22 January 2018 to 7 February 2018 during which the appellant had notified the FTT at the outset that she would be unavailable. This therefore is scarcely a case of lengthy and inexplicable failure to comply with directions.

19. Under rule 9 the FTT may strike out the whole or part of the proceedings, without first giving the relevant party an opportunity to make representations in relation to the proposed striking out (i.e. under rule 9(4)), if the FTT strikes the proceedings out under rule 9(3)(a), i.e. on the basis that the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or relevant part of it.

20. Therefore there was no obligation on the FTT under the rules to give the appellant an opportunity to make representations in relation to the proposed striking out. However the FTT (in my view correctly) did not move directly to striking out the appellant's application without first giving her an opportunity to make representations. Instead the FTT wrote the letter dated 26 January 2018 indicating the FTT's proposal to strike out the application because of non-compliance and giving a period for the appellant to make representations as to why the application should not be struck out.

21. However the FTT had been put on notice from the outset that the appellant was not available from 22 January 2018 to 7 February 2018. Accordingly it was (or should have been) clear to the FTT that the invitation to make representations as to why the application should not be struck out was of no value to the appellant in the terms it was made, because she was known not to be available for making any such representations until after her return on 7 February 2018 whereas the letter only gave her until 5 PM on 2 February 2018.

22. Also it is clear from the papers that there were energetic attempts by the appellant, commencing immediately upon her return on 7 February 2018, to provide to the FTT all of the material that the FTT had sought. The FTT took into consideration a communication from the appellant dated 9 February 2018, but did not take into consideration the further attempts made by the appellant on Monday, 12 February 2018 (including attempts to send substantial documents) to ensure that the FTT had all that it required. Also the FTT failed to take into consideration what I consider to be a further relevant factor, namely that the appellant was continuing (including on 12 February 2018) to strive to provide all material that was needed and was thereby demonstrating that she was someone who plainly wished to have her application proceed and wished to accommodate as best she could all requirements of the FTT.

23. The FTT concluded that it "cannot have any confidence that she will comply with directions in the future or provide an agreed bundle of documents for the determination of the application as directed". When proceeding under rule 9(3)(a) the FTT does not have an

unfettered discretion to strike out proceedings as soon as it becomes established that the applicant has failed to comply with directions falling within rule 9(3)(a). I do not consider that the existence in the mind of the FTT of a lack of confidence that directions will be complied with in the future is a permissible basis for the FTT to strike out proceedings. If the future comes and the FTT's fears have proved well-founded, such that the future directions are indeed not complied with, then there may at that stage be a proper basis for striking out the proceedings. A mere lack of confidence that the applicant will comply with future directions does not provide such a proper basis.

24. Separately from the foregoing I conclude that the FTT was in error in that it failed to conduct any form of weighing of the justification for and consequences of striking out the application. The FTT did not consider the prejudice to the appellant from such a strike out and the prejudice to the respondent (and indeed to the FTT itself and its ability to deal with other cases) if there was no strike out. A strike out would bring potential prejudice to the appellant because she would either have to abandon her claim or attempt to start again. It is unclear what if any significant prejudice was suffered by the respondent (or the FTT) from the failure to comply with the directions of 2 January 2018 and from the belated (but apparently determined) efforts of the appellant to remedy the failure.

25. As regards paragraph 12 of the FTT's decision it is unclear whether this is intended as some form of self-standing reason for striking out the appellant's application, in which case the matter would have to be considered under rule 9(3)(e), or whether it is merely something which the FTT took into account as a further justification for striking out the application under rule 9(3)(a).

26. If the former I consider that the FTT omitted to comply with rule 9(4), which there would be a necessity to comply with in relation to a strike out under rule 9(3)(e), because the opportunity afforded to the appellant to make representations was an opportunity to do so entirely within the period during which (to the knowledge of the FTT) she was unavailable. Also, having regard to the information provided by the appellant and counsel's attendance note, I do not consider that the FTT was entitled to conclude that the application was "unlikely to succeed", nor do I consider that the view expressed by the FTT could constitute a considered view that "there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding" within rule 9(3)(e).

27. If the latter I consider that, by reason of the second point mentioned in paragraph 26 above, the FTT took into account an irrelevant (in the sense of unjustified) consideration.

28. The FTT correctly in its decision notified the appellant of the provisions of rule 9(5) namely that the appellant could apply for the proceedings to be reinstated within 28 days. However the existence of this power to seek reinstatement does not confer validity upon an otherwise invalid decision to strike out the proceedings. Put another way, the existence of this power to seek reinstatement does not remove the right of the appellant to contend (as she has

in this appeal) that the order striking out the proceeding should not have been made in the first place.

Conclusion

29. The appellant's appeal is allowed. The decision of the FTT dated 13 February 2018 to strike at the appellant's application is quashed. The appellant's application is remitted to the FTT to be dealt with upon its merits.

His Honour Judge Huskinson

18 October 2018