



Neutral Citation Number: [2024] UKUT 358 (LC)

Case No: LC-2024-417

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/00BG/HMF/2023/0149

Royal Courts of Justice, Strand
London WC2A 2LL

13 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – whether application for rent repayment order lodged without payment of tribunal fee had been made within time – s. 41(2), Housing and Planning Act 2016 – rules 3, 8, 11 and 26, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal dismissed

BETWEEN:

SEAN JEVAN

Appellant

-and-

IRIS ATHANSIADI (1)
SAM INGVERSEN (2)

Respondents

5/13 New Road,
London E1

Martin Rodger KC, Deputy Chamber President

Decision on written representations

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The following cases are referred to in this decision:

Aly v Aly [1984] 1 WLUK 936

Butters v Hayes [2021] EWCA Civ 252; [2021] 1 WLR 2886, CA

Page v Hewetts Solicitors [2012] EWCA Civ 805; [2012] CP Rep 40

Page v Hewetts Solicitors [2013] EWHC 2845 (Ch)

Salehabady v Eyre Estates [2017] UKUT 60 (LC); [2017] L & TR 22

Introduction

1. What must an applicant do to commence proceedings in the Property Chamber of the First-tier Tribunal?
2. The issue in this appeal is whether the effective commencement of tribunal proceedings by making an application in the First-tier Tribunal, Property Chamber (the FTT) requires that the appropriate fee must first be paid or tendered.
3. When the same question has been asked in respect of court proceedings the answer given, following the dictum of Eveleigh LJ in *Aly v Aly* [1984] 1 WLUK 936, has generally been that a litigant must do all that is within their power to set the wheels of justice in motion according to the procedure that is laid down for the pursuit of the relief they seek. In *Page v Hewetts Solicitors* [2012] EWCA Civ 805 the Court of Appeal held that time stopped running for the purpose of the Limitation Act 1980 when a claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. Failure to pay the appropriate fee in time (or to tender a cheque in the right amount) proved fatal in *Page v Hewetts Solicitors* [2013] EWHC 2845 (Ch), but a failure to pay the correct court fee in time does not invalidate proceedings which have already been issued by the court, and the Court of Appeal has left open whether it would have that effect where the proceedings had been filed in time but not issued (see *Butters v Hayes* [2021] EWCA Civ 252, at [23]-[24]).
4. The issue arises out of a decision of the FTT handed down on 11 June 2024 in a rent repayment order case. It is a requirement of section 41(2), Housing and Planning Act 2016 that a rent repayment order may only be made under Part 2, Chapter 4 of the Act if the housing offence in respect of which the order is made was “committed within 12 months ending with the date the application was made”.
5. Procedure in the FTT is governed by the Tribunal Procedure (First-tier Tribunal) (Property Chamber Rules 2013 (the FTT Rules). Rule 26 is titled “starting proceedings”. It begins as follows:
 - (1) An applicant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of application.The rule continues at 26(2) with a list of requirements about the contents of an application: it must be signed and dated and, unless a practice direction makes different provision, must include specified details of the applicant and each respondent, the address of the premises with which the application is concerned and so on. Rule 26(5) then stipulates that:
 - (5) The applicant must provide with the notice of application any fee payable to the tribunal.
6. Article 4(2) and Schedule 1 to the First-tier Tribunal (Property Chamber) Fees Order 2013 provide that a fee is payable on filing an application to commence proceedings in a residential property case and that it is due “at the same time as the application is made”.

7. In April 2020, at the start of the Covid-19 pandemic, when the FTT's offices were closed and staff were working remotely, the facility to make payment of tribunal fees on-line was introduced. Guidance to users about starting proceedings was issued by the FTT on 29 April 2020 and stated that where a fee was required it could be paid using on-line banking. The date that the application or appeal was lodged with the tribunal would be regarded as the date of receipt for the purpose of any statutory time limit, and the applicant would then have 14 days to pay the fee. They would do so using the appropriate bank account details and a unique payment reference which would be provided by the FTT.
8. The procedures described in the 2020 guidance have subsequently become absorbed into the FTT's standard ways of working and are explained in the text of the forms which it publishes for use in making applications for which a fee is payable. The relevant application form for rent repayment applications is Form RRO1. It explains that an applicant may pay the required fee by cheque or postal order or by an on-line banking payment. If the latter option is chosen the applicant is told they will be sent details for paying on-line. A checklist at the end of the form explains that if the applicant has opted for on-line payment a unique payment reference will be sent by the FTT office which must be used when paying the fee.

The proceedings

9. For a period of two years from September 2021 the respondents were tenants of a flat belonging to the appellant which should have been licensed under the local housing authority's selective licensing scheme but was not. On 5 June 2023 they filed an online application to the FTT for a rent repayment order. A fee was payable and their representative, Mr McGowan of the organisation Justice for Tenants, asked to pay it by an online bank transfer. On 22 June the FTT provided the necessary bank details to enable the payment to be made.
10. The FTT's letter of 22 June acknowledged receipt of the respondent's on-line application, provided details of the relevant bank account and reference and asked the respondents to confirm within 14 days that payment had been made. On 5 July it confirmed that the payment had been successfully received.
11. At the hearing of the application, subject to a defence of reasonable excuse which the FTT did not accept, the appellant acknowledged that he had committed the offence of managing an unlicensed house contrary to section 95, Housing Act 2004 between 1 October 2021 and 6 June 2022; on 7 June 2022 he applied for a licence and from that date the offence was no longer being committed. The FTT decided that the application had been made within the period prescribed by section 41(2) of the 2016 Act and ordered the appellant to repay rent of £3,150.82 to each of the respondents.
12. The FTT was referred to the decision of the Court of Appeal in *Page*, which was said to mean that an application was not made until the required fee was paid but decided that it did not apply to an application which was not governed by the Civil Procedure Rules. It noted that although rule 26 of the FTT Rules requires that any application to it be accompanied by the appropriate fee, the FTT's own application form allows for the fee to be paid online, and it is the FTT's practice that fees paid within 14 days of notification of the relevant bank details are accepted. The application was therefore

treated by the FTT as having been received on 5 June 2023, which was within 12 months of 6 June 2022, being the last date on which the offence had been committed.

13. When it refused an application for permission to appeal the FTT explained that when an application is submitted online it is not possible for the applicant to pay a fee in either of the ways it is equipped to accept it, namely by cheque or by bank transfer.

The appeal

14. With the permission of this Tribunal, the appellant now challenges the FTT's determination that the application was made within time. It is agreed by the parties that the rent repayment application was lodged on the very last day permitted by section 41(2) of the 2016 Act, but the application fee was not paid until two weeks later.
15. In submissions prepared on the appellant's behalf by Mr Philip Noble, he challenged the FTT's characterisation of *Page* as a case under the Civil Procedure Rules; it was, he submitted, a decision concerning the meaning of the words "the date on which the claim was brought" as they are used in the Limitation Act 1980.
16. Mr Noble argued that, as a matter of law, a claim is only brought or an application is only made when all the necessary steps have been taken, including the payment of the fee. The fact that facilities are provided for an application to be made on-line does not relax the requirement of section 41(2), and the FTT's procedures cannot do so either.
17. In submissions on behalf of the respondents, Mr McGowan suggested that the effect of the FTT guidance and the notes to Form RRO1 was to make the required fee payable 14 days after the applicant received the FTT's unique reference number to enable it to be paid on-line.
18. Mr McGowan referred to the FTT's general case management powers in rule 6 of the FTT Rules including rule 6(1) which gives it power, subject to statute, to regulate its own proceedings, and rule 6(3)(a) which enables it to extend time for complying with rules, practice directions or directions in an individual case. He also drew attention to rule 11(1), which provide as follows:

Fees: non-payment

11. (1) In any case where a fee is payable under an order made under section 42 of the 2007 Act (fees), the Tribunal must not proceed further with the case until the fee is paid.

(2) Where a fee remains unpaid for a period of 14 days after the date on which the fee is payable, the case, if not already started, must not be started.

(3) Where the case has started, it shall be deemed to be withdrawn 14 days after the date on which the Tribunal sends or delivers to the party liable to make payment a written notification that the fee has not been paid.

He suggested that rule 11(2) envisaged that a claim may have "started" before a necessary fee had been paid.

19. Mr McGowan submitted that guidance on when a claim is “made” should be sought in the FTT Rules and specifically rule 26(1). A party who wished to pay on-line could not do so until the FTT provided the necessary reference and in principle it should be enough for a party to do all in their power to commence a case within the relevant time limit without being at risk that the claim will be timed out by a delay in the FTT taking whatever administrative steps were required at its end. Support for this approach came from *Page*, although as that case concerned the Limitation Act 1980 the Court of Appeal’s decision was of limited assistance.

Discussion and conclusion

20. In *Page*, at [29], Lewison LJ identified the question to be answered when deciding whether a civil claim has been brought before the expiry of a relevant limitation period:

“When an action is "brought" for the purpose of the Limitation Act 1980 is, in my judgment, a question of construction of the Act. It is not a question of construction of the CPR, let alone a question of construction of a Practice Direction. The CPR (and perhaps the Practice Direction) may inform the construction, but the question remains: what does the Act mean?”

21. What does the Act mean? In this case the Act is the 2016 Act and the requirement to be interpreted is section 41(2): the offence must have been committed within 12 months ending with the date the application was *made*. The question is therefore about the date an application was made. Was it 5 June when the application notice was filed on-line, or 5 July when the fee was paid?
22. Although *Page* demonstrates that the relevant question is about what section 41(2) means when it refers to a claim being “made”, *Page* also shows that the answer to that question may be found in the relevant procedural rules. The FTT Rules cannot change the meaning of the statute, or extend a statutory time limit, but if the meaning of the statute is that, in order to make an application or bring a claim, a litigant must do everything required by the applicable rules, then those rules will be very relevant in identifying the necessary steps.
23. The CPR are not applicable to tribunal proceedings and no assistance on what is required to make a claim in the FTT will be found in the examining them. Although I was referred to a number of CPR authorities on the filing of documents and the issuing of proceedings at court, I do not think it is necessary to analyse them.
24. The only case of which I am aware which considers what is involved in making a claim in the FTT is *Salehabady v Eyre Estates* [2017] UKUT 60 (LC) in which this Tribunal (Judge Behrens QC) had to consider the requirement in section 48(2) of the Leasehold Reform Housing and Urban Development Act 1993 that an application to determine the disputed terms of acquisition on a collective enfranchisement must be “made not later than the end of the period of six months beginning with” the date on which a counter-notice was given. The application was said to have been posted within the period of six months but had been delayed and had not arrived by the time the six month period expired. The Tribunal ruled that the application was valid, at paragraph [20]:

“I agree that the word “made” in s 48(2) looks to a unilateral act by the applicant. In my view the applicant makes the application by starting the proceedings. I also agree that rule 26(1) provides two methods for starting proceedings – by sending or delivering a notice of application to the FTT. It follows in my view that either of those acts is effective to start the proceedings.”

25. The decision in *Salehabady* has been questioned (see *Hague: Leasehold Enfranchisement*, (2021), 7th edition, para. 26-13) and the outcome is not of direct relevance to this appeal, but it illustrates the relevance of the Rules to the ascertainment of the requirements of a particular statute. It also provides support for the adoption of the same approach as was taken by Eveleigh LJ in *Aly v Aly* i.e. that starting proceedings is a unilateral act by the applicant which does not depend on steps taken by someone else (whether the postal service or tribunal staff).
26. If section 41(2) means that within 12 months of the commission of the relevant housing offence a claim must be brought in the manner required by the FTT Rules, what do the Rules require? The answer to that question is to be found in rule 26, read together with the FTT’s overriding objective described in rule 3.
27. Starting with rule 3, the FTT’s overriding objective of dealing with cases fairly and justly is stated in sub-paragraph (1) and then illustrated in sub-paragraph (2) with a non-exhaustive list of what it means to deal with a case fairly and justly. The list includes avoiding unnecessary formality and seeking flexibility in the proceedings (rule 3(2)(b)). The FTT is required to give effect to its overriding objective when it interprets its own rules (rule 3(3)(b)).
28. Rule 26 begins with a bald statement that an applicant must start proceedings before the FTT by sending or delivering a notice of application. The commencement of proceedings does not depend on the tribunal itself processing or issuing the claim. The basic rule that what is required is a notice of application is followed by additional requirements, most of which are in rule 26(2) which deals with the content of an application and the information which it should contain. Rules 26(4) and (5) then identify things which must accompany the application. Thus, if the application is an appeal it must be accompanied by a copy of the decision appealed against (rule 26(4)); any fee payable must be provided with the notice of application (rule 26(5)).
29. Each of these requirements must be considered in the light of rule 8(1) of the FTT Rules, which provides 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 explains that if a party has failed to comply with such a requirement the FTT may take such action as it considers just, which may include waiving the requirement, or requiring the failure to be remedied.
30. There is no issue in this appeal about the sufficiency of the information supplied with the application under section 41(2), so it is not necessary to consider whether there is a minimum compliance threshold below which a document could not sensibly be described as a notice of application. The only default in this case was in the failure to pay the fee within time.

31. As a matter of interpretation of rule 26(1), proceedings are started by sending or delivering a notice of application. The notice of application is a document, not a payment, and the fee itself is not part of that document. There is a separate requirement, imposed by rule 26(5), that the fee must be provided with the notice of application. In terms of the structure and meaning of the rule that requirement further confirms that the application and the fee are different things: the fee is something to be provided with the application, it is not part of the application. There is therefore no reason to elide what the maker of the Rules has kept separate or to interpret the rule as if it said that an applicant must start proceedings before the FTT by sending or delivering a notice of application and providing any fee payable.
32. On that interpretation of rule 26, proceedings are started by sending or delivering a notice of application, whether or not the requisite fee is paid at the same time.
33. That interpretation is in accordance with the FTT's overriding objective. To read the rules as if the making of an effective application was conditional on payment of the fee would be to adopt an unnecessarily formal and inflexible approach, contrary to the encouragement given by rule 3(2)(b). By creating a procedural trap it would impede the FTT's task of dealing with cases fairly and justly (notwithstanding the important contribution which time limits generally make to the administration of justice).
34. That interpretation is also consistent with rule 8 which treats non-compliance with the FTT's Rules and practice directions as an "irregularity" rather than a fatal flaw going to the validity of the step taken. Rule 8(1) is expressed in very wide terms (wider than the comparable civil procedure rule, CPR 3.10) and expressly preserves the effectiveness not only of individual steps taken in the proceedings but of the proceedings as a whole (unlike CPR 3.10, at least in its express terms). Rule 8(1) is wide enough to enable a notice of application which does not comply with the requirements of rule 26 nevertheless to be an effective means of commencing proceedings. The power given to the FTT to waive compliance with a particular requirement, or to require that it be complied with later than the rule itself may stipulate, is also consistent with an approach which does not treat compliance as essential to effectiveness.
35. This view of the effect of rule 26 is in accordance with rule 11 which explains the consequences of a failure to pay a fee. Under rule 11(1) it is the FTT which "must not proceed further with the case until the fee is paid". If, as rule 26(1) indicates, proceedings are commenced by the unilateral act of the applicant in sending or delivering the notice of application, the bar in rule 11(1) on the FTT proceeding further until payment is received does not cast doubt on the validity of the proceedings which have already commenced. The direction in rule 11(2) that where a fee remains unpaid for 14 days after becoming payable, "the case, if not already started, must not be started" again refers to the taking of steps by the FTT or its staff. I also agree with Mr McGowan that rule 11(2) contemplates that a case may already have been started ("if not already started") notwithstanding non-payment of the necessary fee.
36. These points tend to confirm that rule 26 means that proceedings are started by sending or delivering a notice of application, whether or not the requisite fee is paid at the same time.
37. I have reached this conclusion without reference to the FTT's guidance or the notes in its standard forms. The status of the original guidance of April 2020 is unclear. Consistently

with the needs of the moment, it explained how the FTT intended to proceed without dwelling on the authority which it considered entitled it to do so. The guidance was not described as a practice direction and appears mostly to reflect the tribunal's administrative rather than judicial practice. Such a document cannot change the meaning of the FTT's Rules nor alter a statutory time limit. Nor can guidance on printed forms.

38. But, as one would expect, there is no inconsistency between the guidance and forms and the FTT Rules. As I have explained, and putting *Salehabady* to one side, the date on which a notice of application is lodged with the FTT is the relevant date for the purpose of limitation. It might be inferred from the statement in the guidance that the date of lodging "would be regarded as" the date of receipt for the purpose of any statutory time limit that the efficacy of making an application without at the same time paying the fee depended on some dispensation from compliance with a stricter requirement, but that would be to read too much into a document intended to convey important information and to reassure. In any event, I do not read the rule in that way.
39. The practice of allowing 14 days grace for payment is also based on the rules, and specifically rule 11(2) and (3). The deemed withdrawal effected by rule 11(3) depends on the FTT first having provided a written notification that the fee has not been paid, but that is consistent with a practice of sending the details necessary to enable the fee to be paid on-line and requiring that the payment must be made within 14 days. The FTT's standard letter requiring payment which was sent to the respondents on 22 June 2023 implicitly notified them that payment had not yet been made. If payment was not then made within the stipulated 14 days, the application would have been deemed to have been withdrawn without any further judicial determination. The guidance and forms are therefore quite consistent with the Rules themselves and involve no relaxation of them.
40. The appeal is accordingly dismissed.

Martin Rodger KC,
Deputy Chamber President
13 November 2024

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.