

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2019] UKUT 337 (LC)

UTLC Case Number: LRA/102/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – PROCEDURE – RELIEF FROM SANCTIONS

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER
TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

**BLOCK A9 THE UPPER DRIVE
LIMITED**

Appellant

and

COPSE MILL PROPERTIES LIMITED

Respondent

**Re: Block A,
9 The Upper Drive,
Hove,
BN3 6GR**

**Upper Tribunal Judge Elizabeth Cooke
Determination on written representations**

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DECISION

1. This is an appeal from the decision of the First-tier Tribunal (“the FTT”) refusing an application to reinstate the appellant’s application for the determination of the terms of a collective enfranchisement after that application had been struck out. The appeal has been determined on the basis of written representations. The appellant has been represented by ODT Solicitors; the respondent’s solicitors, Bate & Albion, have informed the Tribunal that it does not wish to participate in the appeal.

2. The application was made to the FTT on 19 March 2019, and directions were issued to the parties on 1 April 2019. Paragraph 5 of the directions offered a stay of the proceedings for three months, which the parties’ representatives accepted by letters dated 3 April 2019. Paragraph 7 of the directions contained the following warning:

“FAILURE TO INFORM THE TRIBUNAL OF WHETHER A SETTLEMENT HAS BEEN REACHED AT THE END OF 3 MONTHS FROM THE DATE OF THESE DIRECTIONS WILL RESULT IN THE APPLICATION BEING STRUCK OUT WITHOUT FURTHER NOTICE”.

3. The FTT by letter of 9 April 2019 acknowledged the parties’ request for a stay and reminded the parties to update the FTT by 1 July 2019. They did not do so and the application was struck out by letter of 4 July 2019.

4. The appellant applied on 8 July 2019 to reinstate the application and the FTT on 12 July 2019 refused to do so. It said at paragraphs 8 and 9 of its decision:

“This tribunal is satisfied that a reasonable recipient of the directions, particularly one legally represented, should know, given the warning in bold, the requirement to report to the tribunal. The Applicant and their representative failed to do so. The Application identifies no good reason as to why an update was not provided and still no update has been provided.

... The tribunal accepts that striking an application out may prejudice a party but such action is justified to ensure the efficient running to the tribunal and is in accordance with the overriding objective.”

5. The appellant’s grounds of appeal are that the decision was unjust, disproportionate, and an improper use of the FTT’s case management powers, and that the FTT did not take into account relevant considerations and failed to apply the correct test for relief.

6. All those grounds are well-founded.

7. The striking out of the application and the refusal to reinstate had dramatic consequences for the appellant. As the appellant says, it may result in its claim for collective enfranchisement being deemed to have been withdrawn (section 29(2) of the Leasehold Reform, Housing and Urban Development Act 1993), and in it having to wait another 12 months before making a fresh one. In the meantime the appellant is likely to be liable for the respondent's costs under section 33 of the 1993 Act. This is a severe sanction for inadvertence.

8. Moreover, it was one-sided. The FTT's warning that it would strike out an application in the absence of an update by 1 July 2019 was, in general, a threat to applicants, but potentially music to the ears of respondents. One party had an incentive to provide an update whereas the other had every reason not to do so; the penalty fell on one party alone. The policy of striking out on this basis was unfair, and the effects of it are seen vividly in this case.

9. Importantly, on the application for relief from the sanction the FTT gave no consideration to the Court of Appeal's guidance in *Denton v TH White Ltd* [2014] 1 WLR 3926. Those guidelines are of general application to tribunals as well as courts (*Simpsons Malt Ltd v Jones* [2017] UKUT 0460). They required the FTT to consider the seriousness of the breach of a procedural requirement; whether, if the breach was serious, there was a good reason for it; and, even if there was no good reason, whether it would be just to grant relief. The FTT on this occasion appears to have been unaware of those guidelines.

10. The appeal is allowed for these reasons. Rather than remitting the application for relief to the FTT, the Tribunal substitutes its own decision. Looking at the *Denton* guidelines, it is clear that the breach of the FTT's requirement for an update was not serious. There was no breach of a rule, nor of an "unless" order, nor any failure to respond to a notice given under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (notice of intention to strike out). No prejudice or cost was caused to the other party. The explanation for the failure to update was that the appellant's representative had not read the warning notice and was unaware of local practice. Whether or not that is a good reason, it is just to give relief because otherwise the failure by both parties to update the FTT will have resulted in a severe penalty for one party and a reward for the other.

11. Accordingly the appeal succeeds, the FTT's refusal to reinstate the appellant's application is set aside and the application to the FTT is reinstated.

12. As a postscript I note that the FTT refused permission to appeal because "The tribunal is not satisfied that the decision made under the decision dated 12 July 2019 is incorrect." Quite apart from the failure to engage, in that decision, with the grounds of appeal, the FTT applied an incorrect test. Permission should be given where there is a realistic prospect of success, and that may well be the case even where a tribunal remains convinced that it was right. "Realistic" means "not fanciful"; it does not mean that there is a likelihood of success. This is

not, of course, an appeal from that refusal because the Tribunal gave permission itself when the application was renewed; but it may be helpful to the FTT to point out that this basis for refusal was incorrect.

A handwritten signature in black ink, appearing to read 'E Cooke', enclosed within a faint rectangular border.

Upper Tribunal Judge Elizabeth Cooke

5 November 2019