UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 247 (LC)

LC-2023-165

Royal Courts of Justice,
Strand, London WC2A

11 October 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – FTT PROCEDURE – adoption of Denton guidance on relief from sanctions – application for extension of time to comply with directions – application overlooked by tribunal – respondent debarred from participation at hearing – whether all relevant matters taken into account – appeal allowed

BETWEEN:

JALAY ENTERPRISES LIMITED

Appellant

-and-

HARRISON RAMSDALE (1)
MATTHEW JAMES CONGDON (2)
CONOR KEEGAN (3)

Respondents

Re: 160C Muswell Hill Road,
London N10

Martin Rodger KC, Deputy Chamber President

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 [2016] EWCA Civ 121, [2014] 1 WLR 3926

BPP Holdings v Commissioners for Her Majesty's Revenue and Customs [2017] 1 WLR 2945, [2017] UKSC 55

Denton v TH White Ltd [2014] 1 WLR 3926

Hammerson UK Properties PLC v Gowlett [2017] UKUT 469 (LC)

R (Jones) v Ft-T (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48

Silber v London Borough of Barnet [2021] UKUT 206 (LC)

Simpsons Malt Ltd v Jones [2017] UKUT 460 (LC)

Introduction

1. For a court or tribunal to debar a party from participating in the final hearing of a claim brought against them is a draconian step. Sometimes where, by their conduct, a party has prevented the tribunal from determining the claim in a way which is fair to both sides and to others whose cases are waiting to be heard, it may be necessary to impose such an extreme sanction. But in general, and especially where the claim involves allegations of criminal conduct and may result in a substantial financial penalty, the interests of justice require that both parties be given a full opportunity to participate in the proceedings.

2. In this case the First-tier Tribunal, Property Chamber (the FTT) debarred the appellant, Jallay Enterprises Ltd, from participating in the hearing of an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 made against it by the respondents, who were its tenants of a shared flat. The tenants argued that the flat was an HMO which was required to be licensed but was not, and that the appellant had been in control or management of the HMO contrary to section 72 (1) of the Housing Act 2004. After making the debarring order at the start of the hearing the FTT refused to permit a director of the respondent to give evidence in support of a defence of reasonable excuse and refused to permit its solicitor to make submissions on liability or on the amount of the award. It found that the elements of the offence were made out and ordered the appellant to repay rent and tribunal fees totalling £16,866 to the respondents.

3. The appellant was granted permission to appeal by this Tribunal. Its single ground of appeal is that the appellant was denied a fair hearing by a serious procedural irregularity, namely the FTT's debarring order. The appeal has been determined on written submissions prepared by the appellant's counsel, Andrew Brooke, who did not appear before the FTT, and by the respondent's solicitor, Clarke Barrett, of Represent Law, who did.

The facts

4. The appellant is a limited company whose business is property investment and management. It has owned and let a self-contained flat at 160C Muswell Hill Road since the 1970s. The flat has three bedrooms, and a shared kitchen, bathroom and living room.

5. On 29 August 2020 the flat was let by the appellant to the respondents, Mr Ramsdale, Mr Keegan and Mr Congdon, for twelve months at a monthly rent of £1,980. At the end of the year the tenancy continued but Mr Congdon moved out and was replaced by a new tenant who has not participated in the proceedings.

6. The FTT was satisfied that the three tenants were not a single household and that the flat was a house in multiple occupation within the meaning of section 254, Housing Act 2004.

7. On 12 February 2019 the local housing authority, the London Borough of Haringey, designated its whole borough as subject to an additional HMO licensing scheme under which all HMOs occupied by three or more people were required to be licensed. No licence had yet been issued to the appellant when it let the flat to the respondents in August 2020 and the licence it was eventually granted was backdated only to 10 May

2021. There is email correspondence between the appellant and Haringey in November 2020 about its efforts to make an online licence application (which the appellant says it did in May 2020).

The proceedings in the FTT

8. On 3 May 2022 the respondents applied to the FTT for repayment of the whole of the rent of £16,566 they had paid between the commencement of their tenancy on 29 August 2020 and the acceptance by Haringey of the appellant's licence application on 9 May 2021.

9. The FTT issued directions by email on 20 June 2022. These required the appellant to file and serve a statement of its reasons for resisting the application, the signed statement of any witness on whose evidence it wished to rely and copies of any other documents relevant to its case by 22 August. The respondents were to have the opportunity to reply to the appellant's case by 26 September.

10. The FTT's directions advised the appellant to obtain independent legal advice. It also included a warning that if the appellant failed to comply with the directions, it might be barred from taking any further part in all or part of the proceedings and the FTT might determine all issues against it. A similar warning was given to the respondents.

11. The appellant did not file any documents on 22 August as the FTT's directions had required. Its reasons were explained by one of its directors, Mr Ashok Patel, in a telephone call to a member of the FTT's staff on 9 September and in a letter sent later the same day. Shortly after noon that day the respondent's solicitors sent an email to the appellant pointing out that it had not filed the required documents with the FTT and enquiring if it was its intention to settle the claim. That email caused Mr Patel to telephone the FTT and, after speaking to a member of its staff, to send his own email shortly after 5pm.

12. In his email of 9 September Mr Patel explained that he had been waiting for directions from the FTT but had been unaware, until he received the respondents' solicitor's email earlier that day, that these had already been made. Once alerted, he had discovered the FTT's directions in the spam folder of the company's email account. He had not responded to the directions in time because he had been unaware of them, and he now requested an extension of time to enable the company to take legal advice (as the FTT's had encouraged it to do) and to prepare the required documents for the case. Later the same evening Mr Patel sent a copy of that letter to the respondents' solicitor.

13. On 2 October the FTT responded to Mr Patel's letter, asking for confirmation that his request for an extension of time had also been sent to the respondents before it could be considered. Mr Patel replied the next day, confirming that a copy had indeed been sent to the respondents' solicitors on the same day it had gone to the FTT. The FTT replied, confirming that Mr Patel's correspondence would be dealt with shortly. Separately, on 17 October, Mr Patel returned a listing questionnaire as the FTT had requested.

14. Nothing further was heard from the FTT about the appellant's application for an extension of time to file its documents.

15. On 15 December the FTT sent the parties notice that the final hearing would take place on 13 January 2023. Eight days later, on 23 December, Mr Patel sent three documents to the FTT (although they did not reach the panel which eventually heard the case) and to the respondents' solicitors, they being a statement of case dated 9 November, his own witness statement bearing the same date, and an electronic bundle of documents containing communications between the appellant and Haringey in November 2020 about the appellant's previous attempts to obtain a licence using the authority's online portal.

16. Mr Patel's witness statement appears to have been prepared with professional assistance. In it he maintained that the appellant had committed no offence because it had a reasonable excuse for not having a licence, which was a defence under section 72(5), 2004 Act. He claimed to have taken all reasonable steps he could in May 2020 and thereafter to lodge the appellant's application for an HMO licence with the authority but had been unable to do so successfully until 10 May 2021 despite seeking the assistance of the authority's staff and following their advice. The authority was said to have failed to process the application or the payment made by the appellant. These assertions were supported by copies of prolonged email exchanges with Haringey from November 2020 until May 2021.

17. On the same day he sent his witness statement Mr Patel telephoned the FTT and followed up with an email asking for an adjournment of the hearing so that he could look for legal representatives and explaining that documents which appeared to be going to the respondents were not being received by him. He did not say whether the missing documents included the notice of hearing, or whether he was referring simply to the original directions. That application was refused by a procedural judge on 10 January, although I have not been shown a copy of the refusal decision.

18. The appellant finally instructed solicitors for the hearing who filed a further witness statement and a skeleton argument on its behalf. These documents requested relief from sanctions (although no sanction had yet been imposed) so that the appellant could rely on the evidence filed in December 2022 and put forward its substantive defence. They did not request an adjournment of the hearing.

19. The appellant was represented by Mr Young of Londonium Solicitors at the hearing on 13 January. Mr Patel was also present as were the respondents, Mr Ramsdale and Mr Keegan, both of whom gave oral evidence. It appears from Mr Young's contemporaneous note (there is no transcript) that at the start of the hearing the Judge informed him that since the appellant had not filed any evidence it would be debarred from participating or relying on the skeleton argument he had filed on its behalf. Mr Young was nevertheless permitted to make an oral application for relief against that sanction and for permission to rely on Mr Patel's evidence. That application was refused and the appellant was debarred from participating in the hearing in any way, whether by giving evidence, by cross examining the respondents or by making submissions.

The FTT's decision

20. The FTT dealt with Mr Young's application in its decision issued on 16 January 2023, in which it said this (references to the Respondent are to the appellant in this appeal and *vice versa*):

> "[4] In the week before the hearing the Respondent's application to postpone the hearing had been considered and refused by a procedural judge. Mr Young sought to renew that application and to ask the Tribunal to allow the documents which he contended his client had served on the Applicants on 23 December 2021 to be admitted in evidence. He asserted that his client had a reasonable excuse defence which should be considered by the Tribunal. Mr Patel, a Director of the Respondent company was present at the hearing.
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> [5] The Applicants' application had been filed with the Tribunal on 03 May 2022 and Directions were issued on 20 June 2022 which set out a timetable for procedural matters to be undertaken by each party leading to a hearing the date of which would be arranged subsequently. Importantly, the date for hearing bundles to be filed was 22 August 2022 with which the Applicants complied but the Respondent did not.
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> 6. Mr Young said that the Respondent had written to the Tribunal (but not at that time also to the Applicants) on 7 September 2022 asking for an extension of time and said that his client had never received a reply to that request. He was unable to explain why his client had neither chased the Tribunal for a response nor filed a bundle in accordance with the Directions. It is noted that the request for an extension was made significantly after the date for filing had already passed.
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> 7. Ultimately, the Respondent served some documents on the Applicant's representative on 23 December 2022 which was after the Applicant's representative had closed for the Christmas holidays. As a result, the documents were not seen by the Applicants' representative until 04 January 2023 and had not been seen by the Tribunal at all because, contrary to the Respondent's assertion that they had been served, they had not been received by the Tribunal.
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> 8. The Respondent's representative wished the Tribunal to consider both a skeleton argument and a 'supplement' witness statement. The Tribunal declined to admit these documents as they had not been served on the Applicants in sufficient time to allow them to respond.
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> 9. The Tribunal maintains the position that the Respondent had failed to comply with the Tribunal's Directions, had failed to respond to the application in any meaningful way and was therefore effectively precluded from taking an active part in the hearing. The Tribunal heard the Respondent's representative's submissions described as being 'for relief of sanctions' but declined to postpone the hearing. No plausible reason for the Respondent's failure to comply with the Directions or tardiness was mooted and prejudice would be suffered by the Applicants if the case was further postponed."

21. The FTT then explained that it accepted the respondents' evidence and was satisfied that an offence had been committed and that it had jurisdiction to make a rent repayment order, which it did in the full amount requested by the respondents.

The ground of appeal

22. The appellant's ground of appeal is that the FTT erred in debarring it from taking part in the hearing and by refusing its application to rely on its evidence out of time.

The FTT's procedural rules

23. The FTT's power to bar a respondent from participating in proceedings is contained in rule 8 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Before considering that rule it is first relevant to refer to rule 3. Whenever the FTT exercises any power conferred by the 2013 Rules, or interprets those Rules, it is required by rule 3(3) to seek to give effect to its own overriding objective.

24. That overriding objective is stated in rule 3(1) as being to enable the FTT "to deal with cases fairly and justly". What it means to deal with a case fairly and justly is amplified by rule 3(2) and includes –

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with the proper consideration of the issues."

Rule 3(4) then requires that parties must help the FTT to further the overriding objective, and generally must cooperate with it.

25. Rule 6 of the FTT's Rules lays down the general principle that the FTT may regulate its own procedure. In view of the various aspects of dealing fairly and justly with cases identified in rule 3(2) it is to be expected that the FTT will use this power of self-regulation flexibly and without unnecessary formality, and with a view to ensuring so far as practicable that all parties are able to participate fully in the proceedings.

26. Rule 3(2)(b) itself recognises that enabling full participation by all parties is not an absolute requirement but is an objective to be achieved "so far as practicable". It will sometimes be necessary to settle for something less than full participation where a party has itself failed to cooperate in the achievement of the overriding objective. That possibility is dealt with by rules 8 and 9.

27. Rule 8(1) lays down an important principle. It states that "An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings". Rule 8(2) then gives the FTT a menu of possible responses to a failure to comply with the Rules, a practice direction or a procedural direction. The first is to waive the requirement – not every default requires a sanction. The second is to require the failure to be remedied. The third is to exercise the power under rule 9 to strike out the party's case, in whole or in part; if that sanction is imposed the party concerned is entitled to apply within 28 days for the proceedings, or the part struck out, to be reinstated (rule 9(5)-(6)). The fourth is a power to ask this Tribunal to compel compliance with the direction. And the fifth and final response is "barring or restricting a party's participation in the proceedings".

28. The consequence of barring a party from participation in the proceedings is dealt with by rule 9(8), which says this:

> "If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent."

The reference in this rule to a "bar that has not been lifted" recognises that the FTT has power to give directions in relation to the conduct or disposal of proceedings at any time, including the power to give a direction amending, suspending or setting aside an earlier direction (rule 6(2)). Although the Rules do not use the language of "sanctions" or "relief from sanctions", there is no doubt that the FTT has all the procedural tools it requires either to punish or to forgive transgressions, as it seeks to achieve its overriding objective.

The appropriate response to non-compliance with FTT directions

29. These are tribunal proceedings. Nevertheless, for reasons I will explain, it is appropriate to refer to the approach to non-compliance with directions which has been developed in the civil courts. The modern emphasis in the courts is on the importance of compliance with procedural rules (the Civil Procedure Rules, or "CPR"), and on the need, in the interests of the parties and in the wider public interest, for litigation to be conducted efficiently and at proportionate cost. With that in mind the courts have developed a stricter, systematic approach to the consequences of non-compliance by the imposition of appropriate sanctions, from which relief is made available only after consideration of the causes and consequences of the relevant default.

30. The basis of procedural enforcement in the civil courts is now CPR 3.9(1) which provides that on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, directions and orders. An application for additional time to comply with a direction made after the time for compliance has expired is treated as an application to which rule 3.9(1) applies, on the basis that, unless time is extended, the party will be

unable to take the relevant step and will be prevented, for example, from relying on evidence not filed in time.

31. In applying CPR 3.9(1) the civil courts have adopted a consistent and systematic approach. In *Denton v TH White Ltd* [2014] 1 WLR 3926 the Court of Appeal gave guidance recommending a three stage approach to applications for relief against sanctions.

32. At its first stage the *Denton* guidance requires an assessment of the seriousness or significance of the breach in respect of which relief from sanctions is sought. If, after considering its effect on the particular case and on litigation generally, a court concludes that a breach is not serious or significant, relief from sanctions will usually be granted. If, however, the court considers that the breach is serious or significant, the second and third *Denton* stages of the guidance become of greater significance.

33. The second stage is to consider why the failure or default occurred. The burden is on the defaulting party to persuade the court to grant relief and it must therefore explain what happened and why. If there is a good reason, such as illness or accident, relief against sanctions is likely to be granted, but merely overlooking a deadline, for whatever reason, is unlikely to be a good reason. That is not to say that, in the absence of a good reason for default, an application for relief will inevitably fail, as the Court of Appeal emphasised in explaining its third stage (paragraphs [12], [29-30] and [38]).

34. At the third stage the court must consider all the circumstances of the case, to enable it to deal justly with the application. Rule 3.9(1) itself expressly so requires, but it also emphasises the particular weight to be given to two important factors, namely, the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, directions and orders (paragraphs [32] and [35]). In looking at all the circumstances, the court may take into account the promptness of the application for relief against sanction and any other past or current breaches by the parties of the rules, practice directions and orders (paragraph [36]).

35. In *Denton*, at paragraph [37], the Court of Appeal warned against an unduly draconian approach to relief and emphasised that compliance was not to be regarded as an end in itself; rules and rule compliance were the handmaids not the mistresses of justice and could never be allowed to assume a greater importance than doing justice in any case.

36. So much for courts. What about non-compliance with procedural directions in tribunals?

37. The FTT's Rules contain no equivalent of CPR 3.9(1). Its overriding objective is expressed differently and, in particular, it lacks the courts' emphasis on enforcing compliance with rules and orders (CPR 3.9(f)). The closest it comes to the court's concept of "the efficient conduct of litigation" is where it identifies "dealing with the case in ways which are proportionate" as one aspect of dealing fairly and justly with proceedings. Nevertheless, a similar approach to compliance has become more widely adopted by tribunals following the decision of the Supreme Court in a tribunal appeal, *BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55.

38. At paragraph [24] of *BPP Holdings*, 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 strictly applicable only to courts, "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 Ft-T."

39. *BPP Holdings* concerned an application by a taxpayer to debar HMRC from further participation in a tax appeal following its failure to comply with an order which included a warning that non-compliance might result in the making of a debarring order. At paragraphs [14]-[15] the Supreme Court considered that the FTT had correctly proceeded on the basis that the application was for the imposition of a sanction, and not an application to be relieved from an automatic debarring order.

40. The FTT had treated the CPR cases, culminating in *Denton*, as providing useful guidance to it. The Supreme Court approved the FTT's approach and found that it had been entitled to determine the application by taking into account all relevant factors, while giving significant weight to ensuring the parties were on an equal footing and saving expense as part of the consideration of the overriding objective to deal with cases fairly and justly (*BPP Holdings* (paras. [20], [27]–[28]). 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."

41. Similar encouragement for the adoption of the *Denton* guidance by tribunals had been given by the then Senior President of Tribunals, Sir Ernest Ryder, sitting in the Court of Appeal in *BPP Holdings* ([2014] 1 WLR 3926) when he said this (at [37]):

> "… I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it."

42. The same approach has been adopted by this Tribunal in responding to procedural default in its own jurisdictions and in giving guidance to the Valuation Tribunal for England in rating appeals (*Simpsons Malt Ltd v Jones* [2017] UKUT 460 (LC)). In *Hammerson UK Properties PLC v Gowlett* [2017] UKUT 469 (LC) I said this, in reaction to *BPP Holdings*:

> "The civil courts approach the imposition of sanctions and the grant of relief from sanctions by adopting the three stage approach recommended by the Court of Appeal in *Denton*. Following *BPP* it is now to be expected that the Tribunal will do the same. The Tribunal may not follow the approach developed by the courts in every respect, and will respond to applications in

> specific circumstances as they arise. But the principle that the Tribunal's orders are to be complied with in like manner to any court's has been definitively established and requires that the Tribunal have regard to the manner in which the courts achieve that compliance in developing its own consistent approach."

43. When determining previous appeals from decisions of the FTT, the Tribunal has continued to encourage the adoption of the *Denton* guidance, as in *Block A9 The Upper Drive Limited v Copse Mill Properties* [2019] UKUT 337 (LC) is *Silber v London Borough of Barnet* [2021] UKUT 206 (LC). In the latter case the Tribunal (Judge Cooke) highlighted the risk that a failure to take into account the *Denton* criteria could lead a tribunal to make a decision which fell outside the range of decisions available to it in the exercise of its discretion.

44. Although *Denton* may rightly be seen as requiring a stricter approach to compliance with directions, its importance and usefulness is just as much in its provision of a framework for consistent decision making when the consequences of non-compliance are considered by a court or tribunal. The guidance provided by the Court of Appeal and which it, and the Supreme Court have indicated all tribunals should adopt, requires a systematic consideration of three stages: assessing the seriousness of the relevant failure to comply; considering why the default occurred; and evaluating all of the relevant circumstances to enable the tribunal to deal fairly and justly with the case. It is for each panel to decide for itself what fairness and justice requires in the case before it, but if all panels adopt the same framework for their decision making the risk of inconsistency, and therefore unfairness, will be reduced.

The scope of appeals against discretionary decisions of the FTT

45. It is not for this Tribunal to interfere with the FTT's management of its own cases. Instead, it is our function, through the determination of appeals, to give guidance on the implementation of the FTT's Rules and to ensure that they are applied fairly and consistently. An important function of this Tribunal is to ensure consistency of approach amongst FTT judges (*BPP Holdings*, paragraphs [26] and [34] and *R (Jones) v Ft-T (Social Entitlement Chamber)* [2013] UKSC 19 at paragraphs [41] – [46]).

46. As the Supreme Court explained in *BPP Holdings*, the grounds on which an appellate tribunal may interfere with a debarring order made by the FTT are limited. 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 one which the appellate judge considers cannot be justified. That is a high hurdle. An appellate tribunal should not interfere with a case management decision by a 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 (*BPP Holdings*, paragraph [33]).

47. This restrained approach to appeals against discretionary case management decisions does not mean that an appellate tribunal can never interfere where a debarring order has been made. Unlike case management decisions of a more routine nature, a debarring order can often have the effect of determining the substantive case. For that reason at paragraph [34] of *BPP Holdings* Lord Neuberger PSC warned that:

> "[T]here must be a limit to the permissible harshness (or indeed the permissible generosity) of a decision relating to the imposition or confirmation (or discharge) of a debarring order".

The appeal

48. It was submitted on behalf of the appellant that the FTT's refusal to permit it to participate in the proceedings was vitiated by a series of serious procedural irregularities and errors of fact and law. The following aspects of the decision were criticised.

49. First, it was said that the FTT conflated the application first made on 9 September to be allowed to rely on evidence despite non-compliance with the original directions, which was repeated at the hearing, with the entirely separate application to adjourn the hearing which had been made on 24 December and had already been dealt with and refused. Mr Young had not suggested that the hearing be adjourned and had asked simply for the opportunity to rely on the evidence which had already been filed. By treating the application as being for an adjournment, when it was not, the FTT decided the wrong question.

50. Secondly, the FTT made its decision without ever dealing with the application of 9 September. The failure to consider that application for an extension of time when it was made or at all was a serious procedural irregularity which prejudiced the appellant. If a decision had been made in September, or at any time before the hearing date was fixed, the factors relevant to its determination would have been significantly different. The FTT had not taken that into account, nor had it considered the explanation for default given on 9 September when reaching its decision to bar the appellant from participation.

51. Thirdly, the FTT had made a number of factual errors in paragraph [6] of the decision and had unfairly blamed the appellant for not 'chasing' it for a response to the 9 September application. Contrary to what the FTT had suggested, the application for additional time had been sent to the respondents on the same day it was made, and the appellant had not "failed to respond to the application in any meaningful way". It was also an exaggeration to describe the application as having been made "significantly after the date for filing had already passed". Mr Patel had reacted as soon as he became aware of the FTT's directions by making the application on 9 September (just over 2 weeks after the deadline for evidence had passed). He had then responded immediately to the FTT's enquiry on 2 October. He was informed that the application for an extension of time would be dealt with and quite reasonably assumed that that is what would happen. When he eventually became aware that the hearing date had been fixed he approached the FTT again on 23 December and filed the documents he wanted to rely on without the application of 9 September yet having been determined. The FTT had repeatedly asserted that these documents had not been sent to it, which had obviously influenced its decision (the same

suggested failure was later counted as a factor in favour of imposing the maximum possible repayment order). But the documents were sent by email as requested and the FTT had been wrong to say that they had not. A copy of the appellant's email to the FTT had been sent to the respondent's solicitors the next day. Whether the email had reached the panel hearing the case was a different matter, but the FTT was wrong to treat the appellant as not having tried actively to rectify the delay.

52. Fourthly, the FTT had referred to the offence under section 72(1) of the 2004 Act as a "strict liability offence" both during the hearing and twice in its decision. Insofar as this suggested that there was no possible defence, and hence, that there was no point in the appellant's participation in the hearing, that was an error of law. That assumption played a material role in the decision to refuse to permit the appellant to participate.

53. Fifthly, the FTT's decision to debar the appellant was out of all proportion to any prejudice caused by its failure to meet the deadline set in the original directions and was a decision that no reasonable tribunal could reach on the facts of this case. The evidence which the appellant wanted to rely on went to the issue of whether it had a reasonable excuse for not having had an HMO licence at the material time. That evidence was supported by copies of the relevant email chain with Haringey and the respondents' representative had had more than a week to read it after the Christmas and New Year break.

54. In response to these submissions the respondents argued that it was not open to the Tribunal to review the FTT's exercise of discretion of its discretion. The FTT had found that the appellant's evidence had been filed more than 4 months late and sufficiently close to the hearing date to deny the respondent's the opportunity to file a response before the hearing. That was a serious breach which justified the imposition of a sanction. The FTT had been entitled to debar the appellant from participation because of its failure to comply with case management directions.

55. The respondents specifically disputed the appellant's submission that the FTT had not considered the application made on 9 September when it debarred the appellant from participation. It had referred in paragraph 6 of the decision to a request for an extension of time on 7 September (although the true date was 9 September) and must be taken to have had that application in mind. The appellant had not explained why it had failed to file evidence for more than 3 months after that letter. The suggested excuse that Mr Patel was waiting for a response from the FTT to the application for an extension of time was not satisfactory.

Discussion

56. I found it difficult to follow the respondents' submission that the FTT had dealt with the application of 9 September when it made its decision to debar the appellant from participation in the hearing. It had certainly not dealt with the application in the four months before the hearing and from the way in which the application is referred to in paragraph 6 of the decision the panel appear not to have had it in front of them at that time. There is certainly nothing in the decision which refers to the explanation given by Mr Patel for the fact that the directions had not been complied with.

57. Consideration of the FTT's decision to debar the appellant from participating in the proceedings must, it seems to me, begin with its treatment of the application of 9 September and the explanation Mr Patel provided for the late compliance with the FTT's directions. Had the application been considered, and had it been successful, the whole proceedings are likely to have taken a different course. A different timetable would have been fixed and notified to the appellant in time for it to be complied with. Thereafter, if the appellant had complied, it would not have been debarred from defending the application.

58. If the FTT had considered the application of 9 September in good time it would first have had to decide whether it accepted Mr Patel's account of the diversion of the FTT's directions of 20 June into a spam e-mail folder. The explanation was not so unlikely that it could be dismissed out of hand, and Mr Patel had acted very promptly when he said he first became aware that directions had been given. If the FTT had asked itself the sequence of questions in *Denton*, it might or might not have decided that the delay of two weeks was serious, but unless it disbelieved Mr Patel, it would have been bound to conclude that the appellant had a good reason for not serving its statement of case in time (a party cannot be criticised for failing to comply with directions it is not aware of). The proceedings were not so advanced by that stage and the interests of justice would have pointed firmly in favour of a new timetable and allowing the appellant to submit its case and evidence. Indeed, it is difficult to see how any tribunal which took Mr Patel's explanation at face value could have reached a different decision if it had been considering the application in September.

59. If the FTT was not prepared to accept Mr Patel's explanation without further investigation it would have been necessary for it to assess his credibility. It is difficult to see how that could be done without an oral hearing at which he had the opportunity to give his account in person and the FTT could decide whether it believed him. That would be an unwieldy sledgehammer to crack a very small procedural nut.

60. But the FTT did not deal with the application for additional time in September, not had it been dealt with by the time a date was fixed for the final hearing. Should Mr Patel or someone else at the appellant have chased the FTT for a response to the application at an earlier date, as the FTT implied? Perhaps. But it had taken three weeks for receipt of the application to be confirmed by the FTT's administrative staff who had said that it would be referred to a judge, but not how long that would take. A reasonable person without much experience of legal proceedings might well have assumed the application was waiting its turn to be attended to ten weeks later and that the proper course was to wait for a new date to be set, rather than to file material after the date originally permitted. Even if some criticism might attach to the appellant, if the FTT had considered the application of 9 September at the hearing it would surely have had to acknowledge that an administrative slip in its own office might have been an important part of the context in which the appellant's evidence was filed so long after the time originally allowed for it.

61. The FTT appears not to have taken Mr Patel's explanation of the delay into account at all. On the contrary, it asserted in its decision that "no plausible reason" for the appellant's tardiness had been mooted and appeared to place special weight on matters over which the appellant had had no control assuming Mr Patel was telling the truth that it had not been aware of the directions until after the time for compliance had expired.

62. If the FTT had considered the application of 9 September, and Mr Patel's explanation, as part of the exercise of deciding how it should respond to the late provision of evidence it might have concluded that the delay was very serious indeed, and that even if there was a credible explanation for delay until September, no sufficient justification had been given for the failure to file evidence until as late as 23 December while waiting for the FTT to decide the application for an extension of time. On that basis it could have decided to exclude Mr Patel's evidence. But it is far from obvious that that would inevitably have been its decision. A properly directed panel would have taken into account that the allegation faced by the appellant was that it was guilty of criminal conduct. It would also have had regard to the fact that the most important part of Mr Patel's evidence concerned his own dealings with Haringey, that those dealings were recorded in writing in email exchanges which largely spoke for themselves, that the respondents were professionally represented, and that their solicitor had had ten days to consider the content of Mr Patel's witness statement. A panel which had reminded itself that the overriding objective of dealing with cases fairly and justly, including by ensuring, so far as practicable, that the parties were able to participate fully in the proceedings, might very well have concluded that Mr Patel's evidence, or perhaps that part of it which was corroborated by the correspondence with Haringey, ought to be admitted.

63. Even if a properly directed panel could have decided to exclude Mr Patel's evidence entirely, as it might have done, it would still have had to consider whether some lesser sanction short of barring the appellant from all participation in the proceedings was available. Rules 3(2)(c) and (3) place a responsibility on the FTT to ensure both parties' full participation in the proceedings "so far as practicable". Even if it was not prepared to allow Mr Patel to give evidence, what reason was there for barring the appellant's solicitor, Mr Young, from cross-examining the respondents on their own evidence and making submissions on the appellant's behalf?

64. But in this case the FTT did not direct itself properly. It was either unaware of the contents of the application of 9 September, or it chose to ignore them and gave no indication that they had been taken into account in reaching the discretionary decision to bar the appellant from participation. The application was relevant to the assessment of the appellant's culpability for the initial delay. The fact that the appellant was waiting for the application to be determined by the FTT provided an explanation why the delay had not been rectified sooner. It was necessary that these matters be taken into account and the FTT's omission to do so means that its decision to bar the appellant from participation cannot stand.

Disposal

65. For these reasons the rent repayment order is set aside and the case is remitted to the FTT for reconsideration by a differently constituted panel.

66. The Tribunal has power under section 12(3)(b), Tribunals, Courts and Enforcement Act 2007 to give procedural directions when it remits a case to the FTT for reconsideration. In this case I direct that the witness statement of Mr Ashok Patel dated 9 November 2022 and the statement of case of the same date both of which were filed with the FTT and copied to the respondents on 23 December 2022 be admitted as the appellant's evidence in the application. The considerations which could have justified a refusal by the FTT to admit

that evidence at the hearing on 13 January are now mostly irrelevant; there is no longer any risk of disrupting a hearing date and the respondents will now have plenty of time to consider how to respond. Any criticism which might justifiably be aimed at the appellant for not filing its evidence while waiting for the FTT to decide whether time should be extended is of relatively little weight when set against the importance of enabling both parties to participate fully in the proceedings.

67. The FTT will wish to consider whether any other procedural directions are required.

Martin Rodger KC,

Deputy Chamber President

11 October 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.