

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2021] UKUT 0027 (LC)
UTLC Case Number: LC-2020-13

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – COSTS – jurisdiction of the First-tier Tribunal – jurisdiction of the Upper Tribunal to hear appeals – procedure - fairness – litigant in person – appeal allowed

BETWEEN:

MS NORMA HORTENSE BEHARIE

Appellant

And

SWIFT ADVANCES PLC

Respondent

**Re: 193 Great Cambridge Road,
Enfield,
Middlesex,
EN1 1SG**

**Judge Elizabeth Cooke
Determination on written representations**

The appellant was not represented
Brachers solicitors for the respondent

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Introduction

1. This is Ms Beharie's appeal from a decision of the First-tier Tribunal ("the FTT") about costs, dated 14 August 2020. She appeals with permission from the Tribunal, and the appeal has been decided under the written representations procedure. Ms Beharie has not been legally represented; the respondent was represented by Brachers solicitors.

The factual background

2. The decision under appeal was made some months after an order for costs that followed the FTT's decision ("the substantive decision") in a reference to the FTT from HM Land Registry. Ms Beharie sought to remove from the register a unilateral notice entered by the respondent, and she was unsuccessful. She applied for permission to appeal that decision; the FTT refused permission, and so did the Tribunal. After that refusal the Tribunal made an order for costs against Ms Beharie, assessed in the sum of £750, because the respondent's solicitors had assisted the Tribunal with written submissions. I mention that order for costs, to which Ms Beharie has referred in her written submissions on this appeal, only in order to make it clear that it is irrelevant to this appeal.
3. This appeal arises from the costs order made by the FTT after the substantive decision.
4. I take the following chronology from a letter sent to the FTT by the respondent's solicitors, Brachers, on 27 April 2020. What they say happened was as follows:
 - a. Following the substantive decision, on 21 June 2019 a costs order was made in the respondent's favour.
 - b. On 12 August 2019 the respondent filed with the FTT and sent to Ms Beharie its detailed bill of costs.
 - c. On 18 September 2019 the FTT ordered that the costs be subject to detailed assessment on the standard basis by a costs judge.
 - d. On 10 October 2019 the respondent sent to Ms Beharie its detailed bill of costs and copies of counsel's fee notes.
 - e. On 21 November 2019 the respondent sent to the FTT and served on Ms Beharie a request for a default costs certificate, which is an order requiring a party to pay costs in full where he or she has not served points of dispute. The respondent's solicitors in a letter to the FTT on that date said "We do not consider that [Ms Beharie's] letters dated 28 August 2019 and 1 November 2019 constitute any Points of Dispute raised by [Ms Beharie]."
 - f. On 10 December 2019 the FTT made an order providing that the respondent's request for a default costs certificate be granted in the event that Ms Beharie failed to serve and file points of dispute by 20 December 2019.

g. On 11 February 2020 the FTT wrote to Ms Beharie as follows:

“The deputy master has read your latest email and would point out that the issue is not whether you filed points of dispute but whether they complied with the Civil Procedure Rules and their Practice Directions. They did not do so and therefore an opportunity was given so that you could serve compliant Points of Dispute. That was not done. Accordingly your opponent has become entitled to their costs in the sums sought in their bill.”

I take it that the “deputy master” was the FTT costs judge who was to have carried out the detailed assessment.

h. The respondent wrote to the FTT on 27 February, 11 March and 23 March 2020, and again in the letter of 27 April from which all the material in this paragraph is taken, asking for a default costs certificate.

5. Ms Beharie has supplied copies of letters referred to in item e above. Her letter of 28 August 2019 was addressed to the FTT, headed “Formal complaint”, and copied to Brachers; in it she set out her objections to Brachers’ bill of costs. The letter of 1 November 2019 was written to this Tribunal and is about the costs claimed against her following its refusal of permission to appeal the substantive decision. The letter of 1 November 2019 is entirely unrelated to this appeal and I make no further reference to it.

6. On 14 August 2020 (following delays arising from the closure of the FTT’s offices during the pandemic) the FTT made an order:

- a. setting aside its order of 18 September 2019 referring the assessment of costs to the costs judge,
- b. setting aside the order of 19 December 2019 because the FTT does not have jurisdiction to issue a default costs certificate,
- c. determining that the costs were to be the subject of summary assessment,
- d. summarily assessing the costs in the sum of £43,437.41 and
- e. requiring Ms Beharie to pay the respondent the sum of £43,437.41 by 4 September 2020.

7. In her reasons for that order the judge observed that Ms Beharie:

“has not raised any objection to the bill of costs, and has not responded to the order of 20 December 2019, nor communicated with either the Tribunal or the Applicant. The fact that this order has now been set aside is not relevant to the

issue I am considering, namely whether [Ms Beharie] has, at any time, taken any steps to object to the costs order sought or to make any representations in relation thereto.”

8. Ms Beharie appeals that decision; she says she did present points of dispute, in her letter of 28 August 2019, and moreover that the FTT in making its order of 14 August 2020 did not give her an opportunity to make representations. She says that the FTT through its case officer wrote to the respondent’s representative in April 2020 asking for information but did not seek any information from her; and that the judge in making her order did not give her an opportunity to explain her position. Had she had that opportunity she would have explained that she had already served points of dispute.
9. Instead, says Ms Beharie, the FTT judge in making the decision of 14 August 2020 relied only on documents provided by the respondent’s solicitors, who misled the FTT by not drawing attention to her letter of 28 August 2019.
10. Ms Beharie also says that she was not treated fairly by the FTT as a litigant in person; she was expected to be aware of and to comply with procedural requirements that she could not have been expected to be aware of.

The appeal

Jurisdiction of the Upper Tribunal

11. Before I consider the appeal I have to consider the argument made by the respondent’s solicitor that there is no jurisdiction to hear it.
12. Most decisions of the Property Chamber of the FTT can be appealed only on a point of law under section 9 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). However, in references to the FTT by HM Land Registry under the Land Registration Act 2002 (“the 2002 Act”) there is an additional right of appeal under section 111 of the 2002 Act:

“(1) Subject to this section, a person aggrieved by a decision of the First-tier Tribunal under this Act may appeal to the Upper Tribunal.

(2) An appeal may not be brought under subsection (1) on a point of law (as to which see instead section 11 of the Tribunals, Courts and Enforcement Act 2007 (right of appeal to Upper Tribunal)).

(2B) An appeal may not be brought under subsection (1) if the decision is set aside under section 9 of the Tribunals, Courts and Enforcement Act 2007 (review of decision of First-tier Tribunal).”

13. Subsection (2) has the effect that the two rights of appeal are mutually exclusive; if the appeal is on a point of law then it is brought under the 2007 Act. Accordingly the right of appeal under the 2002 Act is on matters of fact only.
14. I take the view that Ms Beharie’s appeal raises both a matter of fact (the FTT found that she had not served points of dispute; she says she had) and a point of law (she was not given an opportunity to be heard before the decision of 14 August 2020 was made).
15. For the respondent it is argued that subsection 2B prevents the appeal on a matter of fact. That is incorrect; the effect of subsection 2B is that a decision cannot be appealed once it has been set aside. Accordingly there is now no appeal from the decision of 18 September 2019 because it has been set aside. But that is not what Ms Beharie is doing, and subsection 2B does not prevent an appeal from the decision of 14 August 2020. So there is jurisdiction to hear her appeal on the point of fact.
16. Next the respondent argues that there is no jurisdiction to hear an appeal on a point of law under the 2007 Act because the decision sought to be appealed is an excluded decision under section 11 (5). The relevant parts of section 11 are as follows:

“(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission ...

(5) For the purposes of subsection (1), an “excluded decision” is—...

(d) a decision of the First-tier Tribunal under section 9—

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal,

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun) ...

17. It will be seen that subsection (5)(e) is to the same effect as section 111(2B) of the 2002 Act; a decision once set aside cannot be appealed. However, subsection (5)(d) goes further and prevents an appeal from a decision made by the FTT to review or set aside an earlier decision of its own.
18. That is because section 9(4) provides that when the FTT reviews its decision it may correct accidental errors in it, or amend its reasons, or set it aside; and subsection (5) provides that when the FTT sets aside a decision, it must either re-make it or refer it to the Upper Tribunal for decision. Therefore there will always be a further decision following review or setting aside, and the effect of section 11(5) of the 2007 Act is to ensure that any challenge is directed to that further decision. This prevents an interminable process of digging back into the FTT's decisions. The present appeal can therefore be only against the decision of 14 August 2020 to summarily assess the costs, and against that assessment. If that appeal succeeds the decision of 18 September 2020 ordering detailed assessment remains set aside, and the Tribunal will have to substitute its own decision about the costs process.
19. The legal propositions set out above will have been unknown to Ms Beharie, as a litigant in person. I take her appeal as being against the FTT's decision on 14 August to summarily assess the costs (thereby depriving her of any opportunity to object to amount of the costs claimed), and against the assessment itself.

Jurisdiction of the FTT

20. In my decision granting permission to appeal I observed that it was arguable that the FTT did not have jurisdiction to set aside the order for detailed assessment that it had made in September 2019. The respondent says that the FTT had jurisdiction under rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 51 refers only to decisions that dispose of proceedings; the relevant provision is rule 6, which states:

“(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.”

21. Accordingly I agree that the FTT had jurisdiction to set aside the decision of 18 September 2019.

Ms Beharie's grounds of appeal

22. The respondent's solicitors made no reference to Ms Beharie's grounds of appeal in their written representations made under rule 21(8) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, saying only that they stood by the FTT's decision. The grant of permission to appeal did not refer explicitly to Ms Beharie's grounds of appeal,

although the intention was to grant permission on those grounds, since there was a realistic prospect of success on appeal on the grounds that the order of 14 August 2020 was made without sight of Ms Beharie's points of dispute. For the avoidance of doubt I confirm that permission to appeal is given on those grounds.

23. Ms Beharie's letter to the FTT of 28 August 2019 was copied to Brachers, and they drew the FTT's attention to it in their application for a default costs certificate on 21 November 2019. The respondent's solicitors' letter to the FTT of 27 April 2020 stated that it encloses a copy of the letter of 21 November 2019, and of all its attachments. So Ms Beharie's letter of 28 August 2019 was sent to the FTT at least twice by the respondent's solicitor.
24. Accordingly I reject Ms Beharie's allegations of impropriety on the part of the respondent's solicitors; they made no attempt to conceal the existence of the letter of 28 August 2019, but they did not accept it as her points of dispute.
25. The FTT's costs judge appears to have been aware of Ms Beharie's position. The FTT's letter to her of 11 February 2020, written on the costs judge's instructions and quoted by the respondent's solicitor in their letter of 27 April 2020 (see paragraph 4g above) is a reply to an email from her. I infer that Ms Beharie had written to the costs judge to say, as she continues to say now, that she had already served points of dispute. The cost judge's reply was not an appropriate response to a litigant in person in tribunal proceedings, because it assumed, and indeed required, that she was familiar with the Civil Procedure Rules. And it is troubling that the costs judge appears to have refused to consider the substance of Ms Beharie's points because he was dissatisfied with their form.
26. The judge in her reasons for her decision of 14 August 2020 made no reference to the letter of 28 August 2019 and it is clear that she had not seen it (see paragraph 6 above). The reasons given for the decision of 14 August 2020 therefore indicate that it was made without reference to a material piece of information.
27. Moreover there is no reference in the decision to the Ms Beharie having been given an opportunity to comment on the course the judge proposed at that point to take, namely setting aside the order for detailed assessment and substituting her own summary assessment, and I infer that that opportunity was not given.
28. My impression is that the judge was presented with a file that had ground to a halt during lockdown and needed to be moved along. Correspondence may not have been filed properly during lockdown and relevant material was not brought to the judge's attention. She will have seen that the process of detailed assessment had foundered and took a pragmatic decision to bring the matter to a conclusion. That was entirely understandable, but Ms Beharie's letter of 28 August 2019, containing the points Ms Beharie wished to make in answer to the bill of costs, was overlooked; had Ms Beharie at that point been given an opportunity to comment she would have drawn attention to the letter. The judge would then have been able to consider whether its contents made any difference to her summary assessment and, if they did not, she would have explained why.

29. In refusing permission to appeal on 20 September 2020 the FTT said “[Ms Beharie] has not put forward any grounds for disputing the costs award”, so again the letter of 28 August 2019, referred to in Ms Beharie’s grounds of appeal, was not given consideration.
30. For those two reasons – the overlooking of a material document, and the failure to give Ms Beharie the opportunity to make representations – the decision of 14 August 2020 was made in error and is set aside.
31. However, I have the bill of costs and Ms Beharie’s points of dispute. I agree with the FTT judge that the matter needs to be brought to a conclusion and is suitable for summary assessment. I therefore substitute the Tribunal’s own decision that summary assessment is appropriate and I proceed to assess the costs.

The summary assessment

32. Brachers’ detailed bill of costs is in the form one would expect, setting out the fee-earners’ rates and the work done, along with counsel’s fee notes. The total claimed is £43,437.41. Costs are claimed from 11 January 2017, the date of the reference of the matter to the FTT from HM Land Registry, and relate to work done in relation to the proceedings in the FTT, including mediation, and in connection with the preparation of the bill of costs.
33. I turn to the letter of 28 August 2019 in which Ms Beharie says she set out her points of dispute. The following points are made:
 - a. Objection is taken to the instruction of Mr Hugh Jackson of Selbourne Chambers on the basis that he also represented the first mortgagees in an application for possession of Ms Beharie’s property. There was no impropriety in Mr Jackson’s being instructed and the objection is not understood.
 - b. Ms Beharie objects to the inclusion of charges for telephone calls and communications with the first mortgagee and its solicitors. I take the view that those were proper communications by the solicitors for the respondent as a subsequent charge. It is said that Brachers were colluding with the first mortgagee; I see no basis for that allegation.
 - c. It is said that 90% of the costs had been incurred in the High Court (where Ms Beharie had made an application of her own). She does not explain that allegation by reference to individual items in the bill. I see no reason to suppose that the allegation is true, since the bill is carefully itemised and clearly relates to the FTT proceedings. Any costs claimed against Ms Beharie in the High Court are a separate matter.
 - d. Ms Beharie says she objects to Brachers “claiming legal cost for Mortgage 1 legal team”. No such claim is made, any costs relating to the first mortgage are costs of Brachers.

34. No reduction falls to be made as a result of the letter of 28 August 2019. I see nothing unreasonable or disproportionate in the costs or the rates claimed, and I regard the level of costs as entirely predictable in the course of a rather complicated reference to the FTT. I therefore order that Ms Beharie pay the respondent's costs of the FTT proceedings, in the sum of £43,437.41.

Conclusion

35. The appeal therefore succeeds, but the Tribunal in substituting its own decision has made the same order as the FTT made. Had the FTT in refusing permission to appeal given consideration to the letter of 28 August 2019, which had been overlooked when the decision of 14 August 2020 was made, it is likely that the appeal would have been unnecessary since it would have been able to review its decision, deal with the points of dispute, and confirm its summary assessment.

36. An order requiring payment within 28 days accompanies this decision.

Judge Elizabeth Cooke

9 February 2021