# TC06198

**Appeal number: TC/2016/03912**
**TC/2016/03913**
**TC/2016/03915**

***PROCEDURE – failure to comply with direction which stated that non-compliance may result in the appeals being struck out – whether appeals should be struck out – no***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ANISHA DALAL** **Appellants**
**EBRAHIM DALAL**
**SAJID DALAL**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Manchester on 23 August 2017**

**Mr Ghazan Mahmood of counsel, instructed by AMS Accountants for the Appellant**

**Mr Brian Horton of HM Revenue & Customs for the Respondents**

## DECISION

*Background*

1. This is a decision on whether these appeals should be struck out pursuant to Tribunal Rule 8(3)(a). Rule 8(3)(a) provides that the tribunal may strike out the proceedings if the appellant has failed to comply with a direction which stated that failure to comply could lead to the striking out of the proceedings. There was such a direction in the present appeals and there was a failure to comply by each appellant. The circumstances in which the direction was made are as as follows.

2. On 18 June 2015 HMRC issued various corporation tax assessments and amendments to company tax returns of Bolton Poultry Products Ltd ("the Company") covering periods from 2006 to 2015. The Company had previously gone into liquidation on 30 January 2015. On 4 March 2016 notices of penalty assessments were given to the Company totalling £1,525,796. The penalties were assessed pursuant to Schedule 24 Finance Act 2007 on the basis of alleged deliberate inaccuracies in the Company's company tax returns.

3. On 7 March 2016 HMRC sent personal liability notices to each appellant pursuant to paragraph 19(1) Schedule 24 Finance Act 2007 on the basis of HMRC's contention that the penalty payable by the Company was attributable to the appellants as officers of the Company. The amount specified in each notice was 33.33% of the penalty payable by the company. Each appellant was therefore subject to a penalty of £508,598. I shall refer to the appellants individually as AD, ED and SD. AD and SD are married. ED is the father of SD.

4. I should note here that further personal liability notices were issued to each appellant on 28 November 2016 relating to three of the Company's accounting periods. Each notice was in the sum of £170,863 but I understand from Mr Horton that these were issued for technical reasons to replace some of the liabilities previously notified to the appellants for three periods, albeit in the same amounts. Since then HMRC have also stated that they will not be defending penalties referable to the Company's accounting period ending 30 September 2015 which reduces the liability in relation to each appellant by £36,859. The effect of these matters as explained by Mr Horton is that the liability being pursued against each appellant is £471,739.

5. Following service of the original personal liability notices there was apparently further correspondence between HMRC and the appellants' representative, AMS Accountants ("AMS"). Notices of appeal were lodged with the tribunal on 20 July 2016. It appears that the notices of appeal were late and they included applications for permission to notify the appeals out of time. HMRC did not object to that application and the appeals proceeded. By directions released on 8 August 2016 the three appeals were joined to be heard together and pursuant to those directions HMRC served their statements of case on 7 October 2016.

6. The grounds of appeal are firstly that the underlying tax assessment on the Company is "wildly inaccurate" based on unjustifiable assumptions and estimates. Secondly, there was no deliberate inaccuracy in the Company's tax returns. Thirdly, it is alleged that the penalties are excessive. Fourthly, AD and SD contend that they were not directors or officers of the Company at any relevant time and they did not have any responsibility for the Company's finances.

7. On 2 November 2016 the tribunal released standard directions which required all parties to serve their lists of documents by 25 November 2016 and witness statements by 23 December 2016. Listing information was to be provided by 6 January 2017. Pursuant to those directions HMRC served their list of documents on 24 November 2016 and witness statements on 23 December 2016. They provided listing information on 6 January 2017.

8. By this time there had been no compliance by any of the appellants with any of the directions, and no applications for extensions of time. On 13 January 2017 HMRC made an application to strike out the appeals pursuant to Rule 8. Before that application was dealt with, the tribunal wrote to AMS on 24 January noting the non-compliance and asking them to advise the tribunal of the position within 7 days.

9. On 3 February 2017 AMS wrote to the tribunal apologising for the non-compliance and stating that "there has been some confusion as the Director, Mr E Dalal has been away in India for some time". AMS also objected to the strike out on the basis that proposals had been made to HMRC which had been "dismissed" and that SD and AD "were not directors and should not have been implicated".

10. On 11 March 2017 Tribunal Judge Raghavan directed that following non-compliance, unless the appellants complied with the directions by 3 April 2017 then the proceedings may be struck out. The judge also noted that AMS' letter gave no explanation as to why the directions had not been complied with, and that the absence of one appellant abroad did not amount to an explanation.

11. There was no response to the tribunal's direction and on 31 May 2017 the tribunal asked the parties to provide dates to avoid for a hearing at which the tribunal would consider striking out the appeal. Again, there was no response from the appellants and the hearing was listed for Wednesday 23 August 2017.

12. On Monday 21 August 2017 AMS instructed counsel to represent the appellants at the hearing. On the morning of the hearing Mr Mahmood produced a skeleton argument and witness statements from each of the appellants to support their case that the appeals should not be struck out.

*Findings of Fact*

13. For the purposes of the present application the witness statements were taken as read and for present purposes only I make the following findings of fact.

14. AD and SD contend that they were not directors or officers of the Company and as such they cannot be liable for any penalties. It is not disputed that ED who is 79 years old was a director of the Company. It is contended that the Company was established and operated by ED, that AD and SD were not involved in the management of the Company and that both worked on the instructions of ED.

15. All three appellants were aware of the penalties assessed against each of them and of the appeal proceedings before the tribunal. Each appellant instructed AMS. However ED, as head of the family, made all decisions relating to finance and business. ED was responsible for dealing with all three appeals and AD and SD left him to deal with the appeals on their behalf. This was partly because he was the head of the family and partly because AD and SD had suffered a considerable amount of stress in connection with a separate company they had established, Bolton Halal Chicken Limited ("BHC Ltd"). During the course of 2016 AD and SD were interviewed, arrested and charged in connection with alleged breaches of immigration laws by BHC Ltd. Whilst those charges were dropped there was an unannounced visit by HMRC in late 2016 and in November 2016 AD and SD received civil penalty notices based on alleged breaches of immigration laws. In addition their premises were the subject of animal welfare protests. There were concerns over SD's health and by April 2017 AD and SD had disposed of their interest in BHC Ltd.

16. AD and SD accept that against the background of their involvement with BHC Ltd they buried their heads in the sand as far as the appeals were concerned. They recognise and acknowledge that ED failed to ensure compliance with the tribunal's directions. They were not aware of any directions released by the tribunal and took no steps to find out how the appeals were progressing.

17. ED took on responsibility for the appeals. At some stage AMS engaged the services of AVN Venus Tax, specialists in tax dispute resolution, on behalf of the appellants. On 21 January 2017 AD telephoned Mr Horton of HMRC. AD was aware of the tribunal proceedings and she invited Mr Horton to speak to Mr Bradley of AVN Venus who was with her. Mr Bradley acknowledged that the appellants had had their "heads in the sand" but he indicated that he would be making settlement proposals. Following that phone call there was a subsequent phone call between Mr Bradley and the assessing officer but no offer in settlement was made.

18. ED says that he anticipated that a settlement might be reached and as a result he did not focus on ensuring compliance with the tribunal directions. He now accepts that this was the wrong approach. He also considers that other factors contributed to his lack of focus:

(1) His absence from the UK in India for 15 days during January 2017 and throughout April 2017,

(2) Poor health, although no relevant particulars are given, and

(3) The stress of the appeal and matters in connection with the raid on BHC Ltd.

*Legal Framework*

19. Both parties agree that the approach I should take in relation to non-compliance with the directions released on 11 March 2017 is to apply by analogy the principles applied to relief from sanctions by the civil courts. As the Supreme Court recently stated in *BPP Holdings Ltd v Commissioners for HM Revenue & Customs [2017] UKSC 55* at [26]:

> "26. …In a nutshell, the cases on time limits and sanctions in the CPR [Civil Procedure Rules] do not apply directly, but the Tribunals should generally follow a similar approach."

20. The Supreme Court endorsed a passage from the judgment of the Senior President of Tribunals in the Court of Appeal at [37] where he said:

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, 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."

21. The principles to be applied in relation to relief from sanctions were set out by the Court of Appeal in *Denton v TH White Ltd & others [2014] EWCA Civ 906*. At [24] the court set out what is now the familiar three stage approach as follows:

> (1) Identify and assess the seriousness and significance of the breach (discussed at [25]-[28] of the judgment).
>
> (2) Consider why the default occurred (discussed at [29]-[30] of the judgment).
>
> (3) Evaluate all the circumstances of the case so as to deal justly with the application for relief form sanctions (discussed at [31]-[38] of the judgment).

22. In the first stage the focus is on whether the breach has been serious or significant. At [26] the court recognised that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance. Whether a breach imperils future hearing dates or otherwise disrupts the conduct of the litigation may well be a useful measure of whether it has been serious or significant. The first stage does not involve consideration of unrelated failures which are better considered at the third stage.

23. At [28] the Court of Appeal said this:

> " If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

24. The second stage is important, particularly where the breach is serious or significant. The court or tribunal should consider why the default occurred.

25. The third stage involves consideration of all the circumstances of the case. The need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules are of particular importance in the third stage and should be given particular weight. It is also necessary to take account of the seriousness and significance of the breach and the reasons for it (stages 1 and 2). At [35] and [36] the Court of Appeal said this:

> " *35. …The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.*
>
> *36. But it is always necessary to have regard to all the circumstances of the case…*"

26. It is clear from Denton that where there is a serious or significant breach and no good reason for the breach, a claim for relief from sanctions will not automatically fail. It remains necessary to consider the third stage. It is important to bear in mind the overriding objective of dealing with cases fairly and justly. In Denton reference was made to the Court of Appeal decision in *Chartwell Estate Agents Ltd v. Fergies Properties SA* [2014] EWCA Civ 506. In that case the breaches were serious or significant and there was no good reason for them. Nevertheless relief from sanctions was granted. Davis LJ stated at [62]:

> " 62. … It is also to be emphasised that the courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature. The objective under CPR 3.9 is to achieve a just result, having regard not simply to the interests of the parties but also to the wider interests of justice. As has been said by the Master of the Rolls (in his 18th lecture), enforcing compliance is not an end in itself. In the well-known words of Lord Justice Bowen: "The courts do not exist for the sake of discipline". Such sentiments have not been entirely ousted by CPR 3.9, as to be interpreted and applied in the light of *Mitchell*."

27. At [38] of Denton the Court of Appeal emphasised that the two factors specifically referred to in CPR 3.9 should be given particular weight, namely:

> (1) The need for litigation to be conducted efficiently and at proportionate cost; and
>
> (2) The need to enforce compliance with rules, practice directions and orders.

*Reasons*

28. The question for me is whether in all the circumstances any of the appeals or all of them ought to be struck out. I must apply the approach of the Court of Appeal in *BPP Holdings*, endorsed by the Supreme Court.

29. The appellants failed to comply with the tribunal directions released on 11 March 2017 ("the March Directions"). Tribunal Rule 8(3)(a) is therefore engaged. It provides as follows:

> " (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; …"

30. In exercising my discretion under that rule I must seek to give effect to the overriding objective in Tribunal Rule 2, which provides as follows:

> " 2(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;
>
> (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."

31. Mr Mahmood on behalf of the appellants realistically accepted that the failure to comply with the March Directions was a serious breach, indeed he described the breach as "egregious". There are however degrees of seriousness, and it is worth noting for example that this is not a case where a future hearing date was lost. I shall take that into account at stage 3.

32. Mr Mahmood did not seek to suggest that there was any good reason for any of the appellants' failures to comply. Having said that, it is clear that there are varying degrees of culpability between AD and SD on the one hand and ED on the other. It was ED who had taken on responsibility for dealing with all the appeals. It was not suggested that ED's age was relevant to his failure to comply with the directions.

33. I now turn to consider stage 3. I have not been told what advice ED was receiving from AMS or AVN Venus in relation to compliance with the tribunal's directions. All correspondence from the tribunal in relation to the appeals was sent to the appellants' representative AMS. The appellants have not sought to criticise AMS in any way and I must therefore infer that AMS made ED aware of the tribunal directions and the need to comply with those directions.

34. I am satisfied for present purposes that there was some limited contact between the appellants' representatives and HMRC in relation to the penalties under appeal in January 2017. There was some discussion of possible settlement at that time but I am not satisfied that there was any serious attempt to engage with HMRC about a settlement. There is no evidence of any contact after January 2017 until a few days before the hearing when there was further telephone contact. Apart from that, there was a complete lack of engagement by ED throughout the period from November 2016 when the first directions were released until 21 August 2017 when Mr Mahmood was instructed. During that period ED simply ignored the November directions and the various time sensitive requirements of those directions. No attempt was made to comply with those directions or to seek an extension of time or to give any proper explanation as to why the directions had not been complied with.

35. Further, ED then ignored the March Directions which gave the appellants until 3 April 2017 to comply, indicating in clear terms that the appeals may be struck out in the event of non-compliance. Even when that time limit expired there was no contact with the tribunal or any form of explanation from ED as to why the appellants had not complied with the March Directions. Indeed, the first explanation, such as it is, was not offered until the day of the hearing when the skeleton argument and witness statements were served.

36. Mr Mahmood submitted that the non-compliance was not malicious or intentional, rather it was borne out of naivety and carelessness. In relation to AD and SD I am satisfied for present purposes that that is the case. They are culpable for abrogating responsibility entirely to ED when they should have at least ensured that he kept them updated as to progress in the appeals.

37. The position of ED is that he is clearly more culpable. I do not consider that his non-compliance was merely the result of carelessness or naivety. It seems to me that for whatever reason he took a conscious decision not to engage with the appeal procedure. He was aware of the directions and he was aware that non-compliance with the March Directions could result in the appeals being struck out. I do not accept that ED's absence from the UK, poor health or stress offers any mitigation for the non-compliance. Further, any attempts to settle the dispute in January 2017 were at best half-hearted. The result was an inordinate delay in the proceedings covering the period from November 2016 when the appellants' lists of documents were first due for service to the date of the present hearing, at least 9 months.

38. I am conscious that striking out the appeals would be a draconian step, not to be undertaken lightly. I must take into account factors which weigh against striking out the appeals. Mr Mahmood relied on the following matters:

(1) The appeal has merit and striking out the appeals would give HMRC an unjustified windfall.

(2) The penalties under appeal in relation to each appellant are approximately £500,000 and it would be disproportionate to strike out the appeals.

(3) The delay caused by non-compliance does not in itself justify striking out the appeals.

(4) HMRC have suffered no prejudice beyond that delay.

39. Mr Horton for HMRC sought to argue that the appeals had no realistic prospect of success. However it is clear that for present purposes I should only embark on an assessment of the merits if they can be conveniently and proportionately ascertained (see *R (otao Dinjan Hysaj) v SSHD [2014] EWCA Civ 1633 at [46]*). Subject to a point below in relation to ED I do not consider that I can make any detailed assessment as to the merits of the appeals. Both parties were content that I should proceed on the basis that the appellants would have at least a reasonable prospect of success if they are permitted to pursue the appeals. I am satisfied on that basis that the appellants would therefore suffer significant prejudice if the appeals are struck out. They would lose the opportunity to pursue meritorious appeals.

40. I do not consider that Mr Mahmood is right to say that the effect of striking out the appeals would be a windfall to HMRC. A similar submission was rejected by the Supreme Court in *BPP Holdings* where Lord Neuberger stated at [32]:

> " 32. It was pointed out that a debarring order represents an unjustified windfall for BPP. It is true that the debarring order will either improve BPP's prospects of success in the substantive surviving appeal (if the appeal goes ahead unopposed) or result in BPP succeeding on the appeal when it might not otherwise have done so (if HMRC concede the appeal). However, that point can always be made by a party facing a debarring order, and to give the point any weight, save perhaps in exceptional circumstances, would appear to me to undermine the utility of the sanction of a debarring order. I can see no exceptional circumstances in the instant case."

41. In my view it is sufficient to take into account the prejudice which the appellants will suffer if the appeals are struck out. There are no exceptional circumstances which justify also taking into account any "windfall" to HMRC.

42. The magnitude of the penalties is certainly a factor which carries significant weight in favour of not striking out the appeals. I have no evidence as to what financial effect such penalties would have on the appellants but I infer that the effect would be very significant.

43. Mr Mahmood did not seek to suggest that delay caused to the proceedings was irrelevant, but he did submit that the delay on its own did not justify striking out the appeals. It is true that no hearing date has been lost, but I regard the delay in this case as a highly significant factor. Further, the effect of non-compliance goes beyond the delay which has been caused. It is prejudicial not only to the respondents but to the administration of justice generally. The tribunal oversees compliance with directions and as in this case will follow up non-compliance. There is a public interest in the efficient administration of justice which has been prejudiced by the appellants' non-compliance.

44. I am satisfied that HMRC have not suffered any specific prejudice over and above the delay caused by non-compliance and the need to devote resources to the present application. Mr Horton suggested that HMRC had suffered prejudice in that they remained in the dark about the appellants' documents and witness evidence. However that is not prejudice they will suffer if the appeals are not struck out because clearly it will be necessary for the appellants to comply with the directions if the appeals proceed.

45. Taking into account all the circumstances I am satisfied in relation to AD and SD that their appeals should not be struck out. It was not unreasonable of them to delegate some responsibility for the appeals to ED. Their culpability arises from a failure to supervise ED and a failure to keep themselves informed as to progress in the appeals. That failure continued over an extended period. It resulted in a serious breach of the March Directions and there was no good reason for that breach. However, giving due weight to the circumstances in which the breach arose and in particular to the financial effect a strike out would have, on balance I am satisfied that it would not be fair and just to strike out their appeals.

46. Mr Mahmood submitted that if the appeals of AD and SD are not struck out then ED's appeal should not be struck out even though the blame for non-compliance rests principally with him. He relied on the fact that the three appeals all involve the same factual matrix, the same witnesses and broadly the same issues. No additional time or costs would therefore be associated with allowing ED's appeal to continue. I do not consider that fact weighs very heavily in the balance.

47. It is relevant that Mr Horton accepted that the personal liability notices served on the appellants on 28 November 2016 amount to new decisions in respect of which there is a separate right of appeal. Mr Horton stated that if the appeals are struck out then HMRC will not rely on the new liability notices. Conversely, if the appeals are not struck out then HMRC will not rely on the original liability notices for three of the periods and appeals against the replacement notices would have to "catch up" with the present appeals.

48. HMRC are not seeking to uphold the original liability notice to ED which is under appeal to the extent of £170,863. In other words, I infer that ED would succeed in his appeal to that extent. In my view that is a factor to be taken into account, but it appears to be more a technical matter than a matter of substance. It is not a case where there would be injustice in the sense of a sum becoming payable to which HMRC accept they have no entitlement. HMRC seek to maintain the whole amount of the penalty, albeit by reference to peersonal liability notices served after the notice of appeal was lodged.

49. Mr Mahmood suggested that it would be an affront to justice if the appeals were struck out but the appellants could then litigate the new penalties on the same grounds as the current appeals. I do not consider it would be an affront to justice, it would simply be the price of a serious and significant breach in relation to the present appeals for which there was no good reason. In any event the point does not arise. If the appeals are struck out the original penalties would be payable and HMRC have indicated that they would not rely on the new notices. There would therefore be no question of a new appeal.

50. I must take into account all the circumstances and determine the application in a way which is consistent with the overriding objective of dealing with cases fairly and justly. The Supreme Court in *BPP Holdings* noted at [35] that the tribunal was faced with two "unpalatable choices", namely the draconian action of striking out the appeal or doing nothing. I am faced with the same choice. In relation to ED it is very finely balanced, but taking everything into account I am just persuaded that his appeal should not be struck out. Serious though the breach is and despite the absence of any good reason for the breach, in my judgment it would not be proportionate to strike out the appeal where so much is at stake.

*Conclusion*

51. There must be no further delay in these proceedings. I have released case management directions at the same time as this decision. In terms of what the appellants are required to do, those directions are on terms that in the event of non-compliance the appeals will be struck out.

52. I indicated at the hearing that HMRC would be able to make an application for costs pursuant to Tribunal Rule 10. In principle I would be sympathetic to such an application, but obviously the appellants will have an opportunity to respond to such an application and if appropriate invite the tribunal to consider their financial means.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 03 NOVEMBER 2017**