UT Neutral citation number: **[2022] UKUT 00289 (TCC)**

UT (Tax & Chancery) Case Number: UT/2021/000061

Upper Tribunal
(Tax and Chancery Chamber)

By remote video hearing

Heard on: 6 October 2022
Judgment date: 03 November 2022

AMUSEMENT MACHINE LICENCE DUTY and GAMING DUTY – reinstatement following automatic striking-out for breach of an unless order – requirement for error of law in FTT decision – role of Upper Tribunal in appeals against case-management decisions of the FTT – appeal dismissed

Before

JUDGE GREG SINFIELD

JUDGE NICHOLAS ALEKSANDER

Between

NTK LEISURE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ronan Daly BL, counsel

For the Respondents: Charlotte Brown, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. NTK Leisure Limited ('NTK') appeals against a decision issued by the First-tier Tribunal ('the FTT') on 17 March 2020 ('the Full Decision') refusing NTK's application for reinstatement of its appeal. NTK's appeal had been automatically struck out for failure to serve a witness statement in compliance with the FTT's Directions issued on 17 February 2018 ('the Unless Order').

FACTUAL BACKGROUND

2. The background to NTK's appeal is long and complicated. The history of NTK's appeals against assessments for Amusement Machine Licence Duty and a related appeal in respect of Gaming Duty, which date back to October 2008, is set out in great detail in [3] to [76] of the Full Decision and, for reasons explained below, no purpose would be served by repeating it in this decision.

3. Following an unsuccessful application by NTK for HMRC to be barred from taking further part in the proceedings, in February 2016, the FTT issued case management directions ('the 2016 Directions'). The 2016 Directions were made "in order to bring this appeal effectively to a substantive hearing and to forestall any procedural or practical issues that might arise from the existing abbreviated Directions". The 2016 Directions included the following:

> 6. It appears that no witness statements have been delivered on behalf of the Appellant, though a witness statement of Keith Lloyd has been delivered on behalf of HMRC. The Appellant sought to have this witness statement excluded on the basis that it was ordered at the May 2013 hearing to be served by 20 September 2013 but was not supplied until March 2015. I consider the Appellant will not suffer any prejudice by permitting this witness statement to be relied on by HMRC, as it has been in the Appellant's possession for nearly a year now. I also note that the same Directions (those issued on 28 June 2013) required the Appellant to serve its witness statements by 18 October 2013, and I was informed at the hearing on 13 January 2016 that no witness statements had yet been served on behalf of the Appellant. Mr Charles indicated that HMRC would not object to the late service of witness evidence on behalf of the Appellant, as long as it was received sufficiently in advance of the final hearing.
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> 7. HMRC shall be permitted to rely on the witness statement of Keith Lloyd dated 25 March 2015, subject to Officer Lloyd attending the hearing to be asked questions on it under oath by the Appellant.
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> 8. The Appellant shall deliver to HMRC at the address specified below, so as to be received by them no later than 13 April 2016, witness statements in usual form (as to which, the witness statement of Officer Lloyd will serve as an adequate model) setting out what the evidence will be of every individual who will attend the hearing to give evidence on behalf of the Appellant. The Appellant shall be permitted to rely on any evidence so served on HMRC, subject to each such witness attending the hearing to be asked questions on it under oath by HMRC.
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> 9. For the avoidance of doubt, no person shall be permitted to give evidence at the hearing other than those in respect of whom witness statements have been made and served on the other party. If HMRC consider, after receiving the witness statements referred to in Direction 8 above, that they need to serve further witness evidence in reply, they shall make application to the Tribunal for permission to do so.

4. NTK did not appeal against the 2016 Directions.

5. The time limits were subsequently varied on 19 April 2016 on the application of NTK for reasons that are not material to this decision.

6. On 3 November 2017, the FTT released directions ('the 2017 Directions') requiring NTK to comply with direction 8 of the 2016 Directions (service of witness evidence) within 28 days, i.e., by 1 December 2017. NTK did not provide any witness statements in compliance with the 2017 Directions.

7. NTK did not appeal against the 2017 Directions.

8. On 1 February 2018, HMRC applied for the Amusement Duty Appeal to be struck out on the basis that the FTT could not deal with proceedings fairly and justly due to the NTK's failure to cooperate with the FTT. HMRC relied in particular on NTK's failure to provide witness statements in the revised time limit prescribed by the 2017 Directions.

9. Rather than striking out the Amusement Duty Appeal, on 17 February 2018, the FTT issued the Unless Order. The preamble to the Unless Order stated that the FTT considered that, "the Appellant should be given a quite clear last chance to comply with the Tribunal's directions (and to demonstrate to the Tribunal that it has done so), in default of which the appeal will be struck out." The Unless Order directed:

> 1. UNLESS the Appellant:
>
> (1) Complies with Direction 8 of the Tribunal's Directions issued on 17 February 2016, and
>
> (2) delivers to the Tribunal copies of all witness statements provided to HMRC in compliance with such Direction.
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> In each case no later than 21 days after the date of release of these Directions, then this appeal shall, automatically and without further order, be STRUCK OUT.

10. NTK did not appeal against the order, and it accepts that the order was validly made. NTK did not comply with the Unless Order, as it failed to supply witness statements.

11. Following NTK's failure to comply with the Unless Order, on 15 May 2018 the FTT notified NTK that it had struck out the Amusement Appeal in the following terms:

> As you have not complied with the Directions (copy enclosed), and as permitted by rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the judge has struck out your appeal. Your appeal is therefore unsuccessful.
>
> You have the right to apply for the proceedings to be reinstated but such an application must be made in writing and received by the Tribunal within 28 days from the date of this letter. Such an application should be supported by reasons.

12. On 4 June 2018, NTK applied to reinstate the appeal arguing, inter alia, that:

(1) There was no failure to comply with the Unless Order as NTK did not intend to provide a witness statement. Specifically, it was the accepted position between the parties and the FTT that Mr Ruairi Owens would be permitted to give oral evidence at the hearing without providing a witness statement;

(2) The 2016 Directions did not state that NTK needed to inform the FTT that it would not be producing a witness statement, in contrast with Direction 4 which expressly stated that the parties should provide a list of documents or confirm that there was no such list;

(3) HMRC had provided witness statements late in the day in relation to earlier proceedings and were permitted to adduce them by reference to the potential prejudice that would be suffered by the parties. The issue should therefore be whether HMRC were prejudiced by NTK's actions;

(4) Striking out the Amusement Duty Appeal was unduly draconian. At most, NTK should have been prevented from relying upon witness evidence.

RELEVANT LEGISLATION

13. Rule 2 of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') provides:

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (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;
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> […]
>
> (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-
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> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.

14. Rule 8 of the FTT Rules, as material, provides:

> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
> […]
>
> (5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
>
> (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to the appellant.

THE FTT'S DECISIONS ON REINSTATEMENT

15. On 1 April 2019, the FTT issued a summary decision ('the Summary Decision') setting out the relevant facts and giving the reasons for refusing NTK's application for reinstatement of its appeal.

16. Rule 35 of the FTT Rules requires that where the tribunal has given a summary decision, a party must apply for full written findings and reasons before making an application for permission to appeal. On 24 May 2019, NTK made an application to the FTT for permission to appeal, which was treated as an application for full written findings and reasons.

17. The FTT issued the Full Decision giving full written findings and reasons on 17 March 2020, which confirmed its decision to refuse reinstatement. The FTT's findings of fact were materially the same as in the Summary Decision and are set out at paragraphs [53]-[62]. In summary:

(1) As the Appellant had notified the FTT in its letter of 13 November 2017 that Mr Daly was acting as its representative, it was appropriate, under rule 11 of the FTT Rules to issue the Unless Order and subsequent direction striking out the appeal to Mr Daly, the Appellant's representative, at the address provided and there was no requirement for the FTT to send these documents to the Appellant as well;

(2) Mr Daly had received the Unless Order on 17 February 2018 but did not provide it to the Appellant until some seven weeks later on 9 April 2018. No explanation was given for this delay, despite Mr Daly acknowledging that he and the Appellant were in contact regarding HMRC's strike out application which had been made two weeks before the Unless Order was issued;

(3) It was 'inexplicable' that the Appellant had done nothing in response to the documents of which it was aware, namely the 2016 Directions, the directions issued in March 2017, the November 2017 Directions and HMRC's strike out application of 2 February 2018, or following discussions with its representative regarding the strike out application. The FTT concluded that, "[t]his is not the action of a litigant who is actively pursuing an appeal mindful, as it is required to be, of its obligation to assist the tribunal to further the overriding objective and to co-operate with the tribunal fully."

(4) The Appellant had accepted that it was aware of the Unless Order by 9 April 2018 but still no action was taken until 4 June 2018, after the Appellant's representative had been notified that the appeal had been struck out.

(5) The assertion that the Appellant did not intend to serve any witness statements, and that it did not think it needed to notify the FTT of this, lacks credibility in light of the following facts:

(a) The appellant notified the tribunal in a letter dated 22 December 2013 that Mr Ruari Owens was to appear as a witness on its behalf.

(b) As noted in the February 2016 directions, the requirement for the provision of witness statements was in the previous directions issued in 2013 and was discussed at the hearing in 2016 […].

(c) It was plain from the February 2016 directions that witness evidence would not be permitted at the hearing of the appeal without the prior provision of a witness statement.

(d) It was stressed in the November 2017 directions and the tribunal's letter of 23 September 2016 that, once the Upper Tribunal proceedings were concluded, the appellant would be expected to produce its witness statements within a relatively short timescale.

(e) The appellant did not state that it did not intend to provide a witness/witness statement during the whole course of these lengthy proceedings until after the appeal was struck out on 4 June 2018 (and, as noted, in fact it said on 22 December 2013 that it intended to produce Mr Owens).

(f) The letter of 22 December 2013 in which the appellant notified the tribunal that it did not intend to produce further documents referred specifically to direction 4 of the 2016 directions which deals only with documents.

(g) The appellant did not proceed to provide listing information in accordance with the 2017 directions (or under the extended deadline for doing so in the unless order).

(h) If the appellant is not willing to provide a witness of fact with a witness statement, it is very difficult to see how the appellant's case could have any reasonable prospect of success given the nature of the case and that the burden of proof is on it.

18. At [38] – [51] of the Full Decision, the FTT set out the FTT Rules and case law relating to applications to reinstate a case after it has been struck out. In [38], the FTT referred to and quoted part of Rule 8(3)(a) of the FTT Rules. As Ms Brown pointed out in her skeleton argument, this reference was incorrect, as the Unless Order had been made under Rule 8(1). However, we find that it is clear that Judge Morgan had understood the terms of the Unless Order as she quoted it at [32].

APPEAL TO UPPER TRIBUNAL

19. On 18 March 2021, the FTT granted NTK permission to appeal to the Upper Tribunal on the basis that there was an arguable error of law in its decision:

> 3. I take the appellant's application to be made on the grounds that there is an error or errors of law in the decision on the basis that the tribunal reached a conclusion which no reasonable tribunal could have reached for the reasons set out in the application. The appellant's reasons include, in particular, that, in light of the procedural history of this matter, the tribunal drew the wrong conclusions as regards whether the appellant intended to produce witness evidence and what the appellant's understanding was as regards the production of such evidence and, accordingly, erred in the weight and relevance it accorded to these matters.
>
> 4. Whilst my view is that there is no error of law in the decision, I have decided to give the appellant permission to appeal to the Upper Tribunal on the basis that the appellant has an arguable case that there is an error or law.

20. NKT submitted its Notice of Appeal to the Upper Tribunal on 16 April 2021.

21. The appeal is against the Full Decision only

NTK'S SUBMISSIONS

22. NTK provided a lengthy skeleton argument which set out in considerable detail the procedural history of its appeal. At its root, the submissions in the Appellant's skeleton are that it was understood by everyone (and in particular by the Appellant) that Mr Owen would give oral evidence at the substantive hearing, but that he would not provide a witness statement. In its decision, the FTT found that this submission was not credible – a finding that the Appellant does not challenge. But, in any event, we agree with the observations of Judge Richards in the Upper Tribunal's Directions of 5 July 2021 that:

> Whatever the position prior to 2015, paragraph 3(4) of the decision under appeal indicates that in Direction 9 of the "2016 directions" the FTT ordered that evidence could not be given at the hearing by any person who had not provided a witness statement. Ultimately the FTT struck out the appeal for breach of the 2016 directions. How, therefore, is correspondence prior to the 2016 directions relevant to the question of whether the FTT properly exercised its discretion to reinstate an appeal that was struck out for breach of the 2016 directions? Put another way, if the Appellant considered that the 2016 directions set out a different position as regards witness evidence from that taken previously, should it not have appealed against the 2016 directions?

For these reasons, we have not considered (nor placed any weight on) the history of this appeal prior to the making of the 2016 Directions. We agree with Judge Richards that, whatever understanding the parties and the FTT might have had as regards witness evidence prior to the making of the 2016 Directions, the 2016 Directions effectively "reset" the requirement for witness statements.

23. At the hearing, Mr Daly raised as a preliminary issue that the FTT's decision was ultra vires, as it was grounded on the basis that the Unless Order had been made under Rule 8(3)(a), whereas it had actually been made under Rule 8(1).

24. As regards the substantive grounds of appeal, Mr Daly acknowledged that in exercising its discretion to reinstate, the FTT correctly identified that it had to apply the three-stage test articulated in *Denton v White* [2014] EWCA Civ 906, as applied to reinstatement decisions by the Upper Tribunal in *Chappell v the Pensions Regulator* [2019] UKUT 209 (TCC). This test was summarised by the Court of Appeal in *Denton* at [24] as follows:

> A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1) [of the Civil Procedure Rules]. If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in CPR 3.9]."

25. In respect of the third stage, at [32] the Court of Appeal said that the two factors identified at (a) and (b) in Rule 3.9(1) of the Civil Procedure Rules[1] "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

26. Mr Daly did not argue with the FTT's findings in relation to the first and second stages of the test. Rather, he submitted that the FTT made an error of law in its consideration of the third stage. The errors Mr Daly identified in the FTT's decision can be summarised as follows:

(1) The FTT had not adequately addressed the prejudice that would be suffered by the Appellant as a consequence of its appeal being struck out. Whilst the FTT addressed the prejudice suffered by the Appellant at [61], the discussion in this paragraph is extremely brief, and does not consider the extensive involvement Mr Owens (a director of the Appellant) had had with the appeal over many years, the impact that the striking-out has on his finances, on his family, and on his business;

(2) The FTT had not considered the extent to which HMRC would be prejudiced if the appeal is reinstated – which in Mr Daly's submission would be slight;

(3) The FTT had effectively pre-judged the appeal in its finding (for example, at [61]) that the appeal appeared to be without merit given the lack of proposed witness evidence;

(4) The FTT had not analysed whether its decision was fair and just to the Appellant in the light of Rule 2 of the FTT Rules; and

[1] Rule 3.9 provides:
"(1) 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 –
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders."

(5) The FTT had not undertaken a legal analysis of the Appellant's submissions.

DISCUSSION

27. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11, Tribunals, Courts, and Enforcement Act 2007). The only issue in this appeal is whether the Full Decision contains an error of law.

28. Deciding whether to strike out proceedings in an appeal (and any subsequent decision on reinstatement) involves the exercise of discretion by the FTT in relation to a matter of case management. It is well-established that the Upper Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions. As Lawrence Collins LJ observed in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, at [33]:

> An appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge.

29. Those words were quoted with approval by Lord Neuberger in the Supreme Court in *BPP Holdings Ltd & Ors v HMRC* [2017] UKSC 55 at [33] who then added:

> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that it is unjustifiable.

30. The issue in *BPP* was whether the FTT was entitled to make an order debarring the HMRC from defending an appeal. That is the mirror image of the issue that arises in this case, and the same considerations apply in both cases. Lord Neuberger's words make it clear that whether an Upper Tribunal judge (or any appellate judge) would have made a different decision is not relevant to a challenge to a case management decision of the FTT. In order to succeed in its appeal against the FTT's decision not to reinstate, NTK must show that, in making her decision, Judge Morgan took into account irrelevant material, or did not take account of some relevant material or misdirected herself on the law, or failed to apply the right principles, or that the decision was one which no reasonable tribunal could have reached. The hurdle that NTK must surmount in order to succeed before us is a high one.

31. We find that the FTT's decision is not ultra vires in consequence of Judge Morgan referring to Rule 8(3)(a) rather than Rule 8(1) in the Full Decision. We have found that Judge Morgan had clearly understood that the Unless Order had been made under Rule 8(1) as she quoted the relevant part of the Unless Order in her decision. The reference to Rule 8(3)(a) is, we find, an accidental slip which is capable of amendment under Rule 37 of the FTT Rules. To the extent that the Full Decision needs to be remade to correct this mistake, we so remake it.

32. In the course of his submissions, Mr Daly placed great emphasis on the brevity of paragraphs [60] and [61] of Judge Morgan's decision. We find that these criticisms are misplaced. These paragraphs represent the conclusion of a discussion that starts at [52] and extends over roughly three pages. Paragraphs [60] and [61] must be placed in the context of the preceding paragraphs, and we find that the consideration given by the FTT to the relevant issues (when placed in that context) is not unreasonably brief.

33. Turning to the points made by Mr Daly:

(1) Mr Daly confuses the prejudice potentially suffered by Mr Owen (a director of the Appellant) with the prejudice suffered by the Appellant itself – a body corporate. The prejudice suffered by the Appellant is primarily financial and is considered in the Full Decision.

(2) The FTT had considered the potential prejudice to HMRC in its Full Decision. Mr Daly's complaint is that he disagrees with the emphasis the FTT placed on HMRC's need to defend an appeal that is potentially without merit (a point we consider below) when it had considered that the appeal had been settled due to the strike-out. But we find that this emphasis is not unreasonable and is one that a reasonable tribunal can make.

(3) We find that it was not unreasonable for the FTT to state that the appeal appeared to be without merit given the lack of witness evidence on behalf of the Appellant. The Full Decision discusses at length why the FTT found the Appellant's submissions on the provision of witness statements to lack credibility. The FTT had a reasonable basis for its finding that it would have been very clear to the Appellant that Mr Owen should provide a witness statement. Given the nature of the appeal, we also find that it was reasonable for the FTT to conclude that the Appellant's case would have lacked merit in the absence of witness evidence.

(4) We find that the Full Decision appropriately weighs fairness and justice to all parties. At [62] the judge notes the requirement in the decision of the Court of Appeal in *Denton* and the Supreme Court in *BPP* to give particular weight to the need for efficient conduct of litigation at proportionate cost and to the need to enforce compliance with the rules. She includes these factors, together with the seriousness of the Appellant's failings and the absence of any good reason for them – as well as the other factors discussed in her decision – in her determination of the overall balance required by the third stage of the decision-making process.

(5) As regards any absence of legal analysis of the Appellant's submissions, we find that the FTT properly applied the relevant law, which was discussed in detail in the Full Decision. To the extent that there was a lack of legal analysis in the Summary Decision, this can be explained by the fact that it was (by its very nature) a summary of findings of facts and reasons – and a detailed legal analysis was subsequently provided (in accordance with the FTT Rules) in the Full Decision.

34. Mr Daly referred us to the decision of the Employment Appeal Tribunal in *Polyclear v Wezowicz and ors* [2022] ICR 175. This decision relates to the breach of an unless order in circumstances where the relevant party attempted to comply with the order, but fell short of full compliance because strict compliance was impossible. We did not find this decision relevant to the issues before us. In this appeal, there was no attempt by the Appellant at compliance with the Unless Order, and there was no question of full compliance being impossible.

35. In our opinion, it is simply not possible to describe the Full Decision as, to use the term used by Lord Neuberger, unjustifiable. We find that the FTT made no error of law in the Full Decision.

DISPOSITION

36. For the reasons given above, NTK's appeal is dismissed.

COSTS

37. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is the order be made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Upper Tribunal Judge

Judge Nicholas Aleksander
Upper Tribunal Judge

Release date: 03 November 2022