

## Extensions of time in the UT: Hammerson v Gowlett explained

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**Hammerson UK Properties plc v Gowlett (VO)**  
**[2017] UKUT 0469 (LC)**

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- Approach to be taken by UT to non-compliance with its procedural rules, practice directions and case management orders.
  - Opportunity for UT to explain relevance to its own practice of principles considered by the Supreme Court in *BPP Holdings v HMRC* [2017] 1 WLR 2945 and by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926.
  - Application of the same principles in connection with VTE's rules and practice directions already considered by UT in *Simpsons Malt Ltd v Jones* [2017] UKUT 0460.
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## Denton and the CPR



- Three stage approach to applications for relief from sanction under CPR 3.9(1):
  - (1) Identify and assess the seriousness and significance of the failure to comply
  - (2) Consider why the default occurred
  - (3) Evaluate all circumstances of case so as to enable court to deal justly with all circumstances including factors in CPR 3.9(1)(a) and (b), which emphasise the need:
    - (a) for litigation to be conducted efficiently and at proportionate cost; and
    - (b) to enforce compliance with rules, practice directions and orders.

### Step 1: Seriousness and significance



- Focus on whether serious or significant, not whether “trivial”, “minor” or “insignificant”
- “Materiality” may be a useful measure in many cases, i.e. whether has an effect on litigation, either in the particular case or more generally
- But breach may still be serious even if incapable of affecting efficient progress of litigation, e.g. failure to pay court fees
- Concepts are not “hard-edged” – look to guidance and application over time
- Previous unrelated breaches not to be considered at this stage but as part of relevant circumstances at third stage



## Step 2: Reason for default

- Consider why the default occurred
- No “encyclopaedia” of good and bad reasons, but examples given in *Mitchell* include:
  - Debilitating illness or accident: depending on circumstances, may be a good reason
  - Developments in litigation rendering previously agreed timescale unreasonable: likely to be a good reason
  - Merely overlooking a deadline, whether on account of overwork or otherwise: unlikely to be a good reason



## Step 3: Consider all the circumstances

- Relief not automatically refused if breach is serious/significant and no good reason
- Must consider the effect of the breach in every case and give significant weight to importance of complying with rules, practice directions and orders

*“...the old lax culture of non-compliance is no longer tolerated.”*

- Other relevant factors will vary from case to case: will include promptness of application (in time or out of time?) and history of compliance or breaches by both parties
- Parties should co-operate and not seek to gain windfall advantage – contested applications for relief from sanctions should be exceptional



## BPP Holdings: Denton in the tribunal?

- Appeal from order of First-tier Tribunal (Tax Chamber) barring HMRC from taking part in appeal
- Rule 8(3) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:

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;

- UT reversed decision, CA restored order of FtT



## BPP Holdings: the facts

- HMRC served statement of case late (although within agreed extension of time) and was a few days late with disclosure
- BPP applied for order that HMRC provide further information or appeal be allowed
- Order made recorded HMRC undertaking to provide information and said “may be barred from taking further part of proceedings” if fail to do so
- Response provided on deadline day but BPP applied for debarring order 6 weeks later on grounds that didn’t in fact answer questions
- FtT judge found “*no clear understanding of why this default had occurred*” and “*it should have been obvious to a lawyer that the reply delivered on the due date did not comply*”



## BPP Holdings: the Supreme Court's approach

- *"In a nutshell, the cases on time limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach."*
- Decision to make a debaring order against HMRC was "tough", but *"appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified."*
- BUT *"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 debaring order."*



## BPP Holdings: Denton in the tribunal? (the answer)

- *"...all tribunals and appellate courts above the level of the UT should be wary of applying or relying on the procedural jurisprudence of the English and Welsh courts without also taking into account that of the Scottish and Northern Irish courts."*
- *"...while it would be both unrealistic and undesirable for the tribunals to develop their procedural jurisprudence on any topic without paying close regard to the approach of the courts to that topic, the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue."*
- Denton and other cases *"provide a salutary reminder as to the importance that is now attached in all courts and tribunals throughout the UK to observing rules in contentious proceedings generally..."*

## Obligation to provide statement of case in UT



- Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, r42(3): appeal to UT from VTE may be dismissed if not made within **four weeks** of the date on which notice of decision is given
- Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, r 24(3): notice of appeal must be signed, dated and include information listed in r21(3), including:
  - (d) The ground of appeal on which the applicant relies
- Practice Directions, 28 November 2010, section 6.1:
  - 1) Each party to an appeal...must provide a statement of its case
  - 2) The purpose of statements of case is to enable the issues to be determined by the Tribunal to be identified. Each statement of case must therefore set out basic principles of fact and of law on which the party relies. It must be in summary form but contain particulars that are sufficient to tell the other party the case that is being advanced and to enable the Tribunal to identify the issues.

## The facts in Hammerson



- 32 retail units
- Proposals made 28 July 2015 to reduce RVs on ground of material change of circumstances:



## Hammerson: chronology



- 20 September 2017: appeals dismissed by VTE
- 17 October 2017: notice of appeal to UT filed – extension of time of 60 days for statement of case requested (i.e. to 15 December 2017)
- 11 November 2017 (a Saturday...): Registrar directs appellant to file and serve grounds of appeal by 17 November
- 15 November 2017: appellant requests further extension of time to 15 December
- 23 November 2017: Deputy President directs hearing on 1 December 2017 at which appellant required to explain why appeal should not be struck out

## UT's statements of principle



- Applicable to extensions of time for compliance with procedural rules and directions and relief against sanctions in the event of default
- In principle the approach which the Tribunal should take in such a case ought to be the same as it will take to an application to grant a second extension of time for notice of appeal to be filed
- Modern emphasis in civil litigation and tribunal proceedings on importance of compliance with rules, directions and orders and need for disputes to be resolved efficiently and at proportionate cost
- Stricter, more systematic approach has evolved in courts, based on CPR
- *Denton*: enforcement of compliance by imposition of appropriate sanctions for default, from which relief is only available after consideration of causes and consequences of relevant default



- Now clear following *BPP* that same approach available to tribunals: *BPP*
- Nothing in the expectation of compliance is inconsistent with the distinctive culture or overriding objectives of tribunals
- Per Ryder LJ in *BPP* in Court of Appeal:

*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 said it now.*

## The UT's approach



- Three stage approach to sanctions for non-compliance (and by analogy, to applications for extension of time to remedy non-compliance) as laid down in *Denton*:
  - Seriousness/significance of breach
  - Why failure or default occurred
  - Consider all the circumstances
- Repeats warning against “*unduly draconian approach to relief and emphasised that there must be a limit to the permissible harshness of sanctions. Compliance is not an end in itself and adherence to rules must not be allowed to assume a greater importance than doing justice in any case.*”



## Hammerson: the result

- Not serious breach to fail to provide grounds with notice of appeal given (a) practice reflected in PD 6.2(3) and standard notice of appeal and (b) application made for extension of time in notice
- Breach of order requiring grounds by 11 November more serious, but mitigated by (a) shortness of period allowed, (b) request for further extension made promptly and in time, (c) appeal still at early stage so no serious consequences
- Delay caused by wishing to conduct further research before filing statement of case not a good reason – appellant’s desire to present case in as favourable a light as possible is secondary to obligation to state grounds of appeal
- In all circumstances, appropriate to make order requiring appellant to file grounds of appeal by 15 December or be struck out



## What have we learned?

- Get your statement of case in with notice of appeal if possible!
- It is only required to enable the issues to be identified, not address them in detail (although must supply comparables)
- Gathering further evidence will not normally be a good reason to justify an extension of time – may need to apply to amend to introduce further comparables
- Desire to refine/enhance case is not a good reason to delay submission of grounds of appeal, but important that Tribunal and respondent made aware at early stage of case appellant wishes to advance
- Reasons given for requested extensions of time will need to be more detailed and less generic than has been common until now

**Thank you**

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**31 January 2018**

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