Appeal number: CA/2014/0021
CRR/2014/0008

FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER

LEGAL ACTION **Appellant**

And

THE CHARITY COMMISSION FOR ENGLAND AND WALES **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 16 February 2015

RULING ON STRIKE OUT AND EXTENSION OF TIME APPLICATIONS

Background

1. The Respondent opened an inquiry pursuant to s. 46 Charities Act 2011 into "Legal Action" (charity number 110078), which has the working name "Charles Henry", on 28 August 2014. It also served on the charity an order pursuant to s.84 of the 2011 Act, directing it to take specified action, including the re-submission of accounts which meet minimum legal and SORP requirements, the submission of a schedule of its activities and a review of its trading activities.

2. The Respondent sent the charity notice of the opening of the inquiry and the section 84 order on 30 September 2014, by letter and e mail of the same date. The e - mail was delivered. The letter and enclosures were not, but were re-sent on 10 October. The letter was signed for on 13 October but the charity states that it did not receive the Respondent's letter until 17 October.

3. Legal Action wishes to appeal against the Respondent's decision and order. It initially sent a Notice of Appeal to the Tribunal on 21 November 2014. The Tribunal did not accept its application on that date because certain key details required by rule 26 of the Tribunal's rules were missing or incomplete. For example, the charity's address was given as "*Third Floor, Romford*" and no copy of the decisions appealed against were included. It had also not been copied to the Charity Commission as required by rule 26 (6). The Notice of Application also appeared to be out of time in respect of decisions made on 28 August, but there was no application for an extension of time in which to file it as required by rule 26 (5). After some correspondence with the Tribunal, a further Notice of Appeal with an apparently valid postal address was filed, dated 5 December 2014. That application made clear that the charity wished to appeal against the s. 84 order (erroneously described as s.85) and to seek a review of the decision to open the inquiry. The Tribunal had also by then received copies of the decision letter and order and, although the Notice of Appeal had still not been copied to the Respondent, the Tribunal decided to accept the second Notice. The date of the charity's application to the Tribunal is therefore 5 December 2014.

4. I note that the first (invalid) Notice of Application had been signed by Peter Ford as a representative of the charity under rule 11 of the Tribunal's rules. The second Notice of Application was signed by Kevin Gregory, stating that he signed as a charity trustee and not as a representative of the charity. Documents sent to me by the Respondent suggest that Kevin Gregory is barred from conducting legal proceedings by an order made under s.43 of the Solicitors Act 1974.

Submissions

5. On 22 December 2014 the Respondent applied for a strike out of the charity's appeal. It has not (with the Tribunal's consent) yet filed a Response, pending determination of its strike out application. The Respondent's submissions were, firstly, that the Tribunal has no jurisdiction to consider the charity's appeal because Legal Action is currently subject to a General Civil Restraint Order made by Mr Justice Collins on 9 October 2014, by which it is prohibited from commencing legal proceedings without the consent of a High Court Judge for a period of two years from the date of the order. I have seen a copy of that order.

6. The Respondent submits that Mr Justice Collins' order prohibits the commencement of proceedings in the Tribunal as it does the commencement of proceedings in the Courts, and has referred me to *IB v Information Commissioner* [2011] UKUT 370 (ACC) (in which I was the first-instance Judge) where the Upper Tribunal decided that a person who was subject to an order under s. 42 of the Senior Courts Act 1981 (imposing restrictions on vexatious legal proceedings) could not bring proceedings in either the First-tier Tribunal or the Upper Tribunal without the permission of the High Court.

7. Secondly, it was submitted by the Respondent that the charity's Notice of Application was filed out of time and that the Tribunal ought not to allow the charity to proceed out of time in the circumstances of this case. The Respondent submits that Legal Action was duly notified of the opening of the section 46 inquiry and served with the accompanying s. 84 Order by its letter and e mail of 30 September and that the 42 days for filing its application to the Tribunal therefore started to run on that date under rule 26 of the Tribunal's rules.

8. The charity was invited to make representations on the Respondent's strike out application before the Tribunal ruled on it, in accordance with rule 8 (4). It made extensive submissions on 28 January 2015, but these were unsigned and the charity has since declined to confirm to the Tribunal who wrote the submissions on its behalf. The charity now describes itself as a corporate charity which is acting as a litigant in person with no representative.

9. The charity submits that the General Civil Restraint Order (which it accepts has been made against it) does not bar it from bringing proceedings in a Tribunal but only in a Court. As to the Respondent's second submission, the charity has asked the Tribunal formally to rule on the date by which its application should have been made and, if the Tribunal determines that the charity's application was made out of time (which is disputed) it asks for permission to proceed out of time.

10. In considering the parties' submissions, I note that rule 8 (2) of the Tribunal's rules provides that the Tribunal must strike out proceedings in respect of which it has no jurisdiction. This is of course subject to the Appellant's right to make representations under rule 8 (4).

11. I also note that General Civil Restraint Orders are made under the Court's case management powers. The Civil Procedure Rules 1998 (SI 1998/3132), as amended, define a "civil restraint order" as meaning an order restraining a party from (a) making any further applications in current proceedings ("a limited civil restraint order"); (b) issuing certain claims or making certain applications in specified courts ("an extended civil restraint order"); or (c) issuing any claim or making any application in specified courts ("a general civil restraint order"). Practice Direction 3C paragraphs 4.1 to 4. 11 explain the scope and effect of a General Civil Restraint Order.

12. I also note that under rule 26 (2) (a) of the Tribunal's Rules, an Appellant who is the subject of the decision to which the proceedings relate must start proceedings by sending to the Tribunal a Notice of Appeal within 42 days of the date on which notice of the decision was sent to the Appellant.

13. The Tribunal's rules do not make provision for the means by which the Charity Commission must notify a charity that it has opened an inquiry or has made an order which relates to it, but s. 339 (3) of the 2011 Act provides that the Charity Commission "may" serve an order or direction on a body corporate by delivering it or sending it by post to the registered or principal office of that body in the United Kingdom. It would appear that this provision applies to the sending of the s.84 order, but not strictly to the letter informing the charity of the opening of the inquiry, which is not a document specifically required to be sent to the charity under s. 86 of the 2011 Act.

14. Finally, I note that s. 7 of the Interpretation Act 1978 provides as follows:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

15. This is my ruling on the two issues.

"No jurisdiction"

16. I accept the Appellant's submission that a General Civil Restraint Order is made under powers which are distinct from the order made under s. 42 of the Senior Courts Act 1981 and considered to apply to Tribunals in the *IB* case. An order made under the CPR and similar in type to that imposed on this charity was considered by the Upper Tribunal in *JW v Secretary of State for Work and Pensions* [2009] UKUT 198 (AAC) and held not to apply to proceedings in the First-tier Tribunal (Social Entitlement Chamber). The decision in *IB* was also distinguished in *AO and BO v Shepway DC (HB)* [2013] UKUT 009 (AAC). All three cases are referred to on page 295 of the third edition of Edward Jacobs' textbook on "*Tribunal Practice and Procedure*".

17. Having regard to the decision in *JW* and to the terms of the order made against the charity, which prohibits it from "*issuing any application, appeal, or other process in this action or any other action in any Court"* without first obtaining the permission of a High Court Judge, I am not persuaded that the charity is barred by Mr Justice Collins' order from issuing proceedings in this Tribunal. It does not seem to me that a case management power exercisable in the High Court can be interpreted as applying to Tribunals in the same way that primary legislation was interpreted as applying to Tribunals in the *IB* case. For these reasons I am not satisfied that the Tribunal has no jurisdiction in relation to these proceedings and I refuse the Respondent's application for a strike out.

"Out of Time"

18. The Respondent submits that it took steps to clarify the charity's postal address before the opening of the inquiry, having noted that the address given in the charity's annual return and on the register at Companies House were different. The Respondent asked the charity to confirm its correct postal address in May 2014, but it did not do so (I have seen a copy of that correspondence).

19. On 30 September 2014 the Respondent e-mailed to the charity a letter notifying it of the opening of its inquiry and a copy of the s. 84 order. It also sent the letter and order by post to the PO Box address used by the charity on its headed paper. On that date the Respondent also instructed a process server to visit three additional addresses which it had been given for the charity, including the address given in the Companies House register. The process server has filed an affidavit stating that there was no record of the charity at any of those addresses. The letter to the charity's PO Box number was returned, having been delivered to the PO Box for Romford Magistrate's Court in error. On 10 October the Respondent re-sent the letter and order to the PO Box by recorded delivery and it was signed for on 13 October at 11.18 am by someone called "Kevin". I have seen a copy of the signed recorded delivery receipt.

20. The charity submits that it did not in fact receive the Respondent's letter until 17 October 2014 because it did not check its PO Box until that date. It states that "Kevin" is a post office employee. It also submits that as it states on its headed paper and in its automated e-mail acknowledgements that it does not accept service by e-mail, it cannot validly be served with a legal document by this method. It further submits that sending a letter to its PO Box address does not comply with s. 339 of the

2011 Act because that is not its registered or principal office. The charity suggests that the 42 days for filing its application to the Tribunal should start to run from 17 October because that is when it had actual notice of the Respondent's decisions.

21. I am satisfied that the Respondent took appropriate steps to notify the charity of its decision and to serve the order by sending letters to all of the charity's known addresses, including the ones given on its headed paper and at Companies House, on 30 September. I note that under s. 7 of the Interpretation Act 1978, service is deemed to have been effected by posting a letter "unless the contrary is proved". Unfortunately, in its efforts to be thorough, the Respondent seems to have provided me with evidence which does "prove the contrary". The process server's affidavit states that he did not succeed in serving the letter at any of the addresses he visited and the letter sent to the PO Box was delivered to the wrong address and returned. If the Respondent had not provided this evidence with its submissions there would have been a statutory presumption of due service which the Appellant would have had the burden of displacing. However, it seems to me that the Respondent has itself displaced that presumption in providing the evidence of its failed attempts to serve the letter on 30 September.

22. I note that s. 339 of the 2011 Act states that the Respondent "may" effect service by post, which brings it into the category of provisions "authorising" rather than "requiring" such service (a distinction which is evident in the wording of s. 7 of the 1978 Act). This suggests that the Respondent may also effect service in other ways. I note that the charity relies on the statement on its headed paper that it does not accept service by e-mail but that it has conducted correspondence with the Respondent by e- mail. I confess I am uncertain as to the legal status of a letter head or e-mail acknowledgement which informs the reader that "*we do not accept service by e mail"*. It strikes me as a very odd thing for a charity to state. Be that as it may, I note that the letter head making this statement was used in correspondence with the Respondent prior to the 30 September e-mail, and it does not, in these circumstances, seem fair to conclude (as the Respondent asks me to) that service was effected by e-mail on 30 September. It seems to me that if the Respondent did not consider itself bound by the statement on the charity's letter head (which might be a perfectly reasonable stance for it to take) then it ought to have told the charity so before attempting to use its e-mail address for that purpose. In the circumstances, I am not satisfied that due service was effected by e-mail on 30 September.

23. However, it does not seem to me that there is any reason why the letter re-sent on 10 October should not be entitled to the presumption of due service under s. 7 of the 1978 Act, whether or not it complied with s. 339 of the 2011 Act (which is permissive rather than prescriptive). There is no evidence before me to displace the statutory presumption of service which arose as a result of the Respondent posting a letter to the charity at the address given on its headed paper on 10 October, and in any event there is evidence before me that the package was signed for on 13 October so I know it was received.

24. I am not persuaded by the charity's contention that the letter and order were not actually received by it until 17 October. There is no evidence before me to support that assertion, which is made only in the form of an un-signed submission. Accordingly, I find that the charity was duly served a day or two after the letter was sent on 10 October when the letter was delivered. As I am aware that the letter was received at the charity's PO Box address on 13 October, it seems to me that it would

be fair to take the view that the 42 day period for filing its application to the Tribunal expired on 24 November 2014. Accordingly, my ruling is that the charity's application to the Tribunal on 5 December was made eleven days out of time.

25. It follows that I must now consider whether to exercise my discretion to allow the Notice of Appeal to proceed out of time. This discretion is derived from rule 5 (3) (a) of the Tribunal's rules, and must be exercised so as to give effect to the overriding objective in rule 2. The Respondent has referred me to the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) in respect of the criteria to be applied by the Tribunal when deciding whether to allow an appeal to proceed out of time.

27. In *Leeds City Council* Judge Bishopp commented at [19] that:

> In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in Data Select.

28. This is a reference to the following passage in Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC)*:*

> "[34] … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

29. Applying those principles, in this case I have found that the delay in making the application to the Tribunal was a relatively short one of eleven days. However, I consider that the charity's own actions in failing to be open and straightforward with its regulator about its operating address was a significant factor in the delay which occurred between the Respondent's first attempt to write to it on 30 September and its receipt of notice (as I find) on 13 October. I also note that the charity attempted to provide the Tribunal with an incomplete address in its first (invalid) application of 21 November. It seems to me that the charity's own actions, which resulted in confusion as to its true address from 30 September onwards, should be taken into account in exercising my discretion in this matter.

30. In terms of explanation for the delay, there is none because the 5 December Notice of Appeal asks the Tribunal to rule that the application was made in time. It does not give any other reason for requesting an extension of time because it was not accepted that the application had been made out of time. In its 186 paragraph submission of 28 January, the charity repeats its assertion that service was not lawfully effected by the Respondent but does not provide any explanation for exceeding the 42 day time limit. In the circumstances I find that the reason for the delay in initiating an application to the Tribunal after 30 September is overwhelmingly attributable to the charity's own actions in (a) failing to be open and straightforward about its address and (b) purporting to refuse to accept service by e-mail whilst otherwise continuing to correspond with the Respondent by e-mail.

31. Turning to the purpose of the time limits, and the prejudice which would arise to either party from granting or refusing to grant this application, I note that the time limit for applying to the Tribunal in respect of the Respondent's directions decisions and orders is designed to give charities a generous amount of time in which to decide whether to make an application to the Tribunal, whilst balancing against that consideration the Respondent's understandable desire to progress its inquiry within a reasonable period if no application to the Tribunal is made. I note that the charity will not be able to challenge the decisions that the Respondent has made if its application to proceed out of time is not allowed, but as noted above, I consider that the charity has to a large extent been the author of its own misfortune in this regard. In all these circumstances, I do not consider that it would be appropriate to extend time to allow this application to proceed out of time and I now refuse the charity's application. Rule 26 (5) provides that unless the Tribunal extends time for a late application it "must not admit the Notice of Appeal". My decision therefore brings these proceedings to a close.

ALISON MCKENNA

PRINCIPAL JUDGE

DATE: 16 February 2015