Case Name: *Simpsons Malt Limited and Others v Jones and Others (VOs) [2017] UKUT 460 (LC) (4 December 2017)*

Topic: Procedural: VTE strike out for non-compliance with directions reversed by the Upper Tribunal, with guidance issued

Full case: click here

Summary: In each of 5 cases heard together there had been non-compliance to a greater or lesser degree with procedural directions and practice statements of the VTE, in response to which the tribunal had struck out such proceedings and refused reinstatement of the appeals. This was based on the application of a more stringent test requiring exceptional circumstances, which did not become official until the publication of the 2017 consolidated practice statement. The Upper Tribunal was critical of this approach and granted all 5 appeals, directing further consideration by the VTE.

Commentary: This procedural decision of the Upper Tribunal relates to the refusal by the VTE to reinstate appeals which had been struck out for failure to comply with the lower tribunal's procedural directions and practice statements. The appeals were allowed and the UT clarified the approach to be taken in the future by the VTE when there has been a failure to comply with such procedural requirements. This involves the application of the principles set out in *Denton* v *White* [2014] EWCA Civ 906 in determining applications for reinstatement of appeals which had been struck out. The UT also referred to the Supreme Court's decision in *BPP Holdings* v *HMRC Commissioners* [2017] UKSC 55, which provided guidance as to the extent to which an appellate court may interfere with case management decisions taken by the inferior court, where correct principles have been applied and relevant matters have been taken into account; such interference should only occur when the appellate judge is satisfied that the decision is so plainly wrong that it falls outside the ambit of discretion entrusted to the original judge.

Five cases were heard together, forming part of a group of 11 appeals against strike out. In brief, the respective issues giving rise to the VTE's decision to strike out (and the subsequent refusal to reinstate) were:

1. Simpsons Malt Limited – failure to give notice to the VTE that the case remained "live", between 7 and 14 days before the hearing date. In fact, such a notice had been given but the VTE apparently did not place the case on the provisional hearing list. The appellant's surveyor had been trying to settle with the VO prior to the hearing date and, when that proved impossible to achieve, asked the tribunal (a few days before the hearing) for a postponement, in response to which the VTE issued a notice of intention to strike out. The surveyor attended the hearing to explain that both sides expected to settle shortly, but to no avail.
2. Norton Motorcycles Limited – failure to lodge a statement of case under a pilot project applying to the Castle Donington area, where a statement of case had in fact been submitted previously to the tribunal (before the pilot project took effect), prior to successive adjournments. The pilot project wording was ambiguous in this respect and, upon realising that the statement of case already with the tribunal might not be

sufficient to comply with the standard directions, the surveyor applied for a further adjournment. In the application to adjourn the surveyor referred to issues with the software package used to remind his firm of tribunal deadlines, as a result of which the timetable was not adhered to (although the surveyor had sought to progress a settlement with the VO and had filed the bundle with the tribunal in time). The adjournment was refused by the VTE and the appeal was struck out.

3. First Colour Limited – failure to give notice to the VTE that the case remained "live", between 7 and 14 days before the hearing date. Notice was given 2 days before the hearing, stating that the expectation of both sides was that a settlement would be achieved and that a short postponement was requested. The rating surveyor attended the hearing, relying on a practice statement which, in his interpretation, provided that a hearing would take place immediately if the application for postponement was refused. The VO did not attend the hearing and the VTE communicated its decision to strike out the appeal, having refused the request for postponement.
4. Portland Lighting Limited – again, the notification requirement (7 to 14 days before the hearing date) was not complied with, albeit notice was served only 24 hours late. In response, the VTE issued a notice of intention to strike out. The VTE's case officer sent an email to the appellant's surveyor the day before the hearing date, which implied that the hearing was going ahead. The appellant's surveyor attended the hearing, but the VO was not present and the appeal was struck out for failure of the appellants' surveyor to serve notice in time.
5. DP Realty Limited – the original hearing date had been postponed by the VTE and the rescheduled date was entered into a computerised diary system, which inadvertently deleted the new date from the system after a formal notice of postponement was received. Although notice was given that the case was still "live" a subsequent email sent a short time later cancelled that notice, presumably because a mistake was thought to have been made. As a result, the hearing was not scheduled and the appeal was subsequently struck out.

In an introduction to the detailed analysis of each case, the Upper Tribunal made reference to a perceived hardening of approach by the VTE in respect of procedural matters, as part of seeking to clear a backlog of appeals under the 2010 list. This more rigorous approach was formalised in July 2017 by the publication of a consolidated practice statement, which introduced the need for "exceptional" reasons for any postponement or reinstatement of appeals. This reference to exceptional reasons was new, but prior to the consolidated PS being issued the VTE had been following an (unpublished) policy of granting relief against sanctions only where it was satisfied that "exceptional reasons" or "exceptional circumstances" existed. The Upper Tribunal was highly critical of this approach, which they considered to be unlawful.

The UT confirmed that the VTE is empowered to regulate its own procedure, but this must be applied fairly and consistently. It noted that in designing and policing its procedural code the VTE has sought to adopt the approach now taken by the courts to the enforcement of the Civil Procedure Rules (CPR), in contrast to the VTE's previous (relatively-relaxed) attitude.

CPR 3.9(1) is the basis of procedural enforcement in the civil courts. In *Denton* the Court of Appeal provided guidance recommending a three-stage approach to applications for relief against sanctions:

1. Assess the seriousness or significance of the breach in respect of which relief from sanctions is sought. If the breach is assessed to be serious or significant the second and third tests below assume greater importance;
2. Why did the failure or default occur? If there is a good reason, e.g. illness or accident, relief is likely to be granted but overlooking a deadline, for whatever reason, is unlikely to be a good reason; and
3. Consider all the circumstances of the case, so as to enable the court to deal justly with the application. CPR 3.9(1) expressly so requires, but it also emphasises the particular weight to be given to two important factors, namely (1) the need for litigation to be conducted effectively and at proportionate cost and (2) the need to enforce compliance with rules, directions and orders. In considering the application, the court may take into account the promptness of the application for relief and any other past or current breaches by the parties of the rules etc.

The UT confirmed that this approach is equally applicable to rating disputes before the VTE. Although (confirmed in *BPP Holdings*) the CPR do not apply to tribunals, those tribunals should follow the same approach to procedural non-compliance and relief against sanctions.

Having considered the actions of the VTE in each of the 5 cases, the Upper Tribunal concluded that the approach taken in striking out the appeals and refusing reinstatement went beyond the ambit of the practice statements in force at the time (being prior to the introduction of the "exceptional reasons" test when considering applications for postponement/reinstatement, as referred to in the 2017 consolidated practice statement). It accordingly allowed all five appeals. However, no costs were awarded against the VO.

The UT concluded by saying that it remains supportive of the VTE's efforts to manage its caseload effectively and to insist on compliance with its procedural code. The guidance set out by the UT in the decision is intended to support those efforts and in no sense condones breaches of orders or practice statements. Parties are reminded not to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out, a bar from taking part in proceedings or another litigation advantage.