

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2021] UKUT 206 (LC)
UTLC Case Numbers: LC-2021-231**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – CIVIL PENALTY – case struck out by FTT for failure to pay the hearing fee –
criteria for relief from sanctions.*

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)
SECTION 11, TRIBUNALS COURTS AND ENFORCEMENT ACT 2007**

BETWEEN:

MRS GINETTE SILBER

Appellant

-and-

LONDON BOROUGH OF BARNET

Respondent

**Re: 979 Finchley Road,
London
NW11 7HA**

**Upper Tribunal Judge Elizabeth Cooke
Determination on Written Representations**

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The following cases are referred to in this decision:

Block A9 The Upper Drive Limited v Copse Mill Properties [2019] UKUT 337 (LC)
BPP Holdings v Commissioners for Her Majesty's Revenue and Customs [2017] UKSC 55
Denton v T H White Limited [2014] EWCA Civ 906
Haziri and Kela v London Borough of Havering [2019] UKUT 330 (LC)
Raza v Bradford Metropolitan District Council [2021] UKUT 39 (LC)

Introduction

1. This is Mrs Silber's appeal from the refusal of the First-tier Tribunal ("the FTT") to reinstate her appeal against a financial penalty notice following the striking out of her case for failure to pay a hearing fee. She appeals with permission from this Tribunal; the appeal is a review of the FTT's decision, conducted under the written representations procedure. Mrs Silber has been represented by Stokoe Partnership Solicitors. The London Borough of Barnet has chosen not to participate in the appeal.

The facts and procedural history

2. On 3 September 2020 the London Borough of Barnet imposed a financial penalty of £7,000 upon Mrs Silber for the offence of being in control of or managing a house in multiple occupation which was required to be licensed and was not licensed, under section 72(1) of the Housing Act 2004. On 29 September 2020 she appealed against that penalty to the FTT.
3. On 10 December 2020 the FTT gave directions and listed the hearing of the appeal on 26 March 2021. Its letter of 11 December 2020 to the appellant's solicitors enclosed the directions, and required the hearing fee of £200 to be paid within 14 days. No fee was received; on 30 December the FTT's case officer wrote again and said that the application would be deemed to be withdrawn if no fee was received within 14 days (of 30 December). No fee was paid and so on 19 January the FTT sent notice to Mrs Silber's solicitor that the appeal was deemed withdrawn.
4. On 20 January 2021 the appellant's solicitor, Mr Goldkorn, wrote to ask for an extension of time to 1 February 2021 to pay the fee, because he had been in Brazil from 19 December until 13 January and was now in quarantine until 21 January so that he could not get to the office to send a cheque. By letter on 22 January 2021 the FTT invited Mr Goldkorn to apply to reinstate the application. He did so on 26 January.
5. In the application to reinstate Mr Goldkorn submitted that the application should not have been struck out because the fee had been paid with the application (it appears that he did not appreciate that what was wanted was the hearing fee, in addition to the initial application fee), explaining again that he had been abroad and then in quarantine. The London Borough of Barnet made submissions in response, pointing out among other things that Mr Goldkorn has access to his emails in Brazil, and that he could have arranged for a colleague to deal with the matter in his absence. Mr Goldkorn in reply said that he had not had consistent access to the internet while he was abroad, and that his colleagues could not have dealt with the matter in his absence because they were criminal practitioners.
6. The FTT determined the appeal on the basis of the parties' written representations. The judge did not accept Mr Goldkorn's explanation as to why neither he nor a colleague could have dealt with the matter during his absence, and observed that no reason was given as to why he did not deal with the FTT's letter of 11 December before his departure. She then considered the prejudice to Mrs Silber should the appeal be refused and concluded from the grounds of appeal that Mrs Silber had a weak case. She said at paragraph 33 "Though the

case may be important to [Mrs Silber], its overall importance in the context of other cases of appeals against Financial Penalties is low.” The judge noted that if the appeal were reinstated no delay would be caused, but concluded that fairness demanded that the appeal should not be reinstated. The decision was made on 16 February 2021, over a month before the date fixed for the appeal hearing.

The grounds of appeal, the law, and the FTT’s discretion

7. In the grounds of appeal Mr Goldkorn argues for the merits of his client’s case. He accepts that he was at fault but argues that there was no serious breach of the FTT’s requirements and that a further opportunity to pay the fee should have been given. He asks for a determination of the appeal in the FTT on the basis of written representations so that in any event no fee is payable.
8. Mrs Silber’s application to the FTT was for relief from the sanction imposed upon her for failure to pay the hearing fee. In *Haziri and Kela v London Borough of Havering* [2019] UKUT 330 (LC) the Tribunal (the Deputy President) said this at paragraph 21:

“In *Denton v T H White Limited* [2014] 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;
- ii) consider why the default occurred;
- 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.”

9. The decision to refuse relief from sanctions is a discretionary one, and the Tribunal will not interfere with such a decision unless a serious error can be shown.
10. The obvious cause for concern with the FTT’s decision is that the *Denton* criteria were neither mentioned nor followed. It may be that the judge had them in mind; she may have taken the view that the failure to pay the fee was a serious default, and she was clearly unimpressed with Mr Goldkorn’s explanation. She did consider the need to deal justly with the application, but she was heavily influenced by her view of the merits of Mrs Silber’s case, which is not relevant to the decision about relief from sanctions. She failed to take into account that Mrs Silber herself was not at fault, that the result of the striking out of her case would be the loss of her right to appeal the financial penalty, and that it was still weeks

before the date at which her appeal was to have been heard so that the efficient conduct of litigation would not have been prejudiced by her reinstatement. And while the efficient use of the resources of the FTT was a relevant matter, it is difficult to understand the judge's comment that Mrs Silber's appeal was less important than other appeals from financial penalties and I fail to see how such an assessment could rationally or fairly be made.

11. In *Block A9 The Upper Drive Limited v Copse Mill Properties* [2019] UKUT 337 (LC) the FTT's failure to consider the approach set out in *Denton* led it to take an unduly harsh approach and to refuse relief from sanctions where relief should have been given. In my judgment the same has happened here. The FTT's failure to take into account the *Denton* criteria, and its consideration of irrelevant criteria namely the merits of the case and its supposed relative importance, led it to make a decision which fell outside the range of decisions available to it in the exercise of its discretion. Its decision is set aside.

The Tribunal's decision on relief from sanctions

12. The Tribunal substitutes its own decision for that of the FTT.
13. In *Denton* the Court of Appeal said that the failure to pay a court fee is a serious default even if it does not affect the efficiency of litigation (paragraph 26). Turning to the second step, it is clear that Mr Goldkorn, perhaps in haste before his holiday, failed to notice that what was wanted was a hearing fee in addition to the application fee he had already paid. In my judgment that explains his failure to reply to the demand for a fee before he went away. I accept that he was unable either to manage emails from Brazil or to delegate housing litigation to his criminal lawyer colleagues; and as he was (albeit mistakenly) unaware that anything had gone wrong it is entirely understandable that he did not make any other arrangements for the matter to be dealt with in his absence.
14. In the light of that I move on to the third step in the *Denton* criteria, namely to evaluate all the circumstances of the case in order 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. It is significant that the reinstatement of Mrs Silber's case would have had no effect, in February, upon the efficient conduct of litigation since the hearing was some weeks ahead. Compliance with the rules could have been ensured by a requirement for the payment of the fee at once. Most importantly, justice would have been served, because the striking out of Mrs Silber's case was a draconian and disproportionate response to a default that arose from a minor error, namely Mr Goldkorn's misunderstanding about which fee was referred to, and where Mrs Silber herself was not at fault.
15. Accordingly Mrs Silber's case is reinstated in the FTT.

Conclusion

16. The appeal succeeds, the FTT's decision is set aside and the Tribunal substitutes its own decision, which is that the appellant's case is reinstated in the FTT, where her appeal is to be decided by a different judge. If Mrs Silber wishes to proceed with her appeal she should contact the FTT and ask for directions.

17. I have not made reinstatement conditional upon Mrs Silber making immediate payment of the FTT's hearing fee because Mr Goldkorn says that his client would accept a determination upon written representations. It is for the FTT to decide whether such a procedure is appropriate; I note that the offence itself is admitted, and what is in issue is the level of the penalty, but even so the FTT will be alive to the dangers of determining cases on written representations where there are contested issues of fact, even when a party asks for that procedure (I refer to the Tribunal's decisions in *Raza v Bradford Metropolitan District Council* [2021] UKUT 39 (LC)). There are additional reasons for a hearing in this case; first, the grounds of appeal do give the impression that the request for a paper determination may have been driven by desperation to get the case reinstated in the face of the FTT's determination that it was unimportant and, second, there is inevitably a risk that Mrs Silber may feel that her case has been pre-judged in the decision of 16 February 2021.

Judge Elizabeth Cooke

13 August 2021