



**Appeal number: CA/2014/0001
CA/2014/0002**

**FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

BRYAN GUNN

Appellant

and

**THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

Respondent

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 12 November 2014

RULING ON STRIKE OUT APPLICATION

Background

1. This matter concerns a charity known as The Dove Trust. These proceedings concern appeals against two Orders of the Charity Commission. The first Order relates to the Charity Commission's appointment of an Interim Manager for the charity under section 76 (3) (g) of the Charities Act 2011. The original Interim Manager Order was made in June, but varied in July 2013 so that the Interim manager operated to the exclusion of the trustees. In September 2013 the then-charity trustees applied for a review of the variation of the Interim Manager Order. The Charity Commission carried out a statutory review of the variation of the Interim Manager Order and made the decision not to discharge it on 13 December 2013. This is the decision which generated a right of appeal to the Tribunal under section 76(6) of the Charities Act 2011 and is appeal number CA/2014/0001.

2. The second appeal to the Tribunal is CA/2014/0002, which concerns the Charity Commission's Order under section 76 (3) (d) of the Charities Act 2011, preventing four banks from parting with any property held on behalf of the charity. The Order not to part with property was made in June 2013. In September 2013 the then-charity trustees applied for a review of the Order. The Charity Commission carried out a statutory review and made a decision not to discharge the Order on 13 December 2013. This is the decision which generated a right of appeal to the Tribunal under section 76(6) of the Charities Act 2011.

3. This ruling concerns both appeals.

The Tribunal's Powers

4. The Tribunal must "consider afresh" the Respondent's decisions (s.319 (4) (a) Charities Act 2011). In so doing, the Tribunal can consider evidence which was not before the Charity Commission when it made its decision (s. 319 (4) (b) Charities Act 2011).

5. If it allows the appeals, the Tribunal may exercise the powers set out in the relevant part of column 3 of the table in Schedule 6 to the Charities Act 2011. This is a discretionary remedy (s. 319 (5) (b) Charities Act 2011). The powers available to the Tribunal in respect of an appeal brought under s. 76 (6) of the 2011 Act are: (a) to quash the Order and (if appropriate) remit the matter to the Charity Commission; (b) to make the discharge of the Order subject to savings or other transitional provisions; (c) to remove any savings or other transitional provisions to which the discharge of the Order was subject; (d) to discharge the Order in whole or in part. If the Tribunal remits a matter to the Charity Commission it may remit it generally or for determination in accordance with a finding made or direction given by the Tribunal (s. 323 Charities Act 2011).

Recent Developments

6. In the months since the appeals were made to the Tribunal, there have been some developments which are significant to this ruling. Firstly, the Dove Trust currently has no charity trustees. Two former charity trustees have resigned from their positions and the Appellant was removed as a charity trustee by Order of the Charity Commission dated 23 September 2014. (I note here that the Appellant's removal from office is the subject of an appeal to the Tribunal which is yet to be determined).

7. Secondly, the Dove Trust has been the subject of High Court proceedings HC13CO5520, in which Mr Justice Henderson gave directions for the distribution of the charity's assets on the application of the Interim Manager. The Appellant asked for the Tribunal hearings to be delayed until after the outcome of the High Court proceedings was known.

8. Thirdly, I have been told by the Charity Commission that the Freezing Orders in respect of two bank accounts have already been revoked and that the Orders in respect of the other two will shortly be revoked. The Charity Commission submits that this means there is no remedy available to the Appellant in the Tribunal. The Charity Commission has also explained that, even if the Interim Manager Order now under appeal were quashed by the Tribunal, it would not have the effect of removing the

Interim Manager as the Order which the Appellant has appealed against is the variation of the original order only, so the original appointment of the Interim Manager would remain in place whatever happens in the Tribunal hearing. It adds that, as there are no trustees, a quashing of the variation order by the Tribunal would have no practical effect. The Charity Commission tells me that the Interim Manager's continuing functions are to distribute the charity's funds as directed by the High Court and to recover any funds owed to the charity.

9. Fourthly, Mr Colman, who is the Appellant's non-legal representative (and also one of the former charity trustees) made an application to be joined as a party to these appeals. I refused his application on 27 October, following which Ms Nagshineh (another former charity trustee) withdrew her appeals on 28 October, leaving Mr Gunn as the sole remaining Appellant. In my ruling on that issue, I expressed concern that Mr Colman was seeking to use his status as a representative in the Tribunal to further his own cause (in relation to legal proceedings brought against him by the Interim Manager) and I considered whether I should bar him from acting as the Appellant's representative.

10. Finally, on 31 October 2014 the Respondent applied for a strike out of these appeals. I have treated the Respondent's application as one made on the basis that the appeals have no reasonable prospect of success under rule 8 (3) (c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2008 ("the Rules"). The Appellant is entitled to an opportunity to make representations under rule 8 (4) of the Rules before I make a decision on a strike out application, and accordingly I issued directions on 31 October, giving him until 10 am on 10 November to do so. I have taken his representations into account, along with those made in response to an earlier request on 31 October 2014.

The Parties' Submissions

11. I have treated the Charity Commission's application as one falling within rule 8 (3) (c) of the Rules. Its application was made on the basis that it would not be proportionate or consistent with the overriding objective for the appeals to continue, but the overriding objective does not in fact provide a free-standing strike out power. The relevant power to strike out in this case falls under rule 8 (3) (c) of the Rules, into which the overriding objective must of course be read. The Charity Commission's ground for seeking a strike out is, in essence, that there is no longer any practical remedy available to the Appellant in these appeals and so the hearing would not be a proportionate use of public funds.

12. The Appellant's submissions are that, if the Tribunal allows the appeals, it would have power to remit these matters to the Charity Commission "*with a requirement that it must consider how it can make restitution in full to the beneficiaries who are waiting for their money, and those beneficiaries who otherwise will never receive it*" and that the use of the power to strike out would be wrong here as it would involve conferring a tactical advantage on the Respondent and would prevent its unacceptable behaviour towards the charity from being exposed. He invites the Tribunal to bar the Charity Commission from defending the appeals. He refers me to a passage from Upper Tribunal Judge Edward Jacobs' book *Tribunal Practice and Procedure* in which it is stated that a strike out is only appropriate "*if the outcome of the case is, realistically and for practical purposes clear and*

incontestable” and that it is not usually appropriate where the facts relevant to the outcome of the case are disputed, as they are here.

13. The Appellant further submits that the whole point of continuing his appeal against the Freezing Order is “*not that the Order be revoked [but] ...to demonstrate that ...[it] was taken without proper grounds, at the wrong time, and with the wrong motives, and therefore should never have been made*”. He submits that the remedy in relation to the Interim Manager Order should be to require the Charity Commission to reconsider its methods, actions and systems and that compensation be considered for those charities and beneficiaries whose activities have been impaired.

The Law

14. Neither of the parties has cited any case law in support of their positions, but I have found it helpful to read the recent decision of the Upper Tribunal (Tax and Chancery Chamber) in the case of *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC), in which it was held at [21] that

It is clear that the FTT Rules provide a wide variety of forensic tools which can be deployed so as to give effect to the overriding objective which includes dealing with the case proportionately in the light of its importance, the complexity of the issues and the anticipated costs.

15. Further, at [30], the Upper Tribunal held that, although the power at rule 8 (3) (c) of the Rules is worded differently from CPR part 3.4, the CPR is a helpful source of guidance on the application of rule 8 (3) (c) of the Rules. Having reviewed the authorities on the power to strike out under the CPR, the Upper Tribunal concluded at [41] that

...an application to strike out in the FTT under rule 8 (3) (c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24. The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a “mini-trial”. As Lord Hope observed in *Three Rivers* the strike out procedure is to deal with cases that are not fit for a full hearing at all.

16. This decision seems to me to be a helpful codification of the well-established principles which have already been referred to by the parties. I do not therefore consider that there is any need to ask for their further submissions on this authority before making my decision.

Conclusion

17. I have considered whether I ought to delay making this ruling until after the determination of the Appellant’s appeal against his removal as a charity trustee. I have concluded that I should not delay because, even if he were to be reinstated as a trustee by the Tribunal, it would have no impact on my assessment of the reasonable prospects of these appeals succeeding. I set out my assessment of the prospects of success below.

18. I am conscious that the Appellant feels that he is entitled to his “day in court” and I acknowledge that he strongly disputes the evidence on which the Charity Commission relied in making the Orders. In the vast majority of cases where such matters are disputed, I would agree with him that it would be appropriate for the Tribunal hearing to go ahead. However, there are a number of factors which, in my judgment, make this case exceptional. These are as follows.

19. Firstly, these are appeals by way of re-hearing in which the Tribunal must consider the Charity Commission’s decisions afresh. In the case of a reviewable matter, I consider that the Tribunal has discretion to proceed to a hearing even where no remedy is available to it, because it is undertaking a judicial review of the Charity Commission’s decision. However, in an appeal by way of re-hearing the Tribunal’s task is not to establish whether the Charity Commission was wrong, but rather to make its own decision. It follows that the Appellant’s stated reasons for wanting a hearing to take place are misconceived. The Tribunal has no power to order the Charity Commission to review its systems and it has no power to order restitution as the Appellant has argued, so it follows that the remedy the Appellant seeks is also misconceived.

20. Secondly, the factual background to these appeals (including concurrent High Court proceedings) has changed significantly since the appeals to the Tribunal were made. Taking this fresh evidence into account, I consider that the Tribunal would be unlikely to exercise its discretion to quash the Orders appealed against in circumstances where the High Court’s directions have not yet been fully complied with and there is no functioning trustee body.

21. Thirdly, I must take into account the imperative in the overriding objective for me to consider a proportionate approach to the importance of the case, the anticipated costs and the resources of the parties. These appeals are currently listed to be heard together with a 5 day time estimate, and are due to commence on 8 December 2014. The filing of the evidence is not yet complete. The Appellant’s representative has maintained a position of opposition to the consolidation of the appeals and/or the hearing of the evidence together, with the result that the time estimate is longer than one might otherwise have expected. The Charity Commission has been given permission to present its evidence on both appeals together, but it seems likely that the presentation of the Appellant’s case will involve much duplication and repetition of argument and evidence. The Appellant has maintained his position that he wishes to be represented by Mr Colman in the face of repeated expressions of concern by the Tribunal. If these matters were to proceed to a hearing, it is now likely that the Appellant will be unrepresented as I am, as I have indicated, likely to bar Mr Colman from acting as a representative while he has a clear and continuing conflict of interest between his own interests and his duty to co-operate with the Tribunal. In these circumstances, I am doubtful whether the hearing would be completed in the 5 day slot currently allocated to it.

22. Fourthly, in relation to appeal CA/2014/0001, I agree with the Charity Commission that there is no practical remedy available to the Appellant because, even if the Tribunal were to quash the variation Order, the Interim Manager would remain in place. Turning to CA/2014/0002, I agree with the Charity Commission that is no practical remedy that the Tribunal could order in circumstances where the Freezing Orders had already been revoked before the date of the hearing. I have accepted the

Charity Commission's assurance that the remaining Freezing Orders will be revoked very shortly in making this ruling.

23. Taking all these factors into account, I have concluded that the Appellant's prospect of success in both these appeals falls into the "fanciful" rather than "realistic" category of cases. Taking into account the significant public resources which would have to be dedicated to the hearing of the appeals, I have concluded that it would not be proportionate to the importance of the case to continue to a hearing. Both appeals are, accordingly, now struck out. There is no right to apply for reinstatement of an appeal that is struck out under rule 8 (3) (c), although there is a right to apply for permission to appeal to the Upper Tribunal within 28 days of the date appearing below.

Post Script

24. Although I have previously indicated that I would rule on the question of whether Mr Colman should be barred from representing the Appellant at the hearing of these appeals, it is now no longer necessary for me to do so. It may, however, be necessary for me to re-visit that issue if the Appellant decides to be represented by Mr Colman in his forthcoming appeal.

ALISON MCKENNA

PRINCIPAL JUDGE

DATE: 12 November 2014

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