



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/43UF/HNA/2022/0066

Property : 99 Hatch Gardens, Tadworth, Surrey
KT20 5LD

Applicant : Resonance Ltd

Representative : Laura Phillips of Counsel
Knights plc instructing solicitors

Respondent : Reigate & Banstead Borough Council

Representative : Poonam Pattni of Counsel

Type of Application : Appeal against a financial penalty -
Section 249A & Schedule 13A to the
Housing Act 2004

Legal Officer : Judge Tildesley OBE

Date of Hearing : 24 August 2022 Havant Justice Centre
Parties attended by Common Video
Platform

Date of Decision : Oral decision on 24 August 2022
Reasons on 27 August 2022

DECISION

Summary of Decision

1. The Tribunal refuses the Application to reinstate the Appeal, and grants the Application to strike out the Appeal on the ground the Applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly. pursuant to rule 9(3)(b) of the Tribunal Procedure Rules 2013.

The Application

2. This case concerned an Appeal from the Applicant against a financial penalty of £18,000 with costs of £935.33 made under section 249A of the Housing Act 2004 for failure to comply with an improvement notice.
3. The Applications before the Tribunal concerned the Applicant's failure to comply with the Tribunal directions issued on 10 June 2022 and 2 August 2022.
4. On 28 June 2022 the Respondent submitted an Application to strike out the Appeal because the Applicant had failed to provide a statement of case by 17 June 2022. This Application was put on hold because on 29 June 2022 the Tribunal informed the Applicant that the case had been marked withdrawn because of the Applicant's failure to pay the hearing fee. On 12 August 2022 the Applicant had applied to reinstate the Appeal.
5. On 26 August 2022 the Tribunal heard from Miss Laura Phillips of Counsel for the Applicant and Miss Poonam Pattni of Counsel for the Respondent. Ms Nourhan Jarada, Portfolio Manager, gave evidence for the Applicant.
6. The Tribunal had before it the Applicant's Application to reinstate the Appeal, and the Respondent's Application to strike out the Appeal on the grounds that the Applicant had breached Tribunal directions on three separate occasions.
7. The Tribunal gave its oral decision at the end of the hearing.

Chronology

8. On 13 September 2021 the Respondent issued the Applicant with an improvement notice requiring works to be completed by 16 November 2021.
9. On 10 January 2022 the Respondent served a Notice of Intention to Issue a Financial Penalty against the Applicant for failure to comply with an improvement notice. Mr John Williams, Managing Director of

Property Funds for the Applicant, made representations regarding the Notice. Mr Williams raised no issues in the representations about the service of the improvement notice and whether the Applicant had a reasonable excuse for not complying with it. Mr Williams instead focussed on the completion of the necessary works. Mr Williams stated that

“I will personally oversee and commit to these actions, I have also informed the other members of the Leadership and Executive Directors of Resonance (“the Applicant”) of this matter and have committed to updating them of the progress of the actions at our weekly and monthly meetings”.

10. On 15 March 2022 the Respondent served a Final Notice to Issue a Financial Penalty on the Applicant confirming the financial penalty of £18,000.00 in relation to the Offence. The Final Notice informed the Applicant of its right of appeal to the Tribunal which should be made within 21 days (5 April 2022).

11. On 4 April 2022 the Applicant appealed against the financial penalty. Mr Andrew Copson, Head of Property Development, signed the Application and copies of it were given to Mr John Williams and Mr Paul Handford. Mr Copson’s email address was given as the point of contact. Mr Copson cited four grounds of appeal. The fourth ground stated that

“We believe the magnitude of this fine to be disproportionate. Although we accept a fine to be appropriate we would ask that the amount to be reviewed given we are a social enterprise, delivering positive social impact to the community and helping the UK homelessness crisis”.

12. On 9 April 2022 the Tribunal acknowledged receipt and requested payment of the Application fee within 14 days in accordance with rule 11 of the Tribunal Procedure Rules 2013. The acknowledgement also stated that

“Please note that there will be a delay in the next process of your application, potentially up to 7-10 weeks before a Case Officer is allocated. Once a Case Officer is allocated, your application will be referred to a Procedural Judge for Directions”.

13. On 10 June 2022 the Tribunal issued directions which were sent by email to Mr Copson for the Applicant and to Ms Longley for the Respondent. The covering letter stated that

“I enclose a copy of the Tribunal’s directions dated today together with the Statement of Tribunal Rules and Procedures and Bundle Guidance. Please read these documents very carefully”.

14. The enclosed directions stated as a Headnote that

“This is a formal order of the Tribunal which must be complied with by the parties.

The parties must comply with the Statement on Tribunal Rules and Procedure issued August 2020 and the Guidance on PDF bundles dated August 2020, which are enclosed with these directions (if not already provided).

This case has been allocated as fast track which means the hearing will be listed as soon as possible and documents submitted by the parties must be limited, essential and relevant to the case”.

15. The Statement of Tribunal Rules and Procedures enclosed with the directions for 10 June 2022 stated at paragraph 4:

- 4.1. Directions are formal Orders made to assist the parties and the Tribunal in dealing with the application swiftly and economically.

- 4.2. They must be complied with. Failure to comply may result in the Tribunal refusing to hear the defaulting party’s case and ordering that party to pay costs.

16. The Directions dated 10 June 2022 stated amongst others as follows:

The hearing shall take place at Havant Justice Centre, Elmleigh Road, Havant, PO9 2AL on Tuesday 26 July 2022 at 10.00am. The parties can apply to join the hearing by video. Such a request must be made no later than 7 days prior to the hearing.

The Applicant must supply the Tribunal with a hearing fee of £200.00 by no later than four weeks prior to the hearing date. If a hearing fee is not paid the application is deemed withdrawn.

By **17 June 2022** the Applicant must send to the Tribunal and the Respondent its statement of case, any witness statements and documents upon which it seeks to rely. If the Applicant contends its financial means are relevant it shall supply as part of its case full details of the same.

17. On 23 June 2022 the Tribunal wrote to the Applicant requesting the hearing fee and stating that *“If payment is not received by 28 June 2022 your application will be treated as having been withdrawn. This is in accordance with the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.* No hearing fee was received.
18. On 28 June 2022 the Respondent made a case management application to have the Appeal struck out, as the Applicant had failed to comply with the direction that it had not submitted its statement of case. The Respondent copied this to Mr Copson.

19. On 29 June 2022 the Tribunal wrote to the Applicant informing it that the case had been withdrawn as the hearing fee had not been received. The letter ended

“Within 28 days after receipt of this letter, a party may apply to the Tribunal in writing for this case or part of it to be reinstated. It will then be a matter for the Tribunal to decide whether your request should be granted”.
20. On 4 July 2022 the Applicant emailed the Tribunal stating that emails had been missed and requesting *“how we can take this forward.”*
21. On 5 July 2022 the Tribunal responded sending the correspondence dated 29 June 2022 and informing the Applicant that it would need to make a formal application for reinstatement.
22. On 12 July 2022 the Respondent made enquiries as to the position regarding its Application for strike out and the Tribunal informed it that the case had been withdrawn.
23. On 29 July 2022 the Tribunal received a letter from Knights Solicitors requesting reinstatement of the Appeal on the ground of a procedural error.
24. The Tribunal decided that a case management hearing was required to consider both the Application for reinstatement from the Applicant and the Application to strike out the appeal which was made by the Respondent and was placed on hold following the withdrawal of the Appeal.
25. On 2 August 2022 the Tribunal directed the Applicant by 9 August 2022 to make a formal application for reinstatement of the Appeal in accordance with paragraph 4 of the Statement of Tribunal Rules and Procedures. The Tribunal also ordered a case management hearing on 24 August 2022 at which both parties were required to attend.
26. The Applicant submitted its Application for reinstatement on 12 August 2022.
27. On 18 August 2022 the Applicant supplied its statement of case together with a witness statement of Ms Nourhan Jarada.

Parties’ Representations

28. Miss Phillips explained that the Applicant was a social impact property fund manager which acquired and let properties to social housing providers. At the time of the issue of the improvement notice the Applicant owned the subject property but it had let the property to St Mungo’s Community Housing Association which was also responsible for managing the property until 23 December 2021. Miss Phillips asserted on behalf of the Applicant that it had not been aware of the improvement notice and had found no record of the Notice being sent

to it. Further the Applicant had a reasonable excuse for the offence. Miss Phillips reminded the Tribunal that the imposition of a financial penalty was for all intents and purposes a criminal conviction, and that this was a compelling reason for re-instatement of the Appeal.

29. Miss Phillips contended that the Tribunal had not complied with the correct procedure for withdrawing the application following non-payment of the hearing fee. Miss Phillips referred to rule 11 of the Tribunal Procedure Rules 2013 which required 14 days notification before an application could be withdrawn. Miss Phillips pointed out in this case only five days had been given before the case was withdrawn.
30. Miss Phillips relied on the evidence of Ms Jarada in connection with the Applicant's failure to respond to the Tribunal's communications and to provide a statement of case. Ms Jarada explained that the person dealing with the property had left the company. Ms Jarada also stated that during the time after the directions had been issued she had been on holiday and had then contracted COVID.
31. Miss Phillips submitted that the Applicant had now supplied its statement of case, and that the failure to comply with the directions of 2 August 2022 was a mere technical failure. Miss Phillips pointed out that the directors of the company, Mr Williams and Mr Copson, were not lawyers and would not have understood the significance of the directions. Miss Phillips invited the Tribunal to reinstate the Appeal.
32. Miss Pattni for the Respondent referred the Tribunal to the decision of Judge Cooke in the Upper Tribunal case of *Silber v London Borough of Barnet* [2021] UKUT 206 (LC) which required the First-tier Tribunal to consider the "Denton" principles when considering relief from sanctions.
33. Miss Pattni stated that there were three failures on the part of the Applicant to comply with directions in this case (1) failure to pay hearing fee; (2) failure to provide a statement of case; and (3) failure to make application to reinstate on time. Miss Pattni pointed out that this case was characterised by the Applicant's lack of meaningful engagement with the investigation (no response to an interview under caution) and with the Appeal process.
34. Miss Pattni asserted that the directions were clear and unequivocal, not complicated and not taxing. Miss Pattni argued it was incomprehensible that the two directors, Mr Copson and Mr Williams, who managed a portfolio of 800 properties and a turnover of £2M would have had difficulty in understanding the significance of the directions. Miss Pattni considered that Ms Jarada was not the person who should be explaining the Applicant's failures.
35. Miss Pattni pointed out that the Applicant had waited until 29 July 2022 to respond to the Tribunal's communication of 5 July 2022 advising the Applicant to apply for reinstatement. Miss Pattni rejected the notion that the Applicant was confused by the Tribunal Procedure

Rules regarding the time limits for the payment of the hearing fee. Miss Pattni argued that the directions were clear regarding the time by which the hearing fee should be paid and the Applicant was not aware of the Tribunal Procedure Rules when it received the directions.

36. Miss Pattni submitted that the Applicant had committed serious breaches of the directions which had caused severe prejudice because the trial date had been missed. Miss Pattni invited the Tribunal to strike out the Application.

Reasons

37. The Tribunal had before it the Applicant's Application for re-instatement following withdrawal of the case on the Applicant's failure to pay the hearing fee, and the Respondent's Application to strike out the Appeal on three separate breaches of directions.

38. The Tribunal's powers to deal with these applications stem from the Tribunal Procedure Rules 2013. Rule 22(8) allows parties to apply for re-instatement within 28 days from the date of receipt of the notice withdrawing the proceedings. Rule 8 deals with the Tribunal's powers when a party fails to comply with directions. Rule 9 sets out the Tribunal's power to strike out applications. Rule 3 specifies that the Tribunal must give effect to the overriding objective of dealing with cases fairly and justly when it exercises any power under the Rules.

39. The Upper Tribunal has stated in the cases of *Haziri and Kela v London Borough of Havering* [2019] UKUT 330 (LC) and in *Silber* cited above that the Ft Tribunal should apply the "Denton" principles when considering application for relief from sanctions. At paragraph 21 the Deputy President in *Haziri and Kela* said this:

"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".

40. The Tribunal starts with its assessment of the seriousness of the Applicant's failure to comply with directions. The Tribunal finds there have been three separate breaches of the Tribunal directions. The Applicant suggested that they were not serious pointing to the facts that (1) it had only seven days to comply with the direction to produce its statement of case: (2) the Tribunal's direction for the payment of the

hearing fee did not comply with rule 11, and (3) the late application for reinstatement was a technical breach without substance.

41. The Tribunal disagrees with the Applicant's assessment of seriousness. The Tribunal considers a breach of any direction serious. However, in this case the Applicant failed persistently to comply with directions. In short the Applicant demonstrated a course of conduct of ignoring the directions of the Tribunal.
42. The Applicant makes play of the Tribunal's alleged non-adherence to rule 11 regarding the notice to pay the hearing fee. The Applicant stated that the Tribunal failed to give 14 days notice in which to pay the hearing fee from the date when it should have been paid.
43. The Tribunal explained in the hearing that it does not adopt rule 11 on the payment of a hearing fee when the date of hearing is fixed in the directions. Instead the Tribunal makes it a direction that a hearing fee should be paid by a date which in this case was four weeks before the hearing. On 23 June 2022 the Tribunal sent a reminder to the Applicant to pay the hearing fee by the 28 June 2022.
44. The Tribunal is entitled to deal with the payment of hearing fee by means of a direction under rule 6(1) which allows the Tribunal to regulate its own procedure rather than under rule 11. The Tribunal considers that the imposition of a direction is consistent with the overriding objective because it sets out the Tribunal's expectation clearly in the same document as the other directions, and avoids administrative mishaps of failing to send a letter requesting payment which has happened in the past. The Tribunal does not consider there is any prejudice to the parties by adopting the use of directions for the payment of the hearing fee. The Tribunal is satisfied that the Applicant was not misled by this practice because it was not aware of the contents of rule 11 at the time the direction was made. The reality is that the Applicant failed to comply with an explicit direction to pay the hearing fee four weeks before the date of the hearing.
45. Miss Phillips intimated that the Applicant did not have time to comply with the direction regarding the production of the statement of case. The Tribunal points out that the Applicant had been aware of the financial penalty since 10 January 2022. Mr Williams and Mr Copson had set out the Applicant's case in the response to the Notice of Intended Financial Penalty and in its Appeal. On 9 April 2022 the Tribunal had informed the Applicant that there would be a delay of seven to ten weeks before the directions would be issued. In the Tribunal's view the Applicant had more than adequate time to prepare the case.
46. Finally Miss Phillips suggested that the final breach was a technical one because the Applicant had set out its grounds for reinstatement in the solicitors' letter of 29 July 2022. The Tribunal, however, considers that

this breach should not be taken in isolations but as part of a course of conduct of failure to comply with the directions.

47. The Tribunal, therefore, finds that the Applicant's failures to comply with directions were serious.
48. The Tribunal moves to the second question about why the defaults occurred. The Tribunal was surprised that Mr Copson and or Mr Williams did not provide a witness statement. Mr Williams had indicated to the Respondent in his response to the Notice of Intended Financial Penalty that "*he would personally oversee and commit to these actions*". Mr Copson was the direct recipient of the Tribunal's directions and communications. In the Tribunal's view it should have heard from Mr Copson and or Mr Williams not Ms Jarada as to the reasons for the Applicant's failures.
49. Miss Phillips submitted that Mr Copson and Mr Williams were not lawyers and would not have understood the Tribunal's directions. The Tribunal agrees with Miss Pattni's description of the directions as "clear and unequivocal, not complicated and not taxing". The Tribunal is satisfied that it did not require a lawyer to respond to those directions. The Tribunal observes that Mr Williams had prepared the response to the Notice of Intended Financial Penalty and that Mr Copson had completed the Appeal form which suggested to the Tribunal that they were capable of dealing with the Tribunal directions.
50. The Tribunal notes that the failure to comply with the direction of 2 August 2022 regarding the submission of an Application for reinstatement would appear to be the default of the Applicant's solicitors.
51. The Tribunal concludes that the Applicant had no justification for its failure to comply with the directions. The Tribunal is satisfied that the Applicant did not treat them with the urgency and the importance the directions merited. This was demonstrated by the fact that it took the Applicant until 29 July 2022 to apply for reinstatement which was more than 28 days and therefore out of time from the notice of withdrawal sent on 29 June 2022, and 24 days from the Tribunal's letter of 5 July 2022 advising that it could apply for reinstatement.
52. The Tribunal turns to the third leg of the "Denton" criteria of evaluating all the circumstances of the case to enable the court to deal justly with the application.
53. Miss Phillips emphasised that the proceedings were tantamount to criminal proceedings involving a finding that the Applicant had committed a criminal offence. According to Miss Phillips, this consideration should outweigh any perceived failings on the Applicant's part with compliance with Tribunal directions. Moreover, the Applicant had a defence to the Offence. The Applicant had not received the improvement notice, and it had a reasonable excuse for the offence.

54. The Tribunal was not persuaded by Miss Phillips submissions. The Tribunal was not convinced about the Applicant's assertion that it had not received the improvement notice. The Tribunal observes that this was not mentioned in Mr William's representations and the grounds of appeal prepared by Mr Copson. Also it transpired that the Applicant had not made enquiries of the Respondent regarding service of the improvement notice. Miss Pattni at the request of the Tribunal gave details of the service of the improvement notice on the Applicant. The Tribunal considered the issue of the non-service of the improvement notice a "red herring".
55. The Tribunal noted that in the grounds of appeal the Applicant had not raised the question of reasonable excuse only whether the magnitude of the fine was disproportionate. In effect the Applicant had admitted the Offence. The Tribunal pointed out that the Applicant would have to apply for the grounds of Appeal to be amended to include "reasonable excuse" if it the Application was re-instated.
56. The Tribunal acknowledged that the financial penalty would cause reputational damage to the Applicant, and that the tenant, the victim in this case, had now been rehoused.
57. The Tribunal, on the other hand, is obliged to consider the need for litigation to be conducted efficiently and the need to enforce compliance with rules, practice directions and orders. In this regard severe prejudice has been caused by the loss of the trial date of 26 July 2022. Further the Applicant has blatantly and persistently failed to comply with Tribunal directions. Finally the Applicant had two prior opportunities to put forward a defence to the offence (representations to the Respondent and the Application) but had failed to do so.
58. The Tribunal considered on balance that the requirements of efficient litigation and the need to enforce compliance outweigh the Applicant's loss of its right to appeal the financial penalty.

Decision

59. The Tribunal refuses the Application to reinstate the Appeal, and grants the Application to strike out the Appeal on the ground the Applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly pursuant to rule 9(3)(b) of the Tribunal Procedure Rules 2013.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix: Extracts from the Tribunal Procedure Rules 2013

3.— Overriding objective and parties' obligation to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly 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;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

6— Case management powers

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
 - (a) extend or shorten 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;

8.— Failure to comply with rules, practice directions or Tribunal directions

- (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include—
 - (a) waiving the requirement;
 - (b) requiring the failure to be remedied;
 - (c) exercising its power under rule 9 (striking out a party's case);
 - (d) exercising its power under paragraph (5); or
 - (e) barring or restricting a party's participation in the proceedings

9.— Striking out a party's case

(1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or case or that part of them; and

(b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings or case if—

(a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;

(b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;

(c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

(e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.

11.— Fees: non-payment

(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.

22.— Withdrawal

(8) Any party may, within 28 days after the date of receipt of notification by the Tribunal under paragraph (7), apply for a case, or part of a case, which has been withdrawn under this rule to be reinstated.