



Neutral Citation Number: [2024] UKUT 00300 (LC)

Case No: LC-2024-185

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/0088/HNA/2022/0108

Royal Courts of Justice
Strand, London WC2A 2LL

25 September 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – appeal against financial penalty imposed by local housing authority struck out by FTT for failure to file bundle of documents in response to authority’s case – appellant claiming to have no connection with unlicensed HMO – FTT directing itself by reference to CPR 9.3 and disregarding merits of the appeal – whether a proper exercise of its discretion – rules 3, 8 and 9, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 – appeal allowed

BETWEEN:

SIRAJ DEANE

Appellant

-and-

LONDON BOROUGH OF NEWHAM

Respondent

**86A Hatherley Gardens,
East Ham,
London E6**

**Martin Rodger KC,
Deputy Chamber President**

Determination on written representations

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The following cases are referred to in this decision:

BPP Holdings v Commissioners for HM Revenue and Customs [2016] EWCA Civ 121; [2016] 1 WLR 1915

BPP Holdings v Commissioners for HM Revenue and Customs [2017] UKSC 55; [2017] 1 WLR 2945

Denton v T H White Limited [2004] EWCA Civ 906; [2014] 1 WLR 3926

Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] UKSC 64

Haziri v Havering LBC [2019] UKUT 330 (LC)

Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427

Introduction

1. The appellant, Mr Deane, challenges the refusal of the First-tier Tribunal, Property Chamber (the FTT) to reinstate his appeal against a financial penalty of £7,500 imposed on him by the respondent, the London Borough of Newham (the Council), after his appeal had been struck out for failure to comply with the FTT's procedural directions. The penalty was imposed under Section 249A, Housing Act 2004 (the 2004 Act) which permits a local housing authority to impose a financial penalty where it is satisfied beyond reasonable doubt that a person's conduct amounts to a relevant housing offence.
2. Mr Deane was accused by the Council of the offence under section 72, 2004 Act, of having control of or managing an unlicensed HMO, at 86A Hatherley Gardens, East Ham. Mr Deane's defence to that accusation is that he has nothing whatever to do with 86A Hatherley Gardens, whether as owner or manager, and that the Council's information to the contrary is the result of a mistake by a property agent.
3. The appeal, for which permission was given by this Tribunal, has proceeded on the basis of the parties' written representations.

The relevant procedural rules

4. As this appeal is concerned with procedure in the FTT it is convenient to begin by identifying the relevant procedural rules, which are rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the FTT Rules), read together with the overriding objective of the FTT Rules which is found in rule 3.
5. Rule 8(2) provides that if a party in tribunal proceedings fails to comply with a requirement of the FTT Rules, or a practice direction or direction, the FTT "may take such action as the Tribunal considers just". A non-exhaustive list of responses is then listed, including waiving the requirement, requiring that it be remedied, striking out a party's case, or "barring or restricting a party's participation in the proceedings" (rule 8(2)(e)).
6. The FTT has power under rule 9 to strike out proceedings including where an applicant has failed to comply with a direction which included a warning that non-compliance might have that consequence, or has failed to cooperate with the FTT "such that the Tribunal cannot deal with the proceedings fairly and justly" (rule 9(3)(a) and (b)). If proceedings are struck out an applicant has the right to apply under rule 9(5) for the case to be reinstated.
7. Any decision by the FTT to strike out proceedings or to reinstate engages rule 3(3) of the FTT Rules, which requires the FTT to give effect to its overriding objective whenever it exercises any power conferred by the Rules.
8. As rule 3(1) explains, the overriding objective is 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):

“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 the proper consideration of the issues.”

9. Since the decision of the Supreme Court in *BPP Holdings v Commissioners for HM Revenue and Customs* [2017] UKSC 55, the approach to compliance with procedural rules and directions in tribunals has become more closely aligned with the stricter approach now adopted by the civil courts. But it is important to recognise that tribunal procedure rules, and specifically the FTT Rules, are not a carbon copy of the Civil Procedure Rules. In particular the overriding objectives identified in the two sets of rules are not identical and contain differences of emphasis and nuance which reflect the different characteristics of dispute resolution in courts and tribunals. Needless to say, the rules which govern the work of the FTT are its own FTT Rules, and not the Civil Procedure Rules. I will return to this point later.

The background to the appeal

10. The following background information is taken from the FTT’s decision of 18 December 2023 and from the witness statement filed with the FTT by the Council in response to Mr Deane’s appeal against the financial penalty notice and documents exhibited to it.
11. 86A Hatherley Gardens is part of a terraced house in East Ham which was visited by officers of the Council in October 2021 and found to be an unlicensed HMO. The officers were shown a copy of a tenancy agreement dated 5 March 2020 signed only by the two tenants named in the document but which identifying Mr Deane, the appellant, as the landlord. One of the tenants later signed a statement saying that he paid rent using a banking app, that he had last seen the landlord or the landlord’s agent three years earlier (without saying which he had seen) and that he did not speak to the landlord but only to the agent. The agent was named as Tantum Property.
12. The Council carried out further investigations which established that Mr Deane is not the registered proprietor of the property. Nor was any connection identified between Mr Deane and 86A Hatherley Gardens in official records, although it was established that he was connected with a number of other properties including 86 Hatherley Gardens.
13. Mr Deane informed the FTT that he had previously been a director of Tantum Property Consultants Ltd, but that it had ceased trading in February 2020 when its assets and trading name were sold to Stonehenge Property Management Ltd. The management of

both 86 and 86A Hatherley Gardens was part of the business of Tantum but the two properties were owned by different people. In his witness statement Mr Deane described 86 Hatherley Gardens as “my family property” and said, correctly, that 86A Hatherley Gardens is owned by Sanam Raujackdine. He said that he had no further involvement with the business after the handover to Stonehenge was completed and that Stonehenge had taken over management of both Nos. 86 and 86A. Mr Deane’s explanation for the appearance of his name on the tenancy agreement for No.86A was that it was a mistake by Stonehenge after it had taken over management and that he had signed the tenancy agreement in the belief that it related to his family property at No.86.

14. On 12 October 2022 the Council served notice of its intent to impose a financial penalty on Mr Deane. The reason for the penalty was stated to be that Mr Deane was the managing agent of No.86A and had failed to licence it as an HMO. The Council was aware that Mr Deane was not the owner of the property and, according to Mr Deane, it also served a notice of intent to impose a separate financial penalty on Ms Raujackdine, the registered proprietor of No.86A.
15. The Council received a response to the notice of intent served on Mr Deane by email from someone describing themselves as an office administrator at Deane Holdings who stated simply that 86A Hatherley Gardens did not belong to Mr Deane. The Council proposed to make a further visit to the property and served notices of entry at the various addresses it had for Mr Deane. It received a further response from the administrator at Deane Holdings repeating that the property was not owned by Mr Deane.
16. Despite these representations and apparently without carrying out any further investigation the Council decided to proceed with the financial penalty and served a final notice on Mr Deane imposing a penalty of £7,500 on 25 November 2022. The reason given in the notice was that: “being the managing person of the property at 86A Hatherley Gardens ... you did fail to licence an HMO and thereby committed an offence under section 72(1) of Housing Act 2004.” The reasons did not explain why the Council believed Mr Deane was “the managing person” and did not refer to the response it had received to the notice of intent.
17. According to Mr Deane, the Council also served a final notice on Ms Raujackdine, imposing a separate financial penalty of £5,000 on her as the person having control of No.86A.

The appeal to the FTT

18. On 22 December 2022, Mr Deane lodged a notice of appeal with the FTT. In it he repeated that he had no connection with the property and that he had been named in the tenancy agreement as a result of a mistake by Stonehenge, the agent managing it on behalf of Ms Raujackdine. The notice of appeal was accompanied by a copy of the registered freehold title for No. 86A confirming that she and not Mr Deane was the registered freehold proprietor and that the property was not subject to a registered lease, and an email from Stonehenge to Mr Deane dated 20 December 2022 acknowledging that a mistake had been made by them concerning the tenancy agreement for No. 86A.

19. The notice of appeal submitted in Mr Deane's name did not provide details of a representative but gave his email address as manager@deaneholdings.com. Mr Deane subsequently explained to the FTT that the notice of appeal had been completed on his behalf by a Mr Kasi, the office manager of Deane Holdings (which I take to be the name of one of Mr Deane's businesses) and that the email address was the one used by Mr Kasi and not by Mr Deane himself.
20. On 1 September 2023, the FTT gave directions (which began by repeating the defence advanced in Mr Deane's notice of appeal) and set the case down for hearing on 18 December. A copy of the directions was sent to Mr Deane using the email address he had provided. In preparation for the hearing both parties were directed to file a bundle of documents in support of their position. As the FTT would need to be satisfied beyond reasonable doubt that Mr Deane had committed the suggested offence, the Council was directed to file its documents first.
21. The material which Mr Deane was directed to file in a single electronic file included a further copy of the notice of appeal and any documents filed with it (which the FTT already had), an "expanded statement of reasons for the appeal" including any additional grounds on which Mr Deane wished to rely and any response to the Council's case, any witness statement to be relied on, and any other documents to be used at the hearing.
22. The directions also included a warning to both parties that in the event of a failure to comply, the FTT might strike out their case pursuant to rule 9(3)(a). That is the rule which authorises striking out where a party has failed to comply with a direction which stated that such a failure could lead to the striking out of the proceedings.
23. On 29 September 2023, the Council filed its documents in response to the appeal. These included a witness statement by one of its officers supported by a further 270 pages explaining the background to the Council's selective licensing scheme and the steps which had been taken before the Council imposed the financial penalty on Mr Deane.
24. Mr Deane was required to pay a hearing fee of £200 which he did, after a reminder, on 11 October. He had been directed by the FTT to submit his bundle of documents in response to the Council's case by 20 October, but he failed to do so.
25. On 11 December 2023, the Council asked the FTT to strike out the appeal, suggesting that it was unable to prepare as it claimed not to know the case that it was required to answer. If the FTT was not minded to strike out the appeal, the Council suggested the hearing on 18 December should be postponed.
26. On 12 December the FTT notified the parties that it was minded to strike out Mr Deane's appeal under rule 9(3)(a) because he had failed to comply with the directions and warned him that it would do so if his documents were not filed by 4pm on 14 December.
27. Mr Deane did not comply with the FTT's deadline and on Friday, 15 December the appeal was struck out and the hearing which was due to take place on the following

Monday was vacated. Mr Deane was informed of his right to apply for the proceedings to be reinstated under rule 9(5).

28. Shortly after midday on 15 December, Mr Deane sent an email to the FTT with the documents he wished to rely on stating that he had tried telephoning and had left a message but not saying when he had done so. The email was sent from his personal email address, and not from the address in the notice of appeal. It arrived 20 hours after the deadline set by the FTT and after a direction had already been made striking out the appeal.
29. The FTT treated Mr Deane's email as an application to reinstate the appeal and notified the parties that it would consider that question on 18 December, the next working day and the date originally fixed for the hearing of the appeal.

The FTT's decision of 18 December 2023

30. The hearing on 18 December 2023 was attended by Mr Deane and by the Council's Head of Law, Enforcement and Litigation, Mr Mehat.
31. In its decision, issued on the same day, the FTT recorded that the Council had imposed the financial penalty because it was satisfied that Mr Deane had committed the offence of managing an unlicensed HMO at No. 86A. It noted that it was common ground that he was not the owner of the property but that he was specified in the tenancy agreement as the landlord and had been a director of Tantum Property, which had been identified by one of the tenants as the manager. It said that the issue in the appeal was why Mr Deane's name appeared on the tenancy agreement.
32. The FTT recorded what it had been told by Mr Deane at the hearing, prefacing its account with the observation that he had been unable to give any adequate explanation for what it described as "the abject failure to comply with the directions". He had blamed Mr Kasi, whose email address had been included in the notice of appeal and said that he had not seen the emails sent to that address or been made aware of the direction to file a bundle of documents until the morning of 15 December, when he was notified (presumably by Mr Kasi) that the appeal had been struck out. He had been aware of the requirement to pay the fee, because Mr Kasi told him, but it was not clear when he became aware of the date of the hearing.
33. The FTT did not accept Mr Deane's explanation or that Mr Kasi was to blame for his failure to engage with the proceedings. It described the background to the appeal as "one of obfuscation". It said that it was satisfied that the tribunal's correspondence had been sent to the email address provided by Mr Deane "and that he would have received this".
34. The FTT then directed itself on the law. It referred first to the decision of the Supreme Court in *BPP Holdings*, which encourages tribunals to follow a similar approach to procedural non-compliance and relief against sanctions as the civil courts. The FTT then referred to rule 3.9 of the Civil Procedure Rules which provides that on an application for relief from any sanction imposed for a failure to comply with a rule, practice direction or court order, the court will consider all the circumstances of the case, 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.”

35. The FTT next referred to *Denton v TH White Limited* [2004] EWCA Civ 906 in which the Court of Appeal (at [24]) laid down the sequential approach now followed by civil courts when exercising their power under CPR 3.9 to grant relief against sanctions for non-compliance. That approach involves 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 giving consideration to the matters specifically identified in CPR 3.9(1)(a) and (b), the need for litigation to be conducted efficiently and the need to enforce compliance with rules, practice directions and orders. The FTT reminded itself that the Court of Appeal had said in *Denton* (at [32]) that the two factors identified at (a) and (b) in CPR 3.9(1) “are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.”
36. The FTT finally referred to a decision of this Tribunal, *Haziri v Haverling LBC* [2019] UKUT 330 (LC), in which I had applied *Denton* and *BPP Holdings* after citing *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, in which (at [26]), Lord Neuberger had said that the strength of a party's case on the ultimate merits of the proceedings was “generally irrelevant” when it comes to case management issues. I had then affirmed (at [27]) that the merits of the appeal in *Haziri* were not a relevant factor in that case. The issue in the appeal (which was commenced out of time) was whether the property in question was an HMO, which depended on facts which had not yet been established and on which the FTT could not properly have formed any view.
37. Having identified the legal principles it would apply the FTT proceeded to determine the application to reinstate the appeal by addressing the three stages identified by the Court of Appeal in *Denton*. Rather than paraphrase that treatment I will set it out the relevant paragraphs of the decision in full:

“Stage 1: The Seriousness of the Failure to Comply

24. The failure is very serious. This was Mr Deane’s appeal. He should have ensured that he complied with the directions so that his case could be determined fairly and justly. On 1 September, the Tribunal had set the matter down for hearing on 18 December. The hearing would not have been able to proceed given the late service of his Bundle. Mr Deane’s involvement in “the control or management” of the property is a fact sensitive issue.

Stage 2: The Reason for the Default

25. Mr Deane has failed to provide any adequate explanation for his failure to comply with the Directions. We do not accept his explanation that this was all the fault of Mr Kasi.

Stage 3: Evaluating all the circumstances of the case

26. At this stage, the two factors identified in (a) and (b) of CPR 3.9(i) are of particular importance. These are: (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.

27. Any party is required to comply with any Directions given by the Tribunal. Mr Deane has had no regard to these.

Conclusion

28. Taking all these factors into account, we are satisfied that this application should not be reinstated. The procedural breaches have been serious. No adequate explanation has been provided for these breaches. These failures have caused unnecessary expense to the parties. It has also made undue demands upon the resources of this tribunal.”

The appeal

38. Mr Deane applied to the FTT on 12 January 2024 asking it to reinstate his appeal and giving some additional information about communications between Mr Kasi, his office manager, and himself. The FTT notified him that, having already refused one application for reinstatement it was not willing to entertain a further application for the same relief. Instead it would treat the latest application as a request for permission to appeal against the decision of 18 December 2023, which it refused. Mr Deane then sought the permission of this Tribunal.
39. In his grounds of appeal Mr Deane, who was not professionally represented, reiterated his case that he did not own or manage No. 86A, nor had he ever done. The Council had imposed a financial penalty for the same offence on the true owner of the property. He claimed also to have followed the FTT’s directions when he became aware of them and made further reference to IT issues and emails going astray which he had not known until after investigations by his IT department conducted after the 18th December hearing.
40. Mr Deane did not articulate any particular error in the FTT’s approach or reasoning and appeared to rely simply on the underlying merits of his case. The FTT had not paid any attention to the strength or weakness of his grounds of appeal against the financial penalty and, quoting *Haziri*, proceeded on the basis that the merits were not relevant to the determination of Mr Deane’s application to reinstate his appeal. It was to examine the correctness of the FTT’s approach that permission to appeal was granted by this Tribunal.
41. In its response to the appeal the Council reiterated the facts and emphasised the care taken by the FTT in applying the *Denton* guidance. It submitted that Mr Deane had identified no error of law in the FTT’s approach and that the appeal should be dismissed.

Discussion

42. The appeal to this Tribunal is against the FTT’s refusal, on 18 December, to reinstate the appeal against the financial penalty which had been struck out on 15 December. There

is no appeal against the strike out decision itself, and I have seen no document recording that decision or identifying who made it. It may simply be that the parties were informed that it had been made. It is understandable that an unrepresented party may not have appreciated that a separate right of appeal lay against that decision. In practice there is a substantial overlap between the two decisions and it is not necessary to maintain a very firm distinction, nor is it possible given the absence of any statement recording the reasons for the decision made on 15 December. If the appeal ought not to have been struck out, the application to reinstate it ought to have succeeded; but even if the decision to strike out the appeal was properly made, the question whether it ought to be reinstated was a separate one.

43. At paragraphs [33] of *BPP Holdings*, Lord Neuberger PSC emphasised the restraint which an appellate tribunal should adopt when asked to interfere with a debarring order and quoted the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, at [33]:

“[A]n 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 the discretion entrusted to the judge.”

44. The same restraint is necessary when considering an appeal against a decision not simply to debar a party from participation, as in *Denton*, but to strike out their appeal altogether and then to refuse to reinstate it.
45. It is a feature of the FTT’s decision in this case that it left in place a finding by the Council that Mr Deane had committed a criminal offence, without that conclusion ever having been subjected to judicial scrutiny. It also left him subject to a significant financial penalty for that offence. It could be argued that those considerations might justify a different approach by this Tribunal in considering an appeal from a procedural decision shutting Mr Deane out from a judicial determination of his guilt or innocence. But as no submissions have been made to that effect by Mr Deane, who is unrepresented, I will not consider it further and will apply the approach indicated by Lord Neuberger PSC in *BPP Holdings*. In doing so I also remind myself that Lord Neuberger acknowledged that “There 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” and that in an appropriate case an appellate tribunal could interfere where a debarring order has been imposed (*BPP Holdings*, at [34]).
46. The question is therefore whether the FTT applied the law correctly when it refused to reinstate Mr Deane’s appeal. It would only be right for me to interfere with its decision if I am satisfied that its reasoning was legally flawed and that it did not apply the relevant principles, or that it was so draconian that it exceeded the limit of permissible harshness to which Lord Neuberger referred.

47. There are two respects in which it seems to me that the FTT clearly misdirected itself in law, and a third instance in which its appreciation of the circumstances of the case was incomplete.
48. First, although the FTT referred in its survey of the relevant law to the Civil Procedure Rules, and specifically to rule 3.9 concerning relief from sanctions, it did not refer to its own Rules. In particular, it did not refer to the overriding objective of the FTT Rules, which is not expressed in the same terms as CPR 1.1, nor to the fact that the equivalent in the FTT's Rules of CPR 3.9, rule 8(2), read together with rule 3, is couched in much more general terms and makes no specific reference to either of the considerations highlighted in CPR 3.9 which the FTT said were of particular importance at stage 3 of its assessment.
49. As the Court of Appeal pointed out in *Denton* (at [32]) the two factors to which specific attention is drawn in CPR 3.9(1) as relevant considerations when a court is dealing with an application for relief from sanctions are taken from the definition of the overriding objective of the Civil Procedure Rules. Factor (a), the need for litigation to be conducted efficiently and at proportionate cost, is in substance included in the definition of the overriding objective in CPR 1.1(2). Factor (b), the need to enforce compliance with rules, practice directions and orders, is specifically identified in CPR 1.1(2)(f) as a core component of the overriding objective. When the Court of Appeal explained that "particular weight" was to be given to these factors by courts, it did so by reference to their inclusion in CPR 3.9(1):

"If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors."

50. The same two factors do not appear in the definition of the FTT's overriding objective in rule 3. Efficiency is not mentioned (although the need to deal with the case in ways which are proportionate to its importance and complexity, and to the anticipated costs and resources of the parties does feature in rule 3(2)(a)). Nor is enforcing compliance identified in rule 3 as a core component of dealing with cases fairly and justly. That does not mean that these considerations are unimportant, as *BPP Holdings* confirms. In particular, I have not lost sight of the guidance 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."

51. Notwithstanding this guidance, a complete assimilation of the approach taken in courts and tribunals would fail to recognise the distinctly different terms in which the overriding objectives of their respective procedural rules are expressed. In taking into account the need to enforce compliance that consideration should not be elevated to a status which the FTT Rules do not confer on it. In particular it should not be allowed to short circuit a proper assessment of the overall justice of the situation, as mandated by rule 8(2), when the FTT consider its response to non-compliance or relief from sanctions.
52. Nor should necessary considerations of efficiency and compliance be allowed to overshadow those aspects of the FTT's overriding objective identified in rule 3 which are missing from CPR 1.1. It might fairly be said that these emphasise some of the less muscular features of dealing with a case fairly and justly, including the avoidance of formality, the search for flexibility and the importance of ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.
53. Of course, it cannot be suggested that those same considerations are irrelevant to doing justice in courts, but that is not a reason to diminish or disregard their special significance for tribunals. CPR 1.1 and rule 3 of the FTT Rules lean in subtly different directions in describing how justice is to be achieved. The differences which appear on the face of the rules are not accidental and should not be forgotten.
54. The difficulty with the FTT's approach in this case lies in the particular weight which it gave to the factors identified in CPR 3.9(1) at the third stage of its *Denton* assessment, and in the absence of consideration of the FTT's own overriding objective and especially of those aspects of rule 3 which might have tempered the draconian approach which it adopted. By concentrating on CPR 3.9 the FTT lost sight of rule 3 and of rule 8(2), with its reference to "such action as the Tribunal considers just" and its helpful menu of responses to cases of non-compliance. These act as a reminder that the appropriate reaction, even in a serious case, need not always be to strike out the proceedings.
55. 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 compliance with them were the handmaids not the mistresses of justice and could never be allowed to assume a greater importance than doing justice in any case. The menu of responses in rule 8(2) has been included by the Tribunal Procedure Committee to assist the FTT in finding the just and proportionate response to non-compliance in a particular case, and it ought always to be kept in mind whenever the consequences of non-compliance are being considered.
56. That menu includes, at rule 8(2)(e), the ability to bar or restrict a party's participation in the proceedings. That is a lesser sanction than striking out the proceedings altogether. Where the burden of establishing that an offence has been committed falls on the Council as respondent, as it does in an appeal against a financial penalty, the lesser sanction of barring or restricting participation need not have the same decisive effect on the outcome of the appeal as an order striking it out. Where an appeal is struck out the proceedings are at an end and the financial penalty remains in place; in contrast, where a party is barred from participating, or restricted in how they may participate, the Council will be left to prove the offence before the penalty can be confirmed and the appeal may yet be successful.

57. Although, on one reading, the FTT’s assessment or evaluation of all the circumstances of the case might appear to have been restricted just to the factors in CPR 3.9(1), I have no difficulty in assuming that it had the whole of the procedural history in mind, as well as the poor impression which Mr Deane himself obviously made at the hearing, as those were all spelled out in the decision before the FTT reached the three stage *Denton* test. The FTT was quite entitled to take a dim view of the excuses it was offered, but it ought not to have directed itself by reference to the wrong procedural rules. In doing so it erred in law.

58. The second respect in which the FTT misdirected itself was in its reliance on the Tribunal’s decision in *Haziri* without looking beyond the bare proposition that the merits of a dispute are not generally relevant to case management decisions. That proposition was supported in *Haziri* by reference to the decision of the Supreme Court in *Global Torch*, in which it was stated by Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed). But, as I indicated in *Haziri*, Lord Neuberger qualified the general rule in one important respect. The relevant passage from his judgment is at [29] to [31], as follows:

“29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject matter of the decisions of Vos J, Norris J and Mann J in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment. Both the general rule and the exception appeared to be common ground between the parties, [...]. In my view, the general rule is justifiable on both principled and practical grounds.

30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.

31. In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face a trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions. For present purposes, I am prepared to assume in the Prince's favour that that is indeed correct.”

59. If the proper outcome of a case is clear at an early stage a court will deal with it summarily, without a full trial. That is the basis of Lord Neuberger’s exception to the general rule that the strength of a party’s case is irrelevant when case management is being considered. The same applies in a case involving an allegation of criminal conduct (albeit in the context of the imposition of a quasi-criminal financial penalty). If the prosecution case is so weak that it is bound to fail, justice demands that the innocent party should be entitled to rely on that fact in support of an application for relief against procedural sanctions.
60. In this case the FTT took the view that Mr Deane’s involvement in the control or management of the property was a fact sensitive issue and that the late service of his documents necessarily meant that the hearing could not have proceeded. But it reached that conclusion without asking itself whether the evidence relied on by the Council provided a basis on which it could properly be concluded that a criminal offence had been committed by Mr Deane. It justified that approach by reference to the principle in *Haziri*, but without considering the exception in favour of a party who is entitled to summary judgment in their favour. That was its second error.
61. The burden of demonstrating that an offence had been committed rested on the Council. It sought to discharge that burden by the evidence which it filed on 29 September 2023. That evidence showed that the financial penalty had been imposed because Mr Deane was understood by the Council to be the “managing person of the property at 86A Hatherley Gardens”.
62. The offence to which the Council referred was the offence in section 72(1), 2004 Act, of being “a person having control of or managing an HMO which is required to be licensed ... but is not so licensed”. The definition of a person having control, in relation to premises, is provided by section 263(1), 2004 Act, as follows:
- “In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.”
- By specifying in its final notice that Mr Deane was alleged to be the “managing person” it is clear that the Council was not alleging that he was a “person having control”.
63. The definition of “person managing” is in section 263(3), 2004 Act; so far as it applies to HMOs it is as follows:
- “In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—
- (a) receives (whether directly or through an agent or trustee) rents or other payments from—
- (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
- (ii) ...; or
- (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise)

with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.”

64. The concepts of having control of, or managing an HMO are both related to the receipt of rent. In the case of a person having control the rent must be a rack-rent. In contrast, a person managing need not receive a rack-rent; receipt of any amount of rent or other payments is both necessary and sufficient.
65. Nothing in section 263(1) requires that the person having control should have any interest in the property itself. That is in contrast to a person managing, who section 263(3) requires must be “an owner or lessee” of the premises.
66. The meaning of the word “owner” is provided by section 262(7):

“In this Act “owner”, in relation to premises –

 - (a) means a person (other than a mortgagee in possession) who is for the time being entitled to dispose of the fee simple of the premises whether in possession or in reversion; and
 - (b) includes also a person holding or entitled to the rent and profits of the premises under a lease of which the unexpired term exceeds 3 years.”
67. The expressions “lease” and “tenancy” have the same meaning in the Act and include a sub-lease or sub-tenancy and an agreement for a lease or tenancy (or sublease or subtenancy) (section 262(1)-(2), 2004 Act).
68. In this case if it relied on section 263(3)(a), it was for the Council to demonstrate, to the criminal standard of proof, that Mr Deane was an owner or lessee of No.86A, and that he received (whether directly or through an agent or trustee) rents or other payments from the people in occupation of the property. Alternatively, it could prove that he received those payments as an agent or trustee on behalf of the owner or lessee.
69. If the Council relied on section 263(3)(b), it was required to prove that Mr Deane was an owner or lessee of No.86A, who would have received (directly or through an agent or trustee) rents or other payments from the people in occupation of the property, but for the fact that he had entered into an arrangement with another person who was not an owner or lessee of the premises by virtue of which that other person received the rents or other payments.
70. The evidence filed in support of the Council’s case comprised a witness statement by one of its environmental health officers with supporting exhibits. The exhibits included the following:
 - (1) The tenancy agreement of 5 March 2020 signed by two occupants of No.86A (but not by a landlord) which identified Mr Deane as the landlord but which was not signed by him or on his behalf.

- (2) A copy of the registered freehold title of No.86A as at 30 November 2021 showing Ms Raujackdine as registered proprietor since 2012 and that the property was not subject to any registered lease.
 - (3) A statement of one of the tenants, Vlad Zartoni, signed on 13 April 2022, confirming his occupation of the property and the rent he paid and naming six other occupants. The statement was in the form of a questionnaire but questions about the person to whom Mr Zartoni paid his rent (their name, address and phone number) were not answered; in response to a direct question about the identity of his landlord, Mr Zartoni said only that he didn't speak to the landlord and only spoke to the agent and had last seen the landlord or agent over three years earlier.
 - (4) Two pages from another statement which said that the agent was Tantum Properties; the maker of the statement was not identified on those pages or in the officer's own statement.
 - (5) A tenancy deposit certificate which is too poorly copied for the landlord's name to be made out and which was not referred to in the officer's statement.
 - (6) Searches made in a number of official databases, including the database of the National Anti-Fraud Network, which showed that Mr Deane had connections with eight different properties, including No.86, but disclosed no connection with No.86A.
 - (7) A copy of the emails of 8 and 15 November 2022 from Deane Holdings responding to the Council's notice of intent and request for access stating that No.86A did not belong to Mr Deane; the officer's only comment on these denials was that the Council believed Mr Deane had a connection to the property "as the landlord and person managing the property as indicated by the tenancy agreement".
71. The Council's evidence did not show that Mr Deane was the owner of No.86A. The freehold proprietor was Ms Raujackdine and no registered lease was shown on the title. By section 27(2)(b)(i) of the Land Registration Act 2002 leases granted out of existing registered titles for a term of more than seven years are compulsorily registrable. Mr Deane could therefore only have been an owner, within the meaning in section 262(7) (b), if he held a lease granted for a term of less than seven years, the term of which had more than three years left to run.
 72. Although Mr Deane was not shown to be an owner, he might nevertheless still have been a person managing if he was a lessee. There was no evidence that Mr Deane had been granted a lease by Ms Raujackdine or by anyone else.
 73. Nor was there evidence that Mr Deane was the recipient of rent or any other payment from those in occupation of No.86A, whether on his own account or as trustee or agent for anyone else. Mr Zartoni had not responded when asked whom he paid rent to and did not provide a name either for his landlord or for an agent. A second unidentified person stated that the agent was Tantum Properties but did not name the landlord. Both statements said that the maker had had no contact with the landlord for more than three years. The only other document which might have confirmed the identity of the landlord was the tenancy deposit certificate, but it was so poorly reproduced in the Council's

bundle that the name of the landlord could not be made out. The Council's officer did not refer to the certificate in her witness statement.

74. Even without evidence from Mr Deane himself, the Council's case was therefore very weak. It had drawn its conclusions after the most cursory investigation and had presented them to the FTT in a form which was part incomplete and part illegible. Its officers had not obtained a statement from any occupant of No.86A concerning the identity of the person they understood to be their landlord or to whom they paid rent. They had not approached the agent named by one of the tenants (assuming the incomplete statement was made by a tenant). They had not interviewed Mr Deane or, as far as appears from the material it supplied to the FTT, Ms Raujackdine, nor asked either of them or the agent to explain how Mr Deane's name appeared on the unsigned tenancy agreement. The Council's case therefore depended on an inference that Mr Deane must have held a lease or tenancy and must have received payment from the tenants occupying No.86A because his name appeared on the agreement.
75. Receipt of rent is a necessary condition of being a person managing property (unless an arrangement has been entered into under which another person receives it, and there was no evidence of any such arrangement). In the absence of any suggestion by the tenants that they paid rent to Mr Deane, and in the face of the repeated denials of involvement addressed to the Council by Mr Deane's office, when it made its decision of 18 December 2023 the FTT ought to have considered whether the mere existence of the unsigned agreement provided evidence from which they could be sure beyond reasonable doubt that Mr Deane had received rent or had any interest in No.86A at all. If there was insufficient evidence on which to discharge the burden of proof, the FTT should have taken that into account in determining whether to accede to Mr Deane's application to reinstate the appeal.
76. In any event, the material before the FTT was not limited to the statements filed by the Council. Mr Deane had asserted in his notice of appeal (which he supported with a statement of truth) that he was not the owner or manager of the property and had no connection with it. It was not for Mr Deane to prove any of those matters, but his supporting statement filed on 20 December 2022, a year before the FTT hearing, was accompanied by an email from Stonehenge acknowledging that they had indeed made a mistake concerning the tenancy agreement for No.86A. The FTT's decision to strike out the appeal, rather than imposing some lesser sanction, and its refusal to reinstate the appeal, meant that it never had to consider that explanation.
77. The final respect in which the FTT's decision is open to serious question is related to the second. At the first stage of its *Denton* assessment the FTT said that Mr Deane's failure of compliance was "very serious"; this was his appeal and, the FTT said, the late service of documents by him necessarily meant that the hearing on 18 December could not have proceeded if the appeal had been reinstated. It is true that this was Mr Deane's appeal but, as the FTT's directions recognised, the burden of establishing that a criminal offence had been committed lay on the Council. The FTT's assessment of the seriousness and consequences of the breach ignored the material which had already been filed by Mr Deane a year earlier and paid no regard to the weakness of the Council's case.
78. The FTT's directions required Mr Deane to file an appeal bundle in pdf format containing a further copy of his original notice of appeal and supporting documents. But

the FTT already had the notice of appeal and the documents which accompanied it in electronic form. To strike out the appeal for failure to supply them again would be to require compliance for its own sake and would cross the line into impermissible harshness.

79. The other requirements of the directions were optional. Mr Deane was to file an “expanded statement of reasons for the appeal” including any additional grounds on which he wished to rely, together with the statements of any witnesses to be relied on and any other documents to be used. But the single ground of Mr Deane’s appeal was that he had no connection with No.86A and he did not need to expand that ground of appeal. Nor was there any obligation on Mr Deane to rely on other witnesses or documents, as the directions themselves made clear. Once again, I do not consider that it would be permissible to strike out an appeal which has been properly commenced simply because a party has failed to file documents which are not necessary to identify the ground relied on and which the FTT has indicated are optional.
80. If the FTT considered that some sanction was required because no additional material had been filed in time, or because the documents had not been included in a single pdf file, it could have restricted Mr Deane’s case to the contents of his notice of appeal and documents served with it and denied him the opportunity to rely on any other material. It might have considered denying Mr Deane the right to make any submissions in support of his appeal, leaving it to the Council to prove that he had committed the offence in respect of which the penalty had been imposed, but it is difficult to see how that would be consistent with the overriding objective. Either of those responses would have enabled the hearing to proceed on 18 December. Instead, distracted by CPR 9.3 and misunderstanding *Haziri*, the FTT did not consider either of those options. In my judgment its decision not to reinstate the appeal was flawed and was not within the boundaries of its discretion.

Disposal

81. For these reasons the appeal is allowed and the FTT’s decision of 18 December 2023 refusing to reinstate Mr Deane’s appeal against the financial penalty is set aside. In my judgment the only order which could fairly and justly have been made on that application was an order reinstating the appeal.
82. Two questions remain to be considered. The first is whether the order for reinstatement of the appeal should be subject to any qualification concerning Mr Deane’s participation. The FTT was unimpressed by the explanation he offered for his failure to communicate with it or to file additional documents, but the documents he did file on 15 December 2023 (which I have not been shown) are not necessary to explain his case. In my judgment the appropriate order is one confining Mr Deane to the documents and explanation he supplied with his original notice of appeal. Subject to that limitation, I would not impose any further restriction on his right to make submissions if the appeal comes to a hearing; it is not necessary to do so, and ensuring that the parties are able, so far as practicable, to participate fully in the proceedings is an important aspect of dealing with cases fairly and justly (rule 3(3)(c)).
83. The second question is whether the reinstated appeal against the financial penalty can be determined without a further hearing or should be remitted to the FTT to be redetermined by a differently constituted panel. The proceedings in this Tribunal have

been conducted on paper and the parties have not had the opportunity to express a view on that question. I have already drawn attention to the weakness of the Council's case and I will give it 21 days from the date of this decision to say whether it is content for me to make an order allowing the appeal against the financial penalty and setting the Council's final order aside, or whether it would like the matter to be considered by the FTT at a further hearing.

Martin Rodger KC,
Deputy Chamber President

25 September 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.