IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 330 (LC)
Case No: HA/13/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – time for appealing final notice – extension of time – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ADIL HAZIRI

FATJON QELA **Appellants**

and

LONDON BOROUGH OF HAVERING **Respondent**

Re: 99 Victoria Road,
Romford,
Essex RM1 2LX

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL

24 October 2019

Muhammad Arshad Khan, of Lords Solicitors, for the Appellants
The Respondent did not attend

The following cases are referred to in this decision:

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

Denton v T H White Limited [2004] EWCA Civ 906

Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64,

Mannion v Ginty [2012] EWCA Civ 1667

Introduction

1. This is an appeal, brought with the permission of the Tribunal, against a decision of the First-tier Tribunal (Property Chamber) (the FTT) made on 13 December 2018 by which it refused to consider an appeal by Mr Adil Haziri and Mr Fatjon Qela against financial penalties imposed on them by the London Borough of Havering under section 249A, Housing Act 2004 (the 2004 Act). Mr Haziri and Mr Qela were given final notice of the penalties on 14 September 2018. The FTT's reason for refusing to consider the appeal was that the appeals had been received by it on 22 October 2018, which was more than 28 days after the date on which final notice had been given, and no good reason had been shown why an extension of time should be allowed.

2. At the hearing of the appeal the appellants were represented by Mr Muhammad Arshad Khan, of Lords Solicitors. I am grateful to him for his submissions. The London Borough of Havering (which is the local housing authority for the relevant area) has not participated in the appeal.

The facts

3. The appellants are the leasehold owners of a semi-detached property at 99 Victoria Road, Romford. According to representations made by Havering in opposing the grant of permission to appeal, the property comprises a ground floor shop from which a car wash business is operated by the appellants, together with a separate ground floor residential unit and a further self-contained flat on the upper floor.

4. The property is in an area which was designated by the local housing authority as subject to additional licensing under Section 56, Housing Act 2004 on 1 March 2018. As a result of that designation, section 61 of the 2004 Act required that every HMO to which Part 2 of the 2004 Act applied must be licenced (subject to certain limited exemptions which do not apply in this case).

5. On 30 May 2018 the authority inspected the property and concluded that both residential units were operated as HMO's. Since neither was licensed, the authority concluded that the appellants had committed offences, contrary to section 72 of the 2004 Act, of being persons having control of or managing an HMO which is required to be licensed but which is not so licensed. The authority also identified circumstances which it considered to constitute breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006 and which therefore amounted to offences under section 234 of the 2004 Act.

6. A local housing authority is empowered by section 249A of the 2004 Act, to impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England. Offences under sections 72 and 234 of the 2004 Act are relevant housing offences for this purpose (section 249A(2)).

7. On 18 June 2018 the authority gave each of the appellants notice of its proposal to impose financial penalties of £8,000 on each of them. The notices of intent informed the appellants of their right to make representations about the proposal.

8. Representations on behalf of the appellants were duly submitted to the authority by Mr Khan's firm, Lords Solicitors, on 23 July and 13 August; I have only been supplied with the second of these documents, but the authority commented on the contents of both documents in its response to the application for permission to appeal. In summary the representations explained that the appellants had acquired the lease of the property in June 2016. At that time the residential parts of the building were already let and the appellants did not appreciate that they were HMO's, thinking instead that those in occupation comprised a single household. The property had been managed for them by an agent and they had been unaware until the authority's inspection on 30 May 2018 that a licence was required. They now intended to apply for a licence and carry out the necessary works to comply with all relevant regulations. Reference was also made to the fact that Mr Qela had been injured in an accident and spent time abroad receiving medical treatment.

9. Nothing in those representations caused the authority to change its mind. On 14 September 2018 it sent final notices to the appellants imposing penalties of £8,000 on each of them. These were sent by registered post and were copied to the appellant's solicitors by email on the same day. The notices included information about the appellant's rights of appeal against the financial penalties as they are required to do by paragraph 8 of Schedule 13A, 2004 Act. No form of final notice is prescribed and the appellants have not shown me a copy of the final notices served on them, but in the authority's submissions in response to the application for permission to appeal it stated that the final notices had informed the appellants that any appeal should be made to the FTT within 28 days and provided its address. I have no reason to doubt that.

10. Discussions then took place between the authority and the appellant's solicitors about the possibility of them paying the penalties by instalments. The authority provided a draft agreement to that effect, but on 12 October, after the end of normal business hours, Lords informed the authority by email that they were now instructed to file an appeal against the penalties with the FTT. On 18 October that email was acknowledged by a member of the authority's staff whose only comment was that the contents of the email were noted.

The time limit for appealing to the FTT against a financial penalty

11. Paragraph 10 of Schedule 13A, 2004 Act makes provision for appeals to the FTT. None of those provisions say anything about the time within which an appeal must be brought.

12. This Tribunal (Judge Cooke) has recently confirmed in *Pearson v City of Bradford Metropolitan District Council* [2019] UKUT 291 (LC) that the omission of the 2004 Act to provide a time limit for the bringing of an appeal against a financial penalty is cured by the FTT's own procedural rules.

13. Proceedings before the FTT are commenced by sending or delivering a notice of application to the tribunal. Rule 27 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides as follows:

> "27-(1) This rule applies where no time limit for starting proceedings is prescribed by or under another enactment.

(2) Where the notice of application relates to a right to appeal from any decision (including any notice, order or licence), the applicant must provide the notice of application to the tribunal within 28 days after the date on which notice of the decision to which the appeal relates was sent to the applicant."

14. As the final notices in this case were sent to the appellants on 14 September 2018 the last day for providing a notice of application bringing an appeal was 12 October 2018, 28 days later. That was the date on which the appellant's solicitors informed the authority of their intention to file an appeal, but no such appeal was in fact filed at the FTT until 10 days later, on 22 October.

The appeal to the FTT and its decision

15. On 23 October the appellants' notice of application was considered by a procedural judge who gave directions recording that the appeals were out of time and requiring the appellants to provide a statement in support of any request for an extension of time by a specified date.

16. By rule 6(3)(a) of the FTT's Rules the FTT is given a specific power to extend the time for complying with any rule, practice direction or direction, even if the application for an extension is not made until after the time limit has expired. That power applies to the time limit in 27(2).

17. On 9 November, within the time permitted by the procedural judge, the appellants filed a statement of case which included their reasons for requesting an extension of time. The first of those reasons was as follows:

"The appellants were late in responding to the Council's Notice due to a number of compulsions because of the pressing circumstances beyond their control as explained in their initial representations. The appellants decided to appeal after taking detailed formal legal advice and finding good grounds to appeal and the respondent was notified of their intention to appeal together with the grounds. The appellants and their legal representative therefore had good reason to believe that they had the implied consent of the respondent for a late application."

18. The second ground on which the appellants explained their delay was this:

"The applicants were under the impression that the 28 days time limit for an appeal started after they exhausted the option of an informal internal review. They requested a reconsideration of the penalty notice and the respondent, after due consideration, declined their request for any deduction in the amount of the penalty but offered a monthly payment arrangement for the penalty to be paid in one year in a letter dated 19 September 2018. The appellants did not find that a financially viable option nevertheless they never accepted the liability. After reconsidering their financial circumstances, grounds of appeal and taking further legal advice they decided to appeal instead of compliance with the penalty notice which they found financially an impracticable option anyway."

19. The FTT has a discretion whether to extend time for the bringing of the appeal. In its decision of 13 September 2018 it exercised that discretion concisely, as follows:

> "The Tribunal considers that there is no basis for extending the time limit in this particular case for the following reasons:
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> (1) there is no evidence of implied consent;
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> (2) the applicants had the benefit of legal advice since before the final notices were served (see the email from Lords Solicitors to the respondent dated 13 July 2018)."

The approach taken by this Tribunal to appeals against case management decisions

20. It is a very well established feature of the relationship between the FTT and the Upper Tribunal that this Tribunal should not interfere with a discretionary case management decision by an FTT judge who has applied correct principles and taken into account matters which should be taken into account and not taken into account irrelevant matters, unless it 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 FTT judge.

21. For a number of years, the courts have emphasised the importance of compliance with the rules and practice directions under which civil litigation is conducted. In *Denton v T H White Limited* [2004] EWCA Civ 906, the Court of Appeal laid down the approach to be followed by the courts in deciding whether to grant relief against sanctions for non-compliance. The majority of the court (Lord Dyson MR and Vos LJ) said at [24] that a judge should approach the question in three stages:

> i) identify and assess the seriousness of the failure to comply;
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> ii) consider why the default occurred;
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> iii) evaluate all the circumstances of the case to enable the court to deal justly with the application, including the need for litigation to be conducted efficiently and the need to enforce compliance with rules, practice directions and orders.

22. In *BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55, the Supreme Court explained that although the Civil Procedure Rules (which govern court procedure) do not apply to tribunals, such tribunals should follow a similar approach to procedural non-compliance and relief against sanctions. At paragraph [24] of *BPP*, Lord Neuberger PSC described decisions of the courts on the application of the Civil Procedure Rules as providing "a salutary reminder as to the importance that is now attached in all courts and tribunals throughout the UK to observing rules in contentious proceedings generally." Those decisions were directed to, and only strictly applicable to, the courts of England and Wales, "save to the extent that the approach in those cases is adopted by the UT, or, even more, by the Court of Appeal when giving guidance to the FTT."

23. *BPP Holdings* concerned an application by a taxpayer to debar HMRC from further participation in a tax appeal following their failure to comply with an order which included a warning that non-compliance might result in the making of a debarring order. At paragraphs [25]

and [33] Lord Neuberger PSC emphasised the restraint which an appellate tribunal should adopt when asked to interfere with a debarring order. The issue of whether to make a debarring order 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. The same restraint is required where an appellate tribunal is asked to reverse a case management decision to grant or refuse an extension of time for the commencement of an appeal.

24. In *Mannion v Ginty* [2012] EWCA Civ 1667 at [18] Lewison LJ said that it was "vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges." It is equally vital, in the interests of all tribunal users, that this Tribunal uphold robust fair case management decisions by FTT judges.

The appeal

25. In his grounds of appeal and skeleton argument Mr Khan emphasised the appellants' case that the properties were not HMO's at all but were occupied by single households. He also stressed the financial burden on the appellants of the significant penalties imposed on them. The same points had been made to the FTT.

26. Both of those matters would have been highly relevant had the applicants brought their appeal in time, but when it comes to determining questions of case management, and in appeals from case management decisions, the proper focus is not on the underlying merits of the dispute. In *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, at [29] Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed) made that clear: "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues". He explained that it was hard to see why the strength of either party's case should, at least normally, affect the enforcement of case management directions and decisions, or to identify how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. He made an exception to that approach where a party's case was so strong it would entitle them to summary judgment without a trial, but that would only be where "the court could be quickly persuaded that the outcome was clear", otherwise it would refuse to consider the merits.

27. This is not a case in which the FTT could have formed any view on the merits of the proposed appeal. The question whether the property was an HMO depended on facts which were not provided. The authority had formed the view, on its inspection, that the individuals occupying the property were doing so as separate households. There was no material on which the FTT could have formed any view on that issue. It was therefore correct to give no weight to the suggestion that the appeal had a strong prospect of success.

28. Mr Khan emphasised that the delay in this case was short. The significance of a period of delay is, to some extent, relative to the period which is allowed for performance. A delay of 10 days in doing something which is required to be done in 28 days is capable of being regarded as significant. That is a matter of assessment for the FTT.

29. Mr Khan explained that the appellants had believed the local authority was content that the commencement of any appeal should be delayed. There are a number of points which can be made about that suggestion. It is not supported by any evidence from the appellants of their belief, or the reasons for it. There is no objective justification for it, the authority having done no more than acknowledge receipt of an email informing them, on the last day for an appeal, that the appellants intended to appeal the following week. In any event, it was not for the authority to grant or withhold additional time for bringing the appeal. That was a matter for the FTT. The appellants had the benefit of professional advice from their solicitors and would, or ought to, have been told as much. The FTT was plainly correct to reject the suggestion that the authority had consented to the delay.

30. The FTT was also entitled to place considerable weight on the fact that the appellants had been professionally represented, by a firm of solicitors, since before the service of the final notice imposing the penalty. No information was provided to the FTT to suggest that communication between the appellants and their advisers was not timely, or that there had been any reason why the solicitors were not able to provide proper advice or comply with their clients' instructions. In those circumstances there was no prospect of the FTT being able to have regard to some of the language and financial difficulties which Mr Khan referred to in his oral submissions.

31. No proper information was provided to the FTT which would have allowed it to form any conclusion on the reasons for the delay. No details were provided of any request for an informal review (and none seems to have been made). Unsubstantiated and general references to "a number of compulsions" and "pressing circumstances beyond their control" were wholly inadequate for the purpose of providing an explanation. The details of the circumstances were said to be in the solicitors' initial representations, but those had been prepared before the service of the final notices and could not explain a subsequent delay in filing an appeal against those notices.

32. Give the lack of any proper explanation for a delay of as long as 10 days, the FTT was entitled to refuse to exercise its discretion in the appellants favour. It is impossible to suggest that its decision was not one which was properly open to it. The appeal is therefore dismissed.

Martin Rodger QC,

Deputy Chamber President

24 October 2019